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Influencers and Social Media Recommender Systems: Unfair Commercial Practices in EU and US Law

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Abstract

In the digital society, the availability of information is both a blessing and a curse. Particularly on social media, the question of how information spreads is mostly engulfed in the commercial interests of platforms who rely on algorithmic governance in managing information flows, and the adversarial approach taken by their users to game algorithms in the pursuit of their own benefits. The interaction between social media platforms and content creators who are engaged in monetization has barely received any scholarly attention. YouTubers deal with issues such as shadow-banning, a practice that entails diverting traffic from some channels and videos on policy grounds, and Instagrammers are increasingly scared of an outright ban from the platform. In growing their online presence, content creators depend on platforms making them visible, which is done through recommender systems.

This paper aims to shed light onto how recommender systems affect influencers (also referred to as content creators) in a three step approach. First, it looks at how recommender systems work, and how they are applied by social media platforms to the activity of content creators. Second, the paper discusses the potential unfair competition issues that arise out of the use of recommender systems in relation to content creators. Third, it reflects on the suitability of existing frameworks on unfair competition in the EU and US to tackle the tensions arising between content creators and social media platforms.

The study innovates existing literature in two ways. It focuses on content creators not as the perpetrators of harms against consumers or citizens, but as the potential victims of social media platforms, thereby providing an illustration of legal issues relating to social media influencers beyond advertising law. Moreover, it revolves around content moderation as an expression of algorithmic governance, with a particular focus on the impact of this governance not on the users-as-audience, but on the users-as-producers, who monetize content as a living.

Table of Contents

1. Introduction

In the digital society, the availability of information is both a blessing and a curse. With the rise of personal computing, digitalization, and interconnectedness in the past decades, anyone can have access to information from anywhere around the world. This has not only facilitated an array of public and private practices that use information as a surveillance tool,[1] but it has also led to new approaches of weaponizing information.[2] Particularly on social media, the question of how information spreads is mostly engulfed in the commercial interests of platforms who rely on algorithmic governance in managing information flows,[3] and the adversarial approach taken by their users to game algorithms in the pursuit of their own benefits.

As social media platforms diversify content monetization models,[4] consumers are increasingly aspiring to produce content for a living. Their products (e.g. merchandise) or services (e.g. advertising) are intermediated by platforms, making them analogous to other categories of peers within the ambit of the gig economy,[5] with the distinction that instead of

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1 Shoshana Zuboff, 'The Age of Surveillance Capitalism: The Fight for the Future at the New Frontier of Power' (Public Affairs 2019).

2 See for instance Lili Levi, 'Real Fake News and Fake Fake News' (2017) 16 First Amend L Rev 232; Ari Ezra Waldman, 'The Marketplace of Fake News' (2018) 20 U Pa J Const L 845; Marc Jonathan Blitz, 'Lies, Line Drawing, and Deep Fake News' (2018) 71 Okla L Rev 59; Russell L Weaver, 'Luncheon Keynote: Fake News: Reflections from History' (2019) 25 Sw J Int'l L 1; Donald L Beschle, 'Fake News, Deliberate Lies, and the First Amendment' (2019) 44 U Dayton L Rev 209; Rory Van Loo, 'Rise of the Digital Regulator' (2017) 66 Duke LJ 1267; Rebecca Tushnet, 'Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation' (2010) 58 Buff L Rev 721; Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 UCLA L Rev 78; Kate Klonick, 'The New Governors: The People, Rules, and Processes Governing Online Speech' (2018) 131 Harv L Rev 1598; Ellen P Goodman, 'Stealth Marketing and Editorial Integrity' (2006) 85 Tex L Rev 83; Erwin Chemerinsky, 'Fake News and Weaponized Defamation and the First Amendment' (2018) 47 Sw L Rev 291; Oreste Pollicino, 'Fake News, Internet and Metaphors (to Be Handled Carefully)' (2017) 9 Italian J Pub L 1.

