THE "NEW" *NEW YORK TIMES*: FREE SPEECH LAWYERING IN THE AGE OF GOOGLE AND TWITTER

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INTRODUCTION

When Ben Lee was at Columbia Law School in the 1990s, he spent three months as a summer associate at the law firm then known as Lord, Day & Lord, which had represented the *New York Times*[1] in *New York Times Co. v. Sullivan*.[2] During those months, Lee listened to the firm's elder partners recount gripping tales of the *Sullivan* era and depict their role in the epic speech battles that shaped the future of free expression. Hearing these stories, a young Lee dreamed that one day he too would participate in the country's leading speech battles and have a hand in writing the next chapter in freedom of expression.

When I met with Lee in August 2013, forty-nine years after *Sullivan*, he was working on freedom of expression as the top lawyer at Twitter. Twitter and other Internet platforms have been heralded for creating the "new media,"[3] what Professor Yochai Benkler calls the "networked public sphere,"[4] for enabling billions around the world to publish and read instantly, prompting a world where anyone — you and I included — can be the media simply by breaking, recounting, or spreading news and commentary.[5] Today, freedom of the press means

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[1] *See* HARRISON E. SALISBURY, WITHOUT FEAR OR FAVOR 126, 381–82 (1980); Interview with Ben Lee, Legal Dir., Twitter, in S.F., Cal. (Aug. 2013); *Louis M. Loeb*, WIKIPEDIA, http://en.wikipedia.org/wiki/Louis_M._Loeb (last modified Nov. 18, 2013), *archived at* http://perma.cc/B6ZQ-Y3ES.

[2] 376 U.S. 254 (1964).

[3] For an introduction to "new media," see, for example, NICHOLAS GANE & DAVID BEER, NEW MEDIA (2008).

[4] *See, e.g.*, YOCHAI BENKLER, THE WEALTH OF NETWORKS 212 (2006).

[5] *See id.* at 212–53; DAN GILLMOR, WE THE MEDIA (2006); Lev Grossman, *You — Yes, You — Are TIME's Person of the Year*, TIME, Dec. 25, 2006, http://content.time.com/time/magazine/article/0,9171,1570810,00.html, *archived at* http://perma.cc/3Z2V-R2K7.

freedom not just for an institutional press but freedom for all of us. The core business functions of Twitter, YouTube, and other platforms turn on expression — no less than the *New York Times*'s. The lawyers working for these companies have business reasons for supporting free expression. Indeed, all of these companies talk about their businesses in the language of free speech. Google's official mission is "to organize the world's information and make it universally accessible and useful."[6] WordPress.com's corporate mission is to "democrati[z]e publishing."[7] Facebook's is to "give people the power to share and make the world more open and connected."[8]

Perhaps even more than other Internet platforms, Twitter thinks of itself as a medium for free speech: its former general counsel calls Twitter "the free speech wing of the free speech party,"[9] its CEO calls it the "global town square,"[10] its cofounder set out as a default principle against blocking speech that "[t]he [t]weets [m]ust [f]low,"[11] and the company instituted a "church-state divide" reminiscent of newspapers separating employees engaged in content from those selling advertising.[12] Lee told me, "I don't know what others think with the phrase 'town square,' but I think about free expression cases."[13]

Had Lee been born fifty years earlier, his dream of influencing the future of free speech likely would have inspired him to take a job representing the *New York Times* or some other leading newspaper at a law firm like Lord Day. Instead, being born to a different time, Lee followed his dream by first taking a job working on free expression at Google, a company with 100 times the market cap of the *New York Times* and arguably 100 times the influence. While at Google, he worked on free expression alongside other well-known free speech

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[6] *About Google*, GOOGLE, http://www.google.com/about/ (last visited May 10, 2014), *archived at* http://perma.cc/953V-LKE2.

[7] Robin Hough, *On a Mission to Democratise Publishing — Matt Mullenweg Interview*, THE GUARDIAN (Sept. 3, 2013, 4:52 PM), http://www.theguardian.com/media-network/media-network-blog/2013/sep/03/democratise-publishing-matt-mullenwegg-cloud, *archived at* http://perma.cc/7AKH-2MK3.

[8] Gillian Reagan, *The Evolution of Facebook's Mission Statement*, N.Y. OBSERVER (July 13, 2009, 9:32 PM), http://observer.com/2009/07/the-evolution-of-facebooks-mission-statement/, *archived at* http://perma.cc/99Q2-4Q47.

[9] Josh Halliday, *Lawyer and Champion of Free Speech Alex Macgillivray to Leave Twitter*, THE GUARDIAN (Aug. 30, 2013, 4:50 PM) http://www.theguardian.com/technology/2013/aug/30/twitter-alex-macgillivray-free-speech, *archived at* http://perma.cc/KXL9-W98P.

[10] Karl Baker, *Twitter CEO Costolo Focused on 'Building Global Town Square,'* BLOOMBERG (Mar. 25, 2013, 2:52 PM), http://www.bloomberg.com/news/2013-03-25/twitter-ceo-costolo-focused-on-building-global-town-square-.html, *archived at* http://perma.cc/NF4N-EBPV.

[11] Biz Stone, *The Tweets Must Flow*, TWITTER BLOG (Jan. 28, 2011, 8:27 PM), https://blog.twitter.com/2011/tweets-must-flow, *archived at* http://perma.cc/BTB5-NJ3P.

[12] *See* Interview with Ben Lee, *supra* note 1.

[13] *Id.*

lawyers, including Alex Macgillivray and Nicole Wong, whose influence has been documented in major news profiles.[14] These lawyers must address difficult and novel cases concerning the speech of hundreds of millions of users. They have grappled with these questions on everything from the Occupy Wall Street movement to the publication of WikiLeaks.[15] They have navigated issues from UK local law enforcement measures to Chinese state censorship.[16] These lawyers have earned lots of praise, with reporters hoping their practices would become the "industry standard" and claiming that Twitter "beta-tested a spine."[17] Many reporters credited Twitter's actions to its speech lawyers.[18] Professor Jeffrey Rosen opined that Google's lawyers and executives "exercise far more power over speech than does the [U.S.] Supreme Court"[19] and called an administrative law case (that I worked on[20]) involving the blocking of Internet speech "a model for the free-speech battles of the future."[21]

Whether or not Rosen is right that Google lawyers somehow outrank Chief Justice John Roberts, no one should doubt that lawyers like Lee are shaping the future of free expression worldwide. While they have been criticized for some of their decisions, the lawyers at companies like Google and Twitter are reminiscent of newspaper lawyers of old in their conscious thinking about and focus on freedom of expres-

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[14] *See* Jeffrey Rosen, *Google's Gatekeepers*, N.Y. TIMES MAG., Nov. 28, 2008, http://www.nytimes.com/2008/11/30/magazine/30google-t.html, *archived at* http://perma.cc/8GTH-BA2Q; Somini Sengupta, *Twitter General Counsel Leaves as Company Prepares to Go Public*, N.Y. TIMES, Aug. 30, 2013, http://bits.blogs.nytimes.com/2013/08/30/twitter-general-counsel-leaves-as-company-prepares-to-go-public, *archived at* http://perma.cc/W2PA-EDL9.

[15] *See, e.g.*, Megan Geuss, *Twitter Hands Over Sealed Occupy Wall Street Protester's Tweets*, ARS TECHNICA (Sept. 14, 2012, 6:17 PM), http://arstechnica.com/tech-policy/2012/09/twitter-hands-over-occupy-wall-street-protesters-tweets/, *archived at* http://perma.cc/P8EA-6LDV ("After a subpoena was upheld in June, the social network had little choice."); Ryan Singel, *Twitter's Response to WikiLeaks Subpoena Should Be the Industry Standard*, WIRED (Jan. 10, 2011, 7:56 PM), http://www.wired.com/2011/01/twitter-2/, *archived at* http://perma.cc/V685-NJV9.

[16] *See, e.g.*, Uri Friedman, *Twitter Braces for U.K. Censorship Following the Riots*, THE WIRE (Aug. 11, 2011, 10:09 AM), http://www.theatlanticwire.com/global/2011/08/twitter-braces-censorship-following-uk-riots/41127/, *archived at* http://perma.cc/N2D3-WNG6; Shira Ovide, *For Twitter, Free Speech Is a High-Wire Act*, WALL ST. J. (Aug. 4, 2013, 7:57 PM), http://online.wsj.com/article/SB10001424127887323997004578643883120559180.html, *archived at* http://perma.cc/Q3NP-35ED.

[17] Singel, *supra* note 15.

[18] *See, e.g.*, E.B. Boyd, *Why Twitter Was the Only Company to Challenge the Secret Wikileaks Subpoena*, FAST COMPANY (Jan. 11, 2011, 1:05 AM), http://www.fastcompany.com/1716100/why-twitter-was-only-company-challenge-secret-wikileaks-subpoena, *archived at* http://perma.cc/H4EK-QPVY; Singel, *supra* note 15.

[19] Jeffrey Rosen, Lecture, *The Deciders: The Future of Privacy and Free Speech in the Age of Facebook and Google*, 80 FORDHAM L. REV. 1525, 1529 (2012).

[20] I was the lawyer who brought this case on behalf of consumer groups and law professors.

[21] Jeffrey Rosen, *Net Cemetery*, NEW REPUBLIC, Oct. 12, 2009, http://www.newrepublic.com/article/net-cemetery, *archived at* http://perma.cc/3J8S-VWKF.

sion. Their companies are not perfect, just as the *New York Times* is not perfect.[22] Fifty years from now, though, we will remember these lawyers and their impact on how millions of people experience freedom of expression. And their paradigmatic decisions already have played significant roles in some of the most important freedom of expression episodes in modern times, including the leaking of classified documents to WikiLeaks and *The Guardian*,[23] the sharing of anti-Islamic videos on YouTube,[24] and the legislative debate over telecommunications and copyright rules such as "network neutrality" and "SOPA."[25]

This Essay's primary thesis is that some of the most important First Amendment lawyering today is happening at top technology companies. If the decisions of these lawyers and their companies further freedom of expression, decades from now we may be celebrating them as we celebrate those who handled *Sullivan*. This Article relies on interviews and discussions with many of the top lawyers at these companies to reveal some of the striking influences shaping our digital-speech environment. While First Amendment lawyers at leading technology companies must of course reckon with decisions of the U.S. Supreme Court — and these decisions may shape these lawyers' mental frameworks — they must also contend with their own corporate and community objectives, with extremely important speech rules promulgated by acts of Congress, and with the laws and traditions of foreign nations that govern so many of their users. A First Amendment practice thrives in the offices of Silicon Valley as it does in the offices of the world's leading newspapers and organs of opinion. In order to fully understand it, however, we need to look not only to judicial opinions but also to legal sources that many might consider nontraditional.

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[22] *See, e.g.*, Michael Gonchar, *'The Century's Bitterest Journalistic Failure'? Considering* Times *Coverage of the Holocaust*, N.Y. TIMES (Apr. 2, 2013, 3:54 PM), http://learning.blogs.nytimes.com/2013/04/02/the-centurys-bitterest-journalistic-failure-considering-times-coverage-of-the-holocaust/, *archived at* http://perma.cc/8VP9-QSDZ; Eric Lichtblau, *The Education of a 9/11 Reporter*, SLATE (Mar. 26, 2008, 7:08 PM), http://www.slate.com/articles/news_and_politics/politics/2008/03/the_education_of_a_911_reporter.html, *archived at* http://perma.cc/S8NC-C6FX; Greg Mitchell, *When the 'NYT' Offered a Weak 'Mini-Culpa' for Hyping Iraq WMD*, THE NATION (Mar. 14, 2013, 10:33 PM), http://www.thenation.com/blog/173357/when-nyt-offered-weak-mini-culpa-hyping-iraq-wmd, *archived at* http://perma.cc/59KL-V4QQ.

[23] *See* Glenn Greenwald, *DOJ Subpoenas Twitter Records of Several WikiLeaks Volunteers*, SALON (Jan. 7, 2011, 11:08 PM), http://www.salon.com/2011/01/08/twitter_2/, *archived at* http://perma.cc/8FRR-LXVT.

[24] *See* Claire Cain Miller, *Google Has No Plans to Rethink Video Status*, N.Y. TIMES, Sept. 14, 2012, http://www.nytimes.com/2012/09/15/world/middleeast/google-wont-rethink-anti-islam-videos-status.html?ref=clairecainmiller, *archived at* http://perma.cc/LX2F-DKE9.

[25] *See, e.g.*, Geoffrey A. Fowler, *Wikipedia, Google Go Black to Protest SOPA*, WALL ST. J. (Jan. 18, 2012, 1:54 PM), http://online.wsj.com/news/articles/SB10001424052970204555904577167873208040252, *archived at* http://perma.cc/BK6L-36RC.

