

The New Social Media: Contracts, Consumers, and Chaos

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ABSTRACT: This is a Response to Niva Elkin-Korel, Giovanni De Gregorio, and Maayan Perel's Article relating to contract networks on social media. Starting with their innovative proposals relating to rethinking how contractual parties interact on social media and expanding the framework of their relations for the purpose of content moderation, this Essay criticizes some of the implications of the proposed paradigm. The Response first recontextualizes social media from the perspective of social commerce and content monetization by proposing the concept of "the New Social Media." It subsequently discusses the role of content monetization in processes of social media content moderation. The main thesis I pursue in this Response is that content monetization has led to the creation of contractual networks, the shape and participants of which are only known by platforms themselves. In the context of an opaque ecosystem where it is difficult to speculate who exactly participates in these contractual networks, the concept, while reflecting a sophisticated systematization of contractual relationships on social media, has some serious limitations.

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INTRODUCTION

Social media platforms are changing under our eyes. In their Article, Niva Elkin-Korel, Giovanni De Gregorio, and Maayan Perel shed light on social media tech giants by focusing on the backbone of their transactional architectures, namely contracts.¹ As the authors acknowledge in their timely and well-written piece, social media platforms have been thoroughly studied as the governors of the new public squares²—where speech is subject to a new wave of private regulation that raises legitimate concerns for individual freedoms³—while governments reflect upon their “vested interest in harnessing the capabilities of platforms to govern online speech.”⁴ Yet social media platforms are entering a new era of business development; one with complex repercussions emerging from a plethora of legal angles, of which freedom of expression is merely one of many reasons why it is essential to better understand market structures and business models.

In this Response Essay, I endeavor to respond to Elkin-Korel, De Gregorio, and Perel’s Article by characterizing what I call “the New Social Media”: social media as primarily a shop—an outcome of transforming audiences, customers, information products, and markets. This process reveals the fast pace of digital innovation, changing Internet demographics, and emerging business models that I will describe through scholarly insights from communication, computer science, and marketing studies. By unpacking the New Social Media, we can better reflect upon the concept of contractual networks proposed by Elkin-Korel, De Gregorio, and Perel, and discuss the strengths and limitations of this framework.

I. THE TRANSFORMATION OF SOCIAL MEDIA: FROM THE TRIANGLE TO THE SHOP

In classical media studies literature, a social media site is described as a “web-based service[] that allow[s] individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system.”⁵ Social media environments have always been highly diverse and dynamic. In 2013, José van Dijck identified four distinct types of social media: (1) “social network sites” dedicated to interpersonal contact (e.g., Facebook, Twitter, and LinkedIn); (2) “user-generated content” fostering creativity and cultural activity (e.g., YouTube, Wikipedia, and MySpace); (3) “trading and marketing sites” aimed at commercial transactions of sale or exchange (e.g., Amazon, eBay, and Craigslist); and (4) “play and game sites” gamifying human interaction

1. Niva Elkin-Koren, Giovanni De Gregorio & Maayan Perel, *Social Media as Contractual Networks: A Bottom Up Check on Content Moderation*, 107 IOWA L. REV. 987, 991–94 (2022).

2. See *id.* at 995, 1007; see also Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1603 (2018).

3. Jack M. Balkin, *Free Speech is a Triangle*, 118 COLUM. L. REV. 2011, 2012–13 (2018).

4. Elkin-Koren, De Gregorio & Perel, *supra* note 1, at 1005.

5. danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUT.-MEDIATED COMM’N 210, 211 (2008).

(WordFeud and FarmVille).⁶ In the same vein, albeit in legal scholarship, Heidi Frostestad Kuehl defines social medias as “websites and applications which enable users to create and share content or to participate in social networking.”⁷

Yet in their limited life span, social media platforms have undergone fast and fundamental changes. They are no longer spaces where content is generated by users equally, as new stakeholders have emerged in the attention economy. In a constant search of new ways to generate revenue, social media giants are transitioning from business models that have largely been focusing on targeted advertising, to capitalizing on the social transformation of influence. In this Part, I will highlight the characteristics of two fundamental changes that find themselves at the core of the New Social Media: content monetization and social commerce. I refer to “content monetization” as an umbrella term for a wide variety of platform affordances and business models enabling content creators to earn revenue out of the content they make,⁸ and to “social commerce” as a new iteration of e-commerce taking place within the communities developed on social networking sites.⁹

The recently published Forbes *Top Creators 2022* offers an accurate insight into the current state of social media as an environment that is thriving on content monetization.¹⁰ The list includes forty-nine so-called “social media savants,” who have amassed not only huge fanbases as Internet celebrities, but also considerable commercial portfolios.¹¹ These “social media savants” have achieved this by branching out into the production of goods and the provision

6. JOSÉ VAN DIJCK, *THE CULTURE OF CONNECTIVITY: A CRITICAL HISTORY OF SOCIAL MEDIA* 8 (2013).

7. Heidi Frostestad Kuehl, *Free Speech and Defamation in an Era of Social Media: An Analysis of Federal and Illinois Norms in the Context of Anonymous Online Defamers*, 36 N. ILL. U. L. REV. 28, 33 (2015) (citing *Social Media*, OXFORD ENGLISH DICTIONARY (2015), <https://www.oed.com> [<https://perma.cc/K52G-AGHL>]).

