

TWITTER AGAINST THE ISLAMIC STATE: EDGE PROVIDER TRANSPARENCY IN THE SPOTLIGHT

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Acts of terrorism illuminate the power of edge providers to exercise editorial discretion over content on their services. The terrorist organization commonly referred to as the Islamic State or ISIS utilizes social media to further its objectives, and in many cases, social media networks react by removing ISIS-generated content as it appears online. Social media networks are free—like all other edge providers—under Section 230 of the Communications Decency Act to engage in the systematic takedown of undesirable content. This system of content management produces inconsistent results, as some objectionable content is removed from the Internet, while other objectionable content is left online. These inconsistencies threaten the freedom of speech in the United States and create new challenges for billions of users across the globe as the necessity to be online continues to flourish.

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INTRODUCTION

The world was shocked when the Islamic State of Iraq and al-Sham, commonly known as ISIS or the Islamic State¹ attacked Paris, France in November 2015.² Following the attacks, Twitter and other social media networks came under fire in the media for hosting terrorist propaganda on their sites.³ Congress stepped in to discuss the issue at a U.S. House Subcommittee on Communications and Technology oversight hearing of the Federal

1. The terrorist organization has renamed and rebranded itself multiple times. It is known as the Islamic State, but is also frequently referred to as the Islamic State in Iraq and the Levant (ISIL) or the Islamic State of Iraq and al-Sham (ISIS), or as Daesh, a derogatory term extracted from its Arabic acronym. JESSICA STERN & J.M. BERGER, *ISIS* 8–9 (2015).

2. *Three Hours of Terror in Paris, Moment by Moment*, N.Y. TIMES (Nov. 15, 2015), http://www.nytimes.com/interactive/2015/11/13/world/europe/paris-shooting-attacks.html?_r=0 [<https://perma.cc/PRZ7-YWEX>].

3. See, e.g., Federico Guerrini, *Attacks in Paris Highlight the Worst and Best of Social Media*, FORBES TECH. (Nov. 14, 2015, 10:41 AM), <http://www.forbes.com/sites/federicoguerrini/2015/11/14/attacks-in-paris-highlight-the-worst-and-best-of-social-media/#215f2a5e6406> [<https://perma.cc/N39E-DH93>]; Alyssa Zeisler, *Social Media Plays Key Role in Paris Attacks Reaction*, FIN. TIMES (Nov. 13, 2015), <https://www.ft.com/content/13b66b4a-8a87-11e5-90de-f44762bf9896> [<https://perma.cc/HW84-6MNP>].

Communications Commission (FCC). Representative Joe Barton (R-Texas) asked then FCC Chairman Tom Wheeler if the agency could shut down websites used by ISIS.⁴ Chairman Wheeler replied: “We do not have jurisdiction over Facebook and all the other edge providers. We do not intend to assert jurisdiction over them.”⁵ By December 2015, President Donald Trump, then a candidate in the Republican presidential primary, stated that when it comes to terrorism, “I sure as hell do not want to let people that want to kill us—and kill our nation—use our Internet.”⁶ On February 5, 2016, Twitter responded to these criticisms with the announcement that beginning in 2015 the service had suspended over 125,000 accounts for threatening or promoting terrorist acts, primarily related to ISIS.⁷ Today, the discussion over the appropriate role and management of social media networks rages on. The first White House press conference following the 2017 presidential inauguration circled around the appropriate use of social media, specifically the use of Twitter. The White House Press Secretary named the social media network as many as four times while discussing the proper use of Twitter in the media.⁸

The world is experiencing a technological revolution and social media plays a critical role in the change. As of 2015, there was more than three billion Internet users worldwide, meaning that today almost one in two people use the Internet.⁹ Merely twenty years ago, the Internet was just making its way into businesses and homes. Social media networks have found success in this revolution. In September 2016, Facebook reached a milestone with 1.18 billion daily active users.¹⁰ That same year,

4. *Oversight of the Federal Communications Commission: Hearing Before the Subcomm. on Communications and Technology of the H. Comm. Energy and Commerce*, 114th Cong. (2015) (statement of Rep. Joe Barton) [hereinafter *FCC Oversight*].

5. *Id.*

6. Devan Joseph, *Close Up the Internet: Donald Trump Wants to Down Parts of the Web*, BUS. INSIDER (Dec. 15, 2015, 11:33 PM), <http://www.businessinsider.com/donald-trump-wants-to-shut-down-parts-of-the-internet-penetrate-republican-presidential-debate-2015-12> [<http://perma.cc/MF8R-MS8Q>].

7. *Combating Violent Extremism*, TWITTER BLOG (Feb. 5, 2016), <https://blog.twitter.com/2016/combating-violent-extremism> [<https://perma.cc/82PQ-FD9N>].

8. *White House Press Secretary Slams Media*, N.Y. TIMES: TRUMP'S NEW GOV'T (Jan. 21, 2017), <https://nyti.ms/2jLhKkb> [<https://perma.cc/J7T3-QJLX>].

9. Press Release, Int'l Telecomm. Union, ITU Releases 2015 ICT Figures (May 26, 2015), http://www.itu.int/net/pressoffice/press_releases/2015/17.aspx#.WPEIZFPyFh [<https://perma.cc/2RDK-N7QY>].

10. *Company Info*, FACEBOOK: NEWSROOM, <http://newsroom.fb.com/company-info/> [<https://perma.cc/9SDG-FQE4>] (last visited Mar. 25, 2017).

Twitter reached 313 million monthly active users.¹¹ This widespread adoption of edge provider¹² services presents United States policymakers with the dilemma of not only if, but also how, to regulate edge providers and the Internet as a whole. As technological growth continues, and computer and mobile applications increasingly serve as vital forms of communication for billions of people, new policy questions and public expectations inevitably will continue to arise.

Despite this changing technological landscape, Congress has remained hesitant to provide guidance on, or reevaluate the duties of edge providers toward their users.¹³ This hesitancy to protect online users is outdated. Twitter's management of ISIS-generated content demonstrates that social media networks manage online content in an inconsistent, case-by-case manner that threatens the freedom of speech. This fact coupled with the public's growing reliance on social media providers—and the increasingly important role of online content in daily life—warrants the imposition of transparency rights and consistent enforcement of social media networks' terms of service agreements in order to avoid censorship that suppresses speech.

First, this note examines the current state of law in the United States surrounding edge providers and online content.¹⁴ The almost complete void of regulation raises questions about what rights Internet users might anticipate in the future and the vulnerability of online content rights today. This note then examines the role of social media networks in the United States and the evolving state of user expectations. A lack of coherence appears between user expectations and the network management practices of edge providers. Finally, this note proposes legislative, legal, and private actions that would better serve the public interest as online markets and communication tools continue to evolve. Although the issue of content rights is universal, this note proposes a solution tailored to the United States and refers to popular social media companies including Twitter and Facebook as “social media networks.”

