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Law and Online Social Networks: Mapping the Challenges and Promises of User-generated Information Flows

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Law and Online Social Networks: Mapping the Challenges and Promises of User-generated Information Flows

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PREFACE: NETWORKS AND COMMUNITIES—
PROMISES AND QUESTIONS

The Internet is often referred to as a “network of networks.”¹ Usually, this definition refers to the technical infrastructure that facilitates the Internet’s ability to transfer data at great speed and from distant locations through a resilient pathway.² However, the Internet also creates social networks of individuals interacting with each other. In doing so, it generates and maintains relationships of varying strengths. These social networks thrive on the existing technological infrastructure and are enhanced by novel social phenomena.

Online social networks permit a variety of interactions, from aimless chatter to the exchange of offensive and obscene materials. They also allow meaningful and important exchanges among diverse parties. Such information exchanges facilitate an effective and efficient distribution of data and content. Furthermore, they facilitate the creation of novel forms of content, both simple and complex. While it is true that these social interactions (and the data flows they support) take place in the general Internet context as well, social networks, provide several important benefits. They increase user participation, as well effectively filtering and accrediting information. Accordingly, they generate a reliable and sustainable flow of information and content.

In recent years online social networks (as well as their close relative, online communities)³ have grown in expanse, complexity, popularity, and recognition, even beyond the realm of internet-savvy users. Websites that support and construct these networks have soared in value⁴ and have become coveted targets for

¹ See, e.g., William H. Dutton, Professor of Internet Studies, Oxford Internet Institute, *Through the Network (of Networks)—The Fifth Estate* 6 (Oct. 15, 2007), available at <http://people.oii.ox.ac.uk/dutton/wp-content/uploads/2007/10/5th-estate-lecture-text.pdf>.

² See, e.g., Internet, Wikipedia, <http://en.wikipedia.org/wiki/Internet> (last visited Nov. 29, 2007).

³ Various commentators address these terms differently, though it appears that the term “online social networks” emphasizes the existence of relations among the users themselves. I thank Beth Noveck for this distinction.

⁴ Kevin J. Delaney, Robert A. Guth & Vauhini Vara, *Microsoft Fires Volley at Google in Ad Battle*, WALL ST. J. ONLINE, Sept. 25, 2007, <http://online.wsj.com/article/SB119065193646437586.html> (reporting that Microsoft is considering offering between

takeovers by media moguls.⁵ They are closely linked to the “Web 2.0” phenomenon,⁶ which spotlights online interactions among and contributions by, the users themselves. These websites now hold the leading positions in popularity rankings,⁷ and are often addressed in the mass media.⁸ Understandably, they generate a great deal of interest among the academic community.⁹ Scholarship in the fields of sociology, economics, psychology, and law is devoted to understanding the inner workings of these networks, and their implications, benefits and disadvantages.¹⁰ It is these implications that this Article intends briefly to address and review. This analysis is far from merely theoretical, and has important practical implications. As the popularity of these networks grows, courts, regulators, and legislators will be called upon to address the networks’ inner dynamics. This Article strives to provide preliminary tools for dealing with these looming legal and policy challenges.

\$300 million to \$500 million for a five percent stake in Facebook.) The high end of that range would value Facebook as a whole at \$10 billion.

⁵ *News Corp in \$580m Internet Buy*, BBC NEWS, July 19, 2005, <http://news.bbc.co.uk/1/hi/business/4695495.stm> (reporting that News Corp., which is owned and headed by media mogul Rupert Murdoch, paid \$580 million for Myspace.com in 2005).

⁶ Web 2.0, Wikipedia, http://en.wikipedia.org/wiki/Web_2.0 (last visited Nov. 30, 2007).

⁷ Alexa Traffic Ranking on November 7, 2007 shows several “Web 2.0” websites in leading positions, such as youtube.com (#4), myspace.com (#6) and facebook.com (#7). This is without referring to the search engines that dominate the list and might be considered such sites as well; <http://www.alexa.com> (last visited Nov. 29, 2007).

⁸ For one famous example, see Lev Grossman, *Time’s Person of the Year*, TIME, Dec. 13, 2006, available at <http://www.time.com/time/magazine/article/0,9171,1569514,00.html>.

⁹ A search on the Oxford website for articles dealing with social networks indicates numerous academic writings, from a wide spectrum of academic fields, concerning this issue. University of Oxford, <http://www.ox.ac.uk> (entering term “social networks” in search field yields over 1500 results) (last visited Nov. 28, 2007).

¹⁰ Virtual worlds, merely a subset of this issue, have generated a great variety of legal literature. See, e.g., THE STATE OF PLAY: LAW GAMES AND VIRTUAL WORLDS (Jack Balkin & Beth Simone Noveck eds., New York University Press 2006) [hereinafter BALKIN & NOVECK]; F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1 (2004); Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VIRGINIA L. R. 2043 (2004). Leandra Lederman, “*Stranger than Fiction*”: *Taxing Virtual Worlds*, 82 N.Y.U. L. REV 1620 (2007).

Within the broad notion and topic of online social networks, this Article strives to tackle three tasks. In Part I, I define online social networks and address their overall evolution. I then demonstrate the various dynamics occurring within the confines of these networks. Thereafter, I address several challenges these networks and their participants face when striving to assure a flow of meaningful and accurate information. Next, I turn to the technological and social tools used to face these challenges, with mixed success. In Part II, I point to several important and specific social dynamics which these platforms make possible, the outcomes of such dynamics (when indeed successful), and their intriguing legal and policy ramifications. Here I focus on the effects on regulatory frameworks addressing consumer protection and the structure of the mass media markets. Acknowledging these new forms of data flow calls for serious rethinking of the relevance of and need for existing legal doctrines and policy objectives. In Part III, I strive to identify legal rules and policy objectives, that facilitate the dynamics, addressed in Part I, and thus lead to the beneficial outcomes mentioned in Part II. In other words, I examine how decisions made by courts and legislators on a variety of issues related to online social networking will affect the flow of accurate and relevant information within these realms.

By tackling these three tasks, I strive to meet several objectives. I hope to create a path for future scholarship on the role of law and policy in the context of social networks to follow and I aim to provide courts and regulators with general intuitions. These intuitions will guide them toward decisions that promote the beneficial dynamics transpiring within online social networks. I briefly conclude in Part IV.

Largely, this Article's objective is to call to the attention of legal scholars, policy makers, and practitioners the issues, challenges and promises these technological platforms and social dynamics have in store. It should be noted, that a growing body of scholarship on these issues already exists. An important contribution was made recently by Yochai Benkler, in his book

The Wealth of Networks.¹¹ In it, Benkler explains how technology, economic forces, and social phenomena have led to novel opportunities for the creation and distribution of information.¹² He demonstrates at great length how these opportunities can promote many important social objectives, while emphasizing and focusing on the ways they enhance personal autonomy,¹³ democracy, and freedom. Benkler explains that these opportunities are a result of the existing legal regimes and social institutions, and warns that any change in their current balance and structure will realign this equilibrium and thus limit (or even eliminate) the existing beneficial outcomes.¹⁴ He further explains what rules and policies should be adopted to promote these outcomes and objectives.

This Article recognizes Benkler's great contribution to this line of scholarship and takes a step forward by accepting many of his basic assumptions and notions. In each of the next three sections, it focuses on several specific issues which go beyond Benkler's initial analysis. In Part I, the Article focuses on a specific subset of networks—online social networks.¹⁵ In Part II, it focuses on specific benefits and outcomes of the social discourse within these realms, rather than on broader questions of autonomy, free speech, and democracy. Finally, in Part III, it focuses on concrete legal steps which would facilitate the “wealth” of social networks, and in that way ensure that the positive outcome addressed are indeed achieved.

I. ONLINE SOCIAL NETWORKS—A PRIMER

In this Part, I provide the necessary background for understanding the ongoing scholarly discourse on online social networks, their inner workings, benefits, and challenges. I start by defining online social networks in general, and those central to this

¹¹ YOCHAI BENKLER, *THE WEALTH OF NETWORKS* (2006), available at http://www.benkler.org/Benkler_Wealth_Of_Networks.pdf.

¹² *Id.* at 2.

¹³ *Id.* at 9, 146.

¹⁴ *Id.* at 9.

¹⁵ Benkler indeed acknowledges and discusses these networks as well, but focuses in most parts on the broader notions and effects of the Internet.

discussion in particular. Thereafter I address the technological tools and social behaviors that led to the flourishing of this realm. I conclude by introducing the major challenges to the success of these networks—an issue I return to in Part III where I examine the legal response to these challenges.

A. Definitions

In the very general sense, social networks refer to platforms that allow individuals to exchange messages and information, and in some instances work together as a group or team toward various objectives. Taking this notion online, however, is somewhat confusing; it could refer to all social interactions occurring online, since the Internet in general is a platform that facilitates such behavior.¹⁶ For that reason, I apply a taxonomy to differentiate various forms of social networks, while pointing out which forms will be central to this Article's analysis. Such a taxonomy could be based on the technological tools applied¹⁷ or the number of the network's participants.¹⁸ While partially resorting to these elements, I premise this Article's analysis on distinctions among social networks according to the *strength of ties*¹⁹ they create and help maintain. In doing so, I refer to recent work by Lior Strahilevitz (which in turn rests on decades of sociology scholarship), to distinguish strong, intermediate, and weak forms of ties, while choosing to focus on networks that facilitate the

¹⁶ As I explain below in the context of search engines, the web as a whole could be viewed as a social network generating results as to the relevance of various webpages in response to various queries. *See infra* Part I.B.

¹⁷ *See generally* Beth Simone Noveck, *Democracy of Groups*, FIRST MONDAY, Oct. 27, 2005, http://www.firstmonday.org/issues/issue10_11/noveck.

¹⁸ *See* BENKLER, *supra* note 11, at 373.

¹⁹ A great deal of scholarship in the fields of communications theory and sociology is devoted to the analysis of various forms of networks while distinguishing them on the basis of the strength of ties among participants. For instance, Granovetter examined which form of social network is most helpful in helping individuals find their next job. *See* Mark Granovetter, *The Strength of Weak Ties: A Network Theory Revisited*, 1 SOC. THEORY 201, 205 (1983). He first found that networks of "weak ties" were of the greatest help—yet later research proved that additional factors must be taken into consideration (such as the form of job and education). *Id.* at 205–09.

intermediate ones.²⁰ I now explain this taxonomy and my reasoning for addressing this particular segment. The Internet provides for a great variety of social interactions. It allows users to strengthen existing close social ties with family and friends, using various means of communications applications such as e-mail, instant messenger, blogs, Voice Over IP (VoIP) and the like.²¹ The strengthening of these ties could also occur within the confines of a network, such as mailing lists and other applications that facilitate discussion. These dynamics also take place within other close communities such as the workplace and neighborhoods. While these dynamics and ties lead to intriguing outcomes, I choose to exclude them from this discussion. Often they substitute or enhance exchanges that would have occurred regardless of the internet medium. They are subject to unique forms of motivation to contribute as well as checking mechanisms for accreditation and filtering. This is because participants interact offline or are all subject to other sets of norms. For these reasons, both the challenges they create and the responses to them differ from those addressed throughout this Article.