8. Susanne Kopf, “Rewarding Good Creators”: *Corporate Social Media Discourse on Monetization Schemes for Content Creators*, SOC. MEDIA + SOC’Y, Oct.–Dec. 2020, at 1, 1; Jacob Ørmen & Andreas Gregersen, *Institutional Polymorphism: Diversification of Content and Monetization Strategies on YouTube*, TELEVISION & NEW MEDIA, July 11, 2022, at 1, 1–2 (2022); Nicole E. Pottinger, Note, *Don’t Forget to Subscribe: Regulation of Online Advertising Evaluated Through YouTube’s Monetization Problem*, 107 KY. L.J. 515, 516, 519–21 (2018); and Hua (Jonathan) Ye, Xueping Yang, Xinwei Wang & Theophanis C. Stratopolous, *Monetization Of Digital Content: Drivers Of Revenue On Q&A Platforms*, 38 J. MGMT. INFO. SYST. 457, 458–60, 467 (2021).

9. Hui Han, Hongyi Xu & Hongquan Chen, *Social Commerce: A Systematic Review and Data Synthesis*, 30 ELEC. COM. RSCH. & APPLICATIONS 38, 38–39 (2018); Zhao Huang & Morad Benyoucef, *From E-Commerce to Social Commerce: A Close Look at Design Features*, 12 ELEC. COM. RSCH. & APPLICATIONS 246, 246–47 (2013); Fujun Lai & Xin Luo, *Social Commerce and Social Media: Behaviors in the New Service Economy*, 56 INFO. & MGMT. 141, 141 (2019); Xiaolin Lin, Yibai Li & Xuequn Wang, *Social Commerce Research: Definition, Research Themes and the Trends*, 37 INT’L J. INFO. MGMT. 190, 190–91 (2017); Ting-Peng Liang & Efraim Turban, *Introduction to the Special Issue Social Commerce: A Research Framework for Social Commerce*, 16 INT’L J. ELEC. COM. 5, 6 (2011); and George Lăzăroiu, Octav Neguriță, Iulia Grecu, Gheorghe Grecu & Paula Cornelia Mitran, *Consumers’ Decision-Making Process on Social Commerce Platforms: Online Trust, Perceived Risk, and Purchase Intentions*, 11 FRONTIERS PSYCH., May 15, 2020, at 1, 1–2.

10. Alexandra Sternlicht, *Top Creators 2022*, FORBES, <https://www.forbes.com/sites/alexandra sternlicht/2022/09/06/top-creators-2022> [<https://perma.cc/6WV8-B4ZE>].

11. *Id.*

of services connected to their personal brands.¹² For example, the top earning creator listed by Forbes is Jimmy Donaldson (“MrBeast”); a twenty-four-year-old social media personality who currently owns the fifth most subscribed channel on YouTube.¹³ He has recently diversified his advertising revenue from platform—or influencer—marketing with a new restaurant concept, MrBeast Burger, which he employs to further monetize his popularity.¹⁴ In 2021, Donaldson earned a total of \$54 million.¹⁵

At number four on Forbes’ *Top Creators 2022* list is Elliot Tebele, the creator behind Instagram’s most famous meme account: “FuckJerry.”¹⁶ His strategy of monetizing memes through influencer marketing led to a memorable news cycle in February 2020, when Mike Bloomberg’s campaign hired Tebele’s public relations agency to make political advertisement memes for Bloomberg’s presidential candidacy.¹⁷ In addition, Tebele launched card games and tequila products, contributing to his 2021 overall earnings of \$30 million.¹⁸ Additionally, the Forbes list includes newcomer TikTok creators who rose to fame in the past two years (e.g., Charli D’Amelio and Khaby Lame), more established YouTubers (e.g., Huda Kattan, Markiplier, and Ryan Kaji), and Twitch e-sports streamers (e.g., Ninja and xQc).¹⁹

This list of top creators takes the pulse of an increasingly crowded and dynamic market: the market of identity commodification²⁰—where creators are switching from mere influencers to owners of multiple types of businesses that help them make further gains based on their Internet popularity.²¹ Most importantly, while the Forbes top creators list includes the most famous and followed creators, it also covers creators with a much lesser following.²² This shift reflects the fundamental change in social media interactions: Internet entrepreneurs (or “content creators”) are becoming attention hubs enabling platforms to experiment with two additional revenue strategies—content delivery and social commerce. Even from a terminological perspective, “influencer” has made way for the term “content creator.”²³ “Influencer” even

12. *See id.*

13. *Id.*; *Most Popular YouTube Channels as of February 2023, Ranked by Number of Subscribers*, STATISTA (Mar. 6, 2023), <https://www.statista.com/statistics/277758/most-popular-youtube-channels-ranked-by-subscribers> [<https://perma.cc/ZV7M-H7N2>].

