

A Monopoly of Thought—How Growing
Anticompetitive Practices on the Internet Affect Creative
Work

*Laurel Brown**

CONTENTS

INTRODUCTION.....	1185
I. THE RISE OF THE INTERNET MONOPOLIES	1186
<i>A. Open Origins</i>	1186
<i>B. Paradise Lost?</i>	1187
<i>C. The New Monopolies</i>	1189
II. CREATIVE STRUGGLES UNDER INTERNET MONOPOLIES	1192
<i>A. Searching for Views: Google vs. Creators</i>	1192
<i>B. The Facebook Fight for Likes</i>	1198
III. WHAT CAN BE DONE?	1203
<i>A. Intellectual Property’s Limited Assistance</i>	1203
<i>B. Tagging Along with Antitrust Law</i>	1205
<i>C. Appealing to Public Policy</i>	1206
IV. REMEDIES FOR CREATORS	1207

INTRODUCTION

Over the past three decades, the Internet has brought about an unprecedented age of creativity. Access to ideas has grown. Creators have found new platforms for their work. Consumers have received unparalleled choice when it comes to finding and appreciating works of

* Juris Doctor Candidate 2021, Seattle University School of Law; B.A., Colgate University; Ph.D., Columbia University. Thank you to Professor Steve Tapia for the early idea and ongoing guidance that led me to this topic. Also, many thanks to the members of the Seattle University Law Review for the time and expertise they dedicated to this Note.

art and entertainment. Like so many other areas of human thought and innovation, the Internet's presence has democratized creative works.

That democratization and spread of creativity, however, may now be imperiled by the rise of dominant companies. Although corporations like Google and Facebook have been instrumental in the spread of creative ideas throughout the Internet, these same companies may also limit creativity when monopolies are created. When there is only one source for Internet content, that source has an outsized influence in what the content is. Therefore, in the expression and dissemination of their work, creators of Internet content can be limited by corporate gatekeepers.

As troubling as this limitation on creativity is, there are few legal remedies that offer direct help to creators stifled by dominant Internet companies. Antitrust law does not directly deal with non-economic product, although antitrust decisions may indirectly affect creative work.¹ Intellectual property law, meanwhile, can only protect creators when work is stolen.² It may take a series of creative solutions to solve the problem of the monopolistic stifling of creative work on the Internet.

This Note will address how dominant Internet companies detrimentally impact creative work and how legal solutions might be employed to combat the damage inflicted by online monopolies. Part I will focus on how certain Internet companies became dominant, showing an evolution from egalitarian ideals to the consolidated control of the World Wide Web (the web) by companies like Google, Facebook, and Amazon. In Part II, this Note will focus on how two particular companies—Google and Facebook—affect creative endeavors in their control of access to audiences and by determining the economics of content production on the Internet. Part III details what creators on the Internet can do, legally, in the face of dominant, monopolistic companies. The Note concludes with a survey of the legal and equitable strategies that might be employed to protect online creative work in the future.

I. THE RISE OF THE INTERNET MONOPOLIES

A. Open Origins

The current landscape of the Internet lies far from where the web began. Once the high-tech home of programmers and academics, the

1. See *Antitrust Laws and You*, U.S. DEP'T JUST. (Jan. 5, 2017), <https://www.justice.gov/atr/antitrust-laws-and-you> [<https://perma.cc/MR9J-2GJS>].

2. Even when theft occurs, a creator still must face a David-and-Goliath challenge in taking on a corporation. These challenges themselves may act to stifle creativity, as will be discussed later in this Note.

Internet exploded into the popular consciousness in the 1990s.³ That explosion brought with it a view—definitely idealistic and possibly even utopian—of what the Internet could mean to humanity.

One of the most influential views was expressed in John Perry Barlow’s “A Declaration of the Independence of Cyberspace.”⁴ First released online in 1996, the polemical Declaration announced freedom from many of society’s rules. This included freedom of thought: “In our world, whatever the human mind may create can be reproduced and distributed infinitely at no cost.”⁵ This freedom was, in fact, how things often worked in the early days of the Internet. While individual users faced costs when getting online in the first place—neither a dial-up connection nor an hour at an Internet cafe were free—there were few entities that truly dominated the Internet of the 1990s.⁶

The free and open nature of the Internet even found expression in early web-related case law. In the early case of *ACLU v. Reno*, the plaintiffs argued that the Communications Decency Act of 1996 (CDA) contained provisions that violated the First Amendment and the Due Process Clause of the Fifth Amendment when applied to “indecent” content on the Internet.⁷ In its holding, the district court echoed Barlow’s Declaration when reflecting on the spread of information online: “The World Wide Web has become so popular because of its open, distributed, and easy-to-use nature. . . . The Internet is therefore a unique and wholly new medium of worldwide human communication.”⁸

B. Paradise Lost?

Stirring in this libertarian idyll of unfettered communication, however, were the earliest hints of what would come in terms of corporate domination. By 2001, software titan Microsoft was facing antitrust litigation in the Supreme Court; the court in *United States v. Microsoft*

3. While only fourteen percent of American adults reported regular use of the Internet in 1995, that number grew to forty-six percent by 2000. Susannah Fox & Lee Rainie, *The Web at 25 in the U.S.: Part 1: How the Internet Has Woven Itself into American Life*, PEW RSCH. CTR. (Feb. 27, 2014), <https://www.pewresearch.org/internet/2014/02/27/part-1-how-the-internet-has-woven-itself-into-american-life/> [https://perma.cc/XM7S-HG2V].

4. John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (Feb. 8, 1996), <https://www.eff.org/cyberspace-independence> [https://perma.cc/3BH6-UU57].

5. *Id.*

6. It is notable that the most single popular website throughout the 1990s, America Online (AOL), was primarily a portal. The site did offer content and directed users’ movements, but most AOL subscribers merely used the site as a launchpad to find other Internet content. See Data Is Beautiful, *Most Popular Websites 1996–2019*, YOUTUBE (Oct. 14, 2019), <https://youtu.be/2Uj1A9AguFs> [https://perma.cc/9S5Z-VGQE].

7. *ACLU v. Reno*, 929 F. Supp. 824, 827 (E.D. Pa. 1996).

8. *Id.* at 838, 844.

Corp. affirmed a finding of monopoly on appeal.⁹ One of the specific allegations supporting the monopoly contention was the use of Microsoft's browser, Internet Explorer, which the company had integrated into its Windows operating system to the exclusion of other Internet browsers available at the time.¹⁰ While Microsoft eventually settled the case and made the use of non-Microsoft browsers again available on its operating systems, the damage was done: Microsoft's main browser competitor, Netscape, had lost its dominant market share (ninety percent in 1995) to Internet Explorer (ninety-five percent of the market share in 2000) and soon faded from the scene.¹¹

The Internet dominance of Microsoft was soon matched—and quickly surpassed—by other, newer actors.¹² Since the turn of the millennium, Internet-based companies have come to prominence in their own rights. Google (founded in 1998) revolutionized and dominated the browser industry.¹³ Facebook emerged a few years later (in 2004, with wide release in 2006) to take over the growing social-media universe.¹⁴ Amazon, meanwhile, had been selling books online since 1994 before taking control of retail sales, deliveries, and cloud computing.¹⁵

All of these companies have been of great service to those in creative industries like visual arts, music, and writing. Search engines like Google, for example, have been integral in the spread of creative work across the Internet: users worldwide can now find virtually anything posted online.¹⁶ Google also owns platforms like YouTube, where creators can directly post their video content to be found and seen by audiences everywhere.¹⁷ Although somewhat limited in its reach, Google has even promoted artistic

9. United States v. Microsoft Corp., 253 F.3d 34, 51 (D.C. Cir. 2001).

10. *Id.* at 45.

11. John Naughton, *Netscape: The Web Browser That Came Back to Haunt Microsoft*, GUARDIAN (Mar. 22, 2015), <https://www.theguardian.com/global/2015/mar/22/web-browser-came-back-haunt-microsoft> [<https://perma.cc/PS23-P8AC>].

12. Indeed, Internet Explorer itself faded away in the face of competitors like Google's Chrome, Apple's Safari, and Mozilla's Firefox. Microsoft announced in 2015 that it would "retire" Internet Explorer. *See id.*

13. Christopher McFadden, *Almost Everything You Need to Know About Google's History*, INTERESTING ENG'G (Jan. 15, 2018), <https://interestingengineering.com/almost-everything-you-need-to-know-about-googles-history> [<https://perma.cc/73WH-AFXS>].