11. *About*, TWITTER, <https://about.twitter.com/company> [https://perma.cc/7C5Z-E4F8] (last visited Jan. 21, 2017).

12. The FCC defined social media networks, such as Facebook and Twitter, as edge providers. *In the Matter of Protecting and Promoting the Open Internet*, GN Dkt. No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 15 FCC Rcd. 5601, 5884 (2015) “Any individual or entity that provides any content, application, or service over the Internet, and any individual or entity that provides a device used for accessing any content, application, or service over the Internet.”

13. *See FCC Oversight*, *supra* note 4.

14. This note recognizes that the discussed principles apply broadly to all edge providers. For the purposes of this paper, Twitter will serve as the primary example of an online social media network lacking transparency mechanisms.

I. OVERVIEW OF CONTENT REGULATION IN THE UNITED STATES

As the Internet transforms the lives of Americans—edge providers’ legal obligations remain stagnant. In 1996, Congress passed the Communications Decency Act¹⁵ and in the decades since, edge providers have exercised uninhibited discretion regarding content maintenance on their services and continue to take shelter in the presumption that their networks are immune from liability.¹⁶ This immunity is subject only to a few exceptions, including the Digital Millennium Copyright Act and federal criminal laws.¹⁷

A. Section 230 of the Communications Decency Act

Section 230 of the Communications Decency Act shields edge providers from liability for the content located on their networks.¹⁸ The language of the Act provides that “no provider or user of an *interactive computer service* shall be treated as the *publisher or speaker* of any information provided by *another information content provider*.”¹⁹ An interactive computer service is defined as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”²⁰ This broad definition includes edge providers such as social media networks as they provide Internet access through which users publish content. The phrase “another information content provider” is defined as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”²¹ As applied to social media networks, this definition excludes the social media provider from liability for content posted by a user of the service. The user is the information content provider, and so liability remains only for the user who publishes content through the service. The statute contains narrow exceptions from limited liability under criminal laws, intellectual property, and the Electronic Communications Privacy Act of 1986 including any amendments.²²

In 1997, one year after Congress passed the Communications

15. 47 U.S.C. § 230 (2012).

16. See JERRY KANG, COMMUNICATIONS LAW AND POLICY 324 (4th ed. 2012).

17. *Id.*

18. 47 U.S.C. § 230 (2012).

19. 47 U.S.C. § 230(e)(1) (2012) (emphasis added).

20. 47 U.S.C. § 230(f)(2) (2012).

21. 47 U.S.C. § 230(f)(3) (2012).

22. 47 U.S.C. § 230(e)(1)–(4) (2012).

Decency Act, the Fourth Circuit Court of Appeals ruled in *Zeran v. America Online, Inc.* that America Online (AOL) was not liable for information posted on its platform by an anonymous user. Zeran claimed AOL had unreasonably delayed removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter.²³ Zeran based his claim on the following series of events. On April 25, 1995, an anonymous user posted a message on the AOL bulletin board advertising “Naughty Oklahoma T-Shirts.”²⁴ The advertisement promoted the sale of t-shirts that featured “offensive and tasteless” slogans referring to the Oklahoma City bombing.²⁵ Further, the advertisement encouraged interested individuals to call Zeran’s home phone in Seattle, Washington and provided the number.²⁶ Over the course of the following five days, the anonymous user posted more t-shirt advertisements to the website.²⁷ By the fifth day, Zeran received a threatening phone call approximately every two minutes.²⁸ In response to Zeran’s allegations, AOL claimed Section 230 of the Communications Decency Act as an affirmative defense against Zeran’s charges of unreasonable delay, refusal to post retractions, and failure to screen.²⁹ The appellate court affirmed the lower court’s ruling against Zeran and noted that Section 230 precludes courts from entertaining claims that would place a computer service provider in a publisher’s role.³⁰ Therefore, AOL was not liable for any failures to adequately manage content on its service, remove defamatory messages, post retractions, or screen content. Instead, liability was reserved for the publisher—the anonymous user that used AOL’s service. Following this landmark case, legal actions that seek to hold a “service provider” liable for “traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.”³¹

Although immunity is undoubtedly helpful in shielding edge providers from frivolous or repetitive liability, absolute immunity remains controversial. Advocates against online harassment and bullying struggle to combat the statute’s grant of absolute immunity.³² Bullying and harassment are common occurrences

23. *Zeran v. America Online*, 129 F.3d 327, 328 (4th Cir. 1997).

24. *Id.* at 329.

25. The Oklahoma City Bombing, FBI, <https://stories.fbi.gov/oklahoma-bombing/> [<https://perma.cc/YVL3-5DMV>] (last visited Apr. 22, 2017).

26. *Id.*

27. *See id.*

28. *Id.*

29. *Id.*

30. *Id.* at 330.

31. *Id.*

32. *See Eric Goldman, Online User Account Termination and 47 U.S.C. §230(c)(2)*, 2 U.C. IRVINE L. REV. 659 (2012) (discussing the dangers of edge provider immunities).

online, but edge providers have no duty or liability for failing to remove damaging content. Social networking sites, including Facebook and Twitter, aim to keep their sites free of harmful content.³³ However, absent a legal mandate encouraging edge provider transparency or adherence to terms and conditions, all efforts are optional. As technological adoption continues toward ubiquity, the regulatory scheme has not kept pace—except in limited instances, including the Digital Millennium Copyright Act.

B. *The Digital Millennium Copyright Act of 1998*

In 1998, Congress placed service management requirements on edge providers through the Digital Millennium Copyright Act (DMCA), and President Clinton signed the Act into law.³⁴ This adjustment of users' rights and control of online content is an example of a tailored legal modification that has served the American public's interest in controlling content rights online. The DMCA imposes limited liability on edge providers if they fail to address copyright infringement claims.³⁵ As its name suggests, the DMCA protects copyright holders' rights online in an ever-increasing "digital" world.³⁶ Title II, the "Online Copyright Infringement Liability Limitation Act," limits the liability of online service providers for copyright infringement when engaging in certain types of activities.³⁷ The DMCA broadly defines service providers as "a provider of online services or network access, or the operator of facilities therefor."³⁸

In order to enjoy limited liability, service providers must adhere to safe harbor guidelines and promptly block access to—or remove— infringing material from their platforms when they receive notification of the content.³⁹ Although edge providers may have no knowledge of the infringing material prior to notification,

33. See, e.g., Katie Benner, *Twitter Adds New Ways to Curb Abuse and Hate Speech*, N.Y. TIMES (Nov. 15, 2016), https://www.nytimes.com/2016/11/16/technology/twitter-adds-new-ways-to-curb-abuse-and-hate-speech.html?_r=0 [https://perma.cc/S2Q8-AFEP]; Alex Hern, *Facebook Launching Tools to Tackle Revenge Porn*, GUARDIAN (Apr. 5, 2017), <https://www.theguardian.com/technology/2017/apr/05/facebook-tools-revenge-porn> [https://perma.cc/A3RZ-WG44]; Kevin Systrom, *Keeping Comments Safe on Instagram*, INSTAGRAM BLOG (Sept. 12, 2016), <http://blog.instagram.com/post/150312324357/160912-news> [https://perma.cc/TL7K-8PLF].