14. Sternlicht, *supra* note 10.

15. *Id.*

16. *Id.*

17. Scott Bixby, *Mike Bloomberg Is Paying ‘Influencers’ to Make Him Seem Cool*, THE DAILY BEAST (Feb. 18, 2020, 10:45 AM) <https://www.thedailybeast.com/mike-bloomberg-is-paying-influencers-to-make-him-seem-cool-9> [<http://perma.cc/P349-SAVK>].

18. Sternlicht, *supra* note 10.

19. *Id.*

20. This phenomenon has also been called the “commodified self.” *See* P. David Marshall, *The Commodified Celebrity-Self: Industrialized Agency and the Contemporary Attention Economy*, 19 POPULAR COMM’N 164, 166–69 (2021).

21. Sternlicht, *supra* note 10.

22. *See* Sternlicht, *supra* note 10.

23. Sophie Bishop, *Name of the Game*, REAL LIFE (June 14, 2021), <https://reallifemag.com/n>

has a negative connotation arising from the association with “someone specializing in advertorial, with an ability to persuade audiences to buy things,” whereas “content creator” “evokes someone making art, motivated by their vocation rather than the likelihood that their content will attract sponsorship.”²⁴ In this landscape, influencer marketing is only one of the many possible business models,²⁵ which include direct selling (e.g., selling goods or services), subscriptions, and advertisement revenue.²⁶

Because content creators increase the time spent on platforms by fans who develop parasocial relations with their favorite Internet personalities,²⁷ social media platforms have encouraged the development of creators as a new stakeholder genus in the social media ecosystem through new social commerce affordances.²⁸ For instance, YouTube has teamed with the drop-shipping platform, Shopify, to offer viewers the opportunity to buy products mentioned in videos or live-streams in its new service called “YouTube Shopping.”²⁹ Twitter launched “Twitter Shops,” currently available to all merchants in the United States,³⁰ and Instagram has been piloting the “Checkout” button to its United States’ users since 2019.³¹

As a result, speech on social media is no longer a “triangle,”³² or space of public discourse where transactions are tangential to the peer contact between the members of social communities. Transactions have become the backbone

ame-of-the-game [https://perma.cc/5B45-XLUE].

24. *Id.*

25. Kevin Roose, *Don't Scoff at Influencers. They're Taking Over the World.*, N.Y. TIMES (July 16, 2019), <https://www.nytimes.com/2019/07/16/technology/vidcon-social-media-influencers.html> [https://perma.cc/Z2P2-DVUP].

26. Giovanni De Gregorio & Catalina Goanta, *The Influencer Republic: Monetizing Political Speech on Social Media*, 23 GERMAN L.J. 204, 208–09 (2022).

27. See Chen Lou & Hye Kyung Kim, *Fancying the New Rich and Famous? Explicating the Roles of Influencer Content, Credibility, and Parental Mediation in Adolescents' Parasocial Relationship, Materialism, and Purchase Intentions*, 10 FRONTIERS PSYCH., Nov. 15, 2019, at 1, 4–5.

28. Ilhami Tuncer, *The Relationship Between IT Affordance, Flow Experience, Trust, and Social Commerce Intention: An Exploration Using the S-O-R Paradigm*, 65 TECH. SOC'Y, May 2021, at 1, 1–3.

29. David Katz, *Ready, Set, Shop on YouTube*, YOUTUBE: OFF. BLOG (July 19, 2022) <https://blog.youtube/news-and-events/youtube-shopify-integration-merch-shopping> [https://perma.cc/KU44-PM6D].

30. Justin Hoang & David Lie-Tjauw, *Twitter Shops: More Space to Shop*, TWITTER: BLOG (Mar. 9, 2022) https://blog.twitter.com/en_us/topics/product/2022/twitter-shops-more-space-to-shop [https://perma.cc/P8S6-TPY5].

31. *Introducing Checkout on Instagram*, INSTAGRAM: BLOG (Mar. 19, 2019), <https://about.instagram.com/blog/announcements/introducing-instagram-checkout> [https://perma.cc/YJH9-VLEP].