This Article argues for three main points:

First, lawyers at private technology companies have an enormous impact on free expression globally through the policies they adopt for their millions of users — most significantly, terms of use. The terms of these policies often take the form of traditional legal rules and standards; within "Facebookistan"[26] and Twitterland, they have just as much validity. Under the First Amendment, the lawyers who craft these policies have wide discretion. They do not apply simple black-letter law; rather, they must weigh potential precedents, theory, norms, and administrability in developing the rules of speech, which effectively govern hundreds of millions of users.

Second, because a majority of the users on Twitter, Facebook, and Google are abroad, foreign laws and norms end up playing a large role in crafting online speech policies. Over eighty percent of Facebook's active users are abroad.[27] Seventy-five percent of Twitter's users are too.[28] The norms of these nations structure how users will react to various terms of use; so, in turn, these foreign norms structure the terms themselves. Citizens of a European nation who are sensitive to hate speech, for example, might be inclined to avoid Facebook if it does not enact policies that forbid hate speech. Meanwhile, the laws of these nations affect what tech companies can do within each nation's borders. China, for example, censors the Internet for its citizens, and Google has long struggled to reconcile its commitment to freedom of expression and information with the Chinese government's rather different values. The lawyers interviewed for this Article noted a simple, if often overlooked, truth: the U.S. Supreme Court is merely a local tribunal, albeit an important and influential one, and the First Amendment a local ordinance.

Third, within the United States, congressional statutes, not Supreme Court decisions, are the most celebrated protections of freedom of expression online today. My interviews suggest that Section 230 of the Communications Decency Act of 1996,[29] known as "CDA 230," is

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[26] *See* Steve Coll, *Leaving Facebookistan*, NEW YORKER (May 24, 2012), http://www.newyorker.com/online/blogs/comment/2012/05/leaving-facebookistan.html, *archived at* http://perma.cc/TB6Q-9M2H; Rebecca MacKinnon, *Ruling Facebookistan*, FOREIGN POL'Y, June 14, 2012, http://www.foreignpolicy.com/articles/2012/06/13/governing_facebookistan, *archived at* http://perma.cc/DH3N-MLNF.

[27] *See* ANI, *Facebook's International Users Account for 80 Percent of Likes and Shares*, BGR (Dec. 17, 2013, 5:31 PM), http://www.bgr.in/news/facebooks-international-users-account-for-80-percent-of-likes-and-shares/, *archived at* http://perma.cc/4YMC-SHJH.

[28] *See ¾ of Twitter's Members Abroad, Generates Only ¼ of Its Revenue*, TECH2 (Nov. 7, 2013, 11:00 PM), http://tech.firstpost.com/news-analysis/34-of-twitters-members-abroad-generates-only-14-of-its-revenue-215661.html, *archived at* http://perma.cc/VF45-Q32U.

[29] 47 U.S.C. § 230 (2006).

as revered among these speech lawyers as *Sullivan* is among speech scholars. CDA 230 grants Internet providers immunity from suit when one of their users libels someone or engages in a wide variety of other offenses. One of the interviewees described CDA 230 as "the best thing Congress has done in the past twenty years," while also asserting "the hilarious irrelevancy of *New York Times v. Sullivan*" to his company.[30] Moreover, the Digital Millennium Copyright Act of 1998,[31] widely referred to as "the DMCA," provides different, but perhaps equally important, protection regarding copyright infringement. Unfortunately, there is a notable gap in coverage: there is no explicit statutory immunity for trademark claims, so corporations can threaten new media intermediaries with trademark violations when a speaker uses a trademarked name in a critical posting. The interviews suggest that students interested in free expression or freedom of the press should be as acquainted with CDA 230 as they are with *Sullivan*. They also suggest that our usual picture where the Supreme Court defends free speech and Congress restricts it (or is ignorant of it) is false, an unexpected arrangement, which is likely to warm the hearts of legislative constitutionalists.[32]

This Article relies on interviews with top legal decisionmakers from the leading Internet speech platforms, including those at Google, Facebook, Twitter, Tumblr, and Automattic, the company behind WordPress.com,[33] to understand the day-to-day practice "on the ground"[34] of free expression law (I also spoke with lawyers or former lawyers at Yelp, Dropbox, Pinterest, and the Wikimedia Foundation[35]). Though these interviews were often candid and revealing, I should make three caveats. First, I was unable to probe one of the main controversies of today: mass surveillance by American intelligence agencies, unveiled by Edward Snowden and others. Many aspects of this controversy pertain to secret directives and orders, which the interviewees could not discuss.[36] Second, I have represented many of these

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30 Telephone Interview with Ari Shahdadi, Gen. Counsel, Tumblr (Aug. 10, 2013).

31 Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 and 28 U.S.C.).

32 *See* Marvin Ammori, *First Amendment Architecture*, 2012 WIS. L. REV. 1, 4–9.

33 WordPress.com is actually the product name; the company is called Automattic.

34 *Cf.* Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy on the Books and on the Ground*, 63 STAN. L. REV. 247, 247–48 (2011) (studying privacy law and corporate privacy management on the ground through qualitative interviews with chief privacy officers).

35 Several of these companies have been my clients, including Google, Dropbox, WordPress.com, Twitter, and Tumblr. I have also done some work for newspapers and their associations.

36 In the meantime, for perhaps the best source for understanding how lawyers at different companies have chosen to draw lines regarding government surveillance, see *Who Has Your Back? 2013*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/who-has-your-back-2013 (last visited May 10, 2014), *archived at* http://perma.cc/WF68-TCYB.

companies on specific briefs (Tumblr, Twitter) or on a more ongoing basis (Google, Dropbox, Automattic) on a variety of free speech issues. So I also am a participant, not merely an observer. And, third, in focusing on larger corporate platforms, I am not suggesting that other institutions such as nonprofit advocacy organizations, smaller technology groups, academics, or traditional media organizations do not play a key role in advancing freedom of expression today. The work of organizations such as the Electronic Frontier Foundation and Free Press may be analogized to the advocacy organizations of 1964 and should also be remembered and lauded decades from now.

This Article is structured in two main parts. The first is background: it describes the "new media" of today. The second sets out the main argument. Whether or not one agrees with their decisions or vision of free expression, technology lawyers are among the most influential free expression lawyers practicing today. Fifty years from now, we will have a better idea of these lawyers' lasting impact — and whether they will have used their influence in ways worthy of celebration or condemnation. But we can begin understanding their role and their practices today.

I. THE NEW SPEECH VANGUARD

In this Part, I set out some numbers demonstrating the influence of today's digital platforms and describe some of the leading companies and their different communities, business models, and missions.

A. The World's Sources of Information

In the next decade, if the Supreme Court hands down a landmark decision about freedom of expression, it is more likely that one of the parties in the case will be Google or Twitter than that it will be the *New York Times*.

Traditional media organizations are no longer the only place to find news or make political arguments. The death of Osama bin Laden was leaked first on Twitter, not in any newspaper.[37] The biggest news story of 2013 was Edward Snowden's whistleblowing regarding American surveillance programs. He leaked information about them to the blogger Glenn Greenwald because he did not trust the *New York Times* to publish the material.[38] Syrian dictator Bashar al-Assad and the Sy-

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[37] Brian Stelter, *How the Bin Laden Announcement Leaked Out*, N.Y. TIMES (May 1, 2011, 11:28PM), http://mediadecoder.blogs.nytimes.com/2011/05/01/how-the-osama-announcement-leaked-out/, *archived at* http://perma.cc/k2QER7Wn.

[38] Irin Carmon, *How We Broke the NSA Story*, SALON (June 10, 2013, 5:20 PM), http://www.salon.com/2013/06/10/qa_with_laura_poitras_the_woman_behind_the_nsa_scoops, *archived at* http://perma.cc/GAP8-XG9W; Rebecca Shapiro, *Laura Poitras: Why Edward Snowden Didn't Approach NY Times*, HUFFINGTON POST (June 11, 2013, 8:12 AM), http://www

rian rebels disseminate competing propaganda over Instagram.[39] Chelsea Manning leaked her material not directly to a "traditional" news organization but to WikiLeaks, a site that conceives of itself as a new kind of journalistic organization.[40]

The numbers suggest that companies like Google and Twitter have at least as great an impact on free expression as do traditional newspapers. In 2013, the *New York Times* had a print and digital circulation of nearly two million[41] and was able to boast that it was the "#1 individual newspaper site" on the web with nearly thirty-one million unique visitors each month.[42] YouTube, which is owned by Google, has one billion unique visitors a month, about thirty times more than the *New York Times*, or as many unique visitors in a day as the *Times* has every month.[43] Google's search engine reached a billion monthly users in 2011.[44] Facebook also has over a billion users monthly.[45] Tumblr has ten times more unique visitors than the *Times*, with 300 million per month.[46] Twitter has more visitors in a week than the *Times* does in a month, with 200 million active users.[47] Further, Google has an additional form of influence: it sends more traffic to news sites than does any other website, so Google's platforms play a large role in how people even learn about news.[48]

.huffingtonpost.com/2013/06/10/edward-snowden-nytimes-warrantless-wiretapping-story_n_3418503.html, *archived at* http://perma.cc/5S87-XBB8.

[39] Nicole Gaouette, *Assad on Instagram Vies with Rebel Videos to Seek Support*, BLOOMBERG (Sept. 19, 2013, 12:00 AM), http://www.bloomberg.com/news/2013-09-19/assad-on-instagram-vies-with-rebel-videos-to-seek-support.html, *archived at* http://perma.cc/9GNW-DM5N.

[40] 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, 348 (2011).

[41] Christine Haughney, *Newspapers Post Gains in Digital Circulation*, N.Y. TIMES, Apr. 30, 2013,http://www.nytimes.com/2013/05/01/business/media/digital-subscribers-buoy-newspaper-circulation.html, *archived at* http://perma.cc/RPP4-SURB.

[42] *Media Kit*, N.Y. TIMES MEDIA KIT, http://nytmediakit.com/online (last visited May 10, 2014), *archived at* http://perma.cc/B5KA-VMGC.

[43] *Statistics*, YOUTUBE, http://www.youtube.com/yt/press/statistics.html (last visited May 10, 2014), *archived at* http://perma.cc/S8W5-ZRM4.

[44] Rob D. Young, *Google Hits the Billion Monthly Unique Visitors Mark*, SEARCH ENGINE WATCH (June 23, 2011), http://searchenginewatch.com/article/2081332/Google-Hits-the-Billion-Monthly-Unique-Visitors-Mark, *archived at* http://perma.cc/AS64-76GZ.

[45] Drew Olanoff, *Facebook's Monthly Active Users Up 23% to 1.11B; Daily Users Up 26% to 665M; Mobile MAUs Up 54% to 751M*, TECHCRUNCH (May 1, 2013), http://techcrunch.com/2013/05/01/facebook-sees-26-year-over-year-growth-in-daus-23-in-maus-mobile-54, *archived at* http://perma.cc/WD4B-ZZQ7.

[46] Jay Yarow, *The Truth About Tumblr: Its Numbers Are Significantly Worse than You Think*, BUS. INSIDER (May 21, 2013, 10:30 AM), http://www.businessinsider.com/tumblrs-active-users-lighter-than-expected-2013-5, *archived at* http://perma.cc/ZZ3V-EFPH.

[47] Karen Wickre, *Celebrating #Twitter7*, TWITTER BLOG (Mar. 21, 2013, 7:42 AM), https://blog.twitter.com/2013/celebrating-twitter7, *archived at* http://perma.cc/QKM4-VGUH.

[48] Matt McGee, *Google Dwarfs Bing & Yahoo as Traffic Source for Major News Sites*, SEARCH ENGINE LAND (Aug. 27, 2013, 9:00 AM), http://searchengineland.com/google-dwarfs

Company valuations tell a similar story. In August 2013, the New York Times Company sold off the *Boston Globe* for seventy million dollars. This was a drop of more than ninety percent from the *Globe*'s 1993 price of 1.1 billion dollars;[49] it was also twenty million dollars less than the acquisition price for Pulse, a digital RSS newsreader application originally offered for the iPad.[50] That same month, Jeff Bezos, the founder of Amazon, spent one percent of his personal net worth, 250 million dollars, to buy the *Washington Post*.[51] A few months earlier, Yahoo! acquired Tumblr, a blogging platform, for over four times the *Post*'s value, paying 1.1 billion dollars.[52] Also around the time of the *Globe* purchase,[53] the New York Times Company was worth about 1.8 billion dollars; Twitter was valued at ten billion dollars.[54] As of this writing, the *Times*'s market cap is only around one percent of that of Facebook or Google.[55]

To be sure, numbers do not tell the whole story, and there is room to debate the roles these companies do and should play in how we gain information. But we need not choose between traditional and new media in order to recognize the importance of new media.

-bing-yahoo-as-traffic-source-for-major-news-sites-170660, *archived at* http://perma.cc/V2JP-59EW.