14. Anne Sraders, *History of Facebook: Facts and What's Happening*, THESTREET (Oct. 11, 2018), <https://www.thestreet.com/technology/history-of-facebook-14740346> [<https://perma.cc/EP9J-JC3V>].

15. Lydia DePillis & Ivory Sherman, *Amazon's Extraordinary 25-Year Evolution*, CNN (Oct. 4, 2018), <https://www.cnn.com/interactive/2018/10/business/amazon-history-timeline/index.html> [<https://perma.cc/3EMZ-J4JS>].

16. *How Google Search Works*, GOOGLE, <https://www.google.com/search/howsearchworks/> [<https://perma.cc/FZM3-HK8T>].

17. *About*, YOUTUBE, <https://www.youtube.com/about/> [<https://perma.cc/99Q2-CCVH>].

pursuits directly via programs like the Google Doodle.¹⁸ Facebook, similarly, has allowed creators to reach wider audiences than ever before—professional pages, user groups, and personal connections are used by businesses and artists for promotional purposes.¹⁹ Facebook additionally offers advertising for those creators looking to expand their reach even further.²⁰ Amazon, meanwhile, not only provides an outlet for the sale of creative works, but it also allows direct publication by writers through services like book publisher Kindle and comic publisher ComiXology.²¹

But what happens when these creative gateways become barriers? Dominant Internet companies like Google, Facebook, and Amazon have steadily increased their respective market shares over the past few years.²² As a result, each company made its services increasingly invaluable both to creators and their audiences. While exact market share numbers for each of these companies are difficult to determine and are constantly changing, available estimates indicate extreme dominance. Google, for example, held approximately ninety percent of the search-engine market share as of 2019.²³ These dominant Internet companies are now not just the best way to disseminate creative work; they are, in many cases, the *only* way. Because of this, creators are more and more at the mercy of companies that provide access to customers, and there are limited remedies that creators can seek as plaintiffs when challenging these big corporations.

C. The New Monopolies

Under the Sherman Act, monopolization requires possession of monopoly power in a market and the willful acquisition or maintenance of

18. *About*, GOOGLE DOODLES, <https://www.google.com/doodles/about> [https://perma.cc/3WHX-SUFF].

19. *Set Up a Facebook Page*, FACEBOOK, <https://www.facebook.com/business/pages/set-up> [https://perma.cc/9JAT-AKLU].

20. *Boost a Facebook Post*, FACEBOOK, <https://www.facebook.com/business/pages/boost-post> [https://perma.cc/GQT7-LWNS]; *Business Page Ads*, FACEBOOK, https://www.facebook.com/business/help/547448218658012?ref=fbb_set_up_your_page [https://perma.cc/L8LC-HL3C].

21. *Take Control with Self Publishing*, AMAZON, https://www.amazon.com/gp/seller-account/mm-summary-page.html?ie=UTF8&ld=AZFooterSelfPublish&ref_=footer_publishing&topic=200260520 [https://perma.cc/8SQF-PMD6].

22. For a graphic depiction of the rise of these companies, see Data Is Beautiful, *supra* note 6.

23. See Joseph Johnson, *Worldwide Desktop Market Share of Leading Search Engines from January 2010 to July 2019*, STATISTA, <https://www.statista.com/statistics/216573/worldwide-market-share-of-search-engines/> [https://perma.cc/4QCA-CFNV] (showing an 88.61% market share as of July 2019); *Search Engine Market Share Worldwide*, GLOBALSTATS, <https://gs.statcounter.com/search-engine-market-share> [https://perma.cc/FQE5-935Q] (showing a 92.96% market share as of September 2019).

that power.²⁴ In addition to showing harm to business by removing competition, an antitrust case requires a showing that the monopoly harmed consumers.²⁵ While antitrust law likely does not provide a legal remedy for online creators, investigations and cases involving the monopolizing of Internet corporations illustrate a growing problem and point to possible routes forward. This is especially relevant given the notable growth in calls for antitrust protection against companies like Google, Facebook, and Amazon over the last decade.

The precedent for antitrust cases against Internet companies is the long-term monopoly case Microsoft fought starting in the 1990s.²⁶ Although that case ended with a settlement, Microsoft was required as part of its deal to end certain monopolistic practices, including bundling Internet Explorer on computers using the company's Windows operating system.²⁷ Not only did this case create a precedent that the government could use to prosecute antitrust cases against big Internet companies, but the outcome arguably paved the way for the rise of actors like Google in the wake of Microsoft's defeat.

While Internet-based companies initially benefitted from Microsoft's loss in antitrust court, they now face similar legal hurdles in pursuing their own business objectives. Google, for example, has been under antitrust investigations by various governmental entities since at least 2013.²⁸ More recently, 2019 saw Justice Department investigations into Google, Amazon, and Facebook.²⁹ Internationally, Google has even faced extreme

24. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." Sherman Act, 15 U.S.C. § 2.

25. "[A] firm is a monopolist if it can profitably raise prices substantially above the competitive levels . . ." United States v. Microsoft Corp., 253 F.3d 34, 51 (D.C. Cir. 2001).

26. *Id.*

27. Ironically, the nail in Internet Explorer's coffin was actually the rise of broadband service, which made it easy for competitor browsers to be downloaded, thereby removing the advantage of pre-installed Internet Explorer on Windows machines. Sharon Pian Chan, *Long Antitrust Saga Ends for Microsoft*, SEATTLE TIMES (May 11, 2011), <https://www.seattletimes.com/business/microsoft/long-antitrust-saga-ends-for-microsoft/> [<https://perma.cc/7N28-DBHV>].

28. Press Release, F.T.C., Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns In the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search (Jan. 3, 2013), <https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc> [<https://perma.cc/N88D-LBZZ>].

29. See Tony Romm, *The Justice Department Is Preparing a Potential Antitrust Investigation of Google*, WASH. POST (Mar. 31, 2019), <https://www.washingtonpost.com/technology/2019/06/01/justice-department-is-preparing-potential-antitrust-investigation-google/> [<https://perma.cc/ZU9T-KHFU>]; Diane Bartz, *U.S. Justice Department to Open Facebook Antitrust Investigation*, REUTERS, <https://www.reuters.com/article/us-facebook-probe-antitrust/justice-department-to-open-facebook-antitrust-investigation-source-idUSKBN1WA35M> [<https://perma.cc/JM3A-D64M>]; Spencer Soper & Ben Brody, *Amazon Probed by U.S. Antitrust Officials Over Marketplace*, BLOOMBERG,

finances from the European Union following monopoly investigations in 2017 and 2019.³⁰ Popular calls for regulations of these companies have grown alongside the formal investigations: during his presidency, Donald Trump repeatedly complained about Amazon's dominance,³¹ Senator Elizabeth Warren called for the breakup of big tech companies in her 2020 bid for President,³² and Senator Amy Klobuchar introduced a bill to reform federal antitrust law explicitly aimed at tech-industry companies.³³

These investigations have yielded results in the past year. A sixteen-month Congressional investigation into tech giants—specifically Google, Facebook, Amazon, and Apple—determined in October 2020 that these dominant Internet companies were indeed engaging in monopolistic practices.³⁴ The report described Google as “an ecosystem of interlocking monopolies,” with its domination of search functions, mapping, advertising revenue, and other markets.³⁵ Facebook, meanwhile, was criticized for its growing focus on removing competition instead of growing its own product.³⁶ Executives from Facebook, Google, and Twitter have also faced direct scrutiny from Congress over the past year,

<https://www.bloomberg.com/news/articles/2019-09-11/amazon-antitrust-probe-ftc-investigators-interview-merchants> [<https://perma.cc/FB7B-4RFW>]. Additional investigations also began at the state level: Tony Romm, *Facebook, Google and Other Tech Giants Are About to Face a 'Reckoning,' State Attorneys General Warn*, WASH. POST (March 15, 2019), <https://www.washingtonpost.com/technology/2019/03/15/facebook-google-other-big-tech-giants-are-about-face-reckoning-state-attorneys-general-warn/> [<https://perma.cc/734J-YU94>].