34. H.R. 2281, Congress.gov, <https://www.congress.gov/bill/105th-congress/house-bill/02281/all-actions> [https://perma.cc/BPF5-V7DN] (last visited Jan. 25, 2017).

35. See Public Law 105-304 105th Congress.

36. U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998, COPYRIGHT OFFICE SUMMARY (1998), <http://www.copyright.gov/legislation/dmca.pdf> [https://perma.cc/L4VZ-2QF2].

37. *Id.*

38. *Id.* at 9.

39. *Id.* at 12.

when notified of infringing material on their service, they have an affirmative legal duty to examine and possibly remove that content.⁴⁰ The notification creates a duty of the provider towards the user.

Through this enforcement mechanism, the DMCA enables users to manage online intellectual property rights and entitles them to a legal remedy for an edge provider's failure to remove infringing material. This legislation is a rare instance of congressional action for individual online rights that can serve as an example of how to resolve other online content rights disputes. Users should have a similar legal right to dispute lawful content removed from an edge provider's service in a manner inconsistent or contrary to the user's interests.

II. CONTENT REMOVAL: A BLACK-AND-WHITE CASE

A 2015 Brookings Project study titled *The ISIS Twitter Census* (the "Census") examined Twitter's platform maintenance behaviors as applied to ISIS. The Census concludes that the social media network applies a wide variety of takedown mechanisms such as removing content on a case-by-case basis or following certain accounts flagged by the network.⁴¹ While the discretionary removal of content deemed undesirable by Twitter is legal, it has sizeable political and policy implications. The Census found that "social media companies can and do control speech on their platforms. No user of a mainstream social media service enjoys an environment of complete freedom."⁴² This lack of freedom raises a large policy concern: social media companies may remove valuable speech and target particular kinds of speech. Importantly, evidence of this behavior has already surfaced in the media.⁴³ Most individuals would likely agree that terrorism is a black-and-white example of content that social media networks should police and remove.⁴⁴ However, when considered more broadly, these management practices raise public policy concerns. This note examines the presence of terrorist activity online to demonstrate

40. *See id.*

41. J.M. BERGER & JONATHAN MORGAN, *THE ISIS TWITTER CENSUS, THE BROOKINGS PROJECT ON U.S. RELATIONS WITH THE ISLAMIC WORLD* 136 (March 2015), http://www.brookings.edu/~media/research/files/papers/2015/03/isis-twitter-census-berger-morgan/isis_twitter_census_berger_morgan.pdf [<https://perma.cc/HX67-V867>].

42. *Id.* at 60.

43. *See, e.g.*, Michael Nunez, *Former Facebook Workers: We Routinely Suppressed Conservative News*, GIZMODO (May 9, 2016), <http://gizmodo.com/former-facebook-workers-we-routinely-suppressed-conser-1775461006> [<http://perma.cc/US3Z-VKT2>]; Abby Ohlheiser, *Twitter Bans Writer Milo Yiannopoulos for Good, While Cracking Down on Abuse*, WASH. POST (July 20, 2016), http://wapo.st/2a7s6X8?tid=ss_tw [<http://perma.cc/32JJ-RPPK>].

44. *See* STERN & BERGER, *supra* note 1, at 120 (noting ISIS's use of Twitter to post videos of beheadings).

the power that social media networks possess over content and the harm that arises because of this unbridled discretion.

A. *ISIS and Twitter*

ISIS changed the public perception of social media networks when it designated Twitter as a primary recruitment tool for spreading its messages.⁴⁵ Following the Arab Spring, ISIS set up its first Twitter account as an official “media foundation” under the name *al Ftisaamm*, an Arabic reference to maintaining Islamic traditions without deviation.⁴⁶ This official account tweeted videos and other propaganda at a slow rate, but individual accounts for members were more active and gained many followers.⁴⁷ ISIS quickly developed a social media strategy to spread its messages and to recruit new members by using a series of profiles and hashtags that helped the group avoid Twitter’s detection and removal.⁴⁸ It worked.

In 2014, three young women from Denver, Colorado fled the United States to join ISIS before authorities apprehended them in Germany.⁴⁹ The women regularly used social media to connect with ISIS and followed jihadist accounts from around the world on Twitter.⁵⁰ Authorities found that they women followed several prominent ISIS-linked accounts including: “Jihadi News,” “Women of Islam” and “Sara,” an account that posted jihadi lectures.⁵¹ The women also composed thousands of tweets (up to 13,000 on one account) further disseminating ISIS’s messages.⁵² In this instance, Twitter was not the only platform involved in their communications with ISIS. All three women spent amounts of time on other social media sites including Instagram and Facebook.⁵³ This was not an isolated event. Other United States defectors have connected with ISIS through social media including the Kahn siblings of Chicago. On October 4, 2014, the Kahn siblings planned to travel from Chicago to Syria in hopes of joining ISIS and actively followed ISIS-affiliated accounts on social

45. *Id.*

46. *Id.* at 152.

47. *Id.*

48. *Id.* at 155–157.

49. *How Did “Good Girls” from Colorado Get Recruited by ISIS*, NPR (Oct. 22, 2014), <http://www.npr.org/2014/10/22/358120443/how-did-good-girls-from-colorado-get-recruited-by-isis> [<https://perma.cc/L8CH-GKW8>].

50. *Id.*

51. Maria Vultaggio, *ISIS Online Recruitment: 3 Colorado Teenage Girls a Textbook Case*, INT’L BUS. TIMES (Nov. 11, 2014), <http://www.ibtimes.com/isis-online-recruitment-3-colorado-teenage-girls-textbook-case-1722155> [<https://perma.cc/QK5B-TT4N>].