3 See for instance Frank Pasquale, 'The Black Box Society: How Secret Algorithms Control Money, Information' (Cambridge, MA: Harvard University Press, 2016); Tarleton Gillespie, Pablo J Boczkowski and Kriste A Foot (eds) 'Media Technologies: Essays on communication, materiality and society' (MIT Press 2014).

4 Catalina Goanta and Isabelle Wildhaber, 'In the Business of Influence: Contractual Practices and Social Media Content Monetisation' (2019) 4 Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht 346.

5 See for instance Irina Domurath, 'Platforms as Contract Partners: Uber and beyond' (2018) 25(5) Maastricht Journal of European and Comparative Law 565; Sofia Ranchordas, 'Peers or Professionals: The P2P-Economy and Competition Law' (2017) 1 Eur Competition & Reg L Rev 320; Inara Scott & Elizabeth Brown, 'Redefining and Regulating the New Sharing Economy', 19 U. Pa. J. Bus. L. 553 (2016-2017);

offering rooms, rides or household tasks, they create and broadcast content. Generally speaking, user-generated content has received a lot of attention as of the early days of the commercial internet,[6] as people took it to online fora (e.g. gaming) and added a dynamic form of value to existing infrastructures.[7] Yet early into this trend of content democratization, incentives were limited, and it was not until creators started making money out of their content that existing broadcasting platforms saw a surge in their users, both those generating content as well as those consuming it, with new business models and new platforms arising as a result of this shift.

Most of the existing scholarship on content creators in this new meaning defines them as *social media influencers*. Influencers build popularity on social media channels and convert it to real-life currency through monetization. Influencer marketing has been the most visible type of monetization addressed in literature so far, because of the advertising issues it gave rise to.[8] Content creators who may own review/commentary channels on YouTube or keep a visual diary of their activities on Instagram, receive money from companies who ask them to advertise their products or services in an often inconspicuous way.[9] The lack of clarity between

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6 See for instance Yochai Benkler, 'Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment' (1998) 11 Harv J L & Tech 287; Carmen K Hoyme, 'Freedom of Expression and Interactive Media: Video Games and the First Amendment' (2004) 2 First Amend L Rev 377; Jeffrey Kravitz and James Nguyen and Dennis Loomis and Joseph M Gabriel, 'There is Something in the Air: The Legal Implications of Podcasting and User Generated Context - Loyola Law School's Entertainment &(and) Sports Law Society &(and) the Association of Media and Entertainment Counsel Symposium Series - Tuesday, October 3, 2006' (2006) 27 Loy LA Ent L Rev 299; Edward Lee, 'Warming up to User-Generated Content' (2008) 2008 U Ill L Rev 1459; Greg Lastowka, 'User-Generated Content and Virtual Worlds' (2008) 10 Vand J Ent & Tech L 893; Anthony Ciolli, 'Joe Camel Meets Youtube: Cigarette Advertising Regulations and User-Generated Marketing' (2007) 39 U Tol L Rev 121.

7 Memes are an example of such value. See Thomas F Cotter, 'Memes and Copyright' (2005) 80 Tul L Rev 331; Daniel J Gervais and Daniel J Hyndman, 'Cloud Control: Copyright, Global Memes and Privacy' (2012) 10 J on Telecomm & High Tech L 53; Stacey M Lantagne, 'Mutating Internet Memes and the Amplification of Copyright's Authorship Challenges' (2018) 17 Va Sports & Ent LJ 221.

8 See for instance Laura E Bladow, 'Worth the Click: Why Greater FTC Enforcement Is Needed to Curtail Deceptive Practices in Influencer Marketing' (2018) 59(3) William & Mary Law Review 1123; Gonenc Gurkaynak, C Olgu Kama and Burcu Egun, 'Navigating the Uncharted Risks of Covert Advertising in Influencer Marketing' (2018) 39(1) Business Law Review 17; Aimee Khuong, 'Complying with the Federal Trade Commission's Disclosure Requirements: What Companies Need to Know When Using Social-Media Platforms as Marketing and Advertising Spaces' (2016) 13(1) Hastings Business Law Journal 129.