At the other end of the social networking spectrum, the online realm facilitates interactions between participants with very weak social ties. I refer to open forums, which include comments left on the fly within commercial or mass media websites. I also refer to other platforms that generate an open discourse conducted in complete anonymity. While these platforms indeed promote an intriguing discourse, they generate a variety of problems, especially with regard to a limited ability to weed out manipulative content²² and in my view they are of little utility. I chose to exclude them as well from this Article's discussion.

²⁰ Lior J. Strahilevitz, *Social Norms from Close-Knit Groups to Loose-Knit Groups*, 70 U. CHI. L. REV. 359, 366 (2003) [hereinafter Strahilevitz, *Social Norms*].

²¹ BENKLER, *supra* note 11, at 356–57; *see also* JEFFREY BOASE, ET AL., PEW INTERNET AND AMERICAN LIFE PROJECT, THE STRENGTH OF INTERNET TIES 10–14 (Jan. 25, 2006), available at http://www.pewinternet.org/pdfs/PIP_Internet_ties.pdf.

²² For an analysis of this issue, see Shmuel Becher & Tal Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMM. & TECH. L. REV. (forthcoming Apr. 2008) (manuscript at 32–33), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=984765.

As mentioned, the Article focuses on the third form of social interactions online: that among users with intermediate ties.²³ These forms of interaction feature a group of users, some of them repeat players, who have already constructed a *reputation* and *identity* within the online realm, given their ongoing contribution.²⁴ The identity of the users is constructed with the help of applications, ensuring that users have a consistent login name when entering the network. The enhancement of reputation is achieved through a variety of tools that aggregate information²⁵ on the users' previous experiences, actions and interactions. These tools also allow presentation of such information in a way that is accessible and understandable to other network participants.²⁶ Within these realms, some of the users have already learned to identify others (especially the repeat players), formed relationships with them and might even identify their specific online "voice."²⁷ These dynamics, which are facilitated by specific technological tools, entail intriguing legal questions and policy implications, which I address below.

B. Overview of Online Social Networks—Technological, Social & Historical

The Internet enables users to connect with many others at a nominal cost (in most cases, zero marginal cost) and with almost

²³ Strahilevitz, *Social Norms*, *supra* note 20, at 366.

²⁴ For a description of this dynamic, see Becher & Zarsky, *supra* note 22, at 34.

²⁵ See, e.g., Digg, <http://www.digg.com>. "Digg is a community-based popularity website with an emphasis on technology and science articles." Digg, Wikipedia, <http://en.wikipedia.org/wiki/Digg> (last visited Nov. 29, 2007); see also BENKLER, *supra* note 11, at 75–76 (discussing various methods that successful websites use to aggregate data, thereby ensuring some degree of reliability for users); see generally Folksonomy, Wikipedia, <http://en.wikipedia.org/wiki/Folksonomy> (last visited Nov. 29, 2007). (Folksonomy refers to bottom-up processes that are used for sorting and ranking).

²⁶ The distinction between intermediate and weak-ties networks is far from clear. Many of the platforms and websites which generate the latter strive to transform into the former by adding various mechanisms to enhance reputation and create a consistent identity, with varying success.

²⁷ However, these online relationships need not entail the "piercing of the veil" between the user's online persona and his or her offline existence. On the contrary, interactions are in many instances premised on the online user traits alone, while the offline persona remains cloaked in pseudonymity.

no geographical constraints.²⁸ Given these traits and abilities, it is no surprise that users early on made use of the Internet's infrastructure to construct and maintain various forms of social networks, such as the early Multi-User Domains ("MUDs"), chat rooms and forums.²⁹ Even at this early juncture, these social dynamics led to a variety of disputes and problems, which in turn sparked academic interest.³⁰ However, limited bandwidth, which could only support an all-text environment, stopped these media from gaining a broad following, as its inferior interface caused it to lag behind "warmer" media such as TV. In addition, the inability to search the contents of these realms effectively (successful search technologies were developed only later) also³¹ minimized the impact of these early networks.

Online social networks continued to develop in a variety of realms. They prospered in several commercial settings, where business entrepreneurs were quick to acknowledge that the dynamics in these realms could be extremely beneficial to their cause. Such was the case with the amazing success of *eBay.com* and *Amazon.com*, and their reliance on rich online social networks. eBay positioned itself as a virtual marketplace, where almost anything could be bought and sold. It understood early on that

²⁸ At this point and to a certain extent throughout this paper, I assume overall equality in the ability to access and make use of the Internet and the applications it offers. Clearly this assumption is false, as even today a large part of the world's population are excluded from the discourse addressed within this paper. However, this paper does not tackle the "digital divide" issue for various reasons. Given the fact this paper is focused on the discourse in developed countries, I am of the opinion that this issue is a transitional one. See BENKLER, *supra* note 11, at 237. Not only are the costs of accessing the Internet shrinking but many of the applications addressed throughout this analysis are accessible through forms of hardware which are cheaper and more accessible than personal computers, such as cell phones, personal digital assistants ("PDAs"), game consoles, and in the near future TV sets as well.

²⁹ See MUD, Wikipedia, <http://en.wikipedia.org/wiki/MUD> (last visited Nov. 29, 2007); Chat Room, Wikipedia, http://en.wikipedia.org/wiki/Chat_Room (last visited Nov. 29, 2007); see also Joshua Fairfield, *Anti-Social Contracts: The Contractual Governance of Online Communities* 8-9 (Washington & Lee Legal Studies Paper No. 2007-20, 2007), available at <http://ssrn.com/abstract=1002997>.

³⁰ See LAWRENCE LESSIG, CODE 2.0 10-11, 98-99 (2006), available at <http://pdf.codev2.cc/Lessig-Codev2.pdf> (discussing border disputes and sexual assault in virtual space).

³¹ I return below to a discussion of search engines and search technologies, and their great importance to the dynamics addressed here.

merely constructing a platform for commercial transactions would be insufficient—it must also generate trust between buyers and sellers, and formulate a system that would effectively signal the trustworthiness of existing participants to newcomers. eBay famously delegates this task to its users, who provide various forms of feedback on their transactions that is made available to other parties.³² Yet to motivate users to provide this essential feedback, eBay goes to great lengths to generate a “community feeling” among participants.³³ Thus, eBay’s account holders are more than merely consumers in the world’s biggest market—they are part of a vast social network that produces a valuable asset: the reputation rankings for eBay’s long list of vendors.

Amazon.com also benefited from embedding social networks in its business model, albeit by a different approach. Amazon did not need any help in vouching for its sellers (at least not originally³⁴), as Amazon itself took the role of vending products and content. Moreover, Amazon confronted its users with a vast variety of products, far exceeding any local bookstore.³⁵ Thus, it needed new mechanisms to guide users through its extensive collection. To do so, it again chose to rely on the wisdom of the masses and on information streaming from other users and consumers. For instance, consumers could explicitly provide reviews of books they had read and create a list of favorite products.³⁶ Beyond that, profiling the users’ preferences for various forms of books and products allowed Amazon (through the use of sophisticated data mining techniques) to provide users with recommendations for other products based on their prior behavior,

³² See Feedback Forum, eBay, <http://pages.ebay.com/services/forum/feedback.html> (last visited Jan. 14, 2008).

³³ See, e.g., Keith Regan, *Plugging In: Can E-Commerce Leverage Social Networks?*, E-COMMERCE TIMES, Nov. 2, 2006, available at <http://www.technewsworld.com/story/dqTa3ScZHwOR6I/Plugging-In-Can-E-Commerce-Leverage-Social-Networks.xhtml>.

³⁴ Today, Amazon offers access to many other vendors. See CHRIS ANDERSON, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* 92 (2006).

³⁵ For that matter, it far exceeds the largest bookstores in the world. See ANDERSON, *supra* note 34, at 23.

³⁶ See Your Lists, Amazon.com, http://www.amazon.com/gp/lists/homepage.html/ref=topnav_lists_gw (last visited Jan. 14, 2008).

as well as that of their peers.³⁷ To a certain extent, all Amazon.com users are part of a broad social network, which shares information about consumer behavior and preferences, and in the process, creates an astounding prediction model of future selections by online purchasers.³⁸

Beyond these examples, social networking has seen a massive surge in popularity during the last few years. The main reason for such success is probably technological.³⁹ The penetration of broadband has allowed users to experience the Internet in a much “richer” way—with real-time sound, animation and, at last, video. The quicker and better online connections facilitated downstreaming of content, as well as a capability for easy uploading and sharing of various forms of “home made”⁴⁰ content with many others. These and other developments⁴¹ have sent consumers flocking sites such as MySpace, Facebook, Flickr, and many others, which provide access to vast amounts of “uploaded” content. In these networks, users share information on content, as well as disseminate the content itself. The development and use of software tools (at times called “Social Software”)⁴² that facilitate the creation of communities, allowing participants to create online reputations, has also generated other forms of online social networking. The Wiki, for instance, through the creation of a

³⁷ See Recommended for you, Amazon.com, <http://www.amazon.com/gp/yourstore> (last visited Jan. 14, 2008).

³⁸ See BENKLER, *supra* note 11, at 75–76. Benkler goes on to demonstrate that, to a certain extent, Google, too, relies on social networks and connections—for instance, how the links that webpage owners apply to their own pages collectively signal their interest in—or “vote” for—web pages throughout the net.

³⁹ See Tim O’Reilly, *What is Web 2.0: Design Patterns and Business Models for the Next Generation of Software*, O’REILLY MEDIA, Sept. 30, 2005, available at <http://www.oreillynet.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-20.html?page=1> (discussing the development and traits of “Web 2.0”).

⁴⁰ Be it software (e.g., <http://www.opensource.org>), audio (e.g., <http://www.soundforge.com>), graphics (e.g., <http://www.picasa.com>), video (e.g., <http://www.adobe.com/products/premiere>), or a mix of them all.

⁴¹ Such as tools that allow the creation of content on just a home computer, or a technology that enables searches within and throughout social networks. See Michael J. Madison, *Social Software, Groups, and Law*, MICH. ST. L. REV. 153, 158 (2006); Noveck, *supra* note 17, at 106.