30. Press release, EUR. COMM'N, Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service (June 27, 2017), https://europa.eu/rapid/press-release_IP-17-1784_en.htm [<https://perma.cc/9BEL-DMD2>]; Press Release, EUR. COMM'N, Antitrust: Commission Fines Google €1.49 Billion for Abusive Practices in Online Advertising, EUR. COMM'N (Mar. 29, 2019), https://europa.eu/rapid/press-release_IP-19-1770_en.htm [<https://perma.cc/2X58-9JQ9>].

31. Admittedly, the Trump position on Amazon focuses less on a technical monopoly and more on potential damage to the post office and on Amazon founder Jeff Bezos's ownership of *The Washington Post*, but the complaints still play into the popular perception that Amazon is bad for America. See Colin Lecher, *What to Know About Trump's Escalating Fight with Amazon*, VERGE (Apr. 14, 2018), <https://www.theverge.com/2018/4/14/17233680/trump-amazon-bezos-postal-service-explained> [<https://perma.cc/HH52-EJBR>].

32. Elizabeth Warren, *How We Can Break Up Big Tech*, ELIZABETHWARREN.COM (Mar. 8, 2019), <https://elizabethwarren.com/plans/break-up-big-tech> [<https://perma.cc/7MEY-46W7>].

33. Cat Zakrzewski, *The Technology 202: Klobuchar's New Antitrust Bill May Hit Big Tech Where It Hurts*, WASH. POST (Feb. 4, 2021) <https://www.washingtonpost.com/politics/2021/02/04/technology-202-klobuchar-new-antitrust-bill-may-hit-big-tech-where-it-hurts/> [<https://perma.cc/VJP4-DQY7>].

34. Tony Romm, Cat Zakrzewski, and Rachel Lerman, *House Investigation Faults Amazon, Apple, Facebook and Google for Engaging in Anti-Competitive Monopoly Tactics*, WASH. POST (Oct. 6, 2020), <https://www.washingtonpost.com/technology/2020/10/06/amazon-apple-facebook-google-congress/> [<https://perma.cc/42T6-L5JU>].

35. *Id.*

36. *Id.*

answering questions about both their business practices and their respective sites' inability to restrict extremist messaging.³⁷

This federal attention to potential antitrust violations by Internet companies extends beyond investigations and has spawned legal action. The Federal Trade Commission (FTC) sued Facebook for illegal monopolization in December 2020, alleging a "systematic strategy" of acquisitions and policies that would remove all possible threats to its growing social-media monopoly.³⁸ The complaint, filed in the District of Columbia, sought to enjoin Facebook's "anticompetitive conduct and unfair methods of competition in or affecting commerce."³⁹ Specifically, the FTC's complaint focused on Facebook's acquisitions of rival social-networking sites Instagram and WhatsApp, as well as "anticompetitive conditioning of access to its platform to suppress competition."⁴⁰ Facebook has already moved to dismiss this complaint, along with similar state-level complaints of monopolistic business practices.⁴¹

II. CREATIVE STRUGGLES UNDER INTERNET MONOPOLIES

A. Searching for Views: Google vs. Creators

Google is arguably the most dominant force on the modern-day Internet. Estimates put Google's share of the world's search engine traffic at as high as ninety percent.⁴² In addition to the ubiquitous search engine, Google provides services used directly by creators in their work, most

37. Tony Romm, *House to Grill Facebook, Google, Twitter CEOs as Washington Seeks to Crack Down on Disinformation, Antitrust*, WASH. POST (Feb. 18, 2021), <https://www.washingtonpost.com/technology/2021/02/18/house-antitrust-amazon-apple-facebook-google/> [<https://perma.cc/9J4U-UCC9>].

38. Press Release, F.T.C., *FTC Sues Facebook for Illegal Monopolization* (Dec. 9, 2020), <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization> [<https://perma.cc/CS8S-7EQJ>].

39. *F.T.C v. Facebook, Inc.*, No. 1:20-cv-03590 (D. D.C. filed Jan. 13, 2021). The complaint alleges violations of section 2 of the Sherman Act (15 U.S.C. §2) and of section 5(a) of the FTC Act (15 U.S.C. §45(a)).

40. *Id.* at 3. "Anticompetitive conditioning" is defined in the complaint as the requirement that in order for outside applications to access Facebook features, third-party apps must "refrain from providing the same core functions that Facebook offers." *Id.* at 8. The complaint notes that Facebook has at least temporarily stopped its practice of anticompetitive conditioning in response to global regulation. *Id.* at 23, 44.

41. Barbara Ortutay, *Facebook Moves to Dismiss Federal, State Antitrust Suits*, WASH. POST (Mar. 10, 2021), https://www.washingtonpost.com/business/technology/facebook-moves-to-dismiss-federal-state-antitrust-suits/2021/03/10/4bb06c24-81cd-11eb-be22-32d331d87530_story.html [<https://perma.cc/V2PU-9Z4W>].

42. Manisha Priyadarshini, *12 Google Alternatives: Best Search Engines to Use in 2019*, FOSSBYTES (Jan. 11, 2019), <https://fossbytes.com/google-alternative-best-search-engine/> [<https://perma.cc/G38H-TVCB>]. Ironically, Google's search dominance is so great that even writing this Note requires extensive use of the search engine.

notably its video content platform YouTube.⁴³ With Google's search engine directing traffic on the Internet and YouTube bringing video footage to the world, services provided by Google are invaluable to the creative process.

However beneficial a dominant Google is to creative work, the company can also cause problems for Internet creators. Google's search algorithm is a proprietary trade secret and is subject to frequent changes, leading those trying to be found online to constantly reinvent sites to show up better in Google search results.⁴⁴ While some of the factors used in Google's search algorithms can be controlled by websites looking to be found—Google claims to consider “relevance and usability of pages” and “expertise of sources” to generate its search engine results—other factors are inherently uncontrollable, including the location and histories of those doing the searching.⁴⁵

No matter how the algorithm changes, the goal of online creators remains the same: to be found on Google. Google makes superficial efforts to help achieve that goal,⁴⁶ but claims of bias have only grown over the past decade. An FTC investigation in 2013 failed to find certain evidence of bias, concluding instead that possible harm to competitors “could be plausibly justified as innovations” that benefited consumers.⁴⁷ The European Commission followed these findings with its own investigation in 2017, fining the company 2.42 billion euros after concluding that Google's search engine gave an “illegal advantage to another Google product.”⁴⁸ Even if this behavior is not anti-competitive, Google has

43. Although the streaming-video site was originally an independent company, Google purchased YouTube in 2006. *Google Buys YouTube for \$1.65 billion*, NBC NEWS (Oct. 10, 2006), http://www.nbcnews.com/id/15196982/ns/business-us_business/t/google-buys-youtube-billion/#.Xd7PyC2ZM_U [<https://perma.cc/649P-F5S7>].

44. The current version of Google's search uses “a whole series of algorithms,” complicating the process even more for those trying to make Google work in their favor. *See How Search Algorithms Work*, GOOGLE, <https://www.google.com/search/howsearchworks/algorithms/> [<https://perma.cc/8HSH-ZW94>].

45. *Id.*

46. Google provides “webmaster help” in multiple formats with the goal of assisting creators in their web visibility. It may be a case of too much of a good thing being unhelpful in the end—the site's “Webmaster Help” YouTube channel alone consists of more than one thousand videos, implying that mastery of all would be required to keep up with Google's algorithmic demands. *Help Creators*, GOOGLE, <https://www.google.com/search/howsearchworks/mission/creators/> [<https://perma.cc/YXZ9-S79M>].

47. Google simultaneously reached a settlement with the FTC on claims of anti-competition in patents and advertising. FTC, *supra* note 28.

48. European Commission Press Release IP/17/1784, Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service (June 26, 2017).

openly admitted that its search engine favors bigger brands to smaller operators.⁴⁹

What is the practical result of this behavior? The success of businesses, especially that of smaller businesses without the resources needed to devote to constant updates to search-engine optimization (SEO), can rise and fall seemingly at random with the shifts of Google's algorithms.⁵⁰

Even leaving algorithms aside, Google's influence on creators has grown to dominant levels over the past decade. This is most plainly seen in the case of the company's enormous video site, YouTube. With millions of user-generated and professional videos uploaded, YouTube announced in May 2019 that it had two billion unique users monthly,⁵¹ accounting for over seventy-three percent of the online video market.⁵² This dominance in the online video field means that creators wanting to get videos out to the world are almost certainly turning to YouTube for that purpose.⁵³

Creators, however, face more than one hurdle when using YouTube in their work. The video site relies on algorithms similar to its parent, Google, along with the attendant issues and biases.⁵⁴ In addition to this, creators must deal with a copyright infringement system that favors YouTube over independent producers of video footage.

