

# INCREASING COPYRIGHT PROTECTION FOR SOCIAL MEDIA USERS BY EXPANDING SOCIAL MEDIA PLATFORMS' RIGHTS

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## ABSTRACT

*Social media platforms allow users to share their creative works with the world. Users take great advantage of this functionality, as Facebook, Instagram, Flickr, Snapchat, and WhatsApp users alone uploaded 1.8 billion photos per day in 2014. Under the terms of service and terms of use agreements of most U.S. based social media platforms, users retain ownership of this content, since they only grant social media platforms nonexclusive licenses to their content. While nonexclusive licenses protect users vis-à-vis the social media platforms, these licenses preclude social media platforms from bringing copyright infringement claims on behalf of their users against infringers of user content under the Copyright Act of 1976. Since the average cost of litigating a copyright infringement case might be as high as two million dollars, the average social media user cannot protect his or her content against copyright infringers. To remedy this issue, Congress should amend 17 U.S.C. § 501 to allow social media platforms to bring copyright infringement claims against those who infringe their users' content. Through this amendment, Congress would create a new protection for social media users while ensuring that users retain ownership over the content they create.*

## INTRODUCTION

An estimated 2.34 billion people used social media in 2016, and this number is predicted to increase to 2.95 billion by 2020.<sup>1</sup> Social media users are logging onto systems designed to facilitate the sharing and communication of user created content,<sup>2</sup> and they are prolific sharers.<sup>3</sup>

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<sup>1</sup>*Number of Social Media Users Worldwide from 2010 to 2020 (in Billions)*, STATISTA, <https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/> (last visited Oct. 28, 2016).

<sup>2</sup> The Sedona Conference, *The Sedona Conference Glossary: E-Discovery & Digital Information Management (Fourth Edition)*, 15 SEDONA CONF. J. 305, 324 (2014) (defining “social media” as “[i]nternet applications which permit individuals or organizations to interactively share and communicate”). Additionally, the Sedona Conference defines a “social network” as “[a] group of people that use the

Facebook, Instagram, Flickr, Snapchat, and WhatsApp users alone “upload[ed] 1.8 billion images . . . every day” in 2014.<sup>4</sup> A substantial proportion of this shared content is copyrightable subject matter like pictures and videos.<sup>5</sup> This proliferation of copyrightable subject matter enables individuals to connect and stay apprised of each other’s lives, but it also provides potential copyright infringers ample material to copy and illegally share.<sup>6</sup> Such unauthorized sharing infringes the “interests of authors and inventors in the control and exploitation of their writings and discoveries . . . .”<sup>7</sup>

Currently, because social media users hold the exclusive rights to their content, they are the only actors capable of counteracting the infringement of their copyrighted material.<sup>8</sup> While social media platforms should not be the exclusive rights holders to content users create,<sup>9</sup> platforms

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Internet to share and communicate, either professionally or personally, in a public setting typically based on a specific theme or interest.” *Id.* Informatively, Facebook is explicitly identified later in this definition as “a popular social network that allows people to connect to friends . . . anywhere in the world in order to share . . . pictures . . . .” *Id.*

<sup>3</sup> See *Amount of User-Generated Content Created per Online Minute in 2012, by Platform*, STATISTA, <https://www.statista.com/statistics/252485/new-content-generated-by-users-per-minute-by-platform/> (last visited Oct. 28, 2016) (illustrating that Facebook users shared an average of 684,478 pieces of content and Twitter users tweeted an average of 100,000 Tweets *per minute* in 2012).

<sup>4</sup> Jim Edwards, *Planet Selfie: We’re Now Posting a Staggering 1.8 Billion Photos Every Day*, BUS. INSIDER (May 28, 2014, 11:30 AM), <http://www.businessinsider.com/were-now-posting-a-staggering-18-billion-photos-to-social-media-every-day-2014-5>.

<sup>5</sup> See 17 U.S.C. §§ 102(a)(5)–(6) (2012) (recognizing pictures and movies are copyrightable subject matter if they are sufficiently creative and original).

<sup>6</sup> See Oliver Herzfeld & Marc Aaron Melzer, *Fair Use in the Age of Social Media*, FORBES (May 26, 2016, 9:34 AM), <http://www.forbes.com/sites/oliverherzfeld/2016/05/26/fair-use-in-the-age-of-social-media/#26cbfcb826cd> (linking the dramatic increase in social media usage to an increase in questions surrounding copyright infringement).

<sup>7</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

<sup>8</sup> See 17 U.S.C. § 501(b) (2012) (allowing only exclusive rights holders “to institute an action for any infringement of that particular right committed while he or she is the owner of it”); see also, e.g., *Terms of Use*, INSTAGRAM, <https://help.instagram.com/478745558852511> [hereinafter *Instagram TOU*] (last visited Sept. 24, 2016) (“Instagram does not claim ownership of any Content that you post on or through the Service. Instead, you hereby grant to Instagram a non-exclusive, fully paid and royalty-free, transferable, sub-licensable, worldwide license to use the Content that you post on or through the Service . . .”).