⁴² See Clay Shirky, *Social Software and the Politics of Groups*, Mar. 9, 2003, http://www.shirky.com/writings/group_politics.html; BENKLER, *supra* note 11, at 373.

supporting social network, assists individuals to work together for a common goal, and has led to the development of Wikipedia, and other impressive projects.⁴³ The development of Massive Multiplayer Online Games (MMOGs),⁴⁴ also known as “Virtual Worlds,” has allowed online communities to flourish in an immersive environment.⁴⁵

When discussing the evolution of online social networks, I must also emphasize the impact of general search engines.⁴⁶ Search engines amplify the discourse in these realms by allowing any user (and not only active or passive participants in the relevant networks) to access the content developed in the network's confines.⁴⁷ Not all networks view this outcome favorably. Some have moved to block search engines from accessing and indexing social networks. Yet in general it is the search engine that has transformed the social dynamics of the described social networks from a remote obscurity to a powerful force with far-reaching implications.

C. *Limits and Challenges*

After the enthusiastic overview provided above, it is time for some cooling words. Online social networks show much promise, yet the dynamics that creates an efficient flow of relevant, helpful, and correct information to many of their users faces several

⁴³ See DON TAPSCOTT AND ANTHONY D. WILLIAMS, WIKINOMICS 254–57 (2006).

⁴⁴ Such as Second Life (<http://www.secondlife.com>), The Sims (<http://thesims.ea.com>), and World of Warcraft (<http://www.worldofwarcraft.com>). See TAPSCOTT & WILLIAMS, *supra* note 43, at 242; see generally BALKIN & NOVECK, *supra* note 10.

⁴⁵ In some instances, a rich and successful online network emerged premised on simple and “text only” interfaces—such as the “open source” community and project. See generally ERIC S. RAYMOND, THE CATHEDRAL AND THE BAZAAR (2d ed. 2001), available at <http://safari.oreilly.com/0596001088>. However, as this example has many specific attributes, I believe its explanatory value is limited.

⁴⁶ Search engines are themselves fueled by interesting social networks and dynamics. See BENKLER, *supra* note 11, at 75–76.

⁴⁷ While it is true that many of the social networks have their own powerful search tools—such as Wikipedia and YouTube—the general search engines (such as Google) also take users to networks that do not apply such search technologies. It also takes users who are not acquainted with the world of online social networks to the information that lies within these realms. These engines then aggregate all the information gathered from the various social networks into one “results” page, while also ranking and prioritizing it.

obstacles. I will briefly summarize them, while referring to the need for sufficient *platforms*, *motivation*, and *accreditation*. I conclude this part by addressing the trends and implications of actual participation in these social networks.

Platforms are the basic requirement for the existence of social networks. For social networks with intermediate ties to exist, software and memory space must be made available for user participation. Ample commercial interests⁴⁸ apparently support a variety of firms providing these services. Yet the mere existence of platforms is not enough—they must be neutral, and allow the discourse to proceed without a specific entity promoting its own agenda or interest. I will address this limitation briefly below, noting that while this issue is one of great concern in other contexts,⁴⁹ it does not seem problematic in the context of social networks.

The question of *Motivation* is a challenge academics face when trying to understand the inner workings of online social networks, and that entrepreneurs consider when contemplating a business venture reliant on these dynamics. In these networks, we are currently witnessing a great deal of effort exerted by users—at times supplanting the work of many paid experts.⁵⁰ This conduct is generally understood to be motivated by a flurry of *internal*

⁴⁸ Such as subscription fees, advertising or reaping the fruits of the deliberative process occurring within the network.

⁴⁹ Such as the Network Neutrality debate, which addresses the ability of the entities controlling the telecom infrastructure to control the content transferred through it. See Robert Atkinson & Phil Weiser, *A Third Way on Network Neutrality*, THE NEW ATLANTIS, Summer 2006, at 47, available at <http://www.thenewatlantis.com/archive/13/TNA13-AtkinsonWeiser.pdf>; Letter from Lawrence Lessig, Professor, Stanford Law School and Tim Wu, Associate Professor, University of Virginia School of Law, to Marlene H. Dortch, Secretary, Fed. Commc'ns Comm'n (Aug. 22, 2003), available at http://www.freepress.net/docs/wu_lessig_fcc.pdf; Michael K. Powell, Chairman, Federal Commc'ns Comm'n, Remarks at the Silicon Flatirons Symposium: The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age (Feb. 8, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf.

⁵⁰ Such is the case of the Mozilla organization and the Firefox Browser project. Compare Firefox, <http://www.mozilla.com/en-US/firefox> (developed by the Mozilla open source community), with Microsoft's Internet Explorer, <http://www.microsoft.com/windows/products/winfamily/ie/default.mspx> (requiring the employment of many thousands of employees to develop).

motivations⁵¹ such as altruism, communality, spite, and self-fulfillment. However, in some instances, external motivations are at work as well—such as the creation of an offline reputation as an expert, or actual emolument by the relevant platform. In every instance of reliance on social networks and their internal dynamics, one must ask whether the existing balance between the users' motivations and their counter-acting forces (such as the users' feeling that they are being taken advantage of by other free riders or possible legal liability issues) will be maintained. Clearly, with this balance disrupted, the social network, as an active environment producing information flow and content, will cease to exist.

Accreditation refers to the requirement that the information flowing through these realms be relevant, accurate, and impartial. Here I address several concerns.⁵² One is that the content submitted by a participant in the social network is irrelevant or wrong due to his or her incompetence or error. This concern, however, is sufficiently dealt with by various technological tools⁵³ and social dynamics. Therefore, I refrain from addressing it in this Article's subsequent sections.

Another serious concern is that the information is intentionally tampered-with for various commercial interests. In many instances participants and interest groups strive to present information to other consumers in a certain way, and to do so attempt to "game" and manipulate the various filtering, accreditation, and reputation mechanisms the online social network puts in place. They would do so, for instance, to promote a product, slander a rival, or gain prominence in the public sphere. The arms race between the "gamers" and those trying to block this practice is currently played

⁵¹ See BENKLER, *supra* note 11, at 102; CASS R. SUNSTEIN, INFOTOPIA 120, 139 (2006). For a discussion of spite as a motivator see Lior J. Strahilevitz, 'How's My Driving?' For Everyone (and Everything?), 81 N.Y.U. L. REV. 1699, 1713 (2006) [hereinafter Strahilevitz, *How's My Driving?*].

⁵² See Becher & Zarsky, *supra* note 22, at 30–34, 54–55.

⁵³ See *id.* at 29–32; Chrysanthos Dellarocas, *Reputation Mechanisms*, in HANDBOOK ON INFORMATION SYSTEMS AND ECONOMICS (T. Hendershott ed. 2006), available at <http://www.rhsmith.umd.edu/faculty/cdell/papers/elsevierchapter.pdf>; Tal Z. Zarsky, *Assessing Alternative Compensation Models for Online Content Consumption*, 84 DENV. U. L. REV. 645, 709 n.242 (2007) [hereinafter Zarsky, *Denver*].

out in a variety of online contexts,⁵⁴ and it is unclear whether technology alone would suffice to allay these serious concerns.

Finally, the many benefits that may be derived from fruitful discourse in online social networks depend on the actual participation of the *very few*. According to recent surveys only 12% of all Internet users participate (even in the most limited fashion) in the discourse taking place within these social networks.⁵⁵ However, this statistic alone need not generate concern, for two reasons: first, these same surveys indicate a constant rise in such participation.⁵⁶ Second, as mentioned above, search engines substantially alter these numbers and allow curious, browsing users to enter the ongoing discourse and gather information related to their specific query. In other words, search engines further distribute the knowledge generated within the realms of the online social networks.

However, scrutiny of the inner-workings of social networks makes it quite clear that of the overall number of participating users, the percentage of *contributing* users (as opposed to those passively consuming information, or even seeking advice) is extremely low.⁵⁷ Commentators addressing this issue have recently suggested⁵⁸ a triangular distributional structure of the

⁵⁴ See Paul Resnick & Richard Zeckhauser, *Trust Among Strangers in Internet Transactions: Empirical Analysis of eBay's Reputation System* 3 (Nat'l Bureau of Econ. Research, unpublished working paper, 2001), available at <http://www.si.umich.edu/~presnick/papers/ebayNBER/RZNBERBodegaBay.pdf> (discussing how eBay users' reputation scores are subject to manipulation); Zarsky, *Denver*, *supra* note 53, at 686 (addressing the practice of search-engine optimization).

⁵⁵ Resnick & Zeckhauser, *supra* note 54, at 3 (Pew Institute findings regarding usage of online rating systems (32%), participation in online discussions (22%) and social networking (16%)).

⁵⁶ In September 2005, only 11% of all Internet users used social networks. See Pew Institute's analysis of usage over time, available at <http://www.pewinternet.org/trends/UsageOverTime.xls>.

⁵⁷ Only 0.2% of visits to YouTube involve users uploading a video, 0.16% of Flickr visits are people posting photos, and 4.56% of visits to Wikipedia result in content-editing. See Bill Tancer, *Who's Really Participating In Web 2.0*, TIME, Apr. 25, 2007, available at <http://www.time.com/time/business/article/0,8599,1614751,00.html>.

⁵⁸ See Jacob Nielsen, *Participation Inequality: Encouraging More Users to Contribute*, Oct. 9, 2006, available at http://www.useit.com/alertbox/participation_inequality.html; Bradley Horowitz, *Creators, Synthesizers, and Consumers*, Feb. 17, 2006, available at <http://www.elatable.com/blog/2006/02/17/creators-synthesizers-and-consumers>.

social networks' workload, where 90% of all users interact merely passively or seek consumer information, 10% contribute occasionally and incidentally (by making slight corrections, or tagging, grading, and commenting on existing content), and a mere 1% shoulder most of the administrative and creative burdens of the networks' discourse.

These findings raise several concerns. First, they oblige us to rethink the notion of social network dynamics transpiring online as an open and democratic process. Since a very limited number of users stand at the core of information production and flow, this small group has a powerful impact on the information the great majority of passive users view and consume. I will save discussion of this important issue for future analyses.⁵⁹ Second, they require us carefully to consider the "manipulation and accreditation" and "motivation" concerns mentioned above, and also below. When so few sources exercise such profound influence on the overall discourse, the notion of an ability to manipulate it for commercial and other interests is not far-fetched.⁶⁰ Conventional economic analysis tends to view instances in which the actions of the very few are benefited by many as those that create "free-riding" issues—and eventually cause the contributing few to cease given their frustration and their limited compensation. Scholars⁶¹ addressing the motivations of users in social networks go to great lengths to explain why this result need not transpire in the setting here discussed. Yet the empirical findings mentioned here clearly indicate that they have an uphill battle, and that the users' motivation to contribute within these realms is an issue constantly in the need of concern and attention. I return to these two issues throughout my analysis.