[49] *Boston Globe, Once Bought for $1.1 Billion, Sells for $70 Million*, NBC NEWS (Aug. 3, 2013, 3:44 AM), http://www.nbcnews.com/business/boston-globe-once-bought-1-1-billion-sells-70-million-6C10835491, *archived at* http://perma.cc/FJW8-F8FS.

[50] Tomio Geron, *LinkedIn Buys Pulse Newsreader for $90 Million*, FORBES (Apr. 11, 2013, 4:34 PM), http://www.forbes.com/sites/tomiogeron/2013/04/11/linkedin-buys-pulse-newsreader-for-90-million, *archived at* http://perma.cc/LF56-NWKB.

[51] Paul Farhi, *Washington Post to be Sold to Jeff Bezos, the Founder of Amazon*, WASH. POST, Aug. 5, 2013, http://articles.washingtonpost.com/2013-08-05/national/41085661_1_washington-post-co-jeff-bezos-graham, *archived at* http://perma.cc/5SZU-9APP.

[52] Michael J. de la Merced et al., *Yahoo to Buy Tumblr for $1.1 Billion*, N.Y. TIMES, May 19, 2013, http://www.nytimes.com/2013/05/20/technology/yahoo-to-buy-tumblr-for-1-1-billion.html, *archived at* http://perma.cc/4CNG-QVT4.

[53] Jennifer Saba, *Jeff Bezos Bought the Washington Post for Four Times Its Worth*, BUS. INSIDER (Aug. 7, 2013, 6:14 AM), http://www.businessinsider.com/jeff-bezos-bought-the-washington-post-for-four-times-its-worth-2013-8, *archived at* http://perma.cc/5VVT-5DL9.

[54] Ari Levy & Douglas MacMillan, *Twitter Seen Valued at $10 Billion Based on GSV Holding*, BLOOMBERG (May 11, 2013, 12:01 AM), http://www.bloomberg.com/news/2013-05-10/twitter-said-to-be-worth-10-billion-based-on-gsv-holding.html, *archived at* http://perma.cc/NMD9-ZE3H.

[55] As of April 1, 2014, Google's market cap was $380.2 billion, Facebook's was $158 billion, and the *New York Times*'s was $2.59 billion. *See Google Inc.*, GOOGLE FIN. (Apr. 1, 2014), http://www.google.com/finance?q=NASDAQ:GOOG, *archived at* http://perma.cc/9E4G-N6F7; *Facebook Inc.*, GOOGLE FIN. (Apr. 1, 2014), http://www.google.com/finance?q=NASDAQ:FB, *archived at* http://perma.cc/5UXM-GYQM; *The New York Times Company*, GOOGLE FIN. (Apr. 1, 2014), http://www.google.com/finance?q=NYSE:NYT, *archived at* http://perma.cc/N7SJ-ZJQ8.

B. Platforms for User Speech

Today, we are in an era when digital platforms such as Twitter — not newspapers or handbills or pamphlets — are the main mediums for speech.[56] The speech on Google, YouTube, WordPress.com, Facebook, Tumblr, Twitter, Dropbox, Wikipedia, Pinterest, Yelp, and many other sites comes almost exclusively from users, not employees. Billions post photos, status updates, blog posts, news articles, and files. Billions also like/upvote/favorite those posts (which is itself protected speech[57]). While it is true that people often use these digital speech platforms to share stories from traditional newspapers and magazines, the billions of users also express themselves far more widely. They comment, they debate, they critique, they invent, they create, they share.

These users form what Benkler has called the "networked public sphere."[58] Because of the speech options on these platforms, *Time* magazine named "You" the person of the year in 2006 "for seizing the reins of the global media, for founding and framing the new digital democracy, for working for nothing and beating the pros at their own game."[59]

C. The "New Media" Companies

Today's speech companies range in size. Google, the largest, has over 40,000 employees, while Facebook has about 5000 and Automattic has closer to 200.[60] Google, effectively a twenty-first century conglomerate — though not of magazines, newspapers, and television stations — offers a range of services including the most popular search engine, the most popular online video service (YouTube), one of the most popular email services (Gmail), the most popular mobile operating system (Android), the most popular web browser (Chrome), mobile devices and laptops (Motorola devices and Chrome laptops),

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[56] *See* Marvin Ammori, *Another Worthy Tradition: How the Free Speech Curriculum Ignores Electronic Media and Distorts Free Speech Doctrine*, 70 MO. L. REV. 59, 86–91 (2005) (describing where Americans get their news today).

[57] Bland v. Roberts, 730 F.3d 368, 386 (4th Cir. 2013).

[58] BENKLER, *supra* note 4, at 10.

[59] Grossman, *supra* note 5.

[60] *Investor Relations*, GOOGLE, http://investor.google.com/financial/tables.html (last visited May 10, 2014), *archived at* http://perma.cc/WF6S-G8CF; Leena Rao, *Facebook Will Grow Headcount Quickly in 2013 to Develop Money-Making Products, Total Expenses Will Jump by 50 Percent*, TECHCRUNCH (Jan. 30, 2013), http://techcrunch.com/2013/01/30/zuck-facebook-will-grow
-headcount-quickly-in-2013-to-develop-future-money-making-products, *archived at* http://perma.cc/F33-S5GM ("In 2012 alone, Facebook added 1,419 employees to reach a total staff of 4,619 staffers worldwide."); *Work with Us*, AUTOMATTIC, http://automattic.com/work-with-us (last visited May 10, 2014), *archived at* http://perma.cc/59LQ-UHEM.

and a social network (Google+). Google will soon release self-driving cars and wearable computers such as Google Glass and Google smartwatches.[61] Google has more media-related features as well. As with newspapers, most of Google's revenues come from advertising.[62] In 2003, Google acquired Blogger, a site that makes it easy for average people to "publish" on the web.[63]

According to Alan Davidson, a Yale Law School graduate and Google's former director of public policy for the Americas, Google cofounders Sergey Brin and Larry Page, as well as many of Google's early employees, have a commitment to free expression. Just as a newspaper's publishers may believe that freedom of expression will advance a corporate mission of publishing "all the news that's fit to print," Google's founders "felt like it was good business to be a force for freedom. . . . Sergey Brin was a child of the Soviet Union, Larry Page has a civil libertarian streak. And they built a search engine; they didn't want to be a gatekeeper, making decisions about what people see or don't, and to only do so very carefully."[64] Google's current head of global policy, Rachel Whetstone, has publicly said, "At Google we have a bias in favor of people's right to free expression in everything we do."[65]

Since Google is so big and — for the tech world — ancient, having been founded in 1998, many of the top lawyers in Silicon Valley once worked for Google, either as outside counsel or in-house. Indeed, Google's legal alumni include current or former general counsels for Twitter, Dropbox, Pinterest, and Square, among others.[66] Google's philosophy likely impacts the legal thinking at companies across Silicon Valley because its alumni have been shaped by shared experiences and an ongoing informal network, which trades notes on tough questions.[67]

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[61] *See* Jordan Crook, *Google Invites a New Round of Explorers to Buy Glass*, TECHCRUNCH (Nov. 26, 2013), http://techcrunch.com/2013/11/26/google-invites-a-new-round-of-explorers-to-buy-glass, *archived at* http://perma.cc/67UH-QBHM; Eva Dou & Lorraine Luk, *Google Nears Smartwatch Launch*, WALL ST. J. (Oct. 29, 2013, 6:03 AM), http://online.wsj.com/news/articles/SB10001424052702304655104579165080029933904, *archived at* http://perma.cc/S378-WY7Z.

[62] Tim Peterson, *Google Finally Crosses $50 Billion Annual Revenue Mark*, ADWEEK (Jan. 22, 2013, 5:51 PM), http://www.adweek.com/news/technology/google-finally-crosses-50-billion-annual-revenue-mark-146710, *archived at* http://perma.cc/ER7X-YAWV ("$12.1 billion, or 94 percent, of the period's revenue came from advertising, which gained 19 percent on its Q4 2011 numbers.").

[63] *Our History in Depth*, GOOGLE, http://www.google.com/about/company/history (last visited May 10, 2014), *archived at* http://perma.cc/B4BK-2S8U.

[64] Interview with Alan Davidson, in Wash., D.C. (Aug. 9, 2013).

[65] Miller, *supra* note 24.

[66] Chelsea Allison, *Hot Startups Tap Google's Legal Talent*, DAILY BUS. REV., Aug. 5, 2013, http://www.dailybusinessreview.com/PubArticleDBR.jsp?id=1202613877131, *archived at* http://perma.cc/J82A-XX8C.

[67] Thanks to Ramsey Homsany, general counsel of Dropbox and former senior lawyer at Google, for this point.

Unlike Google's sprawling empire, Twitter does only one thing. It enables users to "microblog" messages no longer than 140 characters. They "tweet" these messages and follow other users' tweets in a "feed." In doing so, users can post pseudonymously. Twitter relies on advertising to generate revenue and is free to users.[68] Twitter's cofounders include Evan Williams, who also established two other companies for user speech: Blogger, the first blogging platform, and Medium, a curated long-form media website.[69] Twitter's Lee speaks about his company's founders as one would speak of intrepid newspaper owners: "Our legal team's conceptualization of speech policies and practices emanate[s] straight from the idealism of our founders — that this would be a platform for free expression, a way for people to disseminate their ideas in the modern age. We're here in some sense to implement that vision."[70] To Lee, Twitter's founders, not its lawyers, are the true free speech visionaries: "Our founders were able to look at nonestablished media and its implications for the broad democratic discourse. They're far more self aware than they're given credit for. Those guys could write the book on free expression in the twenty-first century."[71]

Founded in 2005, Automattic is a privately held company that has fewer than 200 employees, one of whom is a lawyer, General Counsel Paul Sieminski.[72] Its core product is WordPress.com, which, having beaten Blogger in the market, is today's leading blogging service. Users have created more than seventy million WordPress sites and more than 400 million people read them every month.[73] Automattic's tools enable its users to publish more than thirty-five million posts every month. These users can choose to maintain anonymous blogs. Some professional media organizations, including CNN and TechCrunch, also use WordPress.com to manage their sites.[74] The company makes money by charging blog publishers for premium features and, to a lesser extent, by selling advertising on its sites. Sieminski also told me that he attributes the company's speech positions to the company

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[68] *See* Will Oremus, *Twitter Is Going Public: Here's How It Makes Money*, SLATE (Sept. 12, 2013, 7:21 PM), http://www.slate.com/blogs/future_tense/2013/09/12/twitter_ipo_social_network_files_for_initial_public_offering_of_stock.html, *archived at* http://perma.cc/6SX4-K5FA.

[69] *See* Matthew Panzarino, *Twitter Co-Founder Evan Williams' Blogging Platform Medium Opens Signups to All*, TECHCRUNCH (Oct. 25, 2013), http://techcrunch.com/2013/10/25/twitter-co-founder-evan-williams-blogging-platform-medium-opens-signups-to-all/, *archived at* http://perma.cc/N2G-TZU9.

[70] Interview with Ben Lee, *supra* note 1.

[71] *Id.*

[72] Interview with Paul Sieminski, Gen. Counsel, Automattic Inc., in S.F., Cal. (July 9, 2013).

[73] *Stats*, WORDPRESS.COM, http://en.wordpress.com/stats (last visited May 10, 2014), *archived at* http://perma.cc/X87-HFQG.

[74] *Id.*

founders, not the lawyers. He said, "Every single one [of the founders and early employees] is cut from open source,[75] free speech cloth."[76] Even without him, Sieminski said, the company would have fought for its users' rights to express themselves; having a lawyer on staff merely allowed the company to be more aggressive where the law permitted.[77]

Facebook famously started in a Harvard dorm room ten years ago and is now the world's largest social network. It has over 1.23 billion users,[78] more than eighty percent of whom are outside the United States.[79] These users share photos, videos, links, and comments with their Facebook "friends." Unlike Twitter, Facebook requires users to provide their real names.[80] It is free and makes its money primarily through advertising. Facebook's cofounder, Mark Zuckerberg, has described Facebook's mission in the language of freedom of expression and association: to facilitate connections and sharing.[81] Another cofounder, Chris Hughes, also appears interested in free expression; he purchased the *New Republic* and now serves as its publisher.[82] Facebook's team makes decisions about content and speech daily. Dave Willner, formerly the head of Facebook's content policy, was profiled in the *New York Times*, the *New Republic* and elsewhere as the impressive, young head of Facebook's "delete squad," which decides how to implement Facebook's free-expression policies.[83] I interviewed both

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[75] "Open source" refers to the practice of making the source code of a technology available for users to modify and reuse. *See* Laurie Wurster, *Open Source Software Hits a Strategic Tipping Point*, HBR BLOG NETWORK (Mar. 9, 2011, 8:30 AM), http://blogs.hbr.org/2011/03/open-source-software-hits-a-st, *archived at* http://perma.cc/FKE7-YBFS.