9 For an overview of the business models attributed to influencer marketing, see Goanta and Wildhaber, fn 4. See also Catalina Goanta & Sofia Ranchordás (eds), 'The Regulation of Social Media Influencers' (Edward Elgar Publishing, forthcoming).

unsponsored and sponsored content has raised questions about truth-in-advertising and unfair commercial practices.[10]

However, the interaction between social media platforms and content creators who are engaged in monetization has barely received any scholarly attention. Meanwhile, YouTubers are dealing with issues such as shadow-banning,[11] a practice that entails diverting traffic from some channels and videos on policy grounds, and Instagrammers are increasingly scared of an outright ban from the platform.[12] In growing their online presence, content creators depend on platforms making them visible, which is done through recommender systems.[13] Whether used in e-commerce,[14] entertainment or social media,[15] just to name a few examples of industries that embrace them, recommender systems are based on the idea of personalizing the information retrieved by or targeting specific Internet users,[16] on the basis of various factors which shape the algorithms that label and disseminate content.

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10 Jan Trzaskowski, 'Identifying the Commercial Nature of "Influencer Marketing" on the Internet' (2018) 65 Scandinavian Studies in Law 81; Christine Riefa and Laura Clausen, 'Towards Fairness in Digital Influencers' Marketing Practices' (2019) 8 Journal of European Consumer and Market Law 64; Sophie C Boerman, Natali Helberger, Guda van Noort and Chris J Hoofnagle, 'Sponsored Blog Content: What Do the Regulations Say: And What Do Bloggers Say' (2018) 9(2) Journal of Intellectual Property, Information Technology and Electronic Commerce Law 146.

11 The Economist, 'What is "shadowbanning"?' (*The Economist*, 1 August 2018) <https://www.economist.com/the-economist-explains/2018/08/01/what-is-shadowbanning>; Rebecca Tushnet, 'The Constant Trash Collector: Platforms and the Paradoxes of Content Moderation' (2019) 2019 Jotwell: J Things We Like 1, 2; Frank Fagan, 'Systemic Social Media Regulation' (2017-2018) 16 Duke L & Tech Rev 393; Joshua A T Fairfield and Christoph Engel, 'Privacy as a Public Good' (2015) 65 Duke LJ 385.

12 Chelsea Ritschel, 'Instagram Influencer Whose Account Was Deleted Said She Called the Police Because It Felt Like "Murder"' (*The Independent*, 12 April 2019) <https://www.independent.co.uk/life-style/instagram-influencer-jessy-taylor-cry-call-police-job-a8868016.html>.

13 Teresa Rodriguez de las Heras Ballell, 'The Legal Autonomy of Electronic Platforms: A Prior Study to Assess the Need of a Law of Platforms in the EU' (2017) 3 Italian LJ 149; Teresa RODRIGUEZ DE LAS HERAS BALLELL, 'Legal Aspects of Recommender Systems in the Web 2.0: Trust, Liability and Social Networking', in J. ...Diaz Redondo (eds.), Recommender Systems for the Social Web, Series 'Intelligent Systems Reference Library' vol. 32, Springer-Verlag, New York (etc) 2012, pp. 43-62; Avi Goldfarb and Catherine Tucker, 'Privacy and Innovation' (2012) 12 Innovation Pol'y & Econ 65; Maria Luisa Stasi, 'Social Media Platforms and Content Exposure: How to Restore Users' Control' (2019) 20(1) Competition and Regulation in Network Industries 86.

14 Christoph Busch, 'Implementing Personalized Law: Personalized Disclosures in Consumer Law and Data Privacy Law' (2019) 86 U Chi L Rev 309, 324.

15 James G Webster, 'User Information Regimes: How Social Media Shape Patterns of Consumption' (2010) 104 Nw U L Rev 593.