This favoritism of YouTube happens because the video site offers a two-tier system for reporting copyright infringement: one for individuals

49. Aaron Wall, *Google Loves Brands*, SEOBOOK (Nov. 15, 2011), <https://www.seobook.com/brands> [https://perma.cc/V8UW-GA42].

50. For just some of the many examples of this, see Harry McCracken, *The Truth About Google's 'War' on Small Business*, ALLBUSINESS, <https://www.allbusiness.com/the-truth-about-googles-war-on-small-business-16754323-1.html> [https://perma.cc/BGM8-ERP4]; Bill Hartzler, *Interview with a Small Business Owner Crushed by Google* (May 18, 2015), <https://www.billhartzler.com/search-engines/interview-with-a-small-business-owner-crushed-by-google/> [https://perma.cc/6HQZ-BZUQ]; *Thank You Google for Destroying My Business*, NW. REGISTERED AGENT (Aug. 9, 2014), <https://www.northwestregisteredagent.com/thank-you-google-for-destroying-my-business> [https://perma.cc/EG3N-G96H].

51. Todd Spangler, *YouTube Now Has 2 Billion Monthly Users, Who Watch 250 Million Hours on TV Screens Daily*, VARIETY (May 3, 2019), <https://variety.com/2019/digital/news/youtube-2-billion-users-tv-screen-watch-time-hours-1203204267/> [https://perma.cc/DY3W-XJNT].

52. *YouTube International Market Share*, DATANYZE, <https://www.datanyze.com/market-share/online-video/youtube-market-share> [https://perma.cc/ML9R-XHTW]. The biggest streaming-video competitor, Vimeo, accounts for only 17.6% of the market. *Id.*

53. Five hundred hours of content were added to YouTube every *minute* in 2019. Mansoor Iqbal, *YouTube Revenue and Usage Statistics (2019)*, BUS. OF APPS (Aug. 8, 2019), <https://www.businessofapps.com/data/youtube-statistics/> [https://perma.cc/A5KN-3NAM].

54. *Search and Discovery on YouTube*, YOUTUBE CREATOR ACAD., <https://creatoracademy.youtube.com/page/lesson/discovery#strategies-zippy-link-1> [https://perma.cc/RHU4-NPJA].

and smaller entities and one for large companies.⁵⁵ Individuals and small entities seeking copyright protection on YouTube must submit a takedown notice pursuant to the Copyright Act.⁵⁶ YouTube simplifies this process by providing a fillable form that claimants can use to assert their rights.⁵⁷ This initiates the legal process, allowing for both claims of copyright infringement and responses by the affected video uploader.

The situation is different for large companies claiming copyright infringement against their owned libraries. YouTube even further simplifies the process for such claimants through its Content ID program, where qualifying companies upload reference content that YouTube matches against all uploaded videos.⁵⁸ Anything that hits as a match via the algorithm is then controlled by the company that claims the copyright.⁵⁹ That company may then block the video, track viewership on the video (with an option to take further action at a later time), or monetize the video.⁶⁰ It is this last feature of Content ID that potentially poses the biggest problems, as monetization diverts ad revenue from the poster of the video to the copyright claimant.⁶¹

An otherwise equitable solution, this system brings up the troubling issue that YouTube has, via Content ID, given itself an incentive to restrict copyright issues to its own system. Companies that control large intellectual property portfolios do not have to bother with claims under the Copyright Act. Instead, with virtually no effort required of the company, YouTube enforces the copyright via Content ID. If the intellectual-property-holding company then chooses to monetize the video, both

55. See *Qualifying for Content ID*, YOUTUBE HELP, https://support.google.com/youtube/answer/1311402?hl=en&ref_topic=9282364 [<https://perma.cc/XRZ8-SGZ7>].

56. See 17 U.S.C. § 512. The rules for the takedown notice are covered in § 512(c)(3): “a notification of claimed infringement must be a written communication provided to the designated agent of a service provider,” including such information as the identification of the copyrighted work, identification of the infringing activity, and a statement of a good faith belief that the material has been used without authorization. 17 U.S.C. § 512(c)(3).

57. *Submit a Copyright Takedown Notice*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2807622> [<https://perma.cc/Y2MG-ZDX2>].

58. *How Content ID Works*, YouTube Help, https://support.google.com/youtube/answer/2797370?hl=en&ref_topic=9282364 [<https://perma.cc/NXC7-62Q4>].

59. *Id.*

60. *Id.*

61. Revenue from ads placed on disputed videos is held by YouTube during the dispute and then paid out to the party that wins the dispute later. *Monetization During Content ID Disputes*, YOUTUBE HELP, https://support.google.com/youtube/answer/7000961?hl=en&ref_topic=9282678 [<https://perma.cc/4Z87-7V5R>].

YouTube and the copyright holder make money off of the uploader's efforts.⁶²

Issues arise under this system when there is a dispute over whether copyright infringement actually occurred. Such a dispute occurred in *Lenz v. Universal Music Corp.*, after a proud mother uploaded a short video of her toddler son dancing to Prince's "Let's Go Crazy."⁶³ Universal (then the copyright holder for Prince's catalog) caught the video in its sweep of copyright-infringing content and notified YouTube via a takedown notice.⁶⁴ After Lenz sent a counter-notification to YouTube, the video was reinstated under the website's fair use policy and a lawsuit resulted.⁶⁵ Lenz eventually won in her case for legal fair use under the Copyright Act, avoiding the takedown on YouTube.⁶⁶

In a system under which takedown notices are formally filed and possibly disputed, this legal result is thus a potential outcome.⁶⁷ The situation is different under the Content ID and video removal system that YouTube runs within its own company. In such cases, YouTube and a copyright claimant avoid the legal processes of the Copyright Act altogether: with no formal takedown notice filed, the alleged infringer thus loses the right to dispute the notice under the law.⁶⁸ YouTube itself admits that Content ID has no innate ability to determine whether content is being used for fair use or for parody, resulting in removal of work that should be allowed.⁶⁹ Instead, the company relies on the Content ID users themselves to police whether or not content should be removed.⁷⁰ As the *Lenz* case

62. It is important to note that YouTube makes money off of all ads attached to videos on its service—that is how the site makes its money. This advertising revenue is in addition to any benefits accruing to YouTube by its withholding of revenue to any party during the dispute period.

63. *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1148–50 (9th Cir. 2016).

64. *Id.* at 1149.

65. *Id.* at 1150.

66. *Id.* at 1157. It should be noted that the burden created by this holding fell on the copyright holder, Universal Music, and not on YouTube. The court required no actions or changes from YouTube in this decision.

67. YouTube's help site provides information on copyright counter notification when the alleged copyright holder has submitted a takedown notice pursuant to § 512 of the Copyright Act. *Copyright Counter Notification Basics*, YOUTUBE HELP, https://support.google.com/youtube/answer/2807684?hl=en&ref_topic=9282678 [<https://perma.cc/HEF2-58RT>].

68. See Patrick McKay, *YouTube Copyfraud & Abuse of the Content ID System*, FAIRUSE.TUBE.ORG (Nov. 23, 2011), <http://fairusetube.org/youtube-copyfraud> [<https://perma.cc/NQJ4-ZQFT>] ("Further Content ID disputes are not allowed, and neither can they file a DMCA counter-notice because no DMCA takedown notice has been filed.")

69. "Content ID can't identify context . . . it's not a perfect system." Shenaz Zack, *Content ID and Fair Use*, GOOGLE PUB. POL'Y BLOG (Apr. 23, 2010), <http://googlepublicpolicy.blogspot.com/2010/04/content-id-and-fair-use.html> [<https://perma.cc/P7LS-9DTW>].

70. *Id.*

illustrates, copyright holders are unlikely to do so without explicit, legal requirements.