[76] Interview with Paul Sieminski, *supra* note 72.

[77] *Id.*

[78] *Company Info*, FACEBOOK NEWSROOM, http://newsroom.fb.com/company-info/ (last visited May 10, 2014), *archived at* http://perma.cc/L9EK-QNZZ.

[79] Trefis Team, *Facebook's International Business Has Significant Upside*, FORBES (Aug. 29, 2013, 3:15 PM), http://www.forbes.com/sites/greatspeculations/2013/08/29/facebooks-international-business-has-significant-upside, *archived at* http://perma.cc/HK7J-BKFJ.

[80] *Statement of Rights and Responsibilities*, FACEBOOK (Nov. 15, 2013), https://www.facebook.com/legal/terms, *archived at* http://perma.cc/KT6U-C6DU.

[81] *See* Scott Ard, *Mark Zuckerberg's IPO Letter: Why Facebook Exists*, YAHOO! FIN. (Feb. 1, 2012, 6:25 PM), http://finance.yahoo.com/news/mark-zuckerberg%E2%80%99s-ipo-letter--why-facebook-exists.html, *archived at* http://perma.cc/TPS2-QXHB ("Facebook was not originally created to be a company. It was built to accomplish a social mission — to make the world more open and connected.").

[82] Brian Stelter & Michael J. de la Merced, *New Republic Gets an Owner Steeped in New Media*, N.Y. TIMES (Mar. 9, 2012, 12:01 AM), http://mediadecoder.blogs.nytimes.com/2012/03/09/new-republic-gets-an-owner-steeped-in-new-media/, *archived at* http://perma.cc/6Z2C-RHCV.

[83] Miguel Helft, *Facebook Wrestles with Free Speech and Civility*, N.Y. TIMES, Dec. 12, 2010, http://www.nytimes.com/2010/12/13/technology/13facebook.html, *archived at* http://perma.cc/U9G3-EKT4; Jeffrey Rosen, *The Delete Squad: Google, Twitter, Facebook and the New Global Battle over the Future of Free Speech*, NEW REPUBLIC (Apr. 29, 2013), http://www.newrepublic.com/article/113045/free-speech-internet-silicon-valley-making-rules, *archived at* http://perma.cc/XKW4-95HY.

Willner and Monika Bickert, Facebook's Head of Global Policy Management. Bickert is a Harvard Law graduate who previously worked for the State Department in Thailand and as a federal prosecutor.

Tumblr is described variously as a microblogging platform and a social network. It enables users to "[p]ost text, photos, quotes, links, music, and videos from [their] browser, phone, desktop, [or] email."[84] Tumblr hosts more than 170 million microblogs and has more than 230 employees.[85] A twenty-one-year-old high school dropout named David Karp founded the company in 2007,[86] and Yahoo! acquired it in 2013.[87] Tumblr's general counsel, Ari Shahdadi, is a Harvard Law School graduate (like Lee and Bickert). His mentors at the law school included Benkler.[88] Like the other lawyers, Shahdadi gave the company's founder credit for speech-protective policies, describing Karp as "the real free expression trailblazer" who empowered (and required) Shahdadi to respect the voice of Tumblr's users and community.[89] Karp cowrote Tumblr's user-speech policies alongside Shahdadi. Shahdadi also gives Twitter credit for blazing a path on free expression issues; he regularly discusses tough issues with Twitter's legal team and expressed admiration for that group.[90]

II. Free Expression Today

These new platforms, on which billions of people speak, read, and share, form a new territory for freedom of expression. Within this territory, speech lawyers write the rules of "free expression." The U.S. Constitution is a local ordinance, albeit an important one, affecting a minority of digital users. U.S. Supreme Court decisions, including *Sullivan* with its "actual malice" standard, are less directly relevant than key congressional statutes that limit intermediary liability for user speech.

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[84] *About*, Tumblr, http://www.tumblr.com/about (last visited May 10, 2014), *archived at* http://perma.cc/VF9V-TE9J.

[85] *Id.*

[86] Josh Halliday, *David Karp, Founder of Tumblr, on Realising His Dream*, The Guardian (Jan. 29, 2012, 1:47 PM), http://www.theguardian.com/media/2012/jan/29/tumblr-david-karp-interview, *archived at* http://perma.cc/X6WN-GLH6; Jenna Wortham & Nick Bilton, *Before Tumblr, Founder Made Mom Proud. He Quit School*, N.Y. Times, May 21, 2013, at A1, *archived at* http://perma.cc/3M7H-HZZQ.

[87] Abram Brown, *Yahoo Offers Details on the $990 Million Tumblr Deal*, Forbes (Aug. 9, 2013, 9:12 AM), http://www.forbes.com/sites/abrambrown/2013/08/09/yahoo-offers-details-on-the-990-million-tumblr-deal, *archived at* http://perma.cc/L7FH-KYRD.

[88] Telephone Interview with Ari Shahdadi, *supra* note 30.

[89] *Id.*

[90] *Id.*

A. Private Tech Companies Write the Rules Governing Our Speech

Today's speech lawyers craft speech rules for the millions of users speaking through their sites and adopt strategies to implement them in the hard cases. These lawyers effectively engage in private speech rulemaking, adjudication, and enforcement.[91]

Every digital company sets out what one journalist called "a sort of jurisprudence of its own"[92] in the contractual language of its "Terms of Service" or "Acceptable Use Policy." These terms identify the categories of speech that are permissible or impermissible on major online platforms. Lawyers at these companies draft the terms and help craft the internal procedures for implementing them. They do so in the shadow of disharmonious national laws, their companies' business objectives, and their personal beliefs about free expression.

The terms of service of each company reflect that company's product and community. For example, the terms of service for Google Search, Google's main search engine, are different from the terms of service for Google's YouTube. Links that connect to pornography or hate speech are not removed from Search, even if both would be removed from YouTube, as Search is designed to reflect the content of the entire web, including any site created by any person or organization.[93] Sometimes, companies ask their users to contribute to writing their policies. The community that writes Wikipedia also wrote the policies.[94] Tumblr, meanwhile, changed three policies in March of 2013 and sought feedback from users.[95] The General Counsel personally replied with an email to every person who commented on the proposed policy changes.[96] At both Wikipedia and Tumblr, the users' input changed the ultimate policy outcome.

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[91] There is at least a fourth domain: advocating for or against proposed legal changes which may implicate these lawyers' interests (copyright legislation such as SOPA being a notable example). I choose to focus here on the work that a general counsel or regulatory lawyer would handle, rather than on tasks generally delegated to the head of public policy.

[92] Somini Sengupta, *Twitter Yields to Pressure in Hate Case in France*, N.Y. TIMES, July 12, 2013,http://www.nytimes.com/2013/07/13/technology/twitter-yields-to-pressure-in-hate-case-in-france.html, *archived at* http://perma.cc/SX2U-HNT3.

[93] *See Terms of Service*, GOOGLE, http://www.google.com/policies/terms/ (last visited May 10, 2014), *archived at* http://perma.cc/6YC8-WCXN; *Terms of Service*, YOUTUBE, http://www.youtube.com/t/terms (last visited May 10, 2014), *archived at* http://perma.cc/ZC2H-TAYP; *see also SafeSearch: Turn On or Off*, GOOGLE, https://support.google.com/websearch/answer/510?hl=en (last visited May 10, 2014), *archived at* http://perma.cc/HB2Y-YCGH; *Webmaster Tools: Remove Content from Someone Else's Site*, GOOGLE, https://support.google.com/webmasters/answer/1663688 (last visited May 10, 2014), *archived at* http://perma.cc/8KM8-MNTC.

[94] *See Terms of Use*, WIKIMEDIA FOUND., http://wikimediafoundation.org/wiki/Terms_of_Use (last visited May 10, 2014), *archived at* http://perma.cc/9FWP-6HWM.

[95] Telephone Interview with Ari Shahdadi, *supra* note 30.

[96] *Id.*

When one looks across the various private jurisprudences, some themes emerge. Companies generally forbid sharing speech that is illegal and unprotected (such as defamatory comments or copyright-infringing videos), but they also prohibit some content that would be fully protected under the First Amendment. For example, Facebook's terms state: "You will not post content that: is hate speech, threatening, or pornographic; incites violence; or contains nudity or graphic or gratuitous violence."[97] The First Amendment would protect, with limited exceptions, all this content from government regulation.[98] Facebook also forbids bullying,[99] but bullying is not recognized as a category of speech that is excluded from First Amendment protection.[100] Facebook's terms state: "You will not bully, intimidate, or harass any user." Moreover, Facebook forbids anonymous accounts,[101] even though the First Amendment provides protections for anonymous speech.[102]

WordPress.com's terms forbid the sharing of private information (like Social Security numbers) even if it may be protected speech.[103] The terms also support anonymous speech.

Written in casual language, Tumblr's Community Guidelines explain that Tumblr is "not for" malicious bigotry, bullying minors, or

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[97] *Statement of Rights and Responsibilities*, *supra* note 80.

[98] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) ("These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."); Watts v. United States, 394 U.S. 705, 707 (1969) (per curiam) (finding statute prohibiting threats against the President constitutional but cautioning that the statute "must be interpreted with the commands of the First Amendment clearly in mind" and that "[w]hat is a threat must be distinguished from what is constitutionally protected speech").

[99] *See Statement of Rights and Responsibilities*, *supra* note 80.

[100] Bullying is not an excluded category per se. Some bullying may be excluded if it is a "true 'threat'" under *Watts v. United States*, 394 U.S. at 708, or constitutes "'fighting' words" under *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). *See, e.g.*, Svedberg v. Stamness, 525 N.W.2d 678, 684 (N.D. 1994) (determining that certain juvenile bullying, including death threats, constituted fighting words). If a school punishes bullying by a student, then the First Amendment tests concerning student speech apply, and such speech may be regulated by the school, subject to *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and its exceptions. *See, e.g.*, J.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1102–10 (C.D. Cal. 2010). Because student speech can be regulated under *Tinker* for causing "substantial disruption," *Tinker*, 393 U.S. at 514, states have been able to pass anti-bullying legislation that generally requires school staff to take bullying seriously. *See Key Components in State Anti-Bullying Laws*, STOPBULLYING.GOV, http://www.stopbullying.gov/laws/key-components/index.html (last visited May 10, 2014), *archived at* http://perma.cc/E4FA-PV4Z.

[101] *See Statement of Rights and Responsibilities*, *supra* note 80.

[102] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

[103] *See Terms of Service*, WORDPRESS.COM, http://en.wordpress.com/tos/ (last visited May 10, 2014), *archived at* http://perma.cc/6UB9-DMBG.

gore (like videos of the torture of animals).[104] It's also not for "sexually explicit video[s]" because "[w]e're not in the business of hosting adult-oriented videos (and it's fucking expensive)."[105] Of course, bigotry,[106] videos of animal torture,[107] and sexually explicit content[108] all receive First Amendment protection. In addition, an earlier version of Tumblr's terms included a somewhat paradoxical sentence: "While we firmly believe that the best response to hateful speech is not censorship but more speech, we will take down malicious bigotry, as defined here."[109]

Google has a different set of terms of service for each of its products. Google Search has few restrictions, as Search aims to reflect the contents of the World Wide Web. Google has far more restrictions for sites that host its advertising offerings. For example, AdSense, a Google-run advertising service that enables even the smallest sites to place text-based "ads by Google" on their pages, has detailed rules for the content participating sites can host while using Google services. As a result, Google's terms make it easier for speakers to monetize certain content and therefore might affect what speakers say and users see. Sites "may not place AdSense code on pages with content that violates any of our content guidelines."[110] The Program Policies provide some initial examples of prohibited content, all of which are protected under the First Amendment, such as "content that is adult, violent or advocating racial intolerance."[111] When one clicks to see the "full content policies," the site includes fourteen bullet points, several listing multiple categories of prohibited speech.[112] The points include "[e]xcessive profanity," "drug paraphernalia content," and "[s]ales or distribution of coursework or student essays." The terms prohibit speech that "promotes illegal activity," although it is generally legal to promote illegal activity (such as encouraging marijuana use even where marijuana is illegal).[113]

As I have explained elsewhere, companies like cloud providers and payment processors tend to have vaguer and less speech-protective

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[104] *Community Guidelines*, TUMBLR (Jan. 27, 2014), http://www.tumblr.com/policy/en/community, *archived at* http://perma.cc/W4V8-7WBY.

[105] *Id.*

[106] *See, e.g.*, Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011).

[107] *See, e.g.*, United States v. Stevens, 559 U.S. 460, 482 (2010).

[108] *See, e.g.*, United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 807 (2000).

[109] *Community Guidelines*, TUMBLR (Mar. 22, 2012).

[110] *AdSense Program Policies*, GOOGLE, https://support.google.com/adsense/answer/48182?hl=en (last visited May 10, 2014), *archived at* http://perma.cc/557C-75WR.