Before concluding this issue, two reassuring comments are due. First, even with these findings, online social networks are a great success.⁶² Second, despite the low rate of actual participation,

⁵⁹ See BENKLER, *supra* note 11, at 259 (arguing that this is not a serious concern, and that overall, online control and influence is diffused, and in any event, cannot be bought).

⁶⁰ See, e.g., *infra* note 133.

⁶¹ See Yochai Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm*, 112 YALE L.J. 369, 438 (2002) [hereinafter Benkler, *Coase's Penguin*].

⁶² See TAPSCOTT & WILLIAMS, *supra* note 43, at 10–20.

social networks appeal to a vast audience and their access costs are very small. Therefore, the *nominal* number of engaged participants is impressive overall and might be sufficient to meet the various objectives addressed throughout the paper. This however, might not be always the case when the overall “target” audience of the social network is limited. This would occur when participation in the online discourse requires a great deal of expertise, or a specific language or skill set.

II. ONLINE SOCIAL NETWORKS AND NETWORKING—AND THEIR (SOMEWHAT SURPRISING) LEGAL IMPLICATIONS

A. *General—and the IP example*

The online social networks described above bring together individuals from distant locations and enable them to exchange information, which is filtered, accredited and valuable to their recipient. Furthermore, as Don Tapscott recently demonstrates in “Wikinomics,”⁶³ these dynamics produce enormous social benefits as the collective wisdom of distant parties comes together to create value. According to Benkler, the dynamics in these realms constitutes a third model of production, which competes with the “market” and the “firm,” and at times surpasses them in its sustainability and effectiveness.⁶⁴

These new and exciting opportunities for generating value and utility necessarily exert a profound effect on law and policy. In various instances, laws and regulation strive to promote information flows and content production. In others, regulators respond to the lack or paucity of such flows and content production by regulating specific markets and market players (as lack of information flow results in market failures and suboptimal market outcomes). With these new flows and forms of content creation in place, the rationale for such regulation (in specific instances) is substantially undermined. I demonstrate this argument by referring to the impact of online social networks on intellectual

⁶³ TAPSCOTT, *supra* note 43, at 10–20.

⁶⁴ BENKLER, *supra* note 11, at 122.

property (“IP”) law and policy – an argument recently made by several leading scholars. Then, I extend this argument to other, more provocative contexts.

IP law is premised on the notion that without providing authors with ownership and control over their works, they will fail to further produce materials that are extremely important for human progress.⁶⁵ In the context of copyright, movie producers, for instance, will not shrink from the high upfront investment needed to produce a motion picture, as they know they can reap the fruits of their work and block unauthorized uses.⁶⁶ Copyright similarly protects the business models for today’s media firms, and allows them to attend to the distribution of books, music, and films through their sophisticated distribution channels.⁶⁷ In doing so, these media firms fulfill the essential role of filtering the vast amounts of content available, while only providing their audience with a few selected works.⁶⁸

Providing “authors” (in the broadest context) with IP rights comes at a high social cost. Owner’s property rights over their creation and work allows them to exclude others from using it at their discretion.⁶⁹ These “others” might be authors who wish to rely on earlier works to develop new ones and promote overall progress. In the context of patents, they might be parties interested in transforming the somewhat abstract patent application into an

⁶⁵ This stems from the fact that Intellectual Property is by nature a “public good.” For more on this issue, see WILLIAM FISHER, PROMISES TO KEEP 199–201 (Stanford University Press 2004). See also U.S. CONST. art. I, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

⁶⁶ See 17 U.S.C. § 106 (2006) (enumerating the exclusive rights afforded by federal copyright).

⁶⁷ See 17 U.S.C. § 102 (including among the subject matter protected by copyright: literary works, music works, and motion pictures).

⁶⁸ FISHER, *supra* note 65, at 78.

⁶⁹ Clearly, in the context of IP, right holders are not free to exclude at their discretion in all instances. For example, users are shielded from infringement claims should they prove they engaged in “fair use” as defined by the courts. 17 U.S.C. § 107. However, given the shrinking nature of this defense, many argue that copyright to the extent it is enforced today, substantially impedes prospective creators. See BENKLER, *supra* note 11, at 440–41. On the link between fair use and important democratic objectives, see Balkin, *supra* note 10, at 53.

actual product that will have beneficial uses.⁷⁰ Yet IP law removes works and inventions from the public domain—a price paid for the sake of motivating future progress and invention.

Enter online social networks. In these realms, various important social objectives are achieved, free of the high cost of removing works and other forms of valuable knowledge from the public domain. Extensive encyclopedias are erected without the need to provide contributors with the prospect of future monetary compensation for their work.⁷¹ Vast amounts of user-generated content are circulated, ranked, and distributed among interested consumers, who do not charge others for consuming their content, and without the ability to block unwanted usage.⁷² Software tools of extreme complexity are written by volunteers.⁷³ These examples and many others show that property rights (at least those allotted by today's IP legal systems) might not be the only way to promote creation, progress, and efficient distribution of ideas. On the contrary, the existence of such property rights can potentially stall the dynamics within social networks. IP owners can move to block the use of their works within these networks, thus limiting the benefits previously mentioned. Therefore, the dynamics within online social networks strengthens voices calling for the limitation of IP protection in the digital age.⁷⁴

The success of online social networks, as opposed to the internet *in general*, will play a crucial role in making this argument. The Internet in general, which facilitates networks of both weak and strong ties, provides the tools and the infrastructure for consuming content and distributing it efficiently. However, without the social networks, the Internet might merely redistribute

⁷⁰ Benkler addressed in length the detriments of the patent system in this context. BENKLER, *supra* note 11, at 344.

⁷¹ Wikipedia, as well as other peer production projects, provides some rights to authors—notably the right to block commercial uses without the consent of Wikipedia. See Copyright, Wikipedia, <http://en.wikipedia.org/wiki/Wikipedia:Copyrights> (last visited Nov. 28, 2007).

⁷² See, e.g., Youtube, <http://www.youtube.com> (allowing site visitors to rate videos, embed on their own blogs, and share with friends) (last visited Feb. 11, 2008).

⁷³ See, e.g., The Apache Software Foundation, <http://apache.org> (last visited Feb. 11, 2008).

⁷⁴ BENKLER, *supra* note 11, at 49.

existing works and become another medium dominated by the existing media giants.⁷⁵ The social networks' ability to generate new content, and effectively distribute user-generated content in a broad, yet reliable way, is crucial for making the argument for limiting IP rights convincing.

B. Online Social Networks and the Easing of Governmental Intervention

1. Consumer Protection

Scholars have drawn on the dynamics in online social networks to argue for the limitation of IP protection.⁷⁶ This notion fits well within the overall liberal objective of promoting free speech, and a rich ongoing discourse among individuals. However, I now show that arguments that are similarly premised on the online social networking dynamics should lead to a change of a very different flavor—one that is libertarian in nature and calls for the limitation of governmental intervention, while allowing markets alone to yield optimal outcomes. I will demonstrate these somewhat surprising yet inevitable claims by briefly addressing two contexts: *consumer protection* (while also addressing contracts of adhesion), and *media policy*.

In a capitalistic regime the state chooses to refrain from interfering in the nature of transactions between vendors and consumers, if the market is not subject to various “market failures.”⁷⁷ Nevertheless, in some instances the state chooses to intervene. One dominant rationale⁷⁸ for such intervention is that the consumers' decision to pursue the transaction is premised on insufficient and partial information. The high cost of collecting

⁷⁵ For more on this argument, see Zarsky, *Denver*, *supra* note 53, at 707.

⁷⁶ BENKLER, *supra* note 11, at 49.

⁷⁷ Oren Bar-Gill & Richard A. Epstein, *Consumer Contracts: Behavioral Economics vs. Neoclassical Economics*, 92 MINN. L. REV. (forthcoming) (Epstein section, at 1), available at <http://ssrn.com/abstract=982527>; Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Market*, 104 MICH. L. REV. 827, 829 n.4–5 (2006).

⁷⁸ There are other rationales for intervening, such as public safety, undue influence over the consumer at the time of the transaction, or the fact that consumers are in a vulnerable mental state at that specific time. We do not deal with these matters in this Article.

and comprehending transaction-related information allows vendors to benefit from information asymmetries, and draft terms biased toward the vendors.⁷⁹ The information asymmetries between vendors and consumers lead to unequal bargaining power, and therefore unfair and inefficient outcomes.

Intervention in this context takes several forms. One milder form is requiring vendors to provide consumers with more and specific information⁸⁰ prior to the transaction. Another, more aggressive route, is setting mandatory terms that will govern the transaction *ex ante*, or intervene *ex post* when transactional terms appear unfair.⁸¹

A closely related issue is the courts' intervention and enforcement of consumer standard form contracts.⁸² Courts, sometimes refrain from enforcing these contracts, finding them unconscionable (or applying other doctrines).⁸³ In some of these cases, courts change the contractual provisions *ex post* to reflect (what the court believes to be) a fair outcome. The theory explaining such intervention (beyond mere paternalism on the part of the courts) states that courts intervene given the fact that the consumer did not know of, or could not comprehend the implications of the contractual provisions at the time of contract formation.⁸⁴

Although some schools of policy and legal thought find these forms of intervention commendable, many others frown on them

⁷⁹ Bar-Gill & Epstein, *supra* note 77, at Epstein 1–2.

⁸⁰ See, e.g., Truth in Lending Act, 15 U.S.C. §§ 1601–15 (2000). For a recent debate on these forms of regulation, see Bar-Gill & Epstein, *supra* note 77, at Bar-Gill 35, Epstein 3.

⁸¹ Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1187–88 (2003). These forms of intervention are far more popular in the European Union (“E.U.”). See generally Francesco Parisi, *The Harmonization of Legal Warranties in European Law: An Economic Analysis*, 52 AM. J. COMP. L. 403 (2004).

⁸² For more on this issue, see Becher & Zarsky, *supra* note 22, at 5 n.11, 8 n.23; Bebchuck & Posner, *supra* note 77, at 829 n.7.

⁸³ Bebchuck & Posner, *supra* note 77, at 829 n.7. For recent examples in the Internet context, see *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1177 (N.D. Cal. 2002); *but see Feldman v. Google, Inc.*, 2007 WL 966011 (E.D. Pa. Mar. 29, 2007). See also Bebchuck & Posner, *supra* note 77, at 829 n. 8–9 for additional references.

⁸⁴ See *supra* note 83; see generally *supra* Part I.

and argue they should be strictly limited to the most necessary instances.⁸⁵ They point out that regulators and legislators are in many instances captured, or fail to grasp and understand the market forces at play when they set mandatory terms.⁸⁶ They argue that the (apparently non-intervening) disclosure requirements might lead to negative outcomes.⁸⁷ They further assert that courts are in no position to regulate the contractual setting between the parties, given the complexity of this task; to do so, courts are required to establish ex post, and without actual knowledge of the parties' state of mind and expertise, what would have been a fair and efficient transaction at the time of contract formation.⁸⁸ Overall, these powerful arguments state that, when possible, markets are the preferable means to govern consumer transactions, unless various market failures are manifest.