YouTube users may still dispute the outcome of a Content ID match, but the system is limited.⁷¹ Once a dispute is filed, YouTube's Content ID lets the company claiming the intellectual property confirm the claim again. This results in the video being blocked (or monetized for the benefit of the Content ID company) with no further recourse allowed to the party that posted the disputed content.⁷² The normal procedure under the Copyright Act is no longer available; without a formal takedown notice, no appeal of the takedown is allowed.⁷³

All of this might still be a valid system for most creators (other than those trying to use YouTube for fair use or parody purposes) if it were not for abuses of the system. Companies have been known to falsely submit copyright infringement claims on popular videos, simply to gain the revenue from monetization under YouTube's system.⁷⁴ While such companies often release their claims if an uploader disputes the situation, the implementation of YouTube's Content ID program can mean that a video stays active while the revenue from that video goes to another source.⁷⁵ An uploader unaware of a Content ID claim may thus lose revenue for an extended period of time. Additionally, legitimate companies using Content ID are incentivized to simply confirm all copyright claims when disputes are filed. By doing so, they keep the ad revenue, and the uploader has little recourse moving forward.

Even without copyright claims entering into the picture, YouTube exercises control over what may be posted on its site. This form of control is not always a bad thing: YouTube must constantly remove content that violates its terms of use and the basic bounds of human decency.⁷⁶ As a result, well over eight million videos were removed from the site between

71. The outcome of a dispute depends largely on the party that claimed copyright infringement. If that party does not respond to a dispute (or agrees with it), the original uploader gets control of the video once more. If the copyright-claiming party does uphold its claim, however, dispute rights are limited unless a formal Copyright Act takedown notice follows. See *Dispute a Content ID Claim*, YOUTUBE HELP, https://support.google.com/youtube/answer/2797454?hl=en&ref_topic=9282678 [<https://perma.cc/V3LC-9SSH>].

72. For more details on the process, see McKay, *supra* note 68.

73. See *id.*

74. David Kravets, *Rogues Falsely Claim Copyright on YouTube Videos to Hijack Ad Dollars*, WIRED (Nov. 21, 2011, 6:30 AM), <http://www.wired.com/threatlevel/2011/11/youtube-filter-profitting> [<https://perma.cc/U9VU-2NUL>].

75. *Id.*

76. *YouTube Community Guidelines Enforcement*, GOOGLE TRANSPARENCY REP., <https://transparencyreport.google.com/youtube-policy/removals?hl=en> [<https://perma.cc/3KQC-FSN6>].

July and September 2019, most of them flagged by computer algorithms and never seen by human eyes.⁷⁷

Not everything removed, however, falls into the category of objectively objectionable content. That is because YouTube also retains the contractual right via its terms of service to remove any content that it wants from the system.⁷⁸ This situation formed the basis of the lawsuit in *Song Fi, Inc. v. Google, Inc.*⁷⁹ In *Song Fi*, YouTube flagged a video as having its view count artificially inflated in violation of the site's terms of service.⁸⁰ While the court concluded that inflated view counts were not "otherwise objectionable" as the term is used in section 230(c) of the Communications Decency Act,⁸¹ the removal of the video after flagging was allowed as a contractual matter.⁸² Thus, YouTube has generally been allowed to remove whatever content it chooses, as long as its terms of use are followed.

Again, YouTube's ability to remove videos is not always going to be an issue for creators—the site has a vested interest in encouraging as much posted content as possible from as many users as it can get. Despite this interest, YouTube's ability to remove content at any time for copyright infringement or service violations means that creators must remain vigilant in order to keep their work publicly available. If there were other high-traffic video sites available for the uploading of content and easy location by potential viewers, YouTube's content removal would not be a problem. As it is, however, creators must choose between following YouTube's rules and not being seen at all.

B. The Facebook Fight for Likes

Facebook is more than just a way to reconnect with old friends, admire new baby photos, and spread nonsensical conspiracy theories. For millions of small-business owners and creative workers, Facebook has

77. *Id.*

78. *Terms of Service*, YOUTUBE, <https://www.youtube.com/static?template=terms> [<https://perma.cc/A5LP-4C35>]. Among other terms given, "YouTube reserves the right to decide whether Content violates these Terms of Service for reasons other than copyright infringement, such as, but not limited to, pornography, obscenity, or excessive length. YouTube may at any time, without prior notice and in its sole discretion, remove such Content and/or terminate a user's account for submitting such material in violation of these Terms of Service." *Id.*

79. *Song Fi, Inc. v. Google, Inc.*, 108 F.Supp. 3d 876, 879–80 (N.D. Cal. 2015).

80. *Id.* at 880.

81. Communications Decency Act, 47 U.S.C. § 230(c)(2) ("No provider or user of an interactive computer service shall be held liable on account of (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable").

82. *Song Fi*, 108 F.Supp. 3d at 885.

offered a new way to connect with customers and patrons.⁸³ The limited reach of such small or local entities prior to social media has been obliterated by the worldwide presence of sites like Facebook.

Facebook has encouraged creator connections from the beginning. In 2007, just three years after Facebook exploded onto the Internet scene, the site began offering its “Pages” service.⁸⁴ These professional Pages allowed creators to build an online home—without the difficulty or cost of developing an independent website—where fans and consumers could easily find the most up-to-date information on products and services.⁸⁵ Importantly, Facebook Pages also had the effect of luring these creators away from competing social media sites like MySpace.⁸⁶

This creative and small-business utopia could not, however, continue to exist in the for-profit environment of Facebook. Almost immediately, Facebook began to offer advertising to those who had set up professional Pages, promising greater reach in return for ad dollars.⁸⁷ Later, Facebook doubled down on this plan, changing the site’s algorithms to decrease the visibility of non-promoted Pages.⁸⁸ Ostensibly, this change was meant to benefit the average Facebook user; instead of seeing advertising copy throughout their feeds, Facebook users would see their friends’ status

83. See *Facebook Pages: Create a Beautiful Online Home for Your Business*, FACEBOOK FOR BUS., <https://www.facebook.com/business/pages> [<https://perma.cc/RJ2R-LENM>].

84. Sam Hollingsworth, *Facebook Group vs. Facebook Page: What’s Better for Your Brand?*, SEARCHENGINE J. (Oct. 4, 2019), <https://www.searchenginejournal.com/facebook-group-vs-facebook-page/325997/> [<https://perma.cc/BB7A-66RL>].

85. Press Release, Facebook, Facebook Unveils Facebook Ads (Nov. 6, 2007), <https://newsroom.fb.com/news/2007/11/facebook-unveils-facebook-ads/> [<https://perma.cc/K8L6-NWBY>]. In the initial launch, Facebook explicitly pointed out that Facebook Pages, while available for ad sales, were meant to allow users to engage “in the same way they interact with other Facebook user profiles.” *Id.*

86. Facebook overtook MySpace in terms of unique monthly visitors (in the United States) back in May 2009, more than doubling its traffic from the same time in the previous year. The disparity between the two sites has only increased since then (although you probably have not checked in years, MySpace does still exist). JR Raphael, *Facebook Overtakes MySpace in U.S.*, PCWORLD (June 16, 2009, 2:35 PM), https://www.pcmag.com/article/166794/Facebook_Overtakes_MySpace_in_US.html [<https://perma.cc/U89X-QZ88>].

87. Facebook Unveils Facebook Ads, *supra* note 85.

88. One of the more recent changes, implemented in 2018, removed Facebook’s News Feed feature in response to issues with “fake news.” While decreasing visibility of professional pages was not, in this case, the goal of the change, Facebook head Mark Zuckerberg acknowledged that the update would mean “less public content like posts from businesses, brands, and media.” *Quoted in* Larry Kim, *RIP, Facebook News Feed for Publishers*, INC. (Jan. 11, 2018), <https://www.inc.com/larry-kim/rip-facebook-news-feed-for-publishers.html> [<https://perma.cc/7WK8-GNEJ>].

updates and hilarious memes.⁸⁹ The only ads would be paid offerings that profited Facebook.⁹⁰

Users could have seen this change as an altruistic move on Facebook's part if it were not for the multitudes of small businesses and independent creators that were hurt by the change. Instead of fans hearing about new work immediately via Facebook, such fans would have to engage in an extended process to find *anything* posted to a professional Page if advertising money was not paid to Facebook to promote that page.⁹¹ Facebook's most recent site design requires a user searching for a professional Page to click a general "Pages" link from the user's homepage feed. There is then an option to click again on "Liked Pages." At this point, the user can slowly scroll through all Pages that user has ever "liked." The user can alternatively find the Page by searching for the Page's exact name—but this type of search is not always an easy task, considering that Facebook requires unique names for each Page on its site.⁹² In general, very few posts from a user's Liked Pages ever make it onto a user's Facebook feed, leaving such manual searches as the only way to find out Page information.