[111] *Id.*

[112] *Id.*

[113] *See* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam).

policies.[114] I have found that Amazon Web Services and Paypal grant themselves far more discretion to stifle speech than do companies like Tumblr or Twitter.

Drafting the terms of service is only the beginning. They must be implemented and work effectively at a scale of hundreds of millions of users, both in high-profile controversies involving the Innocence of Muslims video[115] or anti-Semitic tweets, and also in prosaic, day-to-day decisions determining the outer boundaries of what we can say and view online. In this way, the terms of service function much as traditional laws do. Terms of service have evidently general language ("hate speech" or "bullying"), just as laws and judicial tests often have vague terms ("public interest," "reasonable person," "indecency"). The general language in terms of service can provide the companies some discretion in interpretation as they deal with users. Yet for consistency, companies must also translate these general terms into highly specific definitions to be operationalized by hundreds of employees and contractors around the world, responding to users' complaints twenty-four hours a day. According to Google's current head of global policy, wrestling with the limits of freedom of expression for a billion users, in more than 100 countries with different laws and cultural norms, is "a challenge we face many times every day."[116]

The lawyers generally attempt to avoid making judgment calls about the value of particular speech. For example, WordPress.com sometimes receives very detailed, well-researched complaints explaining that a particular blog post is inaccurate, often with documentary evidence disputing the facts alleged in the blog post. In response, WordPress.com merely sends on the complaint to the blogger. If the complaining party obtains a court order declaring the post defamatory, then WordPress.com honors it, as the company does not have to decide the issue or take the word of the complainant — a court has made the determination and WordPress.com is not involved in the value judgment. As WordPress.com's general counsel, Paul Sieminski, put it: "If something truly is defamatory, we don't want to be publishing it. The hard question is, 'Who are we to know?'"[117] My interviews with representatives of Google, Tumblr, and Facebook revealed the same sentiments: a skepticism about their role in determining, based on context

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[114] MARVIN AMMORI, ON INTERNET FREEDOM (2013), *available at* http://rtb.techdirt.com/products/on-internet-freedom/, *archived at* http://perma.cc/P2MR-YU66; *see also* Benkler, *supra* note 40, at 368.

[115] *See* AMMORI, *supra* note 114.

[116] Miller, *supra* note 24.

[117] Interview with Paul Sieminski, *supra* note 72.

alone, whether something is harassment — let alone defamation — and no eagerness to get in the business of adjudicating such matters.

To implement their speech "jurisprudence," these companies rely on anywhere from a half dozen to several hundred employees (sometimes known as the "trust and safety" team). Facebook's team numbers in the hundreds.[118] Twitter's first general counsel made it among his first orders of business to ensure that the trust and safety team was well staffed. Still, companies have learned that they must rely on their own users, primarily through technology features that enable these users to report objectionable content with the click of a link. One hundred hours of video are uploaded to YouTube every minute;[119] Google's employees simply cannot review it all as it is uploaded. You can report a YouTube video, a Pinterest pin, a tweet, or a Facebook post by simply clicking a button on the same page as the content.[120] Indeed, every piece of content on Facebook has a report link.

When someone reports a piece of content to a company, that company's team reviews the content and applies internal policies, which are more detailed than the public terms of service and are generally designed with the help of lawyers. Twitter, in fact, posts "guidelines" governing, for example, parody accounts and automated tweets. These "guidelines" are much more detailed than the terms of service.[121] Facebook's internal rules, which were leaked, are far more detailed than its terms of service, and they include distinctions regarding crushed heads and sex toys.[122]

Following these policies, the digital company's employees decide whether to remove the content, to keep the content, or to report it up

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[118] Interview with Dave Willner & Monika Bickert, Facebook, in Menlo Park, Cal. (Aug. 16, 2013).

[119] *Statistics*, *supra* note 43.

[120] *See Contact Us*, YOUTUBE, http://www.youtube.com/t/contact_us (last visited May 10, 2014), *archived at* http://perma.cc/Q28Y-LYL6 ("To report an inappropriate video on YouTube, please click the 'Flag' link under the video."); *How to Report Things*, FACEBOOK, https://www.facebook.com/help/181495968648557 (last visited May 10, 2014), *archived at* http://perma.cc/Q38J-FSX7 ("The best way to report abusive content or spam on Facebook is by using the Report link that appears near the content itself." (emphasis removed)); Dara Kerr, *Pinterest Rolls Out User Blocking, Flagging, and Reporting*, CNET (Oct. 17, 2012, 7:40 PM), http://news.cnet.com/8301-1023_3-57534740-93/pinterest-rolls-out-user-blocking-flagging-and-reporting, *archived at* http://perma.cc/HR7B-LV6Z; Hannah Waldram, *Twitter Rolls Out 'Report Abuse' Button for Individual Tweets: Will You Use It?*, THE GUARDIAN (Aug. 30, 2013, 5:49 AM), http://www.theguardian.com/technology/blog/2013/aug/30/twitter-report-abuse-button, *archived at* http://perma.cc/BZR2-QNZA.

[121] *Policies & Violations*, TWITTER, https://support.twitter.com/groups/56-policies-violations (last visited May 10, 2014), *archived at* http://perma.cc/N2ED-BTT5.

[122] *See* Adrian Chen, *Inside Facebook's Outsourced Anti-Porn and Gore Brigade, Where 'Camel Toes' Are More Offensive than 'Crushed Heads,'* GAWKER (Feb. 16, 2012, 3:45 PM), http://gawker.com/5885714/inside-facebooks-outsourced-anti-porn-and-gore-brigade-where-camel-toes-are-more-offensive-than-crushed-heads, *archived at* http://perma.cc/HB8Z-KKN3.

internally for a decision. Much of the content that is reported does not in fact violate the terms of service; often someone just doesn't like a picture or comment.[123] Facebook even provides tools to facilitate communication: rather than reporting a photo that makes you look goofy, you can send a message to the person who posted the photo and ask the person to take it down. These tools are extremely effective because most users are not trolls trying to mock other users. Nonetheless, Facebook has a simple rubric for nonpublic figures: if someone claims that content about them is mean, Facebook does not second-guess that claim. Bullying is context specific and rather than attempt to determine the context, Facebook simply takes nonpublic figures at their word.

The challenge of scaling these policies for more than a billion users is great and requires careful thought about free expression, community, and management, as well as iteration based on the data generated by so many users' clicks. At Facebook, the key has been defining a set of rules that hundreds of employees can apply consistently without having to make judgment calls. As Dave Willner told me, "Effectively, we ask whether something is blue or red, not beautiful or ugly."[124] For harder questions, employees who are initial reviewers can elevate the issue internally.

B. The U.S. Constitution Is a Local Ordinance Enforced by a Local Tribunal

Lawyers at leading tech companies face a world where the First Amendment is merely a local ordinance. Once a company has employees on the ground in a country, it essentially must begin following the law of that nation. At that point, the employees might be harassed or arrested, or charged with crimes under local laws.[125] Strictly speaking, of course, the lawyers who litigated *Sullivan* also faced such a world. But they did not need to be constantly aware of it. In 1964, the *New York Times* barely operated in Alabama, with only a few hundred subscribers. Today, fewer than half of leading tech companies' users are within the United States. Their users come from dozens of countries and regions, each with different national and subnational laws, with different cultures, histories, and (like the United States) local community standards within them. For example, more than eighty percent (or more than 800 million) of Facebook's users are abroad;

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[123] Interview with Dave Willner & Monika Bickert, *supra* note 118.

[124] *Id.*

[125] *See* Kyle Wagner, *A Brief History of Google Employees Being Arrested in Foreign Countries*, GIZMODO (Sept. 27, 2012, 3:30 PM), http://gizmodo.com/5947043/a-brief-history-of-google
-employees-being-arrested-in-foreign-countries, *archived at* http://perma.cc/A4XV-ELMX.

eighty percent of YouTube's traffic, involving more than 800 million unique monthly users, comes from outside the United States.[126] A considerable chunk of major online companies' revenues also comes from abroad.[127]

Multinational user bases pose an obvious problem: these companies must figure out how to adopt and enforce policies that comply with various national laws while advancing a corporate (and individual) interest in freedom of expression. The lawyers for these companies may adopt: (1) a universal rule that can work in even the most speech-restrictive nations (a "least common denominator") and therefore suppress more speech than necessary globally; (2) a universal rule that works in the most speech-protective nations (a "highest common denominator") and therefore expect their sites to be blocked in many countries, making them unavailable as speech platforms to millions; or (3) differing rules based on the nation, pushing the outer limit of protection in each nation but necessarily making compromises on free expression that make the companies complicit in censorship. Other options are also possible.

No American company that I know of has chosen the first path — terms of service that complied with the world's most restrictive speech laws, yet also applied to liberal democracies. Google and Facebook's policies regarding hate speech, though, seem to offer mild examples of such a policy. These companies have issued terms and conditions about hate speech, applicable worldwide, which are more restrictive than America's exceptionally liberal First Amendment requires. Google's guidelines forbid "[h]ate [s]peech," defined as the "promotion of hatred toward groups of people based on their race or ethnic origin, religion, disability, gender, age, veteran status, or sexual orientation/

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[126] *Statistics*, *supra* note 43; Trefis Team, *supra* note 79. Many other popular online services also have user bases with substantial overseas participation. *See* Brian Anthony Hernandez, *Tumblr Hits 15 Billion Monthly Pageviews*, MASHABLE (Jan. 23, 2012), http://mashable.com/2012/01/23/tumblr-15-billion-pageviews, *archived at* http://perma.cc/T74Z-M7S5 ("Right now, about 40% to 45% of Tumblr's users reside in the U.S."); Shailesh Rao, *Connecting Advertisers to Twitter Users Around the World*, TWITTER ADVERTISING BLOG (Jan. 22, 2013, 11:22 PM), https://blog.twitter.com/2013/connecting-advertisers-twitter-users-around-world, *archived at* http://perma.cc/MJ8-M2WS ("Today, 70% of Twitter accounts are outside the U.S., and Twitter is now available in 33 languages.").

[127] *After Strong 2011, Twitter Ad Revenues to Grow 86% to $259 Million in 2012*, EMARKETER (Jan. 31, 2012), http://www.emarketer.com/newsroom/index.php/strong-2011-twitter-ad-revenues-grow-86-259-million-2012, *archived at* http://perma.cc/D3NY-E7RB ("Currently, 90% of Twitter's revenues come from US sources, with other countries contributing just $26 million to its ad revenues this year, eMarketer estimates."); Trefis Team, *supra* note 79 ("The revenue contribution of the U.S. has declined from 62% in 2010 to 51% in 2012, which primarily reflects Facebook's strong active user base growth outside the country.").

gender identity."[128] YouTube's community guidelines forbid "hate speech (speech which attacks or demeans a group based on race or ethnic origin, religion, disability, gender, age, veteran status, and sexual orientation/gender identity)."[129] Facebook's community standards forbid "hate speech": "While we encourage you to challenge ideas, institutions, events, and practices, we do not permit individuals or groups to attack others based on their race, ethnicity, national origin, religion, sex, gender, sexual orientation, disability or medical condition."[130] And Tumblr forbids the promotion of "violence or hatred on the basis of things like race, ethnic origin, religion, disability, gender, age, veteran status, or sexual orientation."[131] Rosen argues that these policies have "European-style definitions," enforced sometimes "in an American way."[132]

I am not persuaded, though, that the speech platforms are necessarily adopting European norms. After all, they are not endorsing a view that people should be prosecuted for hate speech, only that such speech should not be made available on their sites. While American scholars often celebrate the American speech tradition's tolerance for hate speech, we may be deluding ourselves. Most Americans rarely come across hate speech in their daily lives, offline or online. Offline, while the public forum doctrine makes streets and parks available for speech, the doctrine allows for many exceptions — from postal sidewalks[133] to private shopping malls[134] — where hate speech (and other speech) can be silenced.[135] The public forum doctrine also permits vast regulation based on time, place, and manner, so the Westboro Baptist Church may protest a funeral, but it must protest from so far away that the funeral attendees are not aware of the protest.[136] Moreover, few Americans spend their days discoursing in streets or parks.[137]

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128 *Community Standards*, GOOGLE, https://support.google.com/accounts/answer/107107 (last visited May 10, 2014), *archived at* http://perma.cc/VPQ9-QKCS.

129 *YouTube Community Guidelines*, YOUTUBE, http://www.youtube.com/t/community_guidelines (last visited May 10, 2014), *archived at* http://perma.cc/M2DR-UTJM.

130 *Facebook Community Standards*, FACEBOOK, https://www.facebook.com/communitystandards (last visited May 10, 2014), *archived at* http://perma.cc/D8KA-DCFU.

131 *Community Guidelines*, *supra* note 104.