Again, enter online social networks. As mentioned, one major benefit of these platforms is that they facilitate enhanced flows of accredited and relevant information. In this specific context (information related to consumer transactions) a variety of social networks offer a wealth of information,⁸⁹ as many such realms are devoted to consumer transactions. Within these networks data are provided by experienced consumers, advisors and public-interest groups, and even by the vendors themselves (regarding their and their competitors' product).⁹⁰ Such information flows among the

⁸⁵ Bebhuck & Posner, *supra* note 77, at 834.

⁸⁶ See Robert A. Hillman, *On-line Boilerplate: Would Mandatory Website Disclosure of E-standard Terms Backfire?*, 104 MICH. L. REV. 837, 845 (2006); Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 HOUS. L. REV. 975, 982 (2005).

⁸⁷ See Hillman, *supra* note 86, at 849.

⁸⁸ Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge that is Yet to be Met*, 45 AM. BUS. L.J. (forthcoming 2008) (manuscript at 50–51), available at <http://ssrn.com/abstract=1016010>.

⁸⁹ See, e.g., <http://www.epinions.com>; <http://www.yelp.com>; <http://www.consumerreview.com> (all popular consumer information websites).

⁹⁰ Clearly this issue raises questions as to whether users are sufficiently motivated to provide such information. In these instances, a variety of motivations (such as spite, altruism and communality) contribute to an overall affirmative response. See Becher & Zarsky, *supra* note 22, at 31. In addition, this form of data flow is especially susceptible to manipulative practices given the commercial importance of this information. On the chances of allaying this concern, see *id.* at 29; Strahilevitz, *How's My Driving?*, *supra* note 51, at 1733–35.

networks' participants, and in many cases can also be accessed by outsiders using general search engines.

In view of the above, if online social networks prove a sustainable⁹¹ phenomenon and provide a rich and ongoing information flow, markets and other social dynamics could in many additional instances substitute consumer protection measures. They could close the information gap between vendors and consumers, and rebalance information asymmetries. Intervention by courts and regulators in the nature of the transaction (and in the standard form contracts that govern them) would for the most part be unnecessary. This would be true in cases which present sufficient evidence of such an information flow, and also indications that indeed a sizeable⁹² group of consumers seeks out consumer-related information from these networks prior to concluding their transaction. Recent survey data show that consumers in e-commerce consumer markets⁹³ tend to consult search engines, forums, and social networks prior to concluding their transaction. Therefore, regulators and courts should reconsider intervening in these transactions (in competitive settings).⁹⁴ Furthermore, in the future this notion of “non

⁹¹ Benkler indeed forcefully argues that such online dynamics are not a fad. BENKLER, *supra* note 11, at 106.

⁹² As scholars in the field of law and economics point out in several contexts, not *all* consumers must be exposed to this information flow and take the data it includes into consideration. Just a marginal group of knowledgeable consumers would be sufficient to deter vendors from applying imbalanced transactional terms in a competitive setting. See Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interest*, 69 VA. L. REV. 1387 (1983); Becher & Zarsky, *supra* note 22, at 8.

⁹³ For a recent survey containing data regarding Internet activities see Pew Internet & American Life Project, Internet Activities, http://www.pewinternet.org/trends/Internet_Activities_8.28.07.htm (last visited Feb. 11. 2008). According to the survey, 78% of all Internet users research a product or service before buying it. *Id.*

⁹⁴ This assertion clearly conflicts with the E.U. perspective on such transactions which (quite to the contrary) calls for enhanced intervention in this setting. See Directive on Electronic Commerce, Council Directive 2000/31, 2000 O.J. (L 178), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:178:0001:0016:EN:PDF>. The directive sets out several rules which govern the e-commerce transaction and could be viewed as intervening such as the requirement that the supplier provide the purchaser with written confirmation of the contract before or at the time of delivery (Article 5), the right of withdrawal (or a “cooling off period”) (Article 6), and the obligation of suppliers to carry out the contract within 30 days of

intervention” in view of the online social networking dynamics might spread to other, offline markets that present the specific traits I address above.

At this point the cautious reader will question whether the argument made here must rely on online social networks, or whether the Internet in general might suffice. Here I assert that the unique traits of data flows among individuals with ties of intermediate-strength are those which make this argument convincing. Only such flows can reach a sizeable part of the market, which would lead to the required impact. Moreover, only these forms of flow, which are motivated and accredited, will ensure that a sufficient level of trustable information is made available to a sufficiently large group of consumers.⁹⁵

2. Regulating the Structure of Media Markets

Mass media markets are subject to several layers and forms of regulation and governmental scrutiny. Beyond steps concerning actual content,⁹⁶ regulators set in place rules which govern the structure of the markets for TV broadcast, radio, and cable, as well as vertical integration in the overall market.⁹⁷ Such rules limit the market share and reach of various market players in specific markets and overall.

The rules set in place to govern competition in media markets go beyond the standards applied in other markets, where competition is promoted and assured on the basis of antitrust law.⁹⁸ In addition to competition (which is defined differently in this specific context), media regulation sets out to meet unique

placing the order, unless agreed otherwise (Article 7). This is in addition to extensive disclosure requirements which the vendor must make prior to the transaction (Article 4).

⁹⁵ For more on this issue, see Becher & Zarsky, *supra* note 22, at 39 n.178.

⁹⁶ For example, obscene content or the regulation of equal access to the media by politicians. *See generally* BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 224, (Carolina Press 2006) (2001) [hereinafter BENJAMIN ET AL., TELECOM. L. & POLICY]. I will not address these issues here.

⁹⁷ For explanations and descriptions of these ever-changing rules, see *id.* at 401; Howard A. Shelanski, *Antitrust Law and Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CAL. L. REV. 371, 372–80 (2006).

⁹⁸ It is extremely challenging to premise existing media concentration rules on the basis of antitrust rationale alone. *See* Shelanski, *supra* note 97, at 396.

objectives—to ensure diversity and maintain localism.⁹⁹ The reasoning behind these stricter standards and additional elements is premised on several distinct notions: promoting free speech, assuring a rich public discourse, with a variety of voices, empowering all parts of society, and promoting democracy.¹⁰⁰

Considering these important (yet broad and abstract) objectives, existing media concentration rules are justified as an essential measure to prevent instances in which very few entities control the crucial bottlenecks to the public's attention.¹⁰¹ Broadcast TV, radio, cable TV, and to a certain extent the printed press are all regarded as the primary means through which individuals gather news and information, which they later apply to make various decisions.¹⁰² Allowing a limited number of firms to control these crucial bottlenecks will afford them a great deal of influence over the ongoing discourse and eventually the public's behavior (thus compromising the broader objectives mentioned).

Another justification, also premised on the broad and abstract notions mentioned states that regulating media market structure and maintaining a specific number of independent media players, is essential to make sure that the public is exposed to a rich and diverse *variety* of content.¹⁰³ The public might be deprived of such diversity should the media market remain dominated by few players, who might choose to focus on a limited number of voices and content for business or ideological reasons. As key media scholars point out, even an increase in the number of outlets is no

⁹⁹ *Id.* at 372; BENJAMIN ET AL., TELECOM. L. & POLICY, at 64. Here the authors correctly point out that these notions at times conflict.

¹⁰⁰ See C. EDWIN BAKER, MEDIA CONCENTRATION AND DEMOCRACY—WHY OWNERSHIP MATTERS 5 (2007).

¹⁰¹ BENKLER, *supra* note 11, at 202 (“The degree of concentration in media markets supports the proposition that owners of media can either exercise power over the programming they provide . . . or sell their power . . .”).

¹⁰² Benkler articulates this issue by stating that control over these entities leads to the potential impediment over the individual's autonomy. *Id.* at 147; see also BAKER, *supra* note 100, at 121.

¹⁰³ Shelanski, *supra* note 97, at 384 (referring to attempts to meet this objective as the “democracy model” of public interest).

guarantee of diversity, given the ills of an advertising-sponsored media market.¹⁰⁴

As the rationales for these regulatory steps are premised on important, yet abstract and fluid notions (how many voices assure a democratic discourse—5? 50? 500?),¹⁰⁵ they are constantly contested by the regulated parties (which tend to be powerful and influential media firms) and are therefore closely scrutinized by the courts.¹⁰⁶ Over the last few years, courts have not shied away from invalidating broad regulatory structures, finding that they are not premised on proper empirical findings and analytical arguments.¹⁰⁷ While examining these issues, courts (and commentators on these matters as well) accept the notion that these rules cannot be overbroad and restrictive for no apparent reason. Not only would such excessive rules limit the autonomy and commercial freedom of the regulated parties, they might also lead to inefficient outcomes for the overall media market which would be deprived of the potential benefits of horizontal and vertical integration. Moreover, some scholars argue¹⁰⁸ that these restrictions constitute limitations upon the media firms' free speech rights (to engage in speech of their own through their medium of choice). For these reasons, media concentration policy must be carved out with even greater caution and must be backed by sufficient empirical findings and an analytical framework.

The emergence of the Internet as a popular medium has yet to have a substantial effect on this regulatory issue. On the face of it, the Internet adds a flurry of voices at the fingertips of all users. Media moguls have already announced they see no sense in regulating the issues under review here when users can access

¹⁰⁴ BENKLER, *supra* note 11, at 206. Note that the counter-argument exists as well: only a limited number of voices can guarantee diversity in ideas. For a discussion of this classical argument and its rebuttal see *id.* at 206–08.

¹⁰⁵ Benkler struggles with this notion. *Id.* at 206.

¹⁰⁶ For recent cases, see *Fox Television v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002); *Sinclair Broad. Group v. FCC*, 284 F.3d 148 (D.C. Cir. 2002); *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

¹⁰⁷ For a discussion of these cases see Shelanski, *supra* note 97, at 391, 419.