The results of such a confusing and potentially expensive system for the professional use of Facebook for promotion has had significant, real-world consequences over the past decade. Facebook's impact on small-scale creators is often anecdotal, but there is concrete evidence of economic and legal implications as well; as described below, Facebook's practices have affected entire creative industries.

An example of these effects can be found in the massive layoffs that happened at comedy website "Funny or Die" in early 2018.⁹³ With the entire editorial team of the website abruptly let go, one member of that

89. See Shannon Tien, *How the Facebook Algorithm Works and How to Make It Work for You*, HOOTSUITE (Apr. 25, 2018), <https://blog.hootsuite.com/facebook-algorithm/> [<https://perma.cc/RP5V-AJWP>].

90. Of course, ads willing to pay Facebook and ads that users actually want to see are very different things. For example, the author's personal Facebook page (at the moment this Note was originally written) prominently advertised Lysol disinfectant, CBS All Access, and Mike Bloomberg's 2020 presidential campaign.

91. Facebook does not offer instructions on this method: instead, the author of this paper initiated a practical search to find known "liked" Pages on her own Facebook account. Perhaps adding to the confusion is the fact that the "Pages" link defaults to "Your Pages," those that a user has set up for their own personal or business use. Only by clicking through to "Liked Pages" can the user find another party's professional Page.

92. See Christina Newberry, *How to Create a Facebook Business Page in 7 Easy Steps*, HOOTSUITE (Feb. 10, 2020), <https://blog.hootsuite.com/steps-to-create-a-facebook-business-page/> [<https://perma.cc/X5TB-RXW2>].

93. See Sarah Aswell, *How Facebook Is Killing Comedy*, VULTURE (Feb. 6, 2018), <https://www.vulture.com/2018/02/how-facebook-is-killing-comedy.html> [<https://perma.cc/JEE6-5FR8>].

team laid the blame squarely on Facebook.⁹⁴ That writer, Matt Klinman, made it clear in an interview that Facebook’s practices—not any business or editorial decisions at “Funny or Die”—were responsible for what happened:

Facebook started exerting more and more control of what was being seen, to the point that they, not our website, essentially became the main publishers of everyone’s content. Today, there’s no reason to go to a comedy website that has a video if that video is just right on Facebook. And that would be fine if Facebook compensated those companies for the ad revenue that was generated from those videos, but because Facebook does not pay publishers, there quickly became no money in making high-quality content for the internet.⁹⁵

Klinman was even more direct on Twitter, posting that “Mark Zuckerberg just walked into Funny or Die and laid off all my friends.”⁹⁶

The issue that Klinman pointed out is that Facebook—with its massive user base attracting advertisers—has been able to entice websites to post their content directly onto Facebook.⁹⁷ In order for that content to be most visible to Facebook users, valuable content such as video and images need to appear directly on the social media’s page. As a result, there are increasingly fewer reasons for any user to visit the originating website. Those websites then lose advertising money of their own and layoffs follow.⁹⁸

This cycle has been going on for several years. One of the biggest and most impactful situations occurred in 2016 with the “Pivot to Video” incident.⁹⁹ In April of that year, Facebook founder Mark Zuckerberg declared in an interview: “We’re entering this new golden age of video. I wouldn’t be surprised if you fast-forward five years and most of the content that people see on Facebook and are sharing on a day-to-day basis

94. *Id.*

95. *Id.*

96. Matt Klinman (@mattklinman), TWITTER (Jan. 23., 2018, 1:02 PM), <https://twitter.com/mattklinman/status/955908513410281476?lang=en> [<https://perma.cc/M8PD-DZ9F>].

97. By 2018, Facebook and Google took in sixty percent of all digital advertising revenue. Kurt Wagner, *Digital Advertising in the US Is Finally Bigger Than Print and Television*, VOX (Feb. 20, 2019, 9:02 AM), <https://www.vox.com/2019/2/20/18232433/digital-advertising-facebook-google-growth-tv-print-emarketer-2019> [<https://perma.cc/3LP6-839A>].

98. *See id.*

99. While it is unclear where the “pivot to video” term originated, the phrase has been used in most reporting on the situation for the past few years. *See* Maya Kosoff, *Was the Media’s Big ‘Pivot to Video’ All Based on a Lie?*, VANITY FAIR (Oct. 17, 2018), <https://www.vanityfair.com/news/2018/10/was-the-medias-big-pivot-to-video-all-based-on-a-lie> [<https://perma.cc/33MT-AWMT>]; Issie Lapowsky, *A New Facebook Lawsuit Makes ‘Pivot to Video’ Seem Even More Shortsighted*, WIRED (Oct. 17, 2018), <https://www.wired.com/story/facebook-lawsuit-pivot-to-video-mistake/> [<https://perma.cc/XE3P-CP8J>].

is video.”¹⁰⁰ At the same time, Facebook indicated that video on the site was booming, especially for its new (at that time) Facebook Live feature.¹⁰¹

The reaction to this news was swift and significant throughout the media and advertising industries. In particular, the entire media industry started to shift based on Facebook’s numbers:¹⁰² if Facebook were only to promote videos, after all, there was little purpose in producing print or image-based content when ever-increasing revenue for these sites came from the social-media giant. Online journalism sites—including major players like MTV News, Fox Sports, and Mic—laid off writers and turned their focus (and hiring) to video production.¹⁰³ Such a reaction would have been impactful enough on its own, with Facebook appearing to control the methods by which journalists gather and report the news. This was not, however, the whole story. Within a few months, questions began to arise about the numbers reported by Facebook since 2015 for its video views; specifically, allegations surfaced that the numbers had been inflated.¹⁰⁴ By September 2016, Facebook admitted that the numbers released were in “error,” claiming that there had been a “miscalculation” that overstated the number of total video views.¹⁰⁵ Outside estimates of this “miscalculation” indicated that the overstatement was at least on the order of sixty to eighty percent,¹⁰⁶ but might have been as high as nine hundred percent.¹⁰⁷

Members of the advertising industry, who had made financial decisions on where to spend ad dollars based on Facebook’s misinformation, sued in 2017.¹⁰⁸ This lawsuit resulted in a \$40 million

100. Mat Honan, *Why Facebook and Mark Zuckerberg Went All In on Live Video*, BUZZFEED NEWS (Apr. 6, 2016), <https://www.buzzfeednews.com/article/mathonan/why-facebook-and-mark-zuckerberg-went-all-in-on-live-video> [<https://perma.cc/XC5S-YH2Z>].

101. See Jason Lederman, *Mark Zuckerberg: Within Five Years, Facebook Will Be Mostly Video*, POPULAR SCI. (Apr. 6, 2016), <https://www.popsci.com/mark-zuckerberg-within-five-years-facebook-will-be-mostly-video/> [<https://perma.cc/ZLW8-GX6Z>]. Facebook Live allowed users the opportunity to post live video broadcasts on their Facebook pages. See *Facebook Live*, FACEBOOK, <https://www.facebook.com/formedia/solutions/facebook-live> [<https://perma.cc/L5U5-YNAU>].

102. Lapowsky, *supra* note 98.

103. *Id.*

104. *Id.*

105. David Fischer, *Facebook Video Metrics Update*, FACEBOOK FOR BUS. (Sept. 23, 2016), <https://www.facebook.com/business/news/facebook-video-metrics-update> [<https://perma.cc/Y4Q7-BQUV>].

106. Suzanne Vranica & Jack Marshall, *Facebook Overestimated Key Video Metric for Two Years*, WALL ST. J. (Sept. 22, 2016), <https://www.wsj.com/articles/facebook-overestimated-key-video-metric-for-two-years-1474586951> [<https://perma.cc/B3SH-KRFJ>].