132 Jeff Rosen, *Who Decides? Civility v. Hate Speech on the Internet*, INSIGHTS ON L. & SOC'Y, Winter 2013, at 32, http://www.americanbar.org/publications/insights_on_law_andsociety/13/winter_2013/who_decides_civilityvhatespeechontheinternet.html, *archived at* http://perma.cc/7W2L-SJKJ.

133 *See* United States v. Kokinda, 497 U.S. 720 (1990).

134 *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

135 *See, e.g.*, Ammori, *supra* note 32, at 31–45.

136 *See, e.g.*, Snyder v. Phelps, 131 S. Ct. 1207, 1213–14 (2011) ("Although Snyder testified that he could see the tops of the picket signs as he drove to the funeral, he did not see what was written on the signs until later that night, while watching a news broadcast covering the event.").

137 *See* Ammori, *supra* note 56, at 86–91 (discussing the empirics of discourse in America).

They do watch television, listen to the radio, and read newspapers. Most of these traditional sources, at least in the United States, do not disseminate hate speech.[138] Other privately owned spaces, such as businesses and places of employment, also effectively dissuade hate speech. As a result, the "American way" on hate speech is not the vaunted tolerance we sometimes celebrate; rather, the "American way" is merely not to arrest speakers, while otherwise silencing hate speech through a set of doctrines, rules, and norms. Of course, merely not criminalizing hate speech is something to celebrate. But Americans manage to limit hate speech offline through time, place, and manner restrictions and through decisions of business owners, television licensees, and newspaper executives. We do so online through the speech platforms' terms of service. If we seek to avoid actively discouraging hate speech, rather than merely decriminalizing it, we need to make changes across society.

The second and third paths for adopting policies that comply with various national laws are more popular. Twitter has generally followed a combination of the second and third paths (highest common denominator and country-specific). Because Twitter is a relatively light service in terms of data, for the first few years of its existence all of its servers were located in the United States.[139] This approach permitted Twitter to rely plausibly on American free speech protections when responding to other nations' censorship requests. Twitter eventually adopted a country-withheld policy. Under that policy, Twitter makes certain tweets unavailable in a specific country if Twitter receives an official order that the speech is illegal in that nation.[140]

Facebook is less apt to remove speech in one region and not another, asserting that there is "one Facebook."[141] Nonetheless, Facebook has the ability to make content inaccessible on a nation-by-nation basis.

For years, Google pursued the second path, on the assumption that the United States was the Internet's leader and that speech losses in the United States would cascade across the world.[142] That is, if the

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[138] This was not always true. *See, e.g.*, KAY MILLS, CHANGING CHANNELS (2004).

[139] *See, e.g.*, Jean-Paul Cozzatti, *Room to Grow: A Twitter Data Center*, TWITTER ENGINEERING BLOG (July 21, 2010, 11:22 PM), https://blog.twitter.com/2010/room-grow-twitter-data
-center, *archived at* http://perma.cc/H8ET-Y2X2.

[140] *See Tweets Still Must Flow*, TWITTER BLOG (Jan. 26, 2012, 7:25 PM), https://blog.twitter.com/2012/tweets-still-must-flow, *archived at* http://perma.cc/93UZ-NBDC. *See generally Country Withheld Content*, TWITTER HELP CENTER, https://support.twitter.com/articles/20169222-country-withheld-content (last visited May 10, 2014), *archived at* http://perma.cc/V2V-6GN7 (explaining the country-withheld policy).

[141] Interview with Dave Willner & Monika Bickert, *supra* note 118.

[142] Interview with Alan Davidson, *supra* note 64.

United States adopted bad speech policies, other countries would follow, or take an even worse path. In China, Google faced a much-discussed dilemma: whether to censor search results in China (the third path) or to exit the Chinese market (something like the second path). Before 2006, Chinese users could access the American domain name for Google, Google.com, but some results were filtered.[143] Google entered China in 2006, launching a Chinese domain name, Google.cn. Google agreed to censor search results, but in compliance with local law, disclosed to its users whenever a particular search result list was censored.[144] At the time, Google executives described the decision as "excruciating"[145] and the product of years of internal debate.[146] Google decided that providing access to even a censored Google search engine advanced free expression more than providing no access to Google.[147]

In January 2010, Google executives changed their minds. Responding to apparent attempts by the Chinese government to hack into Google's servers to gain information about dissidents, Google announced that "we are no longer willing to continue censoring our results on Google.cn, and so over the next few weeks we will be discussing with the Chinese government the basis on which we could operate an unfiltered search engine within the law, if at all."[148] This decision led to a high-profile standoff with the Chinese government, as Secretary of State Hillary Clinton weighed in and shortly afterward declared "Internet Freedom" a core U.S. foreign policy objective.[149] Since that incident, Google and the Chinese government have played a

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143 Michael Liedtke & Jessica Mintz, *Google Ends 4 Years of Censoring the Web for China*, SEATTLE TIMES (Mar. 22, 2010, 7:20 PM), http://seattletimes.com/html/businesstechnology/2011410505_apustecgooglechina.html, *archived at* http://perma.cc/Z9YZ-KL8D.

144 *China's Google Search Engine to Be Censored*, FOXNEWS.COM (Jan. 25, 2006), http://www.foxnews.com/story/2006/01/25/china-google-search-engine-to-be-censored/, *archived at* http://perma.cc/HP8H-5NVG.

145 *Id.*

146 Andrew McLaughlin, *Google in China*, GOOGLE OFFICIAL BLOG (Jan. 27, 2006), http://googleblog.blogspot.com/2006/01/google-in-china.html, *archived at* http://perma.cc/LM24-7SZK.

147 *See id.* ("Filtering our search results clearly compromises our mission. Failing to offer Google search at all to a fifth of the world's population, however, does so far more severely.").

148 David Drummond, *A New Approach to China*, GOOGLE OFFICIAL BLOG (Jan. 12, 2010), http://googleblog.blogspot.com/2010/01/new-approach-to-china.html, *archived at* http://perma.cc/9ZUM-JNTJ.

149 Tom Krazit & Declan McCullagh, *Clinton Unveils U.S. Policy on Internet Freedom*, CNET (Jan. 21, 2010, 6:26 AM), http://news.cnet.com/8301-30684_3-10438686-265.html, *archived at* http://perma.cc/922R-RFGX; Adam Thierer, *Hillary Clinton's Historic Speech on Global Internet Freedom*, TECH. LIBERATION FRONT (Jan. 21, 2010), http://techliberation.com/2010/01/21/hillary-clintons-historic-speech-on-global-internet-freedom, *archived at* http://perma.cc/B946-9WMR.

cat-and-mouse game. A few months after Secretary Clinton's declaration, Google rerouted users from its Chinese domain (Google.cn) to its domain in Hong Kong (Google.co.hk) to avoid engaging in self-censorship.[150] China used its own technology to block Google for particular users who searched for certain politically sensitive words and phrases.[151] Google then began automatically warning users when they searched for terms that would likely result in the Chinese government blocking their access. Google dropped this initiative months later after discovering that the warnings were ineffective.[152] Today, Google.cn search still routes through Hong Kong and is not censored by Google, but it is often unreliable because searches are blocked intermittently by the Chinese government. Google's market share in China is minimal, around three percent.[153]

In this section, I have argued that legal applications of the First Amendment cannot command the sole attention of free speech lawyers at today's tech companies. But I should note that the First Amendment — and American free speech doctrine — still influences top tech lawyers tremendously (and rightfully so). It does so not as law but as a way of thinking about issues and viewing the world. There are a few reasons for this influence. First, these lawyers are likely to have been educated in American law schools (and often American primary and secondary schools). Even if their First Amendment classes focused on pamphlets and soapboxes,[154] these lawyers are steeped in American speech traditions and understand the principles underlying them. They apply those principles, consciously or unconsciously, in a way that a German- or British-educated lawyer may not. Second, these lawyers work for executives who have also learned the American speech tradition, though less through formal education than through the experience of being part of a nation with a huge and distinctive cultural emphasis on freedom of expression. Third, the First Amendment and its various defining precedents still serve as guiding norms and arguments in international decisionmaking and negotiations —

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[150] David Drummond, *A New Approach to China: An Update*, GOOGLE OFFICIAL BLOG (Mar. 22, 2010), http://googleblog.blogspot.com/2010/03/new-approach-to-china-update.html, *archived at* http://perma.cc/SJC8-LNMD.

[151] *See* Alan Eustace, *Better Search in Mainland China*, GOOGLE INSIDE SEARCH (May 31, 2012, 9:00 AM), http://insidesearch.blogspot.com/2012/05/better-search-in-mainland-china.html, *archived at* http://perma.cc/92YC-MS7K.

[152] Josh Halliday, *Google's Dropped Anti-Censorship Warning Marks Quiet Defeat in China*, THE GUARDIAN (Jan. 7, 2013, 5:06 AM), http://www.theguardian.com/technology/2013/jan/04/google-defeat-china-censorship-battle, *archived at* http://perma.cc/94RA-C3BC.

[153] *See* Jennifer Slegg, *Google's Search Market Share in China Falls to Just 3%*, SEARCH ENGINE WATCH (July 9, 2013), http://searchenginewatch.com/article/2280420/Googles-Search-Market-Share-in-China-Falls-to-Just-3, *archived at* http://perma.cc/LN6-C4C8.

[154] *See* Ammori, *supra* note 56, at 68–70.

even if the Amendment is binding law on relatively few users. Overall, though the First Amendment does not define the bounds of content available or unavailable on a platform, it plays a significant role in establishing background norms. As Bart Volkmer, a lawyer at Dropbox, notes: "We're not a government actor, not subject to the First Amendment, but we care very much about being an open platform for free speech. And our thinking is clearly influenced by our understanding of the First Amendment."[155] In arguments or negotiations with foreign governments, these platforms can point to principles in American law to define categories of speech. The same way international law is, to some extent, a set of arguments and norms, these companies engage in "international" law, advancing norms that often reflect the First Amendment.

C. Congressionally Created Standards Play the Role Sullivan *Once Played*

Sullivan encouraged speech by protecting analog publishers from disastrous and unfair liability for statements made by people who wrote in their pages. Two congressional statutes — CDA 230 and DMCA 512 — give Internet platforms an analogous protection.[156]

We remember the named parties in *New York Times v. Sullivan*, but we forget that the speech at issue was a third-party advertisement.[157] An ad hoc organization — the Committee to Defend Martin Luther King, Jr. and the Struggle for Freedom in the South — placed a full-page advertisement in the *New York Times*. The advertisement's goal was to raise awareness and fundraise for a legal defense of Martin Luther King Jr., who was being prosecuted in Alabama for perjury. Based on some inaccuracies in the advertisement, a Montgomery city commissioner named L.B. Sullivan sued the *New York Times* for libel under Alabama state law. The *Times* faced a wave of similar cases across the South that might have bankrupted the paper. Indeed, all newspapers reporting on the civil rights movement were battling litigation in the South, with over $300 million ($2.2 billion today[158]) in potential libel fines.[159]

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155 Interview with Bart Volkmer, Legal Counsel, Dropbox, in S.F., Cal. (July 10, 2013).

156 *See* 17 U.S.C. § 512 (2012); 47 U.S.C. § 230 (2006).

157 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256–57 (1964).

158 *CPI Inflation Calculator*, BUREAU LAB. STAT., http://www.bls.gov/data/inflation_calculator.htm (last visited May 10, 2014), *archived at* http://perma.cc/W7WD-NVPJ (allowing the user to calculate the present nominal value of $300 million in 1964 dollars).

159 ANTHONY LEWIS, MAKE NO LAW 36 (1991).

The Supreme Court took the *Sullivan* case and reversed.[160] Rather than holding that newspapers are immune from all libel suits by public figures, the Court announced that the First Amendment requires at least the high standard of "'actual malice' — that is, with knowledge that [the statement] was false or with reckless disregard of whether it was false or not."[161] While this standard protected the *Times* and other newspapers from the Southern suits, some scholars have since argued that the standard leads to fishing expeditions and increases the costs of libel defense.[162] Plaintiffs can engage in extensive discovery, aimed partly at revealing sources and methods of newspapers, with the collateral effect of raising costs, while claiming such measures are necessary to determine whether the paper acted with malice or recklessness.

A low threshold for proving libel would have had an impact not only on the *Times* but also on every single third-party activist organization seeking to reach audiences. The *Times* was a speaker, but through its sale of issue advertising to organizations like the Committee, it was also, in part, a platform for the speech of others. Without the "actual malice" standard, newspapers could face massive liability for running issue advertising, discouraging papers from taking it. Therefore, fewer third parties would have been able to reach their audiences.