<sup>9</sup> Cf. Laura Wagner, *Is Facebook Suppressing Politically Conservative Content?*, NPR: THE TWO-WAY

are better situated than individual users to bear the extreme costs associated with copyright infringement litigation.<sup>10</sup> This leaves an *enforcement paradox*: those who can legally bring copyright infringement claims are economically unable to do so, and those who are economically equipped are legally unable to bring such claims. The practical effect of the paradox is that it leaves users' content unprotected.

One solution to this paradox would be to force social media users to transfer their exclusive rights to social media platforms to protect their content. However, such a forced transfer would leave users vulnerable to predatory terms of service agreements. Instead, Congress should intervene to protect user content in this expanding technological and commercial realm by following the example it set for itself nearly twenty years ago when it passed the Digital Millennium Copyright Act (DMCA) to amend the Copyright Act of 1976 (Copyright Act) to balance the interests of content owners and content providers.<sup>11</sup> Congress should amend 17 U.S.C. § 501 to allow social media platforms to bring suit as a nonexclusive rights holder for the infringement of users' content. Congress should limit this new right to scenarios where the nonexclusive rights holder is a social media platform and the infringed content belongs to the platform's user. Such an amendment would "balance[] the interests of content owners, on-line and other service providers, and information users to foster the continued development of electronic commerce and the growth of the Internet,"<sup>12</sup> thereby advancing the goals of the DMCA and the Copyright Act in the realm of social media.

This proposed amendment raises the question of why social media platforms would want or use this right. After discussion of social media platforms' terms of service and modern day copyright law in the United States in Parts I and II, Part III of this Article seeks to answer this question by showing the negative economic impact poor user protections can have on

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(May 10, 2016, 6:06 PM), <http://www.npr.org/sections/thetwo-way/2016/05/10/477525204/is-facebook-suppressing-politically-conservative-content> (noting the negative reaction to social media sites controlling – or at the very least influencing – what content is displayed to users). Social media platforms would exercise said control over the surfacing of user content if they were the exclusive rights holders of users' content. 17 U.S.C. § 106 (2012).

<sup>10</sup> Shyamkrishna Balganes, *Copyright Infringement Markets*, 113 COLUM. L. REV. 2277, 2280 (2013) ("As of 2011, the average cost of litigating a copyright infringement case through trial, for either plaintiff or defendant—and excluding judgment and awards—was estimated to range from \$384,000 to a staggering \$2 million.").

<sup>11</sup> Digital Millennium Copyright Act, Pub. L. No. 105–304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.) ("An Act to amend title 17, United States Code . . .").

<sup>12</sup> H.R. Rep. No. 105-551, pt. 2, at 21 (1998) (Conf. Rep.).

social media platforms. Thus, by increasing the rights held by social media platforms, Congress can increase the copyright protection enjoyed by social media users.

### I. ANALYZING SOCIAL MEDIA TERMS OF SERVICE

The enforcement paradox has its roots in the terms of service and terms of use documents that control interactions among social media users, and between users and the social media platform. The terms of service documents for Facebook,<sup>13</sup> Instagram,<sup>14</sup> Snapchat,<sup>15</sup> Twitter,<sup>16</sup> and YouTube<sup>17</sup> share a common structure: individual users retain ownership of the content they create and share on the social media platform, but they grant a nonexclusive license to the social media platform to use their content. However, there are slight differences in the scope of the grants between social media platforms. YouTube, potentially in an effort to promote fair use, expands this nonexclusive license to also allow other YouTube users “to access [user’s] Content through the Service, and to use,

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<sup>13</sup> *Statement of Rights and Responsibilities*, FACEBOOK, <https://www.facebook.com/terms> [hereinafter *Facebook TOS*] (last visited Sept. 24, 2016) (“You own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings. In addition: 1. For content that is covered by intellectual property rights . . . [subject to privacy settings] you grant us a *non-exclusive . . . license* to use any IP content that you post on or in connection with Facebook (IP License).”) (emphasis added).

<sup>14</sup> *Instagram TOU*, *supra* note 8 (“Instagram does not claim ownership of any Content that you post on or through the Service. Instead, you hereby grant to Instagram a *non-exclusive*, fully paid and royalty-free, transferable, sub-licensable, worldwide *license* to use the Content that you post on or through the Service, subject to the Service's Privacy Policy.”) (emphasis added).

<sup>15</sup> *Snap Inc. Terms of Service*, SNAP INC., <https://www.snap.com/en-US/terms/> [hereinafter *Snap TOS*] (last visited Sept. 24, 2016) (“Many of our Services let you create, upload, post, send, receive, and store content. When you do that, you retain whatever ownership rights in that content you had to begin with. But you grant us a license to use that content.”).

<sup>16</sup> *Twitter Terms of Service*, TWITTER, <https://twitter.com/tos?lang=en#content> (last visited Sept. 24, 2016) (“By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, *non-exclusive*, royalty-free *license* (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed.”) (emphasis added).