¹⁰⁸ Shelanski, *supra* note 97, at 411, 417.

limitless sources online.¹⁰⁹ The powerful media players can also easily argue that users are in no way subject to the media companies' content selection (so one cannot argue they control a crucial bottleneck).¹¹⁰ However, the policy landscape has yet substantially to change in light of these novel factors.¹¹¹

The neglect to account for the way in which the Internet undermines many of the rationales for existing media concentration policy could be explained in several ways. At first, during the first days of the web regulators were probably correct to assume that the powerful draw of the "warm" television medium¹¹² was still no match for the Internet's slow and somewhat "cold" interface. It was also initially unclear whether the Internet was a

¹⁰⁹ See *Murdoch interview with Alan Jones*, SYDNEY MORNING HERALD, Apr. 7, 2004, <http://www.smh.com.au/articles/2004/04/07/1081222525705.html> ("There is so much media now with the Internet and people . . . and so easy and so cheap to start a newspaper or start a magazine, there's just millions of voices, and people want to be heard. And we don't really have to worry . . . you know, the old ideas of it being too concentrated . . . I think that's fading away."). This notion was echoed by (the then) FCC Commissioner Powell, who moved to change media ownership rules, claiming that the current rules fail to take into account the growing influence of Internet and paid television programming, and have been broadly questioned by the courts. See Frank Ahrens, *FCC Set to Vote on Easing Media Ownership Rules*, WASHINGTON POST, at A06, June 2, 2003, available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A1007-2003Jun1>.

¹¹⁰ But see BENKLER, *supra* note 11, at 399–402 (discussing concerns that entities controlling the Internet's broadband infrastructure will leverage such control toward control over the content flowing "over it"). These concerns led to the heated "network neutrality" debate mentioned above. *Id.* To date, these concerns have yet to become manifest.

¹¹¹ The FCC has actually taken the existence and scope of Internet websites addressing news-related matters into account when constructing the Diversity Index ("DI") which was intended to provide indications as to overall media market diversity (and thus provide indications as to whether cross ownership mergers are to be permitted). However, in the *Prometheus* case mentioned above, the court invalidated the rules addressing the role of the Internet in the DI in view of insufficient empirical evidence and backing (finding that it imparted too much weight to single websites in comparison to other media outlets) and remanded them to the FCC for further review of this issue. *Prometheus*, 373 F.3d at 406. On this issue, see JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, *DIGITAL CROSSROADS* 382 (MIT Press 2005).

¹¹² This terminology is based on Marshall McLuhan's "The Medium Is the Message" phrase, first introduced in MARSHALL MCLUHAN, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* (MIT Press 1994) (1964). For more on this phrase, see *The medium is the message*, Wikipedia, http://en.wikipedia.org/wiki/The_medium_is_the_message (last visited Nov. 13, 2007).

medium that generated new content or merely a pipe through which content developed elsewhere was made available.¹¹³ Whether the Internet would be dominated by the same large media groups that control the offline world was similarly unclear.¹¹⁴ It was indeed feasible to assert that the Internet need not provide real diversity as the voices (and sources of content) in it would be the same as those offline, and the distribution of content throughout the net would be controlled by the same offline players as well. Therefore, there would be no reason to ease media concentration regulation.

However, at this juncture I again wish to signify online social networks as an important factor that would require courts and policy makers to rethink the soundness of existing media market regulation policies. Online social networks—when grouped with existing online tools such as search engines, and while taking into account the constant spread of broadband infrastructure—provide powerful responses to several concerns which media concentration policy strives to address. In other words, with online social networks in place, the promise of the Internet as a medium that would heal many of the media markets' ills is largely fulfilled. These networks (as well as other tools of user participation, such as blogs) encourage and facilitate the generation of a public discourse outside the realm of broadcast media—a discourse that is to a certain degree filtered and accredited as well.¹¹⁵ Most of these networks are premised on neutral platforms, and in any event, the multiplicity of these networks limits the ability of one party to exercise bottleneck-like control.

These networks also present a sophisticated mechanism for *distributing* existing content—both user and commercially generated—among the group members.¹¹⁶ With this dynamic in

¹¹³ BAKER, *supra* note 100, at 100.

¹¹⁴ *See id.* at 112; Shelanski, *supra* note 97, at 412–13. For early concerns voiced in this fashion, see Neil Netanel, *Cyberspace Self Governance*, 88 CAL. L. REV. 395, 440–41, 463–65. For more, see Zarsky, *Denver*, *supra* note 53, at 701–02.

¹¹⁵ Baker is unconvinced that the Internet can prove to be an important factor that would affect media concentration policy. BAKER, *supra* note 100, at 104–05. In part, he states problems with reliability in the online realm. However, the discourse transpiring within social networks partially resolves this concern.

¹¹⁶ BENKLER, *supra* note 11, at 85, 426.

place, broadcast media can no longer be accused of having a bottleneck hold over the taste and preferences of content consumers. Most importantly, the dynamics within these networks promote not only the distribution but also the *creation* of content within the network, and in that way supplement the content provided by the media group “controlling” the broadcast realm. In view of these arguments, I believe that the existence of the Internet medium ultimately calls for serious reconsideration of concentration policy (as it stands today) in other media.¹¹⁷

Clearly, this issue requires extensive additional research and writing, which need to be coupled with both empirical and economic studies. I leave these for a later time. At this juncture I wish only to summarize by emphasizing two points: first, there is an analytical link between media concentration policy and the success of online social networks (and not merely the existence of the Internet in general). These new tools for content distribution and creation should be considered when courts and regulators address media concentration policy. Second, the fact that online social networks promote competition, diversity, and localism throughout the media is yet another concrete example of their importance. Yet these benefits (and their potential policy implications) will transpire and persist only if these networks are premised on independent and reliable platforms. In addition, they must consist of sufficiently motivated participants, and must be properly insulated from manipulation by interested parties. While some of these objectives are secured by market and other forces, others might require the intervention of the law, as I discuss below.

3. Additional Issues and Guidelines for Future Inquiries

Beyond these specific examples, online social networks will have additional effects on existing legal regimes, which are difficult to predict at this time. Generally, online social networks allow individuals to organize, deliberate, act, and produce with much greater efficiency. They are thereby able to overcome coordination costs which might have been unbearable at other times. It would be wise for regulators and courts to keep in mind

¹¹⁷ For an opposing view, see BAKER, *supra* note 100, at 100, 116.

the existence of these online dynamics, especially when crafting rules which are meant to overcome market failures due to high coordination costs. Yet another set of instances in which online social networks affect law and policy is addressed by Lior Strahilevitz. Strahilevitz demonstrates that in various instances social norms, which are governed and enforced through robust social networks, can substitute enforcement by the state (as it would be cheaper and more effective).¹¹⁸ I leave the development of these issues for future analyses.

III. PROMOTING ONLINE SOCIAL NETWORKS AND NETWORKING: GENERAL

After setting out and acknowledging the benefits and importance of the information flows within online social networks, it is now time to examine how such dynamics could be maintained and promoted. In this section I argue that these objectives could be achieved by relying on proper law and policy responses. By legal and policy responses one could refer to several processes and outcomes; they could be regulations set in place to promote the objectives outlined below. They could also be court rulings on matters related to the information flows within or from social networks. In my analysis below I mention both, while focusing on the latter. I explain that the promotion of successful dynamics within online social networks could be achieved by both intervening and protecting these dynamics, and at times choosing *not* to intervene and to allow existing market forces to resolve the issue at hand.

As mentioned above, for the dynamics within these networks to prosper and lead to the beneficial outcomes addressed above, three general and foundational needs must be fulfilled: (1) independent, trusted and impartial *platforms* for these social interactions must be made available and accessible; (2) users must be *motivated* to join in these social exchanges, both as passively seeking, gathering and consuming the information, and at times providing, correcting, or

¹¹⁸ In the context of driving, see Strahilevitz, *How is My Driving?*, *supra* note 51, at 1719, or in the context of inappropriate behavior at parades, see Strahilevitz, *Social Norms*, *supra* note 20, at 369.

evaluating it; and (3) tools must be set in place to allow the successful *filtering* and *accreditation* of the information, in a way that is effective, and cannot be easily tampered with or gamed.

In this section, I will focus on issues (2) and (3). The first issue has been discussed in detail by Benkler¹¹⁹ who addresses potential bottlenecks throughout the telecommunications infrastructure in general and in the Internet in particular. Benkler cautions against allowing very few actors to control the physical infrastructure over which Internet communications take place. To avoid the pitfalls of this outcome, he suggests various forms of independent sources, while referring to mesh Wi-Fi networks and municipal broadband. He also promotes regulatory solutions such as “network neutrality” policies.¹²⁰ I refrain from elaborating on this issue, as the arguments and suggestion set forth in the existing literature are sufficient. Furthermore, it appears that there is no real problem of lack of impartial and “neutral” social network platforms in practice.¹²¹

A. *Promoting and Maintaining Motivation*

At the heart of the online social networking dynamic are the users, who are motivated to contribute and participate for a variety of (mostly internal) reasons. Such motivation is the key to maintaining and potentially accelerating today’s level of participation within social networks. There are several strategies regarding the legal response to concern for assuring a high level of motivation in these realms. One response might be that the law should not interfere but should allow the dynamics to play out based on market and social forces—which thus far have led to satisfactory results. This response must be rejected—not because it is wrong but because it is naïve. The legal environment governing social networks and the individuals’ using it is bound to affect user motivation and participation. Even though these dynamics might seem to transpire outside the realm of the law, this

¹¹⁹ BENKLER, *supra* note 11, at 399–408.

¹²⁰ *See id.*

¹²¹ As Benkler himself points out, a variety of online social networks use independent platforms, and are free of the various battles for control transpiring on the layer below (the “physical” layer, as opposed to the “logical” layer). *Id.* at 242.

is rarely the case.¹²² The examples provided below demonstrate the extent to which indirect legal measures can greatly affect these motivations.

In addition to the indirect and at times unapparent effects and influence of the law, actual and explicit steps to promote motivation are possible as well. Such “active” (or “positive”) response would call for the government to motivate individuals externally to contribute and become active members within these networks. The government could do this by providing direct (simply paying) or indirect (tax breaks, for example) incentives to participate, while structuring platforms of its own or relying on those already in existence. While some scholars offer creative models for such intervention in various contexts,¹²³ I believe that in most cases, such steps are not required. This is because of both the relative success of existing motivational incentives, and the fear that these forms of motivation could lead to several difficulties and concerns.¹²⁴ Once government began promoting actions and speech within these realms, it would be faced with complaints and suspicions that one form of speech and action was favored for a variety of reasons and interests (as well as constant pressures to show such favor at various junctures).

However, as mentioned, the law would have a substantial effect on motivations through various indirect legal rules, which reflect on the implications of user participation. These rules will have an impact on individuals' willingness to contribute to the online social discourse. One form of legal rules, which would have a significant indirect effect, is those which address the ability

¹²² See JACK L. GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD Part V (Oxford Univ. Press 2006) (countering some existing arguments according to which the Internet is a borderless and order-less realm); see also Becher & Zarsky, *supra* note 22, at 172–74.

¹²³ In the context of generating a database that would include information which would assist minorities seeking jobs, see Lior J. Strahilevitz, *Privacy versus Antidiscrimination*, 75 U. CHI. L. REV. (forthcoming 2008) (manuscript at 10–12), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1003001 [hereinafter Strahilevitz, *Privacy*].