107. Lapowsky, *supra* note 98.

108. See *Letizia v. Facebook Inc.*, 267 F. Supp. 3d 1235 (2017).

settlement for the advertisers, with Facebook forced to admit some details of its erroneous video numbers.¹⁰⁹

This may have been a victory for the advertisers involved in the Facebook lawsuits, but the settlement offered little help to the online journalism industry. Following the Pivot to Video incident, publishers who chose to focus on video over written content experienced drops in website traffic of sixty percent or more in the following year.¹¹⁰ In many cases, writers were not rehired when video's dominance receded.¹¹¹ Meanwhile, many of the video producers who had been hired during the Pivot to Video time period lost their jobs as well.¹¹²

III. WHAT CAN BE DONE?

A. Intellectual Property's Limited Assistance

There is something of a David-and-Goliath feel when a small-scale creator takes on a corporation so huge that they trigger an international antitrust investigation. Individually, such a creator has little chance of making a dent in the armor of large corporations like Google and Facebook. Still, there are some angles of attack that smaller creators can take to protect and promulgate their work in an age of dominant Internet corporations.

Unfortunately, the most obvious avenue for a creator, that of intellectual property protection, is of little help. As content providers and facilitators, companies like Google and Facebook are rarely responsible for direct infringements on intellectual property. Instead, under the Digital

109. See Ethan Baron, *Facebook Agrees to Pay \$40 Million Over Inflated Video Viewing Times But Denies Doing Anything Wrong*, MERCURY NEWS (Oct. 7, 2019), <https://www.mercurynews.com/2019/10/07/facebook-agrees-to-pay-40-million-over-inflated-video-viewing-times-but-denies-doing-anything-wrong/> [<https://perma.cc/EX52-NXHN>]; Lapowsky, *supra* note 98.

110. Ross Benes, *Side Effect of the Pivot to Video: Audience Shrinkage*, DIGIDAY (Sept. 21, 2017), <https://digiday.com/media/side-effect-pivot-video-audience-shrinkage/> [<https://perma.cc/UP5L-D65U>]. Notably, publishers that increased video production *without* removing written content experienced steady traffic during the same period.

111. In 2018, *The Atlantic* assessed the situation after the Pivot to Video and determined that at least 350 writers had been laid off from national news organizations following Facebook's claims. Additionally, the article noted the possibility that a significant number of writers and reporters at local organizations were let go as well. Alexis C. Madrigal and Robinson Meyer, *How Facebook's Chaotic Push into Video Cost Hundreds of Journalists Their Jobs*, ATLANTIC (Oct. 18, 2018), <https://www.theatlantic.com/technology/archive/2018/10/facebook-driven-video-push-may-have-cost-483-journalists-their-jobs/573403/> [<https://perma.cc/9CK2-SZK9>].

112. *Id.* While many of the affected companies are privately held, thereby making employment statistics hard to find, anecdotal evidence from those who lost their jobs during this period supports the lack of a return to employment.

Millennium Copyright Act (DMCA), service providers—like Google and Facebook—are immune from most intellectual property prosecution:

A service provider shall not be liable . . . for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider . . . does not have actual knowledge that the material or an activity using the material on the system or network is infringing; . . . [or] upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material¹¹³

While Internet companies may be legally protected from intellectual property attacks, the actual function of the law may allow some workarounds for creators.

One such workaround can be seen in the creative responses that have been made to YouTube's Content ID system. A notable example of this can be found on YouTube channel "The Original Ace," where the channel's owner determined how to make otherwise unavailable money from Content ID copyright claims.¹¹⁴ The Original Ace had posted a Minecraft-themed parody of *Gangsta's Paradise*, which was later claimed by the rights holder for the original Coolio song.¹¹⁵ When the fair use exception dispute was denied by the record label, The Original Ace took a new tack: he also claimed to control the copyright on the video.¹¹⁶ Strangely, such double-claiming of a copyright seems to be very much allowed by YouTube, and The Original Ace thus began sharing revenue of his original video with a major record label.¹¹⁷

Surprisingly, YouTube's system does not make this work-around particularly difficult. The Original Ace detailed the entire work-around process in a second video, the blatantly titled *Abusing YouTube Copyright Claims (Tutorial)*.¹¹⁸ By incorporating the Content ID system's problems with another of YouTube's less-popular features and disallowing monetization for accounts that do not meet a minimum number of

113. 17 U.S.C. § 512(e).

114. The Original Ace, *I Copyright Claimed My Own YouTube Video to Get It Re-Monetized*, YOUTUBE (May 24, 2019), <https://www.youtube.com/watch?v=mAgAfo7l4E8> [<https://perma.cc/9M6T-SAXA>].

115. *Id.*

116. *Id.*

117. *Id.*

118. The Original Ace, *Abusing YouTube Copyright Claims (Tutorial)*, YOUTUBE (Nov. 24, 2019), <https://www.youtube.com/watch?v=Mz14U1-r63w> [<https://perma.cc/AB2P-HCUF>]. In case there is any question of this being an obscure bit of advice, it is worth noting that the video received over 400,000 views in less than one month.

subscribers,¹¹⁹ The Original Ace explains how easy it is to turn Content ID into a profit-making enterprise. Someone uploading a video simply needs to register that video's music (preferably original music, but the potential for theft here is impressive) with a distribution company that already has a Content ID account with YouTube.¹²⁰ Using that access to Content ID, the uploader is legitimized as a copyright holder and may claim any YouTube video that contains the music.¹²¹ Oddly, this includes claiming the uploader's *own* videos.¹²² Since YouTube allows monetization of any copyright-claimed video, the uploader with backdoor copyright access can now earn money on the video.¹²³ Copyright laws thus allow a creator to make otherwise disallowed—but entirely legal—money from YouTube and its parent company Google.

B. Tagging Along with Antitrust Law

When intellectual property methods fail the small-scale creator trying to compete with large Internet corporations, there may still be hope in attaching creative pursuits to antitrust protection via an economic proxy. Much of the Internet's creative work is tied to businesses, both large and small; therefore, anticompetitive laws should allow some limited protection of the underlying creative work if small businesses cannot compete in the market because of the monopolies held by corporations like Google and Facebook.

This strategy has had some success in past litigation. The most notable example occurred in 1997 in *Turner Broadcasting v. FCC*.¹²⁴ This case enforced the Cable Television Consumer Protection and Competition Act of 1992,¹²⁵ requiring cable television systems to allocate a certain number of channels to local broadcast stations.¹²⁶ The Supreme Court held that the “must-carry provisions” of the Act furthered an important governmental interest, namely access to the diverse viewpoints available

119. Until 2018, YouTube allowed virtually all uploaders to monetize videos and collect revenue from ads. After 2018, only accounts with at least one thousand subscribers and four thousand hours of viewing time within the previous twelve months qualified for monetization. *YouTube Partner Program Overview & Eligibility*, YOUTUBE, <https://support.google.com/youtube/answer/72851?hl=en> [https://perma.cc/Z2MH-588W].

120. The Original Ace's video also notes that there are video-distribution networks that also have access to Content ID, allowing those within the network to copyright-claim their own videos if they are ever stolen. The Original Ace, *supra* note 117.

121. *Id.*

122. *Id.*

123. *Id.*

124. See *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180 (1997).

125. 47 U.S.C. § 534.

126. *Turner Broad.*, 520 U.S. at 185.

from local, less-profitable stations.¹²⁷ This was held to be the case even if it meant that cable providers were unable to maximize their profits by neglecting the less financially lucrative local channels.¹²⁸

Federal antitrust victories may also yield positive results for individual creators. As of 2021, a small number of companies dominate the Internet: Google accounts for ninety-two percent of search traffic,¹²⁹ Facebook controls at least sixty percent of social media,¹³⁰ and Amazon accounts for roughly half of all online sales.¹³¹ If antitrust legislation or court decisions were to break up these dominating companies, it is possible that the resulting smaller entities would have an incentive to offer greater protections to their users. As such, although antitrust law offers no direct legal support to online creators, the impact of monopoly-busting could still yield positive results for such groups.

C. *Appealing to Public Policy*

Finally, creators may argue that their work is necessary for the good of society and cannot be controlled by the whims of for-profit Internet corporations. Scholars have suggested—especially in the context of creative work like local newspapers—that the existence of some private companies actually constitutes a public good that should be protected.¹³² The basis of the argument holds that when such businesses are removed, there are measurable and important increases in the economic and social costs to the public.¹³³ Legally, it should be noted that the public good argument has precedent from the *Turner Broadcasting* case—the important governmental interest of supporting local television trumps purely profit-increasing motives for cable providers.¹³⁴

127. *Id.* at 215–16.