16 Sarah Eskens, Natali Helberger and Judith Moeller, 'Challenged by News Personalisation: Five Perspectives on the Right to Receive Information' (2017) 9(2) Journal of Media Law 259.

This paper aims to shed light onto how recommender systems affect content creators. It does so by first looking how recommender systems work, and how they are applied by social media platforms to the activity of content creators. For this purpose, computer science literature will be consulted. As the insight into the content of proprietary algorithms that generate recommendations on well-known social media platforms is not open to public academic inquiry, a number of assumptions will be made as a starting point for this analysis. Second, the paper discusses the potential unfair competition issues that arise out of the use of recommender systems in relation to content creators. Third, it reflects on the suitability of existing frameworks on unfair competition in the EU and US to tackle the tensions arising between content creators and social media platforms.

The study innovates existing literature in two ways. It focuses on content creators not as the perpetrators of harms against consumers or citizens, but as the potential victims of social media platforms, thereby providing an illustration of legal issues relating to social media influencers beyond advertising law. Moreover, it revolves around content moderation as an expression of algorithmic governance, with a particular focus on the impact of this governance not on the users-as-audience, but on the users-as-producers, who monetize content as a living.

2. Recommender Systems and Social Media

Recommender systems are information filtering systems that are supposed to predict a user's preference.[17] Their commercial use stems from the consideration that user profiling leads to the personalization of information,[18] increasing user enjoyment of a digital service or product.[19] A popular example of recommender systems is reflected by the way in which viewers experience video or music streaming. Using Netflix, Hulu or Spotify streaming services when the user knows what they want to watch/listen to is very much straight-forward; but the same cannot be said when users employ streaming platforms for entertainment, without having a clear goal in terms of what selection to make. In the latter situation, instead of putting the burden of research on the user, platforms attempt to facilitate an enjoyable entertainment experience by trying to predict what the user would like. In order to do so, platforms need to profile the user first, and intelligent agents constantly respond to new input that may enrich the profile. This use of profiling may be perceived as one of the least controversial business purposes for recommender systems, although that finally depends on what the platform does

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17 For a computer science overview of recommender systems, see Shini Renjith, A. Sreekumar, M. Jathavedan, 'An extensive study on the evolution of context-aware personalized travel recommender systems' (2019) Information Processing & Management <https://www.sciencedirect.com/science/article/pii/S0306457319300111>; D. Goldberg, D. Nichols, B.M. Oki, T. Douglas, 'Using collaborative filtering to weave an information tapestry' Communications of the ACM, 35 (12) (1992), pp. 61-70. Luis Terán, Alvin Oti Mensah, Arianna Estorelli, 'A literature review for recommender systems techniques used in microblogs' (2018) 103 Expert Systems with Applications 63; Flora Amato, Vincenzo Moscato, Antonio Picariello, Francesco Piccialli, 'SOS: A multimedia recommender System for Online Social networks' (2019) 93 Future Generation Computer Systems 914. For a legal overview, see generally Lilian Edwards and Michael Veale, 'Slave to the Algorithm: Why a Right to an Explanation Is Probably Not the Remedy You Are Looking for' (2017-2018) 16 Duke L & Tech Rev 18; Nava Tintarev & Judith Masthoff, Explaining Recommendations: Design and Evaluation, in RECOMMENDER SYSTEMS HANDBOOK (Francesco Ricci et al. eds., Springer 2015); Mireille Hildebrandt, Defining Profiling: A New Type of Knowledge?, in PROFILING THE EUROPEAN CITIZEN 17 (Mireille Hildebrandt & Serge Gutwirth eds., Springer 2008).

18 Indra Spiecker and Olivia Tambou and Paul Bernal and Margaret Hu, 'The Regulation of Commercial Profiling - A Comparative Analysis' (2016) 2 Eur Data Prot L Rev 535.