32. Balkin, *supra* note 3 at 2012–15.

of social interactions, as micropayments,³³ native advertising,³⁴ subscriptions,³⁵ and other similar commercial dealings become the expression and reward of fandom. Behind these transactions are a plethora of contracts that set out performances between an increasing number of stakeholders.³⁶

II. CONTENT MONETIZATION IMPLICATIONS FOR CONTRACTUAL NETWORKS

As Elkin-Korel, De Gregorio, and Perel outline in their Article, social media platforms entail relationships connecting platforms, cultural entrepreneurs, and users.³⁷ It is important that the authors recognize the rise of content creators as an emerging stakeholder type.³⁸ In proposing the contractual network theory model as a solution for more accountability in the context of content moderation, they additionally underline the relevance of the mutual goal bringing together stakeholders of the platform economy.³⁹ More specifically, this shared goal was described by reference to the three components identified to characterize a network: a (1) collective interest; (2) common objective; and (3) high interdependence among contracts and performances.⁴⁰

Using this theoretical model in the framework of social media contracts could be beneficial when considering the alignment of expectations and interpretation of performances in the broader network. In other words, by visualizing the underlying interdependence, the common objective could help shape the collective interest. However, the analysis does not dedicate sufficient

33. Zvezdan Vukanovic, *New Media Business Models in Social and Web Media*, 8 J. MEDIA BUS. STUD. 51, 56–57 (2011); Kishan Mistry, Note, *P(L)aying to Win: Loot Boxes, Microtransaction Monetization, and a Proposal for Self-Regulation in the Video Game Industry*, 71 RUTGERS L. REV. 537, 539–40 (2018); Elena Petrovskaya & David Zendle, *Predatory Monetisation? A Categorisation of Unfair, Misleading and Aggressive Monetisation Techniques in Digital Games from the Player Perspective*, 181 J. BUS. ETHICS 1065, 1065–67 (2022); and Daniel L. King et al., *Unfair Play? Video Games as Exploitative Monetized Services: An Examination of Game Patents from a Consumer Protection Perspective*, 101 COMPUTS. HUM. BEHAV. 131, 131 (2019).

34. Mariah L. Wellman, Ryan Stoldt, Melissa Tully & Brian Ekdale, *Ethics of Authenticity: Social Media Influencers and the Production of Sponsored Content*, 35 J. MEDIA ETHICS 68, 71–72, 79 (2020); Demetris Vrontis, Anna Makrides, Michael Christofi & Alkis Thrassou, *Social Media Influencer Marketing: A Systematic Review, Integrative Framework and Future Research Agenda*, 45 INT'L. J. CONSUMER STUD. 617, 617–18 (2021).

35. Paul Crosby & Jordi McKenzie, *Should Subscription-Based Content Creators Display Their Earnings on Crowdfunding Platforms? Evidence from Patreon*, 16 J. BUS. VENTURING INSIGHTS, Nov. 2021, at 1, 1–2; See STUART CUNNINGHAM & DAVID CRAIG, *SOCIAL MEDIA ENTERTAINMENT: THE NEW INTERSECTION OF HOLLYWOOD AND SILICON VALLEY* 115–47 (2019).

36. See generally Catalina Goanta & Isabelle Wildhaber, *In the Business of Influence: Contractual Practices and Social Media Content Monetisation*, 91 SCHWEIZERISCHE ZEITSCHRIFT FÜR WIRTSCHAFTS- UND FINANZMARKTRECHT 346 (2019) (discussing the contractual relationships between influencers and brands and the law governing these relationships).

37. Elkin-Koren, De Gregorio & Perel, *supra* note 1, at 1025.

38. See *id.* at 1024–25.

39. *Id.* at 1026–30.

40. *Id.* at 1028 (citing Fabrizio Cafaggi, *Contractual Networks and Contract Theory: A Research Agenda for European Contract Law*, in CONTRACTUAL NETWORKS, INTER-FIRM COOPERATION AND ECONOMIC GROWTH 66, 74 (Fabrizio Cafaggi ed., 2011)).

attention to an essential question: Who exactly is part of the network? The answer? It depends where and when we look.

So let us first look at some of the current stakeholders of social media ecosystems as shaped by content monetization and social commerce. In this industry, a contract network—as proposed by Elkin-Korel, De Gregorio, and Perel⁴¹—goes well beyond the platform, the content creator, and the user.

The supply chain includes, among others:

(1) Data analytics companies that use the platform’s Application Programming Interface (“API”)⁴² to offer secondary data products such as engagement and other influencer characterization metrics, influencer discovery services, etc.;⁴³

(2) Individual web developers (including researchers) who use platform APIs;

(3) Companies that purchase advertising from platforms or influencers, as well as their intermediaries (e.g., PR agencies);

(4) Payment and payment infrastructure companies employed by social media platforms relying on wallets and tokens for subscriptions, microtransactions, and social commerce;

(5) Logistics companies involved in fulfilling social commerce orders;

(6) E-commerce stakeholders such as drop-shipping companies (e.g., Shopify), affiliate networks or marketplaces with a vested interest in purchase conversions either on social media or alternative e-commerce spaces;

(7) News and media stakeholders such as media and telecom companies, which depend on social media platforms for the delivery of content.