128. *Id.*

129. Joseph Johnson, *Global Market Share of Search Engines 2010–2021*, STATISTA (Mar. 12, 2021), <https://www.statista.com/statistics/216573/worldwide-market-share-of-search-engines/> [<https://perma.cc/CWA8-CZDG>].

130. Complaint at 19, *F.T.C. v. Facebook*, No. 1:20-cv-03590 (D.D.C. Jan. 13, 2021).

131. Tugba Sabanoglu, *U.S. Amazon Retail E-Commerce GMV Share 2016–2021*, STATISTA (Dec. 1, 2020), <https://www.statista.com/statistics/788109/amazon-retail-market-share-usa/> [<https://perma.cc/762H-LUJQ>].

132. See Julia Cagé, *News is a Public Good*, NIEMAN REPS. (Apr. 7, 2016), <https://niemanreports.org/articles/news-is-a-public-good/> [<https://perma.cc/WM5U-EZZN>].

133. Hidden Brain Podcast, *Starving the Watchdog: Who Fools the Bill When Newspapers Disappear?*, NPR (Dec. 10, 2018), <https://www.npr.org/2018/12/09/675092808/starving-the-watchdog-who-foots-the-bill-when-newspapers-disappear> [<https://perma.cc/C98N-A8TC>] (showing that when local newspapers folded, insurance costs for municipalities increased due to the lack of oversight on local politics and civic functions. Those costs are then passed along to the public in the form of either taxes or decreased services.).

134. *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 224 (1997).

While a potentially powerful means of attack on companies like Google and Facebook—which have been held partially responsible for negative impacts on local news companies over the years¹³⁵—only a small number of creative endeavors could ever benefit from the public good argument. In order to do so, such creative work would need to have a demonstrable and direct impact on larger society. Newspapers and television channels have been able to show such effect,¹³⁶ but it is more complicated for other creators to do so; the societal benefits of a single folk singer or knitter of baby blankets are difficult to prove.

IV. REMEDIES FOR CREATORS

Even if creators manage to find methods to take on the big Internet companies, there remains a question of appropriate remedies: What steps can be taken to allow creators to have an impact in a world dominated by Facebook and Google? Simple antitrust efforts are not enough as they are designed to focus on economic impact and not the creation underlying such economics.¹³⁷ New companies jumping into the Internet field when competition is promoted may be no more inclined to help the small creator than the monopolies that came before. It is therefore important for other remedies—workable with the current monopolistic Internet companies and with any successors—to be explored.

One method might be a governmental requirement that Internet companies engage in algorithmic fairness, or at least in transparency. Because algorithms are central to their businesses, companies like Google and (to a lesser extent) Facebook consider such algorithms to be proprietary trade secrets.¹³⁸ The companies release some results from these algorithms to the public, but most of the details underlying their search

135. While ad revenue for newspapers decreased by \$29 billion between 2007 and 2017 (with overall newspaper employment shrinking by twenty-five percent), Google's ad revenue for the same period increased by \$43 billion. Irina Ivanova, *Newsrooms Look to Reclaim Ad Dollars from Big Tech*, CBS NEWS (June 11, 2019), <https://www.cbsnews.com/news/news-media-alliance-blames-big-tech-for-taking-their-ad-dollars/> [<https://perma.cc/Q5AT-SFZG>].

136. Hidden Brain Podcast, *supra* note 132.

137. U.S. DEP'T OF JUST., *supra* note 1 (providing a summary of antitrust regulations and their economic focus).

138. It is notable that these companies have never sought to patent their search algorithms. By choosing the trade secret classification, Internet companies can control and keep the algorithms private indefinitely, as opposed to the limited duration of a patent. See Prajwal Nirwan, *Trade Secrets: The Hidden IP Right*, WIPO (Dec. 2017), https://www.wipo.int/wipo_magazine/en/2017/06/article_0006.html [<https://perma.cc/X3HN-F4HW>]. For a discussion of Facebook's use of algorithms protected by trade secrets, see Will Oremus, *Who Controls Your Facebook Feed*, SLATE (Jan. 3, 2016, 8:02 PM), http://www.slate.com/articles/technology/cover_story/2016/01/how_facebook_s_news_feed_algorithm_works.html [<https://perma.cc/ZBV9-WT27>].

algorithms are completely unknown.¹³⁹ If creators and small, creative companies can determine how algorithms affect searches and visibility online, those entities can tailor their own Internet presences to maximize visibility.

Even if algorithms were not made public, more efforts could be made to require non-paying sites to appear higher in search results. Currently, both Google and Facebook tend to prioritize paid content. For Google, that means advertising by direct payment and requiring bidding on keywords.¹⁴⁰ Facebook actively pushes paid advertising as a method of increasing visibility of Pages without a direct search by a user.¹⁴¹ If such payments were taken out of the search picture, that could result in a higher percentage of accurate and unpaid results appearing on the first page of results.¹⁴² Having that prominent location made available for smaller entities like creators would promote their businesses more effectively than most other means. Additional help could be found by the companies being required to hire more actual humans to spot-check search results, thereby mitigating the big-business biases of algorithms.

Finally, Internet companies could sponsor creative work more directly. To a limited extent, such sponsorship already exists. Artistic work regularly appears in Google's Doodle program.¹⁴³ YouTube, meanwhile, devotes funds to legal fees that allow a few creators to fight copyright claims made by large corporations against their work.¹⁴⁴ Individual creators can have their videos featured by both YouTube and Facebook.

139. That may not be entirely bad, as public algorithms allow hackers, and others more interested in profit than ethics, an opportunity to manipulate searches and results to their benefit, thereby hurting the average user or small-time creator even more. See John Naughton, *Good Luck in Making Google Reveal Its Algorithm*, GUARDIAN (Nov. 13, 2016, 2:00 AM), <https://www.theguardian.com/commentisfree/2016/nov/13/good-luck-in-making-google-reveal-its-algorithm> [<https://perma.cc/7PDD-7ZFJ>].

140. See *How We Make Money with Advertising*, GOOGLE, <https://howwemakemoney.withgoogle.com> [<https://perma.cc/HT8A-ZU7L>]; Amy Thomson, *Companies Struggle to Land High in Google Search Results for Their Own Names*, L.A. TIMES (Oct. 10, 2019, 2:45 PM), <https://www.latimes.com/business/technology/story/2019-10-10/companies-struggle-to-land-high-in-google-search-results-for-their-own-names> [<https://perma.cc/WH9N-CXU5>].

141. *Facebook Ads*, FACEBOOK FOR BUSINESS, <https://www.facebook.com/business/ads> [<https://perma.cc/XB2M-GV22>].

142. Studies have indicated that approximately ninety percent of users do not progress past the first page of search-engine results. See Jeff Bullas, *10 Facts Reveal the Importance of Ranking High in Google*, JEFF BULLAS'S BLOG (July 14, 2010), <https://www.jeffbullas.com/10-facts-reveal-the-importance-of-ranking-high-in-google/> [<https://perma.cc/EY9N-WHTT>].

143. Google's Doodles are designed by an in-house team of illustrators, often based on outside suggestions. While the employment of artists can never be discounted, it is important to note that outside creators do not have any direct ability to create the popular and prominent Doodles. GOOGLE DOODLES, *supra* note 18.

144. *What Is Fair Use?*, YOUTUBE, <https://www.youtube.com/about/copyright/fair-use/#yt-copyright-protection> [<https://perma.cc/29RP-WFVZ>].

All of these efforts increase the visibility of creators online, but their reach remains necessarily limited. YouTube cannot, of course, afford to defend the copyright claims of every video producer claiming fair use. Google cannot commission work from every aspiring artist. Such remedies are therefore limited, even if they represent important first steps.

These steps may, however, gain in importance if the monopolistic situation surrounding the big Internet companies changes. If more companies were competing for the eyes and time of online users, promotion of creative content could prove a major draw for any site willing to promote that work. As it is, with only a few companies dominating the Internet, special draws are of little importance and must therefore remain of minimal impact to the creative world.