19 Ari Juels, 'Targeted Advertising ... and Privacy Too' (2001) Topics in Cryptology 408; Justin P. Johnson, 'Targeted advertising and advertising avoidance' (2013) The RAND Journal of Economics < https://onlinelibrary.wiley.com/doi/full/10.1111/1756-2171.12014>; S Gilbody, P Wilson, I Watt, 'Benefits and harms of direct to consumer advertising: a systematic review' (2005) 14(4) BMJ Quality and Safety < https://qualitysafety.bmj.com/content/14/4/246.short>. Personalization also has negative externalities such as discrimination or radicalization, which are not particularly discussed in this paper. See for instance Lilian Edwards and Michael Veale, 'Slave to the Algorithm: Why a Right to an Explanation Is Probably Not the Remedy You Are Looking for' (2017-2018) 16 Duke L & Tech Rev 18; Danielle Keats Citron, 'Extremist Speech, Compelled Conformity, and Censorship Creep' (2018) 93 Notre Dame L Rev 1035; Nabiha Syed, 'Real Talk about Fake News: Towards a Better Theory for Platform Governance' (2017-2018) 127 Yale LJ F 337; Evelyn Mary Aswad, 'The Future of Freedom of Expression Online' (2018-2019) 17 Duke L & Tech Rev 26

with the data that is used to train the predictive models. In social media, 'the coupling of online social networks with recommender systems created new opportunities for businesses that consider the social influence important for their product marketing, as well as the social networks that want to improve the user experience by personalizing the content that is provided to each user and enabling new connections'.[20] The use of recommender systems by social media platforms, while meant to perform the same function, raises a world of additional legal problems, given that the peer content YouTube thrives on cannot be vetted the same way as on Netflix. Or can it?

This section is dedicated to first understanding how social media recommender systems work, and who they may harm. In answering this question, particular attention will be given to content creators, and several trends regarding the professionalization of peer content will be explored.

a. How Recommender Systems Work

Given the colossal volume of content produced every day on social media, platforms rely on automation in recommending content to their users. This automation poses considerable challenges from three perspectives: scale, freshness and noise.[21] In terms of scale, recommendation algorithms which may perform on a smaller corpus may not work as accurately on a larger scale. Freshness deals with the responsiveness of the recommendation algorithm in balancing recently uploaded content with the latest actions taken by the user, and relation between the time when content is uploaded and noise relates to the plethora of

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20 Magdalini Eirinaki, Jerry Gao, Iraklis Varlamis, Konstantinos Tserpes, 'Recommender Systems for Large-Scale Social Networks: A review of challenges and solutions' (2018) 78(1) Future Generation Computer Systems 413.

21 Paul Covington, Jay Adams and Emre Sargin 'Deep Neural Networks for YouTube Recommendations' (2016) RecSys '16 Proceedings of the 10th ACM Conference on Recommender Systems <https://dl.acm.org/citation.cfm?id=2959190>.

unobservable external factors which may be invisible to algorithms but still affect user satisfaction.[22] Although specifically identified with respect to YouTube content, these factors extent to other social media platforms as well, and are a clear depiction of the issues faced by these platforms in accurately predicting user preferences.

Recommender systems use a wide array of machine learning methods, with the two most recognizable categories being collaborative filtering and deep neural networks. The collaborative filtering family of algorithms – and particularly Matrix Factorization – is best represented by the algorithms created as a result of the Netflix prize challenge,[23] running between 2006 and 2009.[24] These models display users and items (e.g. videos) in matrices, and attempt to predict a particular user's rating with respect to an item,[25] using information from similar users or items: 'For visualizing the problem, it makes sense to think of the data as a big sparsely filled matrix, with users across the top and movies down the side […], and each cell in the matrix either contains an observed rating (1-5) for that movie (row) by that user (column), or is blank meaning you don't know. To quantify "big", sticking with the round numbers, this matrix would have about 8.5 billion entries (number of users times the number of movies). Note also that this means you are only given values for one in eighty-five of the cells. The rest are all blank.'[26] In addition to Matrix Factorization, another model discussed in literature is the Nearest Neighbors model.[27]

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22 *Ibid*.