This is by no means an exhaustive list of stakeholders, but rather an attempt to map the wide variety and span of actors that have contractual links to different nodes in the network. This landscape is becoming so complex that it is practically impossible to draw a clear stakeholder map, particularly given the opacity of social media platforms and their own contractual interactions. What is more, new data products are constantly being developed by platforms. In May 2022, TikTok launched its so-called “Branded Missions” that are “an industry-first ad solution that enables advertisers to crowdsource authentic content from creators on TikTok, turn top-performing videos into ads, and improve brand affinity with media impressions.”⁴⁴ In other words, this is a form of native advertising not only amplified but mediated by the platform. While this does not add any new stakeholders to the list enumerated above, it does

41. See Elkin-Korel, De Gregorio & Perel, *supra* note 1, at 1031.

42. For an overview of platform APIs, see generally Catalina Goanta, Thales Bertaglia & Adriana Iamnitich, *The Case for a Legal Compliance API for the Enforcement of the EU’s Digital Services Act on Social Media Platforms*, in 2022 ACM CONFERENCE ON FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY (2022), <https://dl.acm.org/doi/10.1145/3531146.3533190> [<https://perma.cc/R6FX-FV8L>].

43. Sophie Bishop, *Influencer Management Tools: Algorithmic Cultures, Brand Safety, and Bias*, 7 SOC. MEDIA + SOC’Y, Jan.–Mar. 2021, at 1, 2, 10.

44. *Introducing TikTok Branded Mission: Inspiring Brand and Creator Collaborations*, TIKTOK: NEWSROOM (May 18, 2022), <https://newsroom.tiktok.com/en-us/introducing-tiktok-branded-mission-inspiring-brand-and-creator-collaborations> [<https://perma.cc/XN6Y-DLPR>].

entail a new contractual setup: Off-platform transactions between brands and influencers are now intermediated on-platform.

Even when focusing on one platform and one of the categories above (data companies with API permissions), a view into the architecture of Facebook's Graph API shows a highly sophisticated web of interconnected governance arrangements facilitating app development and targeting different uses and user groups.⁴⁵ The resulting complexity is so high that while a harmonized model looking at a macro rather than binary contractual level might be a welcomed simplification, contractual networks may not be that model. In my opinion, this is mostly because the granularity of interests acting within the contractual networks is so high that while the existence of interdependence can be rightfully argued, not the same can be said for a common objective and a collective interest. In conclusion, the actual shape of contract networks is very much out of the reach of stakeholders, other than platforms themselves, which makes it difficult to appreciate the full scope of network interests.

III. CONTENT MODERATION IN THE NEW SOCIAL MEDIA

Against this opaque background, the question then is whether content moderation could help shape the common objective and collective interest necessary for the integrity of the theory of contractual networks, regardless of the concrete composition of such networks. I would venture to answer this question in the negative. The concerns put forth by Elkin-Korel, De Gregorio, and Perel relating to the negative impact platforms have on their users by exercising discretionary power, the lack of predictability of content moderation rules, or the negative implications for due process, are very much valid and well formulated.⁴⁶ Behind the terms of service that are never read by users,⁴⁷ a lot of vague clauses lurk, accommodating the need of social media platforms to retain as much contractual freedom as possible. Yet while contracts are highly imperfect, the authors show that so are some of the other applicable legal regimes which we would traditionally count on for increased accountability, such as constitutional law or tort liability.⁴⁸

Contracts are highly imperfect because they have traditionally been the dominating instrument of the contracting party with more bargaining power;⁴⁹ in this case, social media platforms. This resulted in consumer contracts labeled as "termination without explanation."⁵⁰ These are contracts where termination can (and will) happen on erroneous grounds and against innocent consumers,

45. Fernando N. van der Vlist, Anne Helmond, Marcus Burkhardt & Tatjana Seitz, *API Governance: The Case of Facebook's Evolution*, 8 SOC. MEDIA + SOC'Y, Apr.–June 2022, at 1, 6–13.

46. Elkin-Koren, De Gregorio & Perel, *supra* note 1, at 1041–45.

47. Yifat Nahmia, Dalit Ken-Dror Feldman, Ganit Richter & Daphne R. Raban, *Games of Terms*, 45 VT. L. REV. 387, 405–08 (2021); *see also* Kristen Chiger, *When Tweets Get Real: Applying Traditional Contract Law Theories to the World of Social Media*, 3 ARIZ. ST. U. SPORTS & ENT. L.J. 1, 22–23 (2013).