52. *Id.*

53. *Id.*

media.⁵⁴ The FBI apprehended the siblings prior to departure at Chicago O'Hare International Airport.⁵⁵

These are only a few of the many instances where ISIS recruited new members through social media websites. The Census, examined below in detail, explains this recruitment trend and Twitter's reaction to the tactic's success.

B. Twitter as a Battleground for Terrorist Propaganda

J.M. Berger and Jonathan Morgan, at the Brookings Center for Middle East Policy, conducted the Census to study ISIS's activity on Twitter.⁵⁶ Their research tracked the presence of ISIS accounts and aimed to compose a picture of how Twitter monitors terrorist activity.⁵⁷ The Census concluded that the social media network does not regularly disclose information regarding its content management practices, and sought to fill that gap by illuminating how many Twitter users support ISIS, who they are, and how many of those supporters take part in its highly organized online activities.⁵⁸ The Census used innovative techniques to create a large, representative sample of 20,000 accounts clearly defined as ISIS supporters and attempted to define the boundaries of ISIS's online social network.⁵⁹ The analysis was the first of its kind and found that Twitter engaged in the systematic takedown of ISIS content on a case-by-case basis.⁶⁰

According to the Census, Twitter reacted to negative publicity about ISIS-generated content on the network by engaging in active content removal.⁶¹ The Census estimates that just between September and December 2014, ISIS supporters used 46,000 Twitter accounts, although not all of them were active at the same time.⁶² When data collection launched in September 2014, Twitter began to suspend large numbers of ISIS-affiliated accounts.⁶³ The Census concludes that, at a minimum, Twitter suspended 1,000 ISIS-affiliated accounts during the study period, while there was

54. Janet Reitman, *The Children of ISIS*, ROLLING STONE (Mar. 25, 2015), <http://rol.st/1Bqj35H> [<http://perma.cc/E377-PS3T>].

55. Laura Sydell, *Pro-ISIS Messages Create Dilemma for Social Media Companies*, NPR: ALL THINGS CONSIDERED (Jan. 29, 2016, 4:54 PM), <http://www.npr.org/sections/alltechconsidered/2015/01/29/382435536/pro-isis-messages-create-dilemma-for-social-media-companies> [<https://perma.cc/EW7K-MYXU>].

56. BERGER & MORGAN, *supra* note 41.

57. *Id.* at 3.

58. *Id.* at 2.

59. *Id.*

60. *Id.* at 57.

61. *See id.*

62. *Id.* at 2.

63. *Id.* at 3.

evidence of potentially thousands more.⁶⁴ Accounts that tweeted the most often and had the most followers were most likely to be suspended.⁶⁵ Berger and Morgan concluded that it “seems likely—considering current technology—Twitter could in fact eradicate the complete presence of ISIS but largely due to counter terrorism and political speech considerations, withholds from such actions.”⁶⁶ The study addressed continuing policy implications:

This point needs to be crystal clear: social media companies can and do control speech on their platforms. No user of a mainstream social media service enjoys an environment of complete freedom. Instead, companies apply a wide range of conditions limiting speech, using possibly *opaque guidelines* that may result in decisions executed on an ad hoc basis. Furthermore, companies typically do not disclose information about who they suspend and why, nor are they required to.⁶⁷

The Census data shows how little is known about how much and what kind of content Twitter and other social media networks remove from their networks.⁶⁸ Furthermore, it concluded that Twitter and other social media networks possibly harbor the power to eradicate classifications of speech from the services. The importance of these findings lies in the evolving role of social media and edge providers generally in American life. The ability of social media providers to eradicate speech in a society that increasingly depends on online technologies for public discourse raises the provoking issue of whether society trusts social media networks to manage this content absent legal constraints or regulations in the public interest. To understand the significance of these findings and the absence of edge provider transparency, this note will next illuminate how the public interest in social media platforms has evolved and how networks react to those transformations.

64. *Id.*

65. *Id.*

66. *Id.* at 59.

67. *Id.* at 60 (emphasis added).

68. In reaction to the lack of information available about edge providers' takedown activities, Onlinecensorship.org was formed to independently track social media take down practices. The website is an outlet for users to report content takedowns. The website's "What We Do" page states, "Onlinecensorship.org seeks to encourage companies to operate with greater transparency and accountability toward their users as they make decisions that regulate speech. . . . we're collecting reports . . . to shine a light on what content is taken down, why companies make certain decisions about content, and how content takedowns are affecting communities of users around the world." *What We Do*, ONLINECENSORSHIP.ORG, <https://onlinecensorship.org/about/what-we-do> [<https://perma.cc/ZG9C-ZA4P>] (last visited Apr. 18, 2017).

III. THE FUNCTION OF SOCIAL MEDIA NETWORKS

The systematic removal of ISIS content presents a black-and-white example of content removal. That is, most users would likely agree that terrorist propaganda is the sort of content that social media networks should remove from their networks. However, not all cases of content management are so clear. The Census provides a tangible window into Twitter's management of ISIS content and demonstrates that edge providers engage in the systematic takedown of content every day, while the edge providers have no duties to disclose details regarding those management practices or to adhere to their terms of service. As the United States' population increasingly relies on edge providers for information, news, social interactions, and professional connections, content rights must evolve to keep up.

A. *The Evolving Role of Social Media Networks and Public Interest in Content Rights*

The role of social media networks has evolved dramatically in the last decade and continues to develop at a rapid pace. Over two-thirds (69%) of American adults use social networking sites, up from 5% when Pew Research Center ("Pew") began tracking social media usage in 2005.⁶⁹ Young adults, between the ages of eighteen and twenty remain the most likely to use social media, and today 90% of adults in that age group use the services.⁷⁰ As of November 2016, a national survey conducted by Pew found that 68% of all adults in the United States are Facebook users, while 28% use Instagram, 26% use Pinterest, 25% use LinkedIn, and 21% use Twitter.⁷¹ The Pew study found that the number of Facebook users is on the rise with roughly eight in ten Americans using Facebook, a 7% increase from a similar survey conducted in 2015.⁷²

Along with the number of users, individual motivations for social media use are also evolving. A 2010 Pew study on social media and reputation management found that social media sites are changing how Americans interact with—and perceive—one another.⁷³ Reputation management is the act of personally

69. *Social Media Fact Sheet*, PEW RES. CTR.: INTERNET, SCIENCE & TECH. (Jan. 12, 2017), <http://www.pewinternet.org/fact-sheet/social-media/> [https://perma.cc/H228-BM35].

70. Andrew Perrin, *Social Media Usage: 2005-2015*, PEW RES. CTR. (Oct. 8, 2015), <http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/> [https://perma.cc/3P39-UCYE].