¹²⁴ On the difficulties of these forms of “selective incentives” to create information products, see PETER R. MONGE & NOSHIR S. CONTRACTOR, THEORIES OF COMMUNICATIONS NETWORKS 166–67 (Oxford Press 2003).

of individuals to bring claims in tort against network participants, with regard to their online activities. Such claims—that might arise from their representations and communications in the online realm—include libel, breach of privacy, fraud, harming business reputation, and others.¹²⁵ Expanding the users' vulnerability to such claims would require participants to exercise caution and “chill” their participation within these networks.

As activity within these social networks expands, reports of lawsuits over these matters multiply.¹²⁶ Courts are developing various tools and tests as to when participants in the online discourse should be found liable, when their identity should be revealed and the extent of their liability.¹²⁷ Hereby I address several instances in which courts should take into account the benefits of online social networking and *limit* the reach of such claims. That said, there is no reason to afford participants within these realms immunity from the various existing torts which govern the harm that mere uttering may cause others. Indeed, there are many instances in which tort law (and possibly criminal law) must be applied to the full against a network participant whose words went too far.

¹²⁵ I will not address in this context possible suits for IP infringement within these realms.

¹²⁶ See, for instance, Video Professor's suit against one hundred “John Doe” posters on various forums, claiming the violation of federal trademark laws, defamation and state laws. Posting of Greg Beck to Consumer Law & Policy Blog, <http://pubcit.typepad.com/clpblog/2007/09/video-professor.html> (Sept. 21, 2007 14:44 EST); see also Dan Goodin, *Software developer sues to muzzle website users*, REGISTER, Sept. 12, 2007, http://www.theregister.co.uk/2007/09/12/2clix_sues_site_over_critical_comments (2Clix Australia's suit against a site owner, claiming for “severe downturn in sales” caused by comments anonymously posted to his site); see generally cyberSLAPP Cases, <http://www.cyberslapp.org/cases/index.cfm> (listing of cases where internet speakers were sued for their online speech, or where the identities of Internet speakers were sought by subpoena).

¹²⁷ For instance, see *Doe v. Cahill*, 884 A.2d 451, 462–64 (Del. 2005). For a discussion of the legal rules for revealing the user's identity, and additional cases, see DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 148–49 (2007).

B. Liability for Incidental Contributions

In this Article, I choose to focus on the second tier of participating users mentioned above—the 10% of users who do not provide actual content but perform important yet incidental tasks, such as grading, tagging and remarking on other posts and snippets of information. Usually a discussion of the dynamics within social networks focuses on the contribution, motivation, and liability of the 1% of users who actively and directly contribute information (and rightly so). Yet the incidental contributors play an important role in the success of these networks and the achievement of the positive outcomes outlined in Part II above. While playing this role, they are less motivated than the actual active contributors. They might not experience great pride in their contribution, and will not be hailed by others for their promotion of knowledge in the community (although their roles are significantly less taxing in terms of time and attention).¹²⁸ Therefore, there is even more reason to examine whether their motivations are substantially chilled in view of potential legal claims and liability.

To examine sufficiently the proper legal response to claims of liability on the part of incidental contributors, I separately address claims made by other community members (the “inner realm”) and those made by individuals outside the network (the “outer realm”).¹²⁹ First, within the inner realm of the social networks, participants might be aggrieved by others that have marked them or their messages unfavorably. These actions might cause them personal grief and even financial damages. For these reasons, users might bring claims in court against these incidental contributors.¹³⁰ In this context I assert that courts should first

¹²⁸ These users will still be moved to action by powerful motivators such as altruism and in the case of a close online social network by willingness to contribute to the relevant “community.”

¹²⁹ See generally Tal Zarsky, *Privacy and Data Collection in Virtual Worlds*, in BALKIN & NOVECK, *STATE OF PLAY*, *supra* note 10 (distinguishing the legal analysis of relations within and outside online social networks in the context of privacy concerns in online realms), available at <http://ssrn.com/abstract=963889>.

¹³⁰ These aggrieved users are probably blocked from bringing actions in most cases against the platforms themselves in view of § 230 of the Communications Decency Act (“CDA”), 47 U.S.C. § 230. For explanations as to the extent of the protection of this

examine whether such users might find their remedy through other means—such as turning to internal dispute resolution methods¹³¹ and providing online responses to the other users within the social networks, while explaining (to them and the rest of the online community) that they have been treated unfairly.¹³² In other words, I would argue that courts should, when possible, require parties to resolve these conflicts within the online network and without bringing the parties into court.¹³³

Following through with this recommendation sometimes leads to a surprising yet essential recommendation: courts addressing disputes among network participants over these issues should favorably consider upholding and enforcing the Terms of Service (and when relevant, End User License Agreement (EULA))¹³⁴ provisions of the relevant social network platform, which might refer plaintiffs to alternative mechanisms for dispute resolution.¹³⁵ These agreements might set in place requirements for users to refer first to various forms of arbitration or dispute resolution before

section in this context see the Electronic Frontier Foundation's (EFF) Bloggers' FAQ, <http://w2.eff.org/bloggers/lg/faq-230.php> (last visited Nov. 29, 2007).

¹³¹ Examples include those available through eBay. For more on these methods, see Orna Rabinovich-Einy, *Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation*, 11 HARV. NEG. L. REV. 253–93 (2006). For a similar recommendation made in the broader context of all claims regarding libel, see SOLOVE, *supra* note 127, at 123–24 (arguing that to reduce the number of frivolous lawsuits in this context, the law should require a plaintiff first to exhaust informal mechanisms for dealing with this problem).

¹³² Another issue arising in this context is whether the incidental contributor is indeed liable in tort given his or her limited contribution. I leave the establishment of this point to courts on a case-to-case basis.

¹³³ Fairfield, *supra* note 29, at 12 (referring to these forms of claims as the “Magic Circle” argument—according to which disputes within a “virtual world” should remain within it and be resolved through internal measures). Fairfield addresses several problematic elements with this argument. Yet this article considers one of its positive aspects—the manner in which it promotes motivations to contribute to social networking dynamics.

¹³⁴ In the context of virtual worlds, for instance, the discourse among users is governed by the EULA, to which the users provide assent at the time of registering for the game.

¹³⁵ Note that some provisions establish choice of law and jurisdiction in realms that might be problematic for some plaintiffs. I so not refer to these instances in the text. See *Feldman v. Google, Inc.*, 2007 WL 966011, at *5 (E.D. Pa. Mar. 29, 2007) (upholding choice of law provisions).

bringing an action against other users.¹³⁶ Even though such provisions might generate various legal difficulties,¹³⁷ upholding them has beneficial outcomes in the present context: it reassures incidental contributors that the chance they will end up in court is slim. It will keep disputes they are involved in (to a certain degree) out of the courts, especially when the networks themselves maintain existing means to resolve disputes fairly (and in many cases, quickly and cheaply). Thus, it assists in maintaining a high level of motivation for this form of essential participation in the inner working of the social network.¹³⁸

In addition to disputes in the “inner realm,” claims against incidental contribution could be raised by those in the “outer realm,” who are not in privity of contract with the network

¹³⁶ See, for instance, the terms used by Facebook, <http://www.facebook.com/terms.php> (last visited Nov. 30, 2007) (under the heading “Arbitration”) (“The sole and exclusive forum and remedy for any and all disputes and claims relating in any way to or arising out of these terms of use, the site and/or service . . . shall be final and binding arbitration.”). This allows the defendant to argue that this contractual framework blocks the plaintiff’s claim. eBay refers users to such processes as well, though it is unclear whether the referral is mandatory or voluntary. See Resolving Disputes, eBay, <http://pages.ebay.com/help/tp/problems-dispute-resolution.html> (last visited Nov. 30, 2007). Furthermore, eBay recently introduced a “Community Court” to settle disputes regarding reputation, and “respected” eBay community members serve as jurors. This issue raises several thorny issues of contract law that I do not address at this juncture but leave for future analyses.

¹³⁷ Recently, scholars have pointed out several of the problematic aspects of these contracts (which are usually not a result of the true assent of both negotiating parties). See, for instance, Fairfield, *supra* note 29, at 28. Courts have, in several instances, followed suit and set aside these contractual provisions. For instance, in the “Virtual Worlds” context, see *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D. Pa. 2007). Even though I argue that upholding these contractual provisions proves helpful and thus should be a preferred option, I do not disagree with the court’s ruling in *Bragg*. In this case, the court found the relevant contractual sections unconscionable, given that they were “buried” within the overall contract, required confidentiality in the proceedings, and forced the plaintiff to incur heavy costs prior to initiating the arbitration proceedings. However, absent these one-sided provisions, I believe courts should tend to uphold these provisions.

¹³⁸ The argument presented here is strengthened in a recent blog by David Hoffman, who points to recent empirical data indicating a slump in participation in Wikipedia—especially in lower-level tasks such as editing and correcting. He attributes this decline to inefficiencies in Wikipedia’s dispute resolution systems which are pushing participants away. See posting of David Hoffman to Concurring Opinions, http://www.concurringopinions.com/archives/2007/10/is_wikipedia_co.html (Oct. 11, 2007, 16:38 EST).

platform. Here I refer to third parties who are addressed or affected by the ongoing discourse in the social network.¹³⁹ In this context the users are not shielded by contractual terms (or subject to internal community norms) that might channel the dispute away from the courts. Yet here too I would recommend that courts hesitate before allowing plaintiffs to drag these contributors into a lengthy and costly litigation process. Before doing so, courts should consider whether plaintiffs cannot receive sufficient remedies from the active contributor, or whether they can turn to other channels to resolve this dispute within the social network.¹⁴⁰

Before concluding this issue, I offer a final point of clarification and reemphasis. At this juncture the careful reader might question the overall logic of the policy recommendations mentioned above; why, in the interest of promoting the important benefits of social networks, should courts pay special attention to the protection of the rights of the incidental contributors, rather than focusing on the active and direct contributors (and at times preferring the protection of the former to the latter)? My response, as mentioned before, is that even though the benefits from the actions of the active contributors are very high, there are clear incentives that will motivate them to continue to contribute. Incidental contributors face a different “motivation calculus”—even though their contribution is slight their incentives are limited, so creating legal liability might chill this important dynamic.

¹³⁹ These could be parties that are addressed in an unfavorable manner within this realm. This could lead to dire consequences as this information is available to the network participants, and, in many instances, to many others when indexed and referenced by general search engines.