48. Elkin-Koren, De Gregorio & Perel, *supra* note 1, at 1011–19.

49. *Id.* at 1022–24, 1029.

50. Uri Benoliel & Shmuel I. Becher, *Termination Without Explanation Contracts*, 2022 U. ILL. L. REV. 1059, 1066–70 (2022).

leading to a considerable loss of investment, including loss of previous investment,⁵¹ loss of accumulated benefits,⁵² emotional and non-quantifiable costs,⁵³ and switching costs.⁵⁴ The discretion leading to the categories of losses just referred to is prevalent in a contractual network and exercised similarly towards consumers and non-consumers (e.g., content creators or businesses), due in part to the highly automatized nature of social media as a data-driven business environment.⁵⁵ With social media platforms amassing billions of users across hundreds of jurisdictions, it is indeed important to acknowledge that contract network theory could help not only to remedy the perceived injustices pertaining to bilateral relations, but also to offer a solution for dealing with the discretionary problem.

Still, network contracts used in the context of content moderation might not be the viable solution depicted by Elkin-Korel, De Gregorio, and Perel⁵⁶ for a number of reasons, out of which I will outline two.

First, the mere nature of content moderation rules, namely, “community guidelines”—the same rules that are used to determine content suitability and compliance with opaque internal policies for brand safety and legal compliance—is under discussion, as is the case for a very similar type of document: privacy policy.⁵⁷ As the name indicates, “Community Guidelines” are supposed to be guidelines relating to user behavior.⁵⁸ As an illustration, TikTok indicates that “Community Guidelines apply to everyone and everything on TikTok. We proactively enforce them using a mix of technology and human moderation and aim to do so before people report potentially violative content to us.”⁵⁹ Similarly, in a section called “The Twitter Rules,” Twitter indicates that it supports rules destined “to ensure all people can participate in the public conversation freely and safely.”⁶⁰ While community guidelines are sometimes mentioned in the Terms of Service, platforms rarely clarify that these guidelines are an integral part of the binding contract by means of incorporation,⁶¹ leaving their very nature up for interpretation: either to consider the conduct rules binding, or to consider them as a code of conduct where the flexibility of interpretation is exercised

51. *Id.* at 1077–78.

52. *Id.* at 1078–80.

53. *Id.* at 1080–81.

54. *Id.* at 1081–82.

55. See van der Vlist et al., *supra* note 45, at 17–18.

56. See Elkin-Koren, De Gregorio & Perel, *supra* note 1, at 993–94.

57. Gregory Klass, *Empiricism and Privacy Policies in the Restatement of Consumer Contract Law*, 36 YALE J. ON REGUL. 45, 55 (2019).

58. *Community Guidelines*, TIKTOK (Oct. 2022), <https://www.tiktok.com/community-guidelines?lang=en> [<https://perma.cc/WW9W-BK73>].

59. *Id.*

60. *The Twitter Rules*, TWITTER: HELP CTR., <https://help.twitter.com/en/rules-and-policies/twitter-rules> [<https://perma.cc/RUS9-G35U>] (discussing Twitter’s rules regarding safety, privacy, authenticity, and more).

61. David A. Puckett, *Terms of Service and the Computer Fraud and Abuse Act: A Trap for the Unwary*, 7 OKLA. J.L. & TECH. 1, 17–23 (2011).

unilaterally by the platform. As the sanction often attached to the infringement of community guidelines is the termination of the account,⁶² it is quite difficult to legally argue that Terms of Service are not binding. Yet even if the legal status of such documents were to be settled, the interplay between community guidelines and regulatory frameworks brings with it discussions which may limit the usefulness of contractual networks.

As Elkin-Korel, De Gregorio, and Perel themselves acknowledge, “top-down regulation could increase the liability risk faced by digital platforms in exercising their moderation discretion,” and legal compliance incentives could limit certain categories of speech violating clear legal frameworks.⁶³ Content monetization attracts discussions of consumer protection, such as advertising disclosures,⁶⁴ which are highly relevant—but often discarded—implications of content moderation. For instance, while scams are a category of reportable content on most social media platforms, due to the financial harms they can inflict upon consumers,⁶⁵ misleading or undisclosed advertising is not, even though some jurisdictions have been adopting more stringent rules for truth-in-advertising or consumer manipulation. As a further illustration, in 2021, Norway adopted a law modifying the existing consumer law regime by introducing a new obligation to disclose retouched or otherwise visually manipulated advertising through the use of filters or other image or video editing tools.⁶⁶ Yet reporting mechanisms for misleading advertising—based on community guidelines—have not been in the interest of social media platforms, and the considerable volume of advertising regulation requiring

62. On the other hand, social media platforms often retain the discretion to terminate accounts even without explanation (or implicitly without any breach, since they are contracts with continuous performance).