23 Netflix, 'The Netflix Prize' (*Netflix*, 2009)<https://web.archive.org/web/20090924184639/http://www.netflixprize.com/community/viewtopic.php?id=1537>.

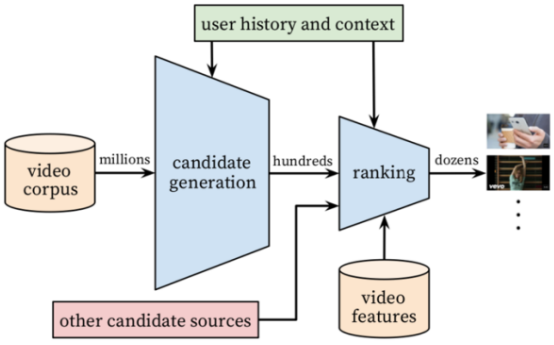
24 The competition was not held afterwards due to privacy concerns. See Arvind Narayanan and Vitaly Shmatikov, 'Robust De-anonymization of Large Datasets (How to Break Anonymity of the Netflix Prize Dataset)' (2008) SP '08 Proceedings of the 2008 IEEE Symposium on Security and Privacy 111 <https://arxiv.org/abs/cs/0610105>.

25 Koren, Yehuda; Bell, Robert; Volinsky, Chris (August 2009). 'Matrix Factorization Techniques for Recommender Systems'. Computer. 42 (8): 30–37. CiteSeerX 10.1.1.147.8295. doi:10.1109/MC.2009.263.

26 Simon Funk, 'Netflix Update: Try This at Home' <https://sifter.org/~simon/journal/20061211.html>.

27 See for instance Pigi Kouki, Shobeir Fakhraei, James R. Foulds, Magdalini Eirinaki and Lise Getoor, 'HyPER: A Flexible and Extensible Probabilistic Framework for Hybrid Recommender Systems', (2015) RecSys '15 Proceedings of the 9th ACM Conference on Recommender Systems <https://shobeir.github.io/papers/kouki_recsys_2015.pdf >.

The deep learning alternative to collaborative filtering was proposed by Covington et al. and builds on Google's development of TensorFlow, an open software library commonly used for machine learning applications such as neural networks. Briefly put, neural networks are machine learning models inspired from biological neurons that learns to solve a task from data and can adapt based on this data.[28] In applying deep learning to recommendations on social media, Covington et al. proposed the use of two neural networks: one that generates recommendations, and one that ranks them, making Google 'one of the first companies to deploy production-level deep neural networks for recommender systems'.[29] First, a so-called candidate generation network uses a given user's activity history such as demographic statistics, watched videos or search history to generate a few hundred videos which are supposed to broadly predict the user's preferences. Then, the ranking network scores these results using more features.[30] By using this approach, the authors of this seminal paper demonstrated that wider and deeper neural networks decrease the so-called 'per-user loss', namely the 'total amount of mis-predicted watch time'.[31]



The two neural networks (candidate generation & ranking) in the deep learning YouTube recommender system(Covington, Adams and Sargin, 2016) [32]

28 See Camron Godbout, 'TensorFlow in a Nutshell — Part One: Basics' (*Medium*, 23 August 2016) <https://medium.com/@camrongodbout/tensorflow-in-a-nutshell-part-one-basics-3f4403709c9d>.

29 Moin Nadeem, 'How YouTube Recommends Videos' (*Medium*, 7 July 2018) <https://towardsdatascience.com/how-youtube-recommends-videos-b6e003a5ab2f>.

30 Fn 29.

31 *Ibid*.