Indeed, the ACLU filed an amicus brief in *Sullivan* making this point:

> If newspapers are to be liable without fault to heavy damages for unwitting libels on public officials in political advertisements, the freedom of dissenting groups to secure publication of their views on public affairs and to seek support for their causes will be greatly diminished . . . particularly in a time in which mass communication, such as the daily press provides, is one of the only effective means for communication of ideas.[163]

Today's digital speech platforms are concerned primarily with this exact topic: third-party speakers. If platforms were liable for every inaccuracy or legal flaw in the third-party speech they carried, they would be unable to carry the speech of hundreds of millions of users. "[T]he freedom of dissenting groups," and everyone else, would be "greatly diminished."[164]

A key question for today's speech lawyers is: under what standards are the Internet companies on the hook for the libels (and other mis-

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160 *Sullivan*, 376 U.S. at 264.

161 *Id.* at 280.

162 *See* LEWIS, *supra* note 159, at 201; Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782, 812 (1986).

163 Brief of the ACLU and the New York Civil Liberties Union as Amici Curiae, *Sullivan*, 376 U.S. 254 (Nos. 39, 40), 1963 WL 66443, at *17–18.

164 *Id.* at *17.

deeds) of the billions of users speaking on their platforms? According to the lawyers I interviewed, the most important free speech protections today, domestically at least, are those that ensure that Internet platforms will not be subject to crippling damages for anything a person publishes on their platforms. That is, these protections play a role analogous to that played by the "actual malice" standard but go further.

The important role of a congressional statute contradicts generally unspoken assumptions that Congress should have no role, or an extremely limited role, in free expression matters because legislatures always have incentives to suppress speech. As I have written elsewhere, legislators may have conflicting, and sometimes pro-speech, incentives.[165] Additionally, judicial bodies often make decisions that set back freedom of expression and do not have a much stronger history of protecting speech when it counts.[166]

The two key immunities are Section 230 of the Communications Decency Act, known as CDA 230, and Section 512 of the Digital Millennium Copyright Act, known as DMCA 512. The key gap in this intermediary framework that threatens freedom of expression is the lack of trademark-based immunity.

1. Libel: CDA 230 is Today's Sullivan. — CDA 230 engenders the same reverence, love, and awe among Internet lawyers as *Sullivan* does among many First Amendment professors.[167] Every lawyer interviewed for this Article heaped praise on CDA 230. CDA 230 provides online intermediaries with immunity from libel and other state laws — an immunity broader than the "actual malice" standard. The operative language is: "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[168]

Congress passed CDA 230 to preempt state laws imposing liability on online platforms, with an eye to providing the platforms immunity regarding defamation suits for others' speech. The courts have held

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165 Ammori, *supra* note 32, at 53–58.

166 *See, e.g.*, Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2731 (2010); United States v. O'Brien, 391 U.S. 367, 385–86 (1968); Dennis v. United States, 341 U.S. 494, 516–17 (1951); Debs v. United States, 249 U.S. 211, 214–15 (1919); Schenck v. United States, 249 U.S. 47, 52–53 (1919).

167 *See, e.g.*, Eric Goldman, *Overzealous Legislative Effort Against Online Child Prostitution Ads at Backpage Fails, Providing a Big Win for User-Generated Content*, FORBES (July 30, 2012, 11:32 AM), http://www.forbes.com/sites/ericgoldman/2012/07/30/child-prostitution-ads-backpage-legislative-fail/, *archived at* http://perma.cc/JK7U-XWYL; *Immunity for Online Publishers Under the Communications Decency Act*, DIGITAL MEDIA LAW PROJECT, http://www.dmlp.org/legal-guide/immunity-online-publishers-under-communications-decency-act (last updated Feb. 18, 2011), *archived at* http://perma.cc/T3LY-92BX; *Section 230 Protections*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/issues/bloggers/legal/liability/230 (last visited May 10, 2014), *archived at* http://perma.cc/538Z-N4JD.

168 47 U.S.C. § 230(c)(1) (2006).

that CDA 230 protects intermediaries not only against claims that a user libeled someone, but also against "claims of negligent misrepresentation, interference with business expectancy, breach of contract, intentional nuisance, violations of federal civil rights, . . . emotional distress," and unfair competition.[169] As a staffer for the advocacy group Center for Democracy and Technology wrote, CDA 230 "has been essential to the creation of user-generated content platforms from Facebook all the way back to GeoCities."[170] Bart Volkmer, a top lawyer at Dropbox, calls CDA 230 an "unbelievable piece of legislation, remarkable — it allows for modern Internet to exist."[171] Aaron Schur of Yelp says:

> [F]rankly, it allows us to exist. Our website exists for people to talk about local businesses, and to speak freely about those businesses. Our users' speech is what we are all about. I don't know if you could start a company like ours in a country without a law like CDA 230.[172]

Ari Shahdadi, the general counsel of Tumblr, claims that "Tumblr would not exist, at least not as it does, without CDA 230."[173] Ben Lee of Twitter told me: "My gosh, every possible erosion of CDA 230 that I've seen misses the point of 230 as the cornerstone for a functioning Internet."[174]

In a nutshell, if I defame Professor Mark Tushnet on Facebook, Twitter, or YouTube, those sites are generally not liable for my defamation. Only I am liable for it. Therefore, those companies can carry my speech without the fear of liability. Without CDA 230, speech platforms would likely have to engage in considerable prescreening of all speech on their sites or abandon their models altogether.

Other countries are generally not nearly as speech protective. As a result, these platforms receive more libel claims abroad. Moreover, beyond libel, some countries (like France) provide a right to privacy even to public figures when in public spaces; celebrities can request the takedown of photos captured on public streets.[175] For U.S. companies without a physical presence in France, CDA 230 provides a shield.

In some ways, CDA 230 does not end the inquiry because online platforms may adopt different policies toward undesirable speech,

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169 *Section 230 Protections*, *supra* note 167.

170 Andrew McDiarmid, *Section 230 Under Attack: State AGs' Proposal Threatens Internet as We Know It*, CENTER FOR DEMOCRACY & TECH. BLOG (July 25, 2013), https://www.cdt.org/blogs/andrew-mcdiarmid/2507section-230-under-attack-state-ags%E2%80%99-proposal-threatens-internet-we-know-i, *archived at* http://perma.cc/7P33-FU8C.

171 Interview with Bart Volkmer, *supra* note 155.

172 Telephone Interview with Aaron Schur, Senior Dir. of Litig., Yelp (Jan. 24, 2014).

173 Telephone Interview with Ari Shahdadi, *supra* note 30.

174 Interview with Ben Lee, *supra* note 1.

175 Telephone Interview with Ari Shahdadi, *supra* note 30.

even if they could carry it without fear of litigation. That is, according to interviewees, CDA 230 merely permits today's speech lawyers to do what they think is right. If I libel Tushnet on my WordPress.com blog (ammori.org) and Tushnet threatens to sue Automattic, the threat will be fairly toothless. As a result, the Automattic general counsel could decide to fight for his users' voice and keep my content online without fear, but he could also take down my content because the company does not wish to be a home for libelous attacks.

One of the interviewees, Alan Davidson, was involved in the passage of CDA 230. He had recently graduated from law school and thought at the time: "We'll figure out what the law of this new thing — the Internet — is, and then we'll go on and do something else. I didn't think it'd be a long-term thing. But fifteen years later, we're still working out a lot of basic issues, including intermediary liability."[176]

Despite the esteem in which CDA 230 is held, critics have sought to weaken it ever since its passage. In 2013, the Attorney General of Mississippi argued that CDA 230 immunity permits YouTube to "aid and abet" illegal activity by hosting videos that instruct people on how to buy illegal drugs.[177] If YouTube were criminally liable for a few errant videos, however, the service might have to shut down, silencing the billions using YouTube to share perfectly legal videos of cute kittens, or of police brutality against Occupy Wall Street activists, or of military violence against participants in the Arab Spring.

Additionally, in 2013, forty-seven state attorneys general asked Congress to modify CDA 230 to permit them to bring suit against online platforms when one of the platform's users violates state criminal law.[178] This would arguably be worse for free expression than reversing *Sullivan*. States have very different laws and many criminalize fairly innocuous activities. If companies had to comply with fifty different state criminal codes and were liable anytime any user violated a single one, then operating speech platforms would be cost prohibitive and extraordinarily risky. Indeed, nineteen law professors, including Professors Eugene Volokh, Eric Goldman, and Jennifer Granick,

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176 Interview with Alan Davidson, *supra* note 64.

177 *See* Stephen McDill, *Attorney General Hood Asks Google to Address Illegal, Counterfeit Goods*, MBJ BUS. BLOG (June 6, 2013), http://msbusiness.com/businessblog/2013/06/06/attorney-general-hood-asks-google-to-address-illegal-counterfeit-goods, *archived at* http://perma.cc/D73Y-7Z6F; *see also* Marvin Ammori, *Recurring Myths About the Legal Obligations of Online Platforms*, STAN. CENTER FOR INTERNET & SOC'Y BLOG (Sept. 5, 2013, 9:36 AM), http://cyberlaw.stanford.edu/blog/2013/09/recurring-myths-about-legal-obligations-online-platforms, *archived at* http://perma.cc/9RXD-A9XY.

178 *See* Mike Masnick, *State Attorneys General Want to Sue Innovators 'For the Children!'*, TECHDIRT (July 24, 2013, 1:08 PM), https://www.techdirt.com/blog/innovation/articles/20130724/12345123927/state-attorneys-general-want-to-sue-innovators-children.shtml, *archived at* http://perma.cc/GN86-Q69F.

signed a letter disagreeing with the state attorneys general.[179] These professors are right: Congress should refuse to heed misguided calls to weaken CDA 230.

The attorneys general largely mean well. They often point to a website called Backpage.com, a classifieds site once owned by the Village Voice.[180] It reportedly earns over twenty million dollars annually from "adult services" advertisements, many of which are prostitution ads, including apparently ads for prostituted children.[181] According to the National Association of Attorneys General, Backpage.com has done far too little to combat child prostitution, as at least dozens of children have been prostituted on the site, according to media reports and arrests.[182] States' attorneys general have limited resources and are attempting to enlist the help of private companies like Backpage.com to help fight child prostitution.

Backpage.com argues that it, in fact, does work with law enforcement, that it has an expedited line to the National Center for Missing and Exploited Children,[183] and that shutting down Backpage.com will just move prostitution classifieds to foreign sites unwilling to work with American law enforcement,[184] just as shutting down Craigslist's adult services earlier did not end such advertising but merely moved it to other sites, like Backpage.com.[185]

Those opposed to changing CDA 230 also argue that state attorneys general often engage in political grandstanding, that shutting down specific sites will merely disperse advertising for child prostitution, and that law enforcement should instead focus on catching the actual

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[179] *See* Letter from NGOs, Trade Associations, Investors, and Legal Scholars to Senator Rockefeller, Senator Thune, Representative Upton, and Representative Waxman (July 30, 2013), *available at* https://www.cdt.org/files/pdfs/coalition-230-letter-congress.pdf, *archived at* http://perma.cc/9WTR-6YEF.

[180] Dan Mitchell, *Attorneys General Target Backpage.com, Threatening the Internet*, CNN MONEY (July 29, 2013, 12:02 PM), http://tech.fortune.cnn.com/2013/07/29/attorneys-general-are-threatening-the-internet, *archived at* http://perma.cc/QPW8-W4GH.

[181] Nicholas D. Kristof, *Where Pimps Peddle Their Goods*, N.Y. TIMES, Mar. 18, 2012, at SR1, *archived at* http://perma.cc/VL98-3KLX (reporting that AIM, a media research and consulting company, estimated that Backpage.com makes twenty-two million dollars in annual revenue from such advertisements); *see also* Rob McKenna, President, Nat'l Ass'n of Attorneys Gen., National Association of Attorneys General (NAAG) Speech on Backpage.com (Mar. 6, 2011), *available at* http://www.kirk.senate.gov/?p=blog&id=434, *archived at* http://perma.cc/GJE3-DR37.

[182] McKenna, *supra* note 181.

[183] Letter from Elizabeth L. McDougall, Gen. Counsel, Village Voice Media Holdings, LLC, to Nat'l Ass'n of Attorneys Gen. (Mar. 23, 2012), *available at* https://www.eff.org/files/filenode/d.n.j.-11908059224.pdf, *archived at* http://perma.cc/EAP6-PZCJ.

[184] Liz McDougall, *Backpage.com Is an Ally in the Fight Against Human Trafficking*, SEATTLE TIMES (May 6, 2012, 3:00 PM), http://seattletimes.com/html/opinion/2018143440_guest07mcdougall.html, *archived at* http://perma.cc/977H-LZJP.

[185] Masnick, *supra* note 178.

pimps and abusers (who have no legal immunities). Backpage.com and other sites make it easier to catch criminals because law enforcement can respond to advertisements and track down children.[186] Moreover, state law enforcement does not aim merely to target Backpage.com for child prostitution: they also seek expanded powers to prosecute YouTube for scattered videos promoting drug use and search engines for indexing sites with copyright infringement.[187] While it might appear easier to force companies to police all the content on their sites, and while it might garner headlines for particular political officials, enabling state attorneys general to prosecute intermediaries for state crimes on their sites would likely bring an end to many of our most valued speech platforms.