<sup>17</sup> *Terms of Service*, YOUTUBE, <https://www.youtube.com/static?template=terms> (last visited Sept. 24, 2016) (“For clarity, you retain all of your ownership rights in your Content. However, by submitting Content to YouTube, you hereby grant YouTube a worldwide, *non-exclusive*, royalty-free, sublicensable and transferable *license* to use, reproduce, distribute, prepare derivative works of, display, and perform the Content in connection with the Service . . . .”) (emphasis added).

reproduce, distribute, display and perform such Content as permitted through the functionality of the Service and under these Terms of Service.”<sup>18</sup> Interestingly, Snapchat, which is known for its ephemeral messaging service, retains the most rights and controls to its users’ content.<sup>19</sup> However, even Snapchat’s far-reaching control only extends to “crowd-sourced Services [that] are inherently public and chronicle matters of public interest,”<sup>20</sup> or to content that others can likely reproduce without copyright infringement.<sup>21</sup> Thus, the terms of service agreements that users must agree to prior to using social media platforms<sup>22</sup> give platforms mere nonexclusive licenses over the content that is most vulnerable to copyright infringement.

Along with common license grants, the terms of service agreements also provide similar limits on social media platforms’ available actions in response to copyright infringement. U.S. based social media platforms stress the importance of user’s privacy and rights and delineate specific methods to protect the privacy and the rights of its users.<sup>23</sup> For instance, platforms reserve the right to remove content. Facebook reserves the right to “remove any content or information [a user] post[s] on Facebook if [Facebook] believe[s] that it violates this Statement or [Facebook’s] policies.”<sup>24</sup> One way a user violates Facebook’s Statement is by “post[ing] content or tak[ing] any action on Facebook that infringes or violates someone else’s rights or otherwise violates the law.”<sup>25</sup> Under the terms of service, this reserved right is permissive.<sup>26</sup> Thus, absent some other legal requirement, the terms of service do not obligate the social media platforms

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<sup>18</sup> *Id.*

<sup>19</sup> See *Snap TOS*, *supra* note 15 (granting Snapchat “a perpetual license to create derivative works from, promote, exhibit, broadcast, syndicate, sublicense, publicly perform, and publicly display” what Snapchat deems to be crowd-sourced content).

<sup>20</sup> *Id.*

<sup>21</sup> See *infra* note 77 and accompanying text (explaining fair use).

<sup>22</sup> See, e.g., *Facebook TOS*, *supra* note 13 (“By using or accessing the Facebook Services, you agree to this Statement, as updated from time to time in accordance with Section 13 below.”).

<sup>23</sup> E.g., *id.* (stating that “[user] privacy is very important to us” and later devoting a section of the terms of service to “Protecting Other People’s [including other user’s] Rights”).

<sup>24</sup> E.g., *id.*

<sup>25</sup> *Id.* Other social media platforms also list the sharing of material that would constitute copyright infringement to be a violation of the platform’s terms of service. E.g., *Instagram TOU*, *supra* note 8 (users may not post content that “violate[s], misappropriate[s] or infringe[s] on the rights of any third party, including, without limitation, privacy rights, publicity rights, copyrights, trademark and/or other intellectual property rights”).

<sup>26</sup> *Facebook TOS*, *supra* note 13 (“We *can* remove [infringing content].”) (emphasis added).

to remove user content.<sup>27</sup> However, this permissive right only enables social media platforms to remove content posted onto their platform, it does not extend to instances where content is copied from their platform and republished outside their platform.<sup>28</sup> If a user posts his or her original content (e.g., a creative photo) onto Facebook, and a commercially motivated individual sees the photo, copies it off of Facebook and then republishes the non-transformed photo on some website outside of the Facebook platform without the Facebook user's permission, nothing in the Facebook terms of service permits Facebook to take any action to combat this clear case of copyright infringement.

In short, the terms of service documents set up the contractual relationship between the social media platforms and their users.<sup>29</sup> Through this relationship, users retain ownership of their content while the social media platforms are granted a nonexclusive license to the content.<sup>30</sup> If users infringe on the copyright rights of others on the social media platforms, then the social media sites may take action.<sup>31</sup> If the infringement takes place outside of the social media platform, then the terms of service do not provide the social media platform with any method to protect the rights of their users.<sup>32</sup>

## II. ANALYZING THE COPYRIGHT ACT OF 1976

When paired with current copyright law, the nonexclusive licenses granted in social media platforms' terms of service agreements generate the legal portion of the enforcement paradox. The Copyright Act grants certain exclusive rights over copyrighted material, and only the holders of these exclusive rights may bring suits for copyright infringement under the Act.

### A. *Copyright Holder's Rights*

The Copyright Act protects "original works of authorship fixed in any tangible medium of expression."<sup>33</sup> There are three distinct requirements

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<sup>27</sup> *Snap TOS*, *supra* note 15 ("Although Snap Group Limited reserves the right to review all content that appears on the Services and to remove any content that violates these Terms, we do not necessarily review all of it. So we cannot—and do not—take responsibility for any content that others provide through the Services.").