63. Elkin-Koren, De Gregorio & Perel, *supra* note 1, at 1007.

64. Arunesh Mathur, Arvind Narayanan & Marshini Chetty, *Endorsements on Social Media: An Empirical Study of Affiliate Marketing Disclosures on YouTube and Pinterest*, 2 PROC. ACM ON HUM.-COMPUT. INTERACTION, Nov. 2018, at 1, 4–5; Sharadhi Alape Suryanarayana, David Sarne & Sarit Kraus, *Information Disclosure and Partner Management in Affiliate Marketing*, in PROCEEDINGS OF THE FIRST INTERNATIONAL CONFERENCE ON DISTRIBUTED ARTIFICIAL INTELLIGENCE 1 (2019), <https://dl.acm.org/doi/10.1145/3356464.3357703> [<https://perma.cc/E39K-3G26>]; Laura E. Bladow, Note, *Worth the Click: Why Greater FTC Enforcement Is Needed to Curtail Deceptive Practices in Influencer Marketing*, 59 WM. & MARY L. REV. 1123, 1132–34 (2018); Tyler Fredricks, Note, *Not Content with Content Influencers: How the FTC Should Promote Advertisement Disclosure*, 19 VA. SPORTS & ENT. L.J. 29, 37–39 (2019); Dami Lee, *The FTC is Cracking Down on Influencer Marketing on YouTube, Instagram, and TikTok*, THE VERGE (Feb. 12, 2020, 4:15 PM), <https://www.theverge.com/2020/2/12/21135183/ftc-influencer-ad-sponsored-tiktok-youtube-instagram-review> [<https://perma.cc/L7HB-FJZ2>]; and Veronica N. Ramirez, Note, *Fashion Statements Turned Endorsements: How FTC Enforcement Could Cripple the Internet’s Trendsetters* Notes, 68 SYRACUSE L. REV. 483, 498 (2018).

65. Emma Fletcher, *Social media a Gold Mine for Scammers in 2021*, FTC (Jan. 25, 2022), <https://www.ftc.gov/news-events/data-visualizations/data-spotlight/2022/01/social-media-gold-mine-scammers-2021> [<https://perma.cc/6E7H-HHQZ>].

66. Kirsty Grant, *Influencers React to Norway Photo Edit Law: ‘Welcome Honesty’ or a ‘Shortcut’?*, BBC NEWS (July 6, 2021), <https://www.bbc.com/news/newsbeat-57721080> [<https://perma.cc/8Q2F-VDN9>].

observation in this example sets a much higher standard of protection than the community guidelines themselves. In this case, relying on contracts is detrimental for the interest of the consumer because the contract is superseded by mandatory legal rules from different legal systems.

Second, the unfathomable granularity of user profiles on social media leads to a wide spectrum of morality and subjective beliefs, which at times may even be overinflated or distorted by the algorithmic governance of online speech.⁶⁷ A series of Twitter field studies conducted on tweet authors and observers regarding U.S. political events documented the overperception of individual and collective outrage, “[inding] robust evidence that . . . observers perceived more outrage in messages than the authors of those messages reported actually feeling[.]” leading to amplified beliefs and polarization.⁶⁸ A similar discussion can be had with respect to consumer literacy and preferences when discussing content monetization.

Content creators themselves as commodified identities are reflections of consumer preferences, which are becoming increasingly personalized.⁶⁹ A collective interest and common objective would at best be found at a community level, where “smaller is better.”⁷⁰ Sure, even this setup is more scaled than bilateral contracts, and perhaps there may be strength in communities. However, I would posit that collective harms affecting an organic community surrounding a niche creator are rare, if at all relevant, whereas groups collectively affected by harms to the extent that they participate in a collective action, will often not be part of the same community.⁷¹ This makes me question whether it is desirable to think in terms of collective interests and common objectives in a bottom-up approach, by looking at the interests and preferences of consumers and other users as contractual parties.

Instead, if public interests are to be protected in private transactions, the main solution with a solid track record is the limitation of freedom of contract to rebalance the distribution of power in the contractual relationship. In the European Union, this has been done through the Unfair Contract Terms

67. W.J. Brady et al., *OVERPERCEPTION OF MORAL OUTRAGE IN ONLINE SOCIAL NETWORKS INFLATES BELIEFS ABOUT INTERGROUP HOSTILITY* 3 (3d ed. 2022) (unpublished manuscript) (on file with OSFPreprints), <https://osf.io/k5dzt> [<https://perma.cc/3Y9F-GTFJ>].

68. *Id.* at 8.