In sum, a congressional statute plays a key role in ensuring free expression today. Despite the usual assumption that the Supreme Court is the only institution that can be trusted to ever advance freedom of expression, Congress has provided perhaps one of the strongest bulwarks for free expression. Considering Congress's important role, there is a place for free speech lawyers in the legislative process.

2. Copyright: DMCA 512 is Flawed but Works. — DMCA 512 provides online speech platforms with qualified immunity regarding copyright infringement. This immunity is extremely important because of the irrationally enormous statutory damages available in copyright cases — up to $150,000 for downloading a single song, with effectively every cent of those damages being punitive not compensatory.[188] It is also important because copyright holders, seeing those potential damage awards, have been highly litigious, suing everyone from the makers of MP3 players to YouTube.[189]

One of the lawyers I interviewed described DMCA 512 as an "eight or nine [out of ten], with a ten being CDA 230. . . . It's good, not quite great."[190] DMCA 512 applies to four categories of intermediaries: conduit providers such as telephone companies, those who store or cache content hosted by another, those who host content posted by another, and search engines.[191] For these intermediaries to benefit from a safe harbor ensuring they are not liable for the copyright infringement of a

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186 *See id.*

187 *See* Ammori, *supra* note 177.

188 *See* J. Cam Barker, Note, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525, 545–49 (2004).

189 *See* Ali Sternburg, *15 Technologies the Legacy Content Companies Have Sued in the Past 15 Years*, TECHDIRT (Oct. 8, 2013, 1:13 PM), http://www.techdirt.com/blog/innovation/articles/20131008/11072724796/15-technologies-legacy-content-companies-have-sued-past-15-years.shtml, *archived at* http://perma.cc/MF26-82XA.

190 Interview with Paul Sieminski, *supra* note 72.

191 *See* 17 U.S.C. § 512(a)–(d) (2012).

particular user, they must follow a notice-and-takedown procedure outlined in DMCA 512. A copyright holder need not sue the person who uploaded particular content in order to have the content removed.

He or she only needs to send a notice to the intermediary. For the company to benefit from DMCA 512's immunity regarding that work, the company must "expeditiously" take down the content and forward the notification to the uploader. At this point, the uploader must either do nothing — and therefore the content stays down — or counter-notify, sending a letter revealing her name, certifying a belief that she is not engaging in copyright infringement, and subjecting herself to jurisdiction for litigation. If the uploader counter-notifies, the online platform notifies the complainant that it will stop disabling access in ten business days unless the complainant obtains a court order.[192] In addition, intermediaries must have a policy for terminating repeat infringers' accounts.[193]

From the perspective of free speech advocates, DMCA 512 has three things going for it. First, it provides a now-settled procedure for addressing copyright issues, which provides speech platforms with a reliable roadmap to avoid the enormous risk of copyright litigation. Several interviewees mentioned that this certainty is important and worth protecting. Second, DMCA 512 provides companies with immunity, which enables them to carry user speech. If Tushnet tweets links to sites pirating *Legally Blonde 2: Red, White & Blonde*, Twitter is not liable so long as it follows the notice-and-takedown procedures. Third, if someone believes that a use of copyrighted material is privileged — under fair use or another exemption or limitation of copyright — that user can provide a counter-notice.

At the same time, DMCA 512 also has some strikes against it from a free speech perspective. First, a DMCA notice can result in the loss of a user's anonymity. If I post a clip from a movie and critique it, its producers may attempt to stifle my criticism. They could send a DMCA notice to my blogging platform (for example, Automattic or Tumblr) claiming that my post violates their copyright in the film. Unless I counter-notify, the content will likely be taken down permanently. To counter-notify, however, I must provide my real name and subject myself to litigation. According to lawyers with whom I spoke, people usually do not counter-notify, even when the notice appears frivolous, at least partly because they would rather not reveal their identities and risk litigation against well-resourced media giants, record labels, and movie studios.

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[192] *Id.* § 512(g)(2)(B).
[193] *Id.* § 512(i)(1)(A).

Second, people can employ DMCA notices strategically to take down content temporarily. In order to maintain immunity regarding that content, an intermediary must take it down.[194] Because a service provider cannot put the content back until ten business days have passed after counter-notification, the content is at least temporarily down. In some cases, the content is down for several weeks after counter-notification.[195] If the music industry wants to slow down a viral video (such as a legal video promoting MegaUpload[196]) or if a politician wants to remove criticism in the days before an election, then the DMCA permits them to send a takedown notice and keep the video down for a few days.[197]

Third, a large number of the notices are apparently automated, perhaps generated by computer searches.[198] This leads to a huge number of notices, not all of high quality. As a result, the platform and the users have to sort it out, usually with the users being fearful of counter-noticing.

Finally, according to my interviews, many DMCA notices include offers to the uploader to settle a claim of copyright infringement, out of court, for a fee.[199] The notices often include notes such as: "If you take down the content and pay us five hundred dollars, we will not press charges." While offers for settling litigation are likely not "extortion" in the strict legal sense, intermediary companies' lawyers will often avoid any doubt by removing the proposed-settlement language

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194 *Id.* § 512(g)(2)(C).

195 *E.g.*, Appellee and Cross-Appellant's Answering and Opening Brief on Cross-Appeal at 10, Lenz v. Universal Music Corp., Nos. 13-16106, 13-16107 (9th Cir. Dec. 6, 2013), *available at* https://www.eff.org/files/2013/12/06/lenz.opening.public.pdf, *archived at* http://perma.cc/T7G8-XMXN (noting a video that was down for six weeks).

196 *See, e.g.*, Mike Masnick, *A Bunch Of RIAA Label Artists Endorse MegaUpload . . . As RIAA Insists It's a 'Rogue' Site*, TECHDIRT (Dec. 9, 2011, 12:22 PM), http://www.techdirt.com/articles/20111209/11491817023/bunch-riaa-label-artists-endorse-megaupload-as-riaa-insists-its-rogue-site.shtml, *archived at* http://perma.cc/FYY8-YT74; Mike Masnick, *Universal Music Issues Questionable Takedown on Megaupload Video that Featured Their Artists*, TECHDIRT (Dec. 9, 2011, 2:36 PM), http://www.techdirt.com/articles/20111209/14234917026/universal-music-issues-questionable-takedown-megaupload-video-that-featured-their-artists.shtml, *archived at* http://perma.cc/S8GN-MS7R.

197 *Cf.* John Biggs, *Automattic Pulls a Customer's Posts After Plagiarist Claims Copyright Infringement [Update]*, TECHCRUNCH (Feb. 6, 2013), http://techcrunch.com/2013/02/06/wordpress-pulls-a-customers-posts-after-plagiarist-claims-copyright/, *archived at* http://perma.cc/R4SS-2KMA (explaining how an Indian website known for plagiarism forced an American blog to take down content under the DMCA).

198 DENA CHEN ET AL., UPDATING 17 U.S.C. § 512'S NOTICE AND TAKEDOWN PROCEDURE FOR INNOVATORS, CREATORS, AND CONSUMERS 9–11 (2011), *available at* http://www.publicknowledge.org/files/docs/cranoticetakedown.pdf, *archived at* http://perma.cc/QBK3-MQYS.

199 Interview with Paul Sieminski, *supra* note 72.

and transmitting to users only the content required by law to be in the notice.

Despite the DMCA's benefits to free expression, the copyright industries and some in Congress sought to undermine the DMCA with a bill called the Stop Online Piracy Act (SOPA)[200], introduced in 2011. The practical effects of SOPA would have been to make speech platforms liable for the copyright infringement on their sites, and to impose a duty to monitor all the content shared by every user. That is why the Internet community rose up in revolt against SOPA, and why, on January 18, 2012, Wikipedia and Reddit went black for a day and Google symbolically censored its search page.[201] Following millions of irate calls to Congress, SOPA died a loud and painful death.[202]

3. Trademark: A New Statute May Be Necessary. — There is a notable gap in the intermediary liability framework: trademark claims.[203] CDA 230 explicitly does not cover intellectual property claims, and DMCA 512 covers only copyright. As a result, there is no explicit intermediary liability immunity for trademark violations[204] (nor is there immunity for patent claims, which are more relevant for 3D-printing platforms).

This gap in intermediary liability for trademark claims empowers corporations to threaten speech platforms whenever whistleblowers or critics use their names. I could write the following sentence on my blog: "My boss at Jillian's Diner fired me for complaining about health code violations." Or: "I ate at Jillian's Diner, and it serves terrible, tasteless burgers." In response to such posts, the management team at Jillian's Diner knows better than to threaten the blogging platform with a libel suit because CDA 230 eliminates that option. Rather, Jillian's lawyers would argue that my use of the term "Jillian's Diner" vi-

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200 H.R. 3261, 112th Cong. (2011).

201 Ned Potter, *SOPA Blackout: Wikipedia, Google, Wired Protest 'Internet Censorship,'* ABC NEWS (Jan. 18, 2012, 11:00 AM), http://abcnews.go.com/blogs/technology/2012/01/sopa-blackout-wikipedia-google-wired-join-protest-against-internet-censorship/, *archived at* http://perma.cc/U9W-3YEG.

202 *See* Jenna Wortham, *A Political Coming of Age for the Tech Industry*, N.Y. TIMES (Jan. 17, 2012), http://www.nytimes.com/2012/01/18/technology/web-wide-protest-over-two-antipiracy-bills.html, *archived at* http://perma.cc/VS7A-QV25.

203 One scholar, Professor Mark Lemley, argues that the Lanham Act does in fact immunize "innocent" trademark infringers from monetary damages, but not injunctive relief, and that this provision may apply to online service providers. Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. ON TELECOMM. & HIGH TECH. L. 101, 105–07 (2007). Yet, as another scholar noted, "[t]he provision applies only to parties who qualify as publishers of third-party content, however, and courts have rarely invoked it." Stacey L. Dogan, *Beyond Trademark Use*, 8 J. ON TELECOMM. & HIGH TECH. L. 135, 151 n.59 (2010). Even Lemley admits: "This exemption has only rarely been applied by the courts, and seems to be unknown even to many trademark lawyers." Lemley, *supra*, at 106.

204 *See* MICHAEL WEINBERG, IT WILL BE AWESOME IF THEY DON'T SCREW IT UP 7–8 (Nov. 2010), *archived at* http://perma.cc/V8J8-DW2E.

olates trademark law either based on user confusion or trademark dilution.[205] Without immunity for trademark infringement, speech platforms have incentives to take down the content.[206]

WordPress.com has seen a severe recent uptick in letters from corporations attempting to silence criticism with claims of trademark infringement. In the view of the company's general counsel, Paul Sieminski, trademark threats have emerged as the new SLAPP — strategic litigation against public participation. According to Sieminski: "Big corporations are a bigger threat to free speech than a lot of governments because they have the resources to police the Internet for any mention of their name and act on it."[207] Without any immunity for third-party trademark claims, "the corporations must believe we would prioritize their complaints over the users' voice, but our calculus is exactly the opposite. The service is for the user, it's a publishing platform, a free speech platform at the end of the day. Those are the values we want to promote."[208] Nonetheless, the counsel's understanding is that not every company pushes back against aggressive trademark claims, partly because of the litigation risk.

Passing a law providing immunity for trademark claims would close this potential loophole and ensure more "uninhibited, robust, and wide-open"[209] debate about the large corporations that hold such sway over our lives.

III. CONCLUSION

The lawyers at leading technology companies are on the front lines of battles for, and over, freedom of expression. For the next several years, these lawyers will continue to "arguably have more influence over the contours of online expression than anyone else on the planet."[210] I expect many of those in law school now, and perhaps those who organized this Symposium, will be among them. The companies they represent have pro-speech incentives — incentives no weaker than those felt by great newspapers. Their daily challenges include drafting terms of service and acceptable use policies for their hundreds of millions of users, scaling them, and enforcing them, all while keeping a thumb on the scale of free expression in the toughest, most high-

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[205] *See* Pratheepan Gulasekaram, *Policing the Border Between Trademarks and Free Speech: Protecting Unauthorized Trademark Use in Expressive Works*, 80 WASH. L. REV. 887, 893 (2005).

[206] When someone alleges trademark infringement because a good being sold online is counterfeit, then a notice-and-takedown procedure is helpful. *See* Tiffany (NJ) Inc. v. eBay Inc., 600 F.3d 93, 99 (2d Cir. 2010).

[207] Interview with Paul Sieminski, *supra* note 72.

[208] *Id.*

[209] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[210] Rosen, *supra* note 14.

profile controversies. For these lawyers, the practice of free expression law focuses far less on the U.S. Supreme Court and far more on statutory immunities, international law and culture, and privacy. Nonetheless, some decades from now, we will likely celebrate these lawyers just as fervently as we celebrate those who defended the *New York Times* in *New York Times v. Sullivan*.