¹⁴⁰ I acknowledge that by introducing these recommendations I am by no means adding clarity to the complicated issue at hand. Much to the contrary, these recommendations add complexity to the matter, as they require courts first to establish whether the contribution at hand is substantial or merely incidental. However, I believe courts would be able to resolve this issue on a case-by-case basis. For a similar position, see SOLOVE, *supra* note 131. Additional legal tools which could promote the motivation of incidental contributions to online social networks are various forms of Anti-SLAPP legislation: laws adopted in several states (California, Oregon, Missouri, and others) that allow defendants to argue for statutory damages in instances in which they are sued for voicing their opinion in a public realm, regarding matters within the public interest. I hope to address these measures and their relevance to the matters at hand in future writing. For information on this issue, see California Anti-SLAPP Project, <http://www.casp.net>. For a list of California statutes and cases, see <http://www.casp.net/mencal.html>.

However, it is clear that future research must examine the relations of motivations, participation, and threats of legal remedies in the context of incidental contributors, so that courts and policy makers might be able to provide a proper response.

C. *Filtering, Accreditation and Law*

The accreditation of information distributed throughout the online social network is a crucial element in the overall analysis of information flow within these realms and their potential benefits. Without such accreditation, the social network will collapse, users will have no reason to collect this information and rely on it, and others will lose all motivation to contribute to a network that provides tainted results. Therefore, the entities providing the platform for the online social networks are strongly motivated to facilitate a successful and unbiased dynamic. The need for accreditation is exacerbated in realms in which the information flowing throughout these networks is bound to have commercial implications;¹⁴¹ in these instances, various entities are greatly concerned that certain forms of information will be graded according to their interests. Such is the case in the two examples addressed above in Part II; positive feedback on commercial vendor-to-consumer transactions would be of great value to the relevant seller; positive feedback regarding various forms of content is extremely beneficial to the content owner¹⁴² and affiliated advertisers. Therefore, in these instances, interested parties will go to great lengths to manipulate the accreditation systems set in place, so that the results reflect their objectives.¹⁴³

¹⁴¹ Manipulation of the online discourse might also take place in view of political interests, but I do not address this important issue in this article. There are examples of politicians caught “tampering” with various Wikipedia entries. See John Borland, *See Who’s Editing Wikipedia—Diebold, the CIA, a Campaign*, WIRED, Aug. 14, 2007, http://www.wired.com/politics/onlinerights/news/2007/08/wiki_tracker; Declan McCullagh, *Congress caught making false entries in Wikipedia*, C|Net News.com, Jan. 30, 2006, http://www.news.com/8301-10784_3-6033082-7.html.

¹⁴² The right holder would reap benefits from viewing these materials through various licensing schemes or imbedded advertisements.

¹⁴³ Some examples of these practices, at times called “sock puppetry,” are evident in news reports. See Frank Ahrens, *Puppets Emerge as Internet’s Effective, and Deceptive Salesman*, WASH. POST, Oct. 7, 2006, at D01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/06/AR2006100601742.html>;

They will strive to “magnify” their presence throughout the network, and in that way overcome the accreditation systems premised on the “wisdom of the crowds.”¹⁴⁴

Social networks step in to meet the challenges of accreditation using various strategies. The entities controlling the platforms construct technological mechanisms for accreditation, and apply several methods to limit its gaming.¹⁴⁵ They apply sophisticated analyses to identify trends of normal and abnormal data flow, and move to block the latter.¹⁴⁶ Yet, because of the powerful incentives to engage in such manipulation, an arms race is developing between the social networks and those striving to manipulate their data flow—the results of which are impossible to predict at this early juncture. Therefore, beyond the technological steps set in place to enhance accreditation and reduce gaming, there is room and need for the intervention of the law.

As opposed to the previous analysis regarding motivation, in this context I believe the state should play an active role in promoting the objective at hand. I briefly explain here *what* and *how* this should be done. Thereafter, I briefly explain *why* this should be a role for the state.

The state should take a proactive role in battling gaming practices transpiring in social networks and move to bring legal action against those engaging in these practices. In doing so, the state could rely on existing legal doctrines and laws, such as fraud, misrepresentation and various laws addressing unfair business practices.¹⁴⁷ In addition, specific rules might be required and are

Brad Stone & Matt Richtel, *The Hand That Controls the Sock Puppet Could Get Slapped*, N.Y. TIMES, July 16, 2007, available at <http://www.nytimes.com/2007/07/16/technology/16blog.html>.

¹⁴⁴ Since the manipulators will artificially control many voices, they are able to create the appearance that the “crowd” is in fact voting in their favor. For descriptions of these practices, see Annalee Newitz, *Herding the Mob*, WIRED, Mar. 15, 2007, available at <http://www.wired.com/wired/archive/15.03/herding.html>.

¹⁴⁵ See, for instance, Benkler’s description of Slashdot and the “Karma” mechanism. BENKLER, *supra* note 11, at 75–80.

¹⁴⁶ For a discussion on how this is done by Google in the context of their battle against search engine optimizing, see Zarsky, *Denver*, *supra* note 53, at nn.160, 161, 193.

¹⁴⁷ Such as § 5 of the FTC Act which declares “unfair or deceptive acts or practices in or affecting commerce” to be illegal. This provision could easily be applied in some of the contexts mentioned in the text (such as e-commerce), and might be more difficult to

indeed set in place in some jurisdictions. For instance, according to press reports, the UK plans to adopt in the very near future “anti-sock puppet” regulation. Such regulation will prohibit and sanction interested parties, who praise their own products without mentioning their ulterior motive.¹⁴⁸

Yet perhaps the most important role for the state would lie in *enforcing* existing and newly enacted laws. These objectives would require labor, funding, and technological sophistication which would best be concentrated within one federal agency. At first glance, in the US, the FTC seems to be a strong candidate for concentrating all the required expertise in one place.¹⁴⁹

To be sure, these proposals will encounter many challenges. First, enforcing these laws will call for technical sophistication in identifying manipulative practices, recording them, and finding those behind them. Next, jurisdictional problems will surely arise as the “gamers” and “sock puppeteers” flee to jurisdictions that do not sanction the manipulative practices here addressed—leading to the need for an international scheme and effort. Finally, state actions focused on the silencing of accrediting voices—even if they are manipulative in nature—will be sure to raise difficult legal questions. Courts would be confronted with questions as to the free speech rights of the commercial entities promoting various products and ideas within these social networks. In addition, policy makers will have to make difficult decisions when striving to distinguish manipulative conduct from enthusiastic (yet somewhat exaggerated and wrong) backing of products, services, and opinions. These challenges should be met after substantial

apply to others (such as the distribution of content and media). I will return to the important role the FTC should play in this context below.

¹⁴⁸ Sam Coates, *Fake bloggers soon to be ‘named and shamed’*, THE TIMES, Feb. 10, 2007, available at <http://www.timesonline.co.uk/tol/news/politics/article1361968.ece>. This legislation resulted from The E.U. Unfair Commercial Practices Directive, Council Directive 2005/29, 2005 O.J. (L 149), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:EN:PDF>, that prohibits a professional trader from “falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.” *Id.* at Annex I, ¶22.

¹⁴⁹ A problematic test case for this matter is the role of the FTC as an enforcer of privacy. For a discussion of this issue, see SOLOVE, ROTENBERG & SCHWARTZ, INFORMATION PRIVACY LAW 750 (Aspen 2006).

legal research. At this point, I can merely hope that this gap in scholarship would be filled quickly so to enable relevant legal response in the near future.

However, even in view of these substantial technological and legal challenges I believe that the state must play a central role in battling these forms of manipulation: first, leaving this role in the hands of private parties might lead to problematic outcomes. The entities controlling the virtual networks might be *too* successful in their attempt to block manipulative content; they might apply filtering mechanisms that weed out not only the bogus messages but also those made by good-faith users as well. At times these forms of private filtering might merely be an excuse for silencing unwanted voices. These outcomes will in fact negate the many benefits of the social networks mentioned above: they are realms in which all users can participate and where ideas are discussed by everyone in a free and democratic fashion. The unfortunate users who are to be silenced in this realm have almost no form of recourse against the private entity operating these networks, this being a private party not subject to “public form”—like rules and restrictions.¹⁵⁰

Second, the sheer force of the state might lead to quicker and better results than private action. The private entities might be successful in blocking messages that resulted from manipulative practices. However, the state could pursue the “gamers” themselves and through various disciplinary steps, ensure they will cease their activity.¹⁵¹

¹⁵⁰ For instance, see *Murawski v. Pataki*, 2007 WL 2781054 (S.D.N.Y. Sept. 26, 2007); Posting of Eric Goldman to Tech & Marketing Law, http://blog.ericgoldman.org/archives/2007/09/askcom_not_liab.htm (Sept. 27, 2007). For a different perspective on this issue in legal scholarship, see Beth S. Noveck, *Trademark Law and the Social Construction of Trust: Creating the Legal Framework for On-Line Identity*, 83 WASH. U. L.Q. 1733, 1756 & n.92, 1759 n.101 (2005) (and quoted references).

¹⁵¹ Note that a somewhat different conclusion has been set forth by the European Network and Information Security Agency. In their Position Paper, *Security Issues and Recommendations for Online Social Networks*, they recommend, among other things that social networks “Maximise Possibilities for Reporting and Detecting Abuse.” They also “encourage the use of reputation techniques.” The recommendations set forth in this article go beyond the recommendations in the position paper and explain how law should move to increase accreditation when these steps are insufficient. See Giles Hogben,

To conclude this section of policy recommendations, I wish to clarify that the two recommendations just made, both of which largely focus on the incidental contributor to social networks, do not contradict. On the face of it, one might argue a conflict between the two; I first call for a lenient, “the-social-networks-will-solve-it” approach to these incidental contributions (and the actual contributors) while urging courts to let dispute resolution mechanisms resolve various disagreements. Then I call for extensive governmental intervention (as opposed to relying on market forces) to make certain that these contributions are not maliciously tainted. However, these recommendations need not conflict. They call for the active intervention of courts and the state only in instances in which the users’ actions might create falsifications and distortions that the market itself is unable to correct, given the inherent vulnerabilities of the technology. In other instances, social networks and data flows should be left to their own devices. Yet I concede that differentiating these instances might not always be easy—and carrying out such differentiation is a challenge that courts and regulators will be required to meet in years to come.

IV. CONCLUSION

In this Article I address an intriguing and important social and technological development: the emergence of online social networks. As I explained above, these networks now attract participation by an expanding realm of users. Throughout the Article I demonstrate the important role law should have both in promoting these dynamics, and in adapting other realms of law to these new developments. Above all, two conclusions arise. First, that social and technological change is occurring at great speed, and it requires law and policy to react appropriately. Such reaction might call for unconventional steps and outcomes; yet those should not be overruled without proper contemplation. Second, many of the complex issues at hand require additional research and inquiry, including empirical studies that will help to establish the role of

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law and the impact of social networks. I can only hope these two needs are fulfilled and that I may contribute to their fulfillment in the future.