<sup>28</sup> *See generally Facebook TOS*, *supra* note 13 (providing remedies for copyright infringement *only* when the infringing content is posted within the Facebook platform).

<sup>29</sup> *E.g.*, *Snap TOS*, *supra* note 15.

<sup>30</sup> *See supra* note 17 and accompanying text.

<sup>31</sup> *See supra* note 25 and accompanying text.

<sup>32</sup> *See id.* (limiting applicability of the terms of service document to conduct performed on the social media platform).

<sup>33</sup> 17 U.S.C. § 102(a)(5) (2012).

within this short clause: the work must be a work of authorship, the work must be original, and the work must be fixed.<sup>34</sup> As defined by the Act, “[w]orks of authorship include . . . pictorial, graphic, and sculptural works.”<sup>35</sup> As defined by the Supreme Court, a work is original when said “work [is] independently created by the author (as opposed to copied from other works), and [when] it possesses at least some minimal degree of creativity.”<sup>36</sup> Lastly, a work is fixed when “the work [is] embodied in a medium, i.e., placed in a medium such that it can be perceived, reproduced, etc., from that medium . . . , and [remains] thus embodied ‘for a period of more than transitory duration . . . .’”<sup>37</sup> So long as a work published onto a social media platform contains a modicum of creativity, it is now widely recognized as deserving the protection of the Copyright Act.<sup>38</sup>

The Copyright Act grants “copyright holders . . . the exclusive rights of 1) reproduction, 2) making derivative works, 3) distribution, 4) public performance, 5) and public display.”<sup>39</sup> Each of these individual rights can exist independent of the other rights, as the term “copyright owner” is

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<sup>34</sup> See *id.* (describing characteristics works need to eligible for copyright protection).

<sup>35</sup> *Id.*

<sup>36</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (quoting 1 M. NIMMER & D. NIMMER, COPYRIGHT §§ 2.01[A], [B] (1990)).

<sup>37</sup> *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 127 (2d Cir. 2008).

<sup>38</sup> See, e.g., Sharon Roberg-Rodriguez, *‘I Found it on Twitter’ — Not a Defense in Copyright Case*, LAW360 (Oct. 7, 2014, 10:08 AM) <http://www.law360.com/article/s/582169/i-found-it-on-twitter-not-a-defense-in-copyright-case> (recognizing material posted on social media as worthy of copyright protection).

<sup>39</sup> Jennifer Jenkins, *In Ambiguous Battle: The Promise (and Pathos) of Public Domain Day, 2014*, 12 DUKE L. & TECH. REV. 1, 8 (2013). This listing is paring down of 17 U.S.C. § 106, which is admittedly long but important to list in full since the variety of material shared on social media platforms invokes all of the enumerated rights:

“Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.” 17 U.S.C. § 106 (2012).

defined in the Copyright Act as “with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.”<sup>40</sup> Thus, there can be multiple copyright owners for one copyrighted piece if the exclusive rights to that copyrighted piece have been transferred by the original creator to multiple owners.<sup>41</sup> The Copyright Act explicitly defines a “transfer of copyright ownership” as only “an assignment, mortgage, *exclusive license*, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright . . . .”<sup>42</sup> While exclusive licenses can transfer copyright ownership, the Copyright Act explicitly excises nonexclusive licenses from the types of legal vehicles that constitute a transfer of copyright ownership.<sup>43</sup> Since social media users only grant social media platforms nonexclusive licenses to use their content, the users do not transfer any copyright ownership to the social media platforms when they agree to the platforms’ terms of services.

This explicit excising of nonexclusive licenses from the list of legal vehicles that can transfer copyright ownership has added importance because, unlike other areas of copyright law,<sup>44</sup> courts have remained faithful to the statutory language defining transfers of copyright ownership.<sup>45</sup> In *Minden Pictures, Inc. v. John Wiley & Sons, Inc.*, for example, the Ninth

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<sup>40</sup> 17 U.S.C. § 101 (2012).

<sup>41</sup> See *Gardner v. Nike, Inc.*, 279 F.3d 774, 778 (9th Cir. 2002) (quoting 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.01[A]) (describing how multiple licensees can be copyright owners of one copyrighted work if each licensee holds an exclusive license to a separate copyright right).

<sup>42</sup> *Id.* (emphasis added).

<sup>43</sup> *Id.* (“[A] ‘transfer of copyright ownership’ is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, *but not including a nonexclusive license.*”) (emphasis added).

<sup>44</sup> See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936–37 (2005) (expanding secondary liability for copyright infringement to include liability for inducement of copyright infringement even though the Copyright Act contains no mention of secondary liability); *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 434–35 (1984) (recognizing that “[t]he Copyright Act does not expressly render anyone liable for infringement committed by another,” yet divining that the “absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity”).

<sup>45</sup> *Minden Pictures, Inc. v. John Wiley & Sons, Inc.*, 795 F.3d 997, 1003 (9th Cir. 2015) (discussing the history of the Copyright Act of 1976 and holding that an owner of a mere nonexclusive license cannot bring a copyright infringement suit).