71. Shannon Greenwood, et al., *Social Media Update 2016*, PEW RES. CTR. (Nov. 11, 2016), <http://www.pewinternet.org/2016/11/11/social-media-update-2016/> [https://perma.cc/W29G-J2XJ].

72. *Id.*

73. Mary Madden & Aaron Smith, *Reputation Management and Social Media*,

ensuring an acceptable online presence by monitoring information available online about oneself. The study notes that “search engines and social media sites play a central role in building one’s reputation online, and many users are learning and refining their approach as they go—changing privacy settings on profiles, customizing who can see certain updates and deleting unwarranted information about them that appears online.”⁷⁴ It is now a defining feature of online life for Internet users to monitor their online identities—roughly 44% of young adult Internet users say they take steps to limit the amount of personal information available about themselves online.⁷⁵ Additionally, 47% of social networking users aged eighteen to twenty-nine have deleted comments that others made on their profiles.⁷⁶ Search engines and social media sites are playing a role in building one’s reputation and users are adapting by adding and deleting information as they see fit.

Individuals have a growing interest in maintaining their online presence in an acceptable manner, as employers and the public utilize the Internet for research and background checks. Employers are likely to have policies about how employees present themselves online and 44% of online adults have searched for information about someone whose services or advice they seek in a professional capacity.⁷⁷ This necessity of managing one’s online reputation has come to the forefront of policy and legal considerations in the European Union with the right to be forgotten.⁷⁸ The United States has not considered such a right, but the idea that information stored on the Internet affects an individual’s professional and personal life is becoming more widely accepted. As social media and other online services are increasingly important to an individual’s professional and personal well-being, individuals should be concerned about not only the content that they can request to be removed, but also the content that they want to remain online as part of their online reputation. In today’s society, it is becoming more important to be

PEW RES. CTR. (May 26, 2010), <http://www.pewinternet.org/2010/05/26/reputation-management-and-social-media/> [<https://perma.cc/RF38-TX7H>] [hereinafter *Reputation Management*].

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. This note recognizes that the right to be forgotten in the European Union raises many similar questions about the right to an online presence and raises an inverse question, which is whether there is a right to be remembered. See European Commission, Factsheet on the ‘Right to be Forgotten’ Ruling, C-131/12, http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf [<https://perma.cc/537J-XFEW>] (last visited Apr. 4, 2017).

“found” online. Therefore, the public interest demands a right to be remembered or clarity under which to operate.

1. Social Media Networks as Free Speech Platforms

Individuals look to social media networks, which have placed themselves in positions of authority, as platforms for free expression and speech. In 2014, Marvin Ammori published an article that describes how social media networks view themselves in the free speech order.⁷⁹ Ammori, relying on “interviews with top legal decision makers from the leading Internet speech platforms,” including Google, Facebook, Twitter, Tumblr, and Automattic, suggests that social media networks are the arbiters of free expression and speech, and grounds those beliefs in the statements of the organizations’ leaders.⁸⁰ Ammori notes that Twitter’s former general counsel, Alex Macgillivray, called Twitter “the free speech wing of the free speech party.”⁸¹ Further, another former Twitter CEO, Dick Costolo, called the network the “global town square.”⁸² Former counsel at Twitter, Ben Lee, spoke with Ammori and stated, “I don’t know what others think with the phrase ‘town square’ but I think about free of expression cases.”⁸³ Ammori notes that the “core business functions of Twitter, YouTube, and other platforms turn on expression—no less than the New York Times’s.”⁸⁴

Other sources echo this town square characterization of Twitter. In 2015, General Counsel for Twitter, Vijaya Gadde, wrote a piece for the Washington Post on Twitter’s free speech obligations.⁸⁵ Her article posited that Twitter conserves “unwavering support for freedom of expression,” but remains dedicated to eradicating abuses like harassment.⁸⁶ This statement corresponds with Twitter’s guidelines and terms of service.⁸⁷ She notes the ways in which Twitter should increase policing of harassment and that “it is not our role to be any sort of arbiter of global speech. However, we will take a more active role in ensuring that differences of opinion do not cross the line into

79. Marvin Ammori, Comment, *The “New” New York Times: Free Speech Lawyering in the Age of Google and Twitter*, 127 HARV. L. REV. 2259 (2014).

80. *Id.* at 2262.

81. *Id.* at 2260.

82. *Id.* (*emphasis added*).

83. *Id.*

84. *Id.*

85. Vijaya Gadde, *Twitter Executive: Here’s How We’re Trying to Stop Abuse While Preserving Free Speech*, WASH. POST (Apr. 16, 2015), http://wapo.st/1OGhqdq?tid=ss_tw [<https://perma.cc/N7XB-5P5M>].

86. *Id.*

87. See *The Twitter Rules*, Twitter: Help Center, <https://support.twitter.com/articles/18311> (last visited Mar. 25, 2017) [<https://perma.cc/LS5C-6AWP>].

harassment.” Her comments rightly note the difficulties presented when social media networks take on the role of protecting free speech, while at the same time monitoring offensive content. Although she noted Twitter’s desire to stay free from the role of “arbiter,” it is clear that they, along with other social media networks, have in fact become a *forum* for public discussion and news dissemination.

Discussions about the role of the media and free expression will become increasingly important as access to critical information continues to advance online. In 2017, Vice President of Partnerships at Facebook, Dan Rose, noted that Facebook is a “new type of platform . . . where people discover a lot of media content.”⁸⁸ In line with that conclusion, a recent Pew study found that as of early 2016, just two in ten United States adults get news from print newspapers.⁸⁹ As the news media increasingly becomes only accessible online and further disseminates over social media networks, protection of online content must evolve to protect public and the freedom of speech.

2. Public Interest in Online Content Use and Rights

In September 2015, privacy hoaxes circulated through the Facebook user community.⁹⁰ One hoax claimed to be a legally binding message that users must repost in order to protect their Facebook photos and profile information.⁹¹ Another claimed that for a set subscription price, users could protect their content from public use.⁹² These hoaxes have periodically appeared on Facebook and quickly spread as users repost the messages.⁹³ Users post these messages because of their interest in shielding content from abuse and protecting their online reputations.

Users will post these messages with the hope of maintaining control over their content, but do not necessarily remove any content once the hoax spreads. As noted above, a Pew study found that individuals employ social media networks and other online services to create online identities for personal and professional

88. Ryan Lawler, *Facebook is Still Figuring Out How to Tackle Fake News*, TECH CRUNCH (Feb. 14, 2017), <https://techcrunch.com/2017/02/14/facebook-fake-news-code-media/> [<https://perma.cc/7CHA-7BGB>].