69. Alice Marwick, *Microcelebrity, Self-Branding, and the Internet*, in *THE BLACKWELL ENCYCLOPEDIA OF SOCIOLOGY* 1, 1–2 (George Ritzer ed., 2017); Helen Langan, *Research Shows Micro-Influencers Drive Consumer Buying Behavior at Much Higher Rates Than Previously Thought*, *EXPERTVOICE* (Oct. 29, 2019), <https://www.expertvoice.com/new-research-shows-micro-influencers-drive-consumer-buying-behavior-much-higher-rates-previously-thought> [<https://perma.cc/3K4M-W3UD>].

70. Kelly Ehlers, *Micro-Influencers: When Smaller Is Better*, *FORBES* (June 2, 2021, 7:20 AM), <https://www.forbes.com/sites/forbesagencycouncil/2021/06/02/micro-influencers-when-smaller-is-better> [<https://perma.cc/JSZ8-8SA2>].

71. *Collectieve Actie: Stop de Illegale Handel in TikTok Profielen*, *STICHTING MASSASCHADE & CONSUMENT*, <https://www.massaschadeconsument.nl/collectieve-acties/tiktok> [<https://perma.cc/3TV6-UCJ9>] (Neth.).

Directive (“UCTD”).⁷² Thomas Wilhelmsson takes this regulatory instrument as an approach in the promotion of four conceptions of justice: procedural, commutative, and distributive justice, as well as support for other societal policies.⁷³ The UCTD has helped European consumers regain some of their agency in take-it-or-leave-it agreements with large corporations,⁷⁴ and it has even shaped boundaries for social media Terms of Service; for instance, no social media platforms will impose mandatory arbitration on European consumers given the known unfairness of such terms in judicial practice.⁷⁵

Further limitations to freedom of contract can take many forms, including the introduction of a duty to explain incumbent upon platforms as a transparency obligation to remedy the unfairness of, for instance, termination without explanation contracts. Benoliel and Becher emphasize two constitutive elements for such a duty: (1) the explanation of “the facts that underlie the termination[,]” or alternatively of the illegal behavior; and (2) “the exact legal basis for termination[,] such as the specific contract term that is breached.”⁷⁶ Such a duty to explain appears, at first sight, to be an inherent continuation of a techno-social process duly mapped at an organizational level but entirely opaque outside of the organization. With such alternatives presenting themselves as enhancements of more established doctrines of contract law,⁷⁷ contractual network theory loses some of its appeal, despite its intellectual sophistication.

CONCLUSION

I wrote this Response piece to address Elkin-Korel, De Gregorio, and Perel’s Article on contractual networks and social media content moderation.⁷⁸ Their stimulating scholarship taking contract network theories from earlier iterations of European private law scholarship and applying them to the context of social media⁷⁹ has proven to be a noteworthy exploration of the private ordering discussions relating to the governance of this space. In proposing contractual networks as a doctrinal concept altering the bilateral nature of social media contracts, the authors make compelling arguments relating to the limitations of alternative approaches for more individual

72. Nenad Gavrilovic, *The Unfair Contract Terms Directive Through the Practice of the Court of Justice of the European Union: Interpretation or Something More?*, 9 EUR. REV. CONT. L. 163, 165–66 (2013); Carri Ginter & Mari Kelve-Liivsoo, *Applying the Unfair Contract Terms Directive to Public Contracts*, 16 EUR. PROCUREMENT & PUB. PRIV. P’SHP L. REV. 65, 69 (2021).

73. Thomas Wilhelmsson, *Various Approaches to Unfair Terms and Their Background Philosophies*, 14 JURIDICA INT’L 51, 52–53 (2008).

74. See, e.g., Case C-40/08, *Asturcom Telecomunicaciones SL v. Rodríguez Nogueira*, 2009 E.C.R. I-09579, I-9620.

75. See Anastasia Konina, *Consumer Dispute Settlement in the European Union and the United States*, 20 INT’L TRADE & BUS. L. REV. 1, 6–9 (2017).

76. Benoliel & Becher, *supra* note 50, at 1092–93.

77. See, e.g., Omri Ben-Shahar, *Fixing Unfair Contracts*, 63 STAN. L. REV. 869, 872–73 (2011).

78. See generally Elkin-Korel, De Gregorio & Perel, *supra* note 1 (applying contract network theories to the social media content moderation).

79. See *id.* at 1031.

protections, particularly when considering the power dynamics exercised by platforms through their overwhelming discretion in interpreting and applying content moderation rules.⁸⁰

This Response has pushed the resulting exploration further, by shaping the concept of the New Social Media, transformed under the weight of content monetization as the central commercial trend redefining user interactions, transactions, and emerging stakeholders. The New Social Media is inherently a shop characterized by a rain of transactions taking place simultaneously on- and off-platform between too many stakeholders to map conceptually. Against this background of exponential complexity, contractual networks lack the ability to reflect all stakeholders in a way that can lead to a collective interest and a common objective, regardless of how interconnected the network members are.

80. *See id.* at 1039.