Circuit<sup>46</sup> refused to expand the definition of “copyright owners” to include nonexclusive license holders.<sup>47</sup> This is a common theme amongst circuit courts. Few, if any, cases recognize a nonexclusive license as giving its holder the requisite standing to bring a copyright infringement suit.<sup>48</sup>

As noted by *Minden*, the logic behind not recognizing a nonexclusive license as a transfer of copyright ownership “is that such a licensee has no more than ‘a privilege that protects him from a claim of infringement by the owner’ of the copyright.”<sup>49</sup> *Minden* notes that because a nonexclusive license grants a licensee “rights only vis-à-vis the licensor, not vis-à-vis the world, he or she has no legal right to exclude others from using the copyrighted work . . . .”<sup>50</sup> Since the social media platforms are mere nonexclusive rights holders, they are not copyright owners with regards to the user-generated content shared on their platforms.

### B. *Enforcing the Infringement of Exclusive Rights Under the Copyright Act*

Social media platforms’ statuses as nonexclusive rights holders (and therefore non-copyright owners) preclude the platforms from bringing copyright infringement suits under current copyright law. Currently, only “[t]he legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it.”<sup>51</sup> Standing to bring infringement suits is limited to exclusive rights holders because only those who “who violate[] any of the *exclusive rights of the copyright owner* as provided by sections 106 through 122 . . .

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<sup>46</sup> Interestingly, the Ninth Circuit created the notion of vicarious liability for copyright infringement, even though the statutory text of the Copyright Act never imposed secondary liability for copyright infringement. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022–23 (9th Cir. 2001) (limiting *Sony*, which created the concept of secondary liability for copyright infringement when it created contributory infringement, to create a new form of secondary copyright infringement called vicarious liability).

<sup>47</sup> *Minden*, 795 F.3d at 1003 (“However, a party granted a mere ‘nonexclusive license’—as, in this case, Wiley’s license to reprint a copyrighted photograph in a textbook—cannot bring an infringement suit.” (citing 17 U.S.C. § 101 (2012); then citing *Eden Toys, Inc. v. Florelee Undergarment Co., Inc.*, 697 F.2d 27, 32 (2d Cir. 1982))).

<sup>48</sup> *See McNeese Photography, L.L.C. v. Access Midstream Partners, L.P.*, No. CIV-14-503-D, 2016 WL 1312630, at \*4 (W.D. Okla. Apr. 4, 2016) (“[*Minden*] restated the law as it had been concerning standing in the copyright context.”).

<sup>49</sup> *Minden*, 795 F.3d at 1004 (quoting *W. Elec. Co. v. Pacent Reproducer Corp.*, 42 F.2d 116, 119 (2d Cir. 1930)).

<sup>50</sup> *Id.*

<sup>51</sup> 17 U.S.C. § 501(b) (2012) (emphasis added).

[are] infringer[s] of the copyright or right of the author, as the case may be.”<sup>52</sup> The importance of holding an exclusive right is that such a right is enforceable as a property right, not just as a contract right.<sup>53</sup> While exclusive licenses are not so restrictive as to preclude two simultaneous holders from claiming an exclusive right, social media platforms do not interpret the rights gained under terms of service agreements to be *exclusive*.<sup>54</sup> Instead, users retain ownership of the copyright protecting their original subject matter. Thus, under existing copyright law, social media platforms lack the requisite ownership rights to bring an action for the infringement of their users’ content. Instead, the individual and legally inept social media users who post their content hold these rights.<sup>55</sup> This leads to the under-enforcement of copyright infringement of social media users’ content.

### III. ALLOWING SOCIAL MEDIA PLATFORMS TO BRING COPYRIGHT INFRINGEMENT CLAIMS

To address this under-enforcement, Congress should amend 17 U.S.C. § 501(b) to allow, but not force, social media platforms, as nonexclusive license holders, to bring suits for the copyright infringement of the user-generated content that the platforms have nonexclusive licenses to. By modifying a single sentence of § 501(b) to provide: “The legal or beneficial owner of an exclusive right under a copyright, *or, notwithstanding anything else in this title, a social media platform that holds a nonexclusive license to its user’s exclusive right under a copyright,* is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it,” Congress can make use of the preexisting copyright protections to protect copyrighted material in the developing social media industry. Such an amendment will enable social media platforms to protect

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<sup>52</sup> *Id.* § 501(a).

<sup>53</sup> *Minden*, 795 F.3d at 1004–05. As a normative matter, this makes sense. If I know I have exclusive ownership of X, and I see you with X, I know you have infringed on my ownership rights to X. Alternatively, if I know I merely have nonexclusive ownership of X, and I see you with X, you have not infringed on my ownership rights to X. Further, in the nonexclusive ownership scenario, no infringement can be assumed a priori.

<sup>54</sup> Defendant Instagram, LLC’s Reply In Support Of Motion to Dismiss Plaintiff’s First Amended Complaint Pursuant to F.R.C.P. 12(b)(1) & 12(b)(6), *Rodriguez v. Instagram, LLC*, 2013 WL 2247056 (N.D. Cal. May 1, 2013) (No. 12-cv-06482-WHA) (analyzing the lack of transferability of property rights through the granting of nonexclusive licenses to content in social media Terms of Service documents).