89. Amy Mitchell et al., *The Modern News Consumer*, PEW RES. CTR. (July 7, 2016).

90. Andrea Peterson, *Why It’s So Hard to Kill Facebook Privacy Hoaxes*, WASH. POST (Sept. 29, 2015), http://wapo.st/1VlxLeb?tid=ss_tw [<http://perma.cc/2UR6-FKSU>].

91. Maya Kosof, *This Facebook ‘Privacy Notice’ is a Hoax and You Shouldn’t Bother Sharing It*, BUS. INSIDER (Sept. 29, 2015), <http://www.businessinsider.com/facebook-privacy-hoax-2015-9> [<http://perma.cc/UK6R-CBW3>].

92. *Id.*

93. *Id.*

purposes.⁹⁴ Users want to know that the content they make publicly available is used in an intended manner. Here arises a disparity between user expectations and content management. Users expect that the content they choose to put on the Internet will remain online if it is not in violation of the provider's terms of service. The following section will posit that social media networks, along with other edge providers, do not have an incentive to equitably or transparently enforce or follow their terms of service.

B. Opaque Guidelines that Limit Speech and Result in Editorial Decisions Executed on a Case-by-Case Basis

Edge providers maintain Terms of Service (TOS) as content guidelines within which users must operate to access the service.⁹⁵ These documents serve as guidance for users on what is acceptable content that the platform is willing to host. Users are required to abide by these standards or face access restriction or removal.⁹⁶ The guidelines vary from provider to provider and enforcement is at the sole discretion of the social media network.

Twitter's management of ISIS content demonstrates that there are cases in which content removal is largely uncontroversial. Twitter systematically removes ISIS content in violation of its TOS, which prohibit violent threats, including "terrorism."⁹⁷ However, the grey areas raise legitimate concerns. For example, Twitter does not remove all "terrorism," broadly defined, and its TOS do not provide examples or detailed descriptions of how the network will interpret "terrorism" for compliance purposes. Twitter's TOS also prohibit abuse and harassment, self-harm, private information, impersonation, offensive content, and spam, among other things.⁹⁸ Each restricted category leaves room for the provider's interpretation. Users are forced to rely on often inconsistent, ad hoc interpretations to access the services that are now a vital part professional and personal communications.

1. Loose Adherence to Terms of Service

Twitter removes content from its application every day and enjoys broad discretion when deciding what content to take

94. *Reputation Management*, *supra* note 73.

95. This note uses the phrase "terms of service" to include any company's standard use contract and recognizes that companies may use other designations including "user agreement," "terms and conditions," etc.

96. *Twitter Terms of Service*, TWITTER, <https://twitter.com/tos?lang=en> [<https://perma.cc/A7YL-C48N>] (last visited Mar. 22, 2016).

97. *The Twitter Rules*, *supra* note 87.

98. *Id.*

down.⁹⁹ The network justifies content removal by referring to its TOS or User Agreement, which is comprised of three separate documents: Terms of Service, Privacy Policy, and Twitter Rules.¹⁰⁰ Users must remain within these terms to enjoy free speech. However, Twitter and other applications do not publicly disclose what kind of content they remove or the process for determining when something is in violation of the TOS. Twitter notifies its users through the TOS that “[y]ou may use the Services only in compliance with these Terms and all applicable laws, rules and regulations.”¹⁰¹ It is clear from the TOS that if the user’s content falls within a prohibited term, it may be subject to removal by the network.¹⁰² However, Twitter uses single, often vague terms like “violence” as a complete category of prohibited content. The general categories noted within Twitter’s Rules include: content boundaries and use of Twitter, abusive behavior, and spam.¹⁰³ Several of the categories serve as links to pages that delve into detail that is more explicit.¹⁰⁴ The prohibition on terrorism is under abusive behavior and the subcategory is listed as “violent threats” with the brief description “[y]ou may not make threats of violence or promote violence, including threatening or promoting terrorism.”¹⁰⁵ The rules remain ambiguous as to what constitutes violence, threats, or terrorism.

Although Twitter’s Rules do explicitly ban terrorism—content involving terrorism remains on the network.¹⁰⁶ The ISIS Twitter Census identified that Twitter chooses to eliminate ISIS content on an ad hoc basis—leaving much infringing content related to terrorism on the network.¹⁰⁷ Many Twitter users associated with ISIS post “stills” from the group’s videos on their account, which does not necessarily contravene Twitter’s TOS. The images remain online although it is arguable as to whether they violate the terms. Broad discretion allows social media networks to maintain their services in ways they see fit, which comes at the expense of user expectations. Managing their applications on a case-by-case basis is a flexible method for providers, but damages the user interest in reliable content management.

The public interest in social media network content management practices is highlighted by several lawsuits brought

99. BERGER & MORGAN, *supra* note 41.

100. *Twitter Terms of Service*, *supra* note 96.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. See Katie Rogers, *Anonymous Hackers Fight ISIS but Reactions are Mixed*, N.Y. TIMES (Nov. 25, 2015), <https://nyti.ms/2pX0Zpi> [<http://perma.cc/KVW8-WTFD>].

107. BERGER & MORGAN, *supra* note 41.

against the networks. In 2016, the families of three victims of the Pulse Nightclub shooting in Orlando, Florida sued Google, Facebook, and Twitter for providing “material” support to the terrorist organization.¹⁰⁸ In that case, the shooter entered the Pulse Nightclub and murdered 49 individuals after pledging allegiance to ISIS.¹⁰⁹ The families allege that Twitter aided ISIS in radicalizing the man responsible for the shooting. The family of an American contractor named Lloyd Fields brought a similar suit against Twitter after an ISIS-linked attack in Jordan claimed Fields’ life.¹¹⁰ The court dismissed the suit based on Section 230 immunity.¹¹¹ In 2015, individuals filed a similar suit after ISIS attacked Paris, France.¹¹² A United States citizen was killed during the coordinated attacks,¹¹³ and the victim’s family has claimed that Facebook, Twitter, and Google—through YouTube—provided “material support.”¹¹⁴ The case is ongoing.¹¹⁵ Underlying each case is the common belief that social media networks should be legally responsible for failing to fulfilling their TOS.

The threat of censorship that can result from inconsistent enforcement of terms of service was shown when Facebook was accused by former employees of suppressing news stories of interest to conservative readers from the social network’s “trending” news section.¹¹⁶ The former Facebook “news curators” told Gizmodo said they were instructed to artificially “inject” selected stories into the trending news module, so that “[i]t wasn’t trending news at all. . . . It was an opinion.”¹¹⁷ These allegations demonstrate the power of censorship possessed by social media

108. Brendan O’Brien, *Orlando Nightclub Victims’ Families Sue Twitter, Google, Facebook*, REUTERS (Dec. 21, 2016, 5:17 AM), <http://reut.rs/2i6wlXt> [<https://perma.cc/5XG4-32DQ>].