<sup>55</sup> For further discussion regarding why users retain these rights, see *supra* Part II.A.

their users' rights in the ever-growing social media industry and is consistent with Congress's interest in regulating new Internet technologies.

#### A. *Social Media Platforms Benefit from This Amendment*

First, social media platforms should support this amendment because it will enable the platforms to protect the rights of their users, which is good for users and good for social media platforms' bottom lines. As exemplified by the Facebook Terms of Service, social media strive to protect the rights and privacy of their users.<sup>56</sup> Yet a staggering "69% of adults say they are not confident that records of their activity maintained by the social media sites they use will remain private and secure,"<sup>57</sup> while "66% say they are not confident that records of their activity collected by the online video sites they use will remain private and secure."<sup>58</sup> While this unease has not yet led to a mass exodus from social media platforms,<sup>59</sup> Twitter's inability to control the content posted on its platform and its inability to protect its user's rights recently led to extreme public backlash.<sup>60</sup> This public backlash corresponded with users leaving the platform because of Twitter's inability to protect their rights.<sup>61</sup> While correlation does not

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<sup>56</sup> See *Facebook TOS*, *supra* note 13 (noting, among other things, that "[user] privacy is very important to us" and "[w]e respect other people's rights, and expect you to do the same").

<sup>57</sup> Mary Madden & Lee Raine, *Americans' Attitudes About Privacy, Security and Surveillance*, PEW RESEARCH CTR. (May 20, 2015), <http://www.pewinternet.org/2015/05/20/americans-attitudes-about-privacy-security-and-surveillance/> (emphasis omitted).

<sup>58</sup> *Id.* (emphasis omitted).

<sup>59</sup> See *id.* ("At the time of the mid-2014 survey, the vast majority of respondents – 91% – had not made any changes to their internet or cellphone use to avoid having their activities tracked or noticed.").

<sup>60</sup> See Emma Green, *The Tide of Hate Directed Against Jewish Journalists*, ATLANTIC (Oct. 19, 2016), <http://www.theatlantic.com/politics/archive/2016/10/what-its-like-to-be-a-jewish-journalist-in-the-age-of-trump/504635/> (noting "[b]etween August 2015 and July 2016, at least 800 journalists received some 19,000 anti-Semitic tweets, sent by 1,600 users," yet Twitter "only shut down 21 percent of the 1,600 accounts that sent anti-Semitic messages, which accounted for 16 percent of the tweets," even though Twitter's Terms of Service explicitly ban the publishing of anti-Semitic messages); Jonathan Mahler, *Anti-Semitic Posts, Many from Trump Supporters, Surge on Twitter*, N.Y. TIMES (Oct. 19, 2016), <http://www.nytimes.com/2016/10/19/us/politics/anti-semitism-trump-supporters-twitter.html> (criticizing Twitter for not responding better to a rise of behavior that infringes the rights of its users).

<sup>61</sup> Jonathan Weisman, *Why I Quit Twitter — and Left Behind 35,000 Followers*, N.Y. TIMES: TIMES INSIDER (June 10, 2016), <http://www.nytimes.com/2016/06/10/insider/why-i-quit-twitter-and-left-behind-35000-followers.html> (detailing how

suggest causation, Twitter's stock price fell from a closing price of \$29.27/share on August 3, 2015 to \$17.66/share on October 28, 2016, a loss of \$11.61/share.<sup>62</sup> Conversely, the predicted "social media advertising average revenue per Internet user in the United States" in the year 2021 is \$86.22; nearly double the \$43.23 value from 2015.<sup>63</sup> Clearly, the more users a social media platform has, the more ad income it will make. However, a social media platform that does not protect the rights of its users risks alienating its users, leading to disastrous consequences for the platforms. Therefore, there are clear economic incentives for social media platforms to protect the rights of its users. The proposed amendment to the Copyright Act allows social media platforms to do just that.

Further, the proposed amendment to the Copyright Act does not place any additional burden on the social media platforms. Platforms already grant themselves a permissive right to monitor and remove content within the platform. For example, the Instagram Terms of Use state that "[w]e may, but have no obligation to, remove, edit, block, and/or monitor Content or accounts containing Content that we determine in our sole discretion violates these Terms of Use."<sup>64</sup> This right, crafted by the social media platforms themselves, allows, but does not force, the platforms to protect the rights of their users within the boundaries of their own platform.<sup>65</sup> To exercise this right, social media platforms necessarily must take affirmative steps to protect the rights of their users, which costs the social media platforms money. The proposed amendment to the Copyright Act does nothing more than expands this right to apply outside the bounds of the social media platforms. Since the proposed right merely expands an already existing enforcement device used by social media platforms, the social media platforms will simply have to apply the same cost benefit analysis before using this new right that they already apply before utilizing the preexisting rights present in the social media platforms' terms of service. While large social media platforms could contract with each other to reciprocally remove copyright-infringing content within their platforms that originated in other platforms, this would likely impose substantial transaction costs on the social media platforms. Further, such an agreement would only bind sites in privity with each other whereas the proposed

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Twitter "ignore[d] its own terms of service," causing a prominent journalist to "leave [Twitter] behind — along with [his] 35,000 followers").

<sup>62</sup> *Twitter Historical Stock Prices*, NASDAQ, <http://www.nasdaq.com/symbol/twtr/historical> (change the timeframe to show historical quotes going back to 2015).

<sup>63</sup> *Social Media Advertising Average Revenue per Internet User in the United States from 2015 to 2021 (in U.S. Dollars)*, STATISTA, <https://www.statista.com/statistics/459708/social-media-ad-revenue-per-internet-user-digital-market-outlook-usa/> (last visited Oct. 30, 2016).

<sup>64</sup> *Instagram TOU*, *supra* note 8 (emphasis added).

<sup>65</sup> *Id.*

amendment would give social media platforms a right to enforce copyright infringement against any infringer.<sup>66</sup>

The proposed amendment does not force social media platforms to bring copyright infringement suits on behalf of their users. Instead, it merely allows social media platforms, should they choose, to bring suit under the Copyright Act as nonexclusive rights holders to protect the exclusive copyright rights of their users. And while it may seem odd to classify the ability to bring a costly suit<sup>67</sup> on behalf of someone else as a right, the social media platforms have already identified value in spending money to protect their users' rights. This is demonstrated by the existence of “rights” grants like the one identified in the Instagram Terms of Use. Further, social media platforms like Facebook, which closed with a market cap of \$400.18 billion on March 21, 2017<sup>68</sup> are better positioned than individual users<sup>69</sup> to bear the high costs of copyright infringement litigation. Taking the low range of Balganesht's estimate of the average cost of litigating a copyright infringement case through trial, such cost is 5.494 times the average household income of a Facebook user.<sup>70</sup> This multiple increases to 28.612 times the average household income for Balganesht's upper range figure.<sup>71</sup> Compared to these large multiples, the same minimum and maximum estimates of the average cost of bringing a copyright infringement case through trial are only 0.000000960 ( $9.60 \times 10^{-7}$ ) and 0.00000500 ( $5.00 \times 10^{-6}$ ), respectively, of Facebook's March 21, 2017

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<sup>66</sup> 17 U.S.C. § 501(b) (2012) (granting an individual with appropriate standing under the Copyright Act “to institute an action for *any infringement*” of a copyright right (emphasis added)).

<sup>67</sup> Balganesht, *supra* note 10, at 2280 (“As of 2011, the average cost of litigating a copyright infringement case through trial, for either plaintiff or defendant—excluding judgment and awards—was estimated to range from \$384,000 to a staggering \$2 million.”).

<sup>68</sup> *Facebook Market Cap*, YCHARTS, [https://ycharts.com/companies/FB/market\\_cap](https://ycharts.com/companies/FB/market_cap) [hereinafter YCHARTS] (mouse over the interactive chart to see the market cap on March 21, 2017).

<sup>69</sup> John Fetto, *10 Consumer Facts About Facebook*, EXPERIAN: MKTG. FORWARD (May 17, 2012), <https://www.experian.com/blogs/marketing-forward/2012/05/17/10-consumer-facts-about-facebook-sim/> (“The average Facebook user claims an annual household income of \$69,900 with annual household spending on discretionary goods and services of \$15,500.”).

<sup>70</sup> This value is calculated using the lower cost estimate of litigating a claim, \$384,000, provided by Balganesht, *supra* note 10, at 2280, and the average household income, \$69,900, from Fetto, *supra* note 69. Dividing \$384,000 by \$69,900 yields 5.494.

<sup>71</sup> This value is calculated using the upper cost estimate of litigating a claim, \$2,000,000, provided by Balganesht, Balganesht, *supra* note 10, at 2280, and the average household income, \$69,900, from Fetto, *supra* note 69. This calculation yields 28.612.

market cap.<sup>72</sup> Rather than five to twenty-eight years of salary, these costs are a mere rounding error to Facebook. Economically, Facebook, like the other social media platforms, can actually bear the costs of the litigation required to litigate copyright infringement cases. Doing so may prove prosperous for the social media platforms, as it could improve user confidence and usership.<sup>73</sup> Yet, the social media platforms will remain unable to act against the infringement of their users' content until Congress amends the Copyright Act.

### *B. Congress Should Amend the Copyright Act*

In 1998, Congress amended the Copyright Act of 1976 by passing the Digital Millennium Copyright Act. Congress did so “to amend title 17, United States Code, to implement the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty, and for other purposes.”<sup>74</sup> As identified by the Act's legislative history, one of these “other purposes” was to “appropriately balance[] the interests of content owners, on-line and other service providers, and information users in a way that will foster the continued development of electronic commerce and the growth of the Internet.”<sup>75</sup> The growth of the social media industry falls squarely within these stated goals.<sup>76</sup> As the number of people on social media continues to grow, the concomitant growth in the amount of copyrightable subject matter creates more opportunities for copyright infringement.<sup>77</sup> Under current copyright law,<sup>78</sup> with the balancing of the interests of content owners [social media users] and the interests of the service providers [social media platforms] present in the platforms' terms of

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<sup>72</sup> See Balganes, *supra* note 10, at 2280; YCHARTS, *supra* note 68 (\$384,000/\$373.14 billion = 0.00000103; \$2,000,000/\$373.14 billion = 0.00000536).