109. Ashley Fantz et al., *Orlando Shooting: 49 Killed, Shooter Pledged ISIS Allegiance*, CNN (June 13, 2016, 11:05 AM), <http://www.cnn.com/2016/06/12/us/orlando-nightclub-shooting/> [<https://perma.cc/2MLB-G8EF>].

110. *Fields v. Twitter, Inc.*, 200 F. Supp. 3d 964, 966 (N.D. Cal. 2016).

111. Russell Brandom, *Twitter is not Legally Responsible for the Rise of ISIS*, *Rules California District Court*, VERGE (Aug. 10, 2016, 4:00 PM), <http://www.theverge.com/2016/8/10/11950098/twitter-isis-lawsuit-safe-harbor-terrorism> [<https://perma.cc/Z329-5BT4>].

112. Alex Johnson & Raul A. Reyes, *Father of American Killed in Paris Attacks Sues Twitter, Facebook, Google*, NBC NEWS (June 16, 2016 10:34 AM), <http://nbcnews.to/1rr0wZs> [<https://perma.cc/8Z8H-WXZT>].

113. *Id.*

114. *Id.*

115. As of April 2017, the case was ongoing and has hearings scheduled in the month of April in the United States District Court, Northern District of California. See *Calendar for: Magistrate Judge Donna M. Ryu*, UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, <http://www.cand.uscourts.gov/CEO/cfd.aspx?71BQ#Notes> [<https://perma.cc/DVK4-XZV9>] (last visited Apr. 14, 2017).

116. Nunez, *supra* note 43.

117. *Id.*

networks. Facebook possibly manipulated its news page to reflect corporate opinions. This behavior applied to takedown procedures generally illuminates the network's power to manipulate speech under inconsistently applied TOS.

2. Deficient Takedown Disclosures

Twitter and other edge providers should retain the right to exercise discretion over what content violates their policies. However, when guidelines are not consistently enforced, users cannot maintain clear expectations regarding their content's longevity, track what content is subject to removal, or limit their exposure to unwanted content, among others. Although Twitter and other social media networks have taken steps to eradicate violations of their TOS, modifications have been largely unsuccessful. In 2014, Twitter's former CEO Dick Costolo claimed, "[w]e suck at dealing with abuse and trolls on the platform and we've sucked at it for years."¹¹⁸ Following his claim, the company moved to improve response time to take down requests and complaints.¹¹⁹ In 2016, Twitter reported that the network removed 235,000 accounts that promoted terrorist activity.¹²⁰ Yet, complaints remain managed on a case-by-case basis and Twitter continues to remove content daily under opaque guidelines that are inconsistently enforced. Further, few provisions of the United States regulatory scheme impose a duty on social media networks to maintain their services with an eye towards the public interest. Instead, social media, and many other online technologies are treated as services that are not vital to everyday living. This rationale is outdated as the public's reliance on online technologies grows.

IV. MOVING INTO THE GREY—TRANSPARENCY REQUIREMENTS FOR SOCIAL MEDIA NETWORKS

Twitter's management of ISIS-affiliated accounts on its platform confirms that the site is actively exercising editorial discretion on a case-by-case basis without informing the public of its actions or strictly complying with its TOS. Meanwhile, the public has a growing dependence on social media services as a primary source of news and personal and professional communications.¹²¹ Further, users trust that networks will host

118. Nitasha Tiku & Casey Netwon, *Twitter CEO 'We Suck at Dealing With Abuse'*, VERGE (Feb. 4, 2015), <http://www.theverge.com/2015/2/4/7982099/twitter-ceo-sent-memo-taking-personal-responsibility-for-the> [<https://perma.cc/FK52-4K9B>].

119. *Id.*

120. Katie Benner, *Twitter Suspends 235,000 More Accounts Over Extremism*, N.Y. TIMES (Aug. 18, 2016), <https://nyti.ms/2pnOteI> [<https://perma.cc/CYS2-FVJ2>].

121. Mitchell, *supra* note 89.

content within and remove content in violation of its TOS.¹²² These discrepancies lead to two great public harms: (1) users have no way to know how much and what kind of information is removed from the services, and (2) broadly defined and inconsistently enforced TOS allow social media networks to control content in a manner inconsistent with the public interest.

A. *The Federal Trade Commission*

Section 5 of the Federal Trade Commission Act (“FTC Act”) makes illegal “unfair or deceptive acts or practices in or affecting commerce.”¹²³ The Federal Trade Commission (FTC) prosecutes deceptive actions in order to guard the public interest. There are three elements to a deceptive practice claim: a representation, omission, or practice that misleads or is likely to mislead the consumer; a consumer’s reasonable interpretation of the representation, omission, or practice under the circumstances; and the misleading representation, omission, or practice is material.¹²⁴ The FTC could exercise its jurisdiction to prosecute edge providers who employ deceptive practices by promoting their services as free speech platforms, but exercising editorial discretion contrary to the user’s expectations. Case-by-case enforcement would deter harmful management practices, although it is not as efficient as congressional action. Users should receive notice from the social networks that TOS are not strictly enforced, but content is instead subject to the discretion of the provider.

In 2016, the FTC brought an action against Lumosity for its deceptive advertising and marketing practices.¹²⁵ The case settled for two million dollars.¹²⁶ Lumosity is an application that was marketed as a “brain training” program that improves cognitive ability.¹²⁷ The Director of the Bureau of Consumer Protection at the FTC stated, “Lumosity preyed on consumers’ fears about age-related cognitive decline . . . but Lumosity simply did not have the science to back up its ads.”¹²⁸ The application was ordered to pay the fine and notify its users of the settlement and cancellation opportunities.¹²⁹ Ultimately, Lumosity was accountable for

122. PERRIN, *supra* note 70.

123. 15 U.S.C. 45 (2012).

124. *FTC Statement on Deception*, 103 FTC 174, 175 (1984) (*appended to Cliffdale Dassocs., Inc.*, 103 FTC 110 (1984)).

125. *Lumosity to Pay \$2 Million to Settle FTC Deceptive Advertising Charges for Its “Brain Training” Program*, FTC (Jan. 5, 2016), <https://www.ftc.gov/news-events/press-releases/2016/01/lumosity-pay-2-million-settle-ftc-deceptive-advertising-charges> [<https://perma.cc/P785-Q42R>].

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

leading users to believe its application improves cognitive abilities.

Similarly, social media providers may face liability for making unsupported claims regarding freedom of speech and content management practices. Twitter's counsel has stated that the platform serves as a "global town square," a claim with free speech implications that are not met under the network's current management practices.¹³⁰ Under Section 5, the FTC could likely show that Twitter made statements, or failed to make a statement, that misled consumers (from an objective standard) and that consumer decisions were materially affected. Today, social media users expect that edge providers consistently enforce TOS, a truth embodied by the pending lawsuits against edge providers for hosting terrorist propaganda.

There is an inconsistency between how consumers perceive the platforms as enforcing their TOS and the reality of the management. As examined above, there is no legal right to have content made available online or a private remedy if a social media network removes content outside of its TOS. Importantly, the FTC could find that many users might not have used Twitter if they knew they might encounter a beheading video, terrorist propaganda, or that their content might be removed with no remedy if the organization deems it to fall under one of the broad categories of prohibited conduct.

In addition to Section 5 of the FTC Act, the FTC also enforces other federal laws relating to consumers' privacy and security.¹³¹ The FTC may bring a claim against social media companies under its privacy jurisprudence. An article titled "The FTC and the New Common Law of Policy" proposes that although the FTC has traditionally limited itself to the four corners of privacy policies, the agency has refused to allow companies to exploit consumer ignorance and create a false sense of trust through language and architecture.¹³² These actions "seem to be the stirrings of a much more complete and substantive regime than simply requiring companies to follow their promises."¹³³ In sum, the article suggests that the FTC could see its role in addressing these issues by nudging—and sometimes pushing—companies to avoid exploiting the fact that people have misconceptions and that people do not read policies. Although TOS of service are often separate from privacy policies, how the networks manage user content is likely

130. Ammori, *supra* note 84, at 2260.

131. *Enforcing Privacy Promises*, FTC, <https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy/enforcing-privacy-promises> [<https://perma.cc/NF7D-WYZZ>] (last visited Apr. 14, 2017).

132. Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 666 (2014).

133. *Id.*

under the purview of the FTC's privacy protections.

FTC action would ensure that social media networks adhere to their TOS, protect consumers from unwanted content, and also ensure that content not in violation of TOS remains online. The public interest favors the balancing act met through careful enforcement of TOS.

B. Congress

The public interest in social media networks and other online technologies have evolved since Congress first passed the Telecommunications Act of 1996. Today, the average person can utilize a smartphone to access the Internet through edge providers at any time.¹³⁴ Even more importantly, the trend is growing for users to post content themselves. Users create narratives for themselves online that they rely on for social communication and employment opportunities.¹³⁵ Congress has the responsibility to keep pace with the public interest and online content rights are an area in need of Congressional reconsideration.

The ISIS terrorist attacks in 2015 drew attention to the role of social media networks in an unprecedented way: presidential candidates discussed solutions to online national security threats,¹³⁶ and Congress deliberated how to combat the threat, as noted above when United States Representative Joe Barton asked then FCC Chairman Tom Wheeler what could be done to stop online terrorism.¹³⁷ Chairman Wheeler stated that Congress would need to legislate to reach edge provider conduct because the FCC does not have jurisdiction to take action against ISIS online by shutting down web sites or social media accounts.¹³⁸ Instead, Chairman Wheeler endorsed the view that Congress could do "specific things" allowing the FCC to assist law enforcement more effectively, without elaborating on what specific things to which he was referring.¹³⁹ Chairman Wheeler identified that agency mandates only stretch so far in combating modern problems. When it comes to ensuring the proper management of the Internet in furtherance of the public interest—Congress is in the best position to provide those protections.

One model for congressional oversight of content is the DMCA as explored above. Under the DCMA, users have the right to challenge the legality of the content available on the website. It is clear that terrorist organizations use social media networks to

134. PERRIN, *supra* note 70.

135. Madden & Smith, *supra* note 73.

136. See Joseph, *supra* note 6.

137. *FCC Oversight*, *supra* note 4.

138. *Id.*

139. *Id.*

disseminate terrorism-affiliated messages, amongst other unwanted speech. A legal right to challenge content contrary to the law or terms of service would empower the public interest and aid the networks in their efforts to police their services. Further, a government mandated transparency requirement could provide users with information about what content is removed from the sites—and how much. This addresses the public risk that social media networks present when they have enough editorial freedom to inhibit free speech through take down procedures, absent any remedy for the user.

Any legislative action should refrain from limiting speech online or the availability of public discourse, but instead look to imposing transparency requirements or notification rights, so that users may clearly understand the service and content and speech rights that the platform provides.

Notably, social media networks have an interest in preventing the necessity of government oversight. Voluntary changes including clear definitions of terms of service and meaningful transparency may negate the urgency for congressional action or oversight.¹⁴⁰ As illuminated above, a large source of consumer confusion comes from opaque terms and conditions. Widespread adoption of TOS with examples, clear definitions, and explanations would resolve many inconsistencies that threaten speech including censorship. Additionally, meaningful transparency actions including reporting disclosures of government requests for information and consumer content removal would negate any claims that there is information asymmetry harming the public interest.

CONCLUSION

Edge providers may not always act in the public's interest. When Congress passed the Telecommunications Act of 1996, edge providers did not serve the important purposes that they serve today. The public's interest in content rights has evolved over the decades since, but providers, acting in their capacity as private companies, maintain the right to completely discretionary service and near unbridled management practices. In absence of private actions to remedy the harm that results from inconsistent enforcement and lacking transparency, Congress should implement transparency requirements for edge providers to protect the public interest as the importance of online identities

140. See Danielle Keats Citron, *Extremist Speech and Compelled Conformity* 30 (forthcoming 2017) (noting companies should adopt robust accountability and transparency measures to contain potential creeping censorship in the international context).

continues to grow. Today, edge providers frequently exercise editorial discretion over their services, which warrants careful actions to safeguard the public's interests.

Absent congressional action, the FTC is the best-suited government actor to guard the public interest by enforcing TOS. Enforcement by the FTC would increase information symmetry without jeopardizing free speech or provider's autonomy. Loosely applied TOS coupled with the absence of liability create an environment for abuse. Content linked to terrorism demonstrates the impact that social media providers have on history, news, and personal identities. There is a pressing need for consistent and transparent enforcement so that free speech rights can flourish in the ever-changing online environment.

In many cases, knowledge is power, and in the comparison of knowledge between social media providers and users—the information asymmetry is startling and must be addressed either by the governmental bodies or the companies themselves.