<sup>73</sup> See *Twitter Historical Stock Prices*, NASDAQ, <http://www.nasdaq.com/symbol/twtr/historical> (change the timeframe to show historical quotes going back to 2016) (noting Twitter's stock price increased from an opening price on February 7, 2016 of \$18.00 a share to an opening price of \$18.77 a share on February 8, 2016 on news of increased user protection measures).

<sup>74</sup> Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.) (emphasis added).

<sup>75</sup> H.R. Rep. No. 105-551, pt. 2, at 21 (1998) (Conf. Rep.).

<sup>76</sup> See generally TRACY L. TUTEN & MICHAEL R. SOLOMON, *SOCIAL MEDIA MARKETING* (SAGE Publ'ns 2d ed. 2015) (cataloging the continued growth of usership and e-commerce on social media platforms). See also *supra* notes 1–2 and accompanying text.

<sup>77</sup> See Herzfeld & Melzer, *supra* note 6 (linking the dramatic increase in social media usage to an increase in questions surrounding copyright infringement).

<sup>78</sup> 17 U.S.C. § 502(b) (2012).

service agreements,<sup>79</sup> individual and unsophisticated social media users are the only parties capable of bringing suits to combat copyright infringement of their content.<sup>80</sup> However, since the average cost of bringing a copyright infringement suit through litigation can be as high as two million dollars,<sup>81</sup> and social media platforms can only challenge infringing content if it is posted onto their platforms,<sup>82</sup> individual users cannot afford to enforce their rights when their content is infringed. To further advance the goals of the DMCA, Congress should address this enforcement paradox.

Social media platforms should have the ability to bring these copyright infringement suits, they should not be required to bring said suits. If a social media platform wishes to reserve this right, it should have to indicate as much within its terms of service or terms of use. Change should come in this form for two main reasons. First, the internal limitations present in copyright law assuage any fear that this new right would have negative First Amendment implications. Courts have long recognized that doctrines like the idea vs. expression dichotomy<sup>83</sup> and fair use<sup>84</sup> militate against fears that copyright infringement remedies violate the First Amendment.<sup>85</sup> Following this logic, expanding the class of persons who can bring copyright infringement suits will not chill free expression. Similarly, tying this new right to the Copyright Act provides a preexisting procedure to enforce these rights,<sup>86</sup> which will spare Congress the time and effort it would otherwise take to provide protection to users' content. By modifying a single sentence of § 501(b), Congress can increase copyright protection for social media users by expanding social media platforms' rights.

### CONCLUSION

The current state of copyright law in the United States leads to an enforcement paradox: those who own exclusive rights to copyrightable subject matter shared on social media (social media users) have the legal

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<sup>79</sup> See, e.g., *Facebook TOS supra* note 13 (granting Facebook a mere nonexclusive license to user-generated content).

<sup>80</sup> 17 U.S.C. § 502(b).

<sup>81</sup> Balganes, *supra* note 10, at 2280.

<sup>82</sup> See, e.g., *Facebook TOS, supra* note 13 (“We can remove any content or information you post on Facebook if we believe that it violates this Statement or our policies.” (emphasis added)).

<sup>83</sup> 17 U.S.C. § 102(b); *Comput. Assocs. Int’l Inc. v. Altai, Inc.*, 982 F.2d 693, 703 (2d Cir. 1992) (“It is a fundamental principle of copyright law that a copyright does not protect an idea, but only the expression of the idea.”).

<sup>84</sup> 17 U.S.C. § 107.

<sup>85</sup> See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1028 (“We note that First Amendment concerns in copyright are allayed by the presence of the fair use doctrine.”). This is especially true when the copiers are not fair users. *Id.*

<sup>86</sup> 17 U.S.C. §§ 501–13.

ability to bring suit in the event the copyright is infringed, but lack the financial ability to pay the staggering sums required to take a copyright infringement suit to trial. Conversely, those who own nonexclusive rights to the copyrightable subject matter shared on social media (social media platforms) lack the legal ability to bring suit in the event the copyright is infringed, but have the financial ability to pay the staggering sums required to take a copyright infringement suit to trial. Fortunately, there is an easy and low cost solution to solve this paradox – amending 17 U.S.C. § 501(b) to allow social media platforms that hold nonexclusive licenses in the copyrightable subject matter generated by their users to bring copyright infringement suits for the infringement of user-generated content. Such an amendment will be in the spirit of the DMCA, and will allow United States’ copyright law to address the infringement issues arising out of the increasing prevalence of social media platforms in modern day life.