32 Fn 21.

Due to Google's academic engagement, research such as that by Covington et al.'s offers some transparency into the hardship and solutions involved in the recommender system theory and practice when applied to social media. However, other platforms are more secretive about how their features are built, and information regarding those can only be pieced together from journalism reports and anecdotal experiences.[33] For instance, Instagram's recommended posts is 'a rule-based personal assistant which can focus on broadening users' access to content and switch from chronological feed to algorithmic one based on both topical relevance and personal relevance [...] related to weighted search and data mining, which are two of the prominent natural language processing applications of information retrieval'.[34] Still, it is unclear how Instagram allocates weights to search terms, and what data mining is used in this respect.

Overall, a lot of questions regarding recommender systems are unclear. How often do they change? What are the pitfalls observed by platform developer teams? What is the scientific measure of the pitfalls which are not so easily observable? With his 'Algotransparency' project, former Google employee Guillaume Chaslot aims to show that YouTube algorithms are specifically built with less accuracy, so that users can spend more time on the platform.[35] Unsurprisingly, this view is debated by Google, who argues against the accuracy of the methodology used by Algotransparency.[36]

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33 See for instance Josh, C. (2018) 'How Instagram's algorithm works' Retrieved from https://techcrunch.com/2018/06/01/how-instagram-feed-works/; Sarah, P. (2018). Instagram will now add 'Recommended' posts to your feed. Retrieved from https://techcrunch.com/2017/12/27/instagram-will-now-add-recommended-posts-to-your-feed/

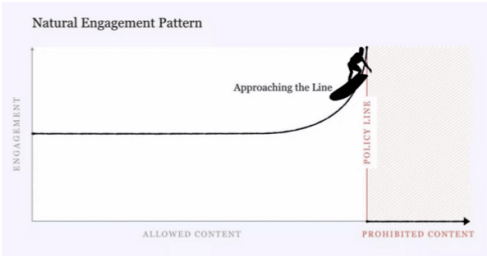
34 See Yajing Hu, 'The Mystery Behind Instagram Recommendation System' (*Georgetown Commons*, 28 January 2019) <https://blogs.commons.georgetown.edu/cctp-607-spring2019/2019/01/28/the-mystery-behind-instagram-recommendation-system/>. See also Boden, M. A. (2016). AI: Its nature and future. Oxford University Press. P63).

35 Már Másson Maack, '"YouTube recommendations are toxic", says dev who worked on the algorithm' (*The Next Web*, June 2019) <https://thenextweb.com/google/2019/06/14/youtube-recommendations-toxic-algorithm-google-ai/>. See also Algotransparency, 'Daily Youtube Recommendations' (Algotransparency, 12 September 2019) < https://algotransparency.org/index.html?date=12-09-2019&keyword=>.

36 *Ibid*.

b. Harms Caused by Recommender Systems to Content Creators

Going back to the reason why recommender systems are used in practice – they are supposed to help users tailor content according to their needs. In other words, recommender systems personalize information. This personalization, as seen in the prior section, relies on preferences directly or indirectly expressed by users, such as ratings, search history, or demographic profiles. The use of this data has raised serious concerns regarding user privacy,[37] especially given that the de-anonymization of large-scale datasets as those offered by Netflix can be achieved much easier than previously believed.[38] There may also be a question of dark patterns (whether voluntary or involuntary) surrounding recommender systems, as they may be used to promote illegal or controversial content.[39] On the one hand, platforms may be under a legal obligation to remove illegal content. However, controversial content, found at the edge of their community guidelines, is supposed to increase audience engagement, so platforms may not have a direct interest in removing it, even though their public narrative is to protect public interest.[40]



Guillaume Chaslot's appreciation of Facebook nature engagement pattern[41]

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37 Arjan Jeckmans, Michael Beye, Zekeriya Erkin, Pieter Hartel, Reginald Lagendijk, and Qiang Tang, 'Privacy in Recommender Systems' In: Ramzan N., van Zwol R., Lee JS., Clüver K., Hua XS. (eds) Social Media Retrieval. Computer Communications and Networks. Springer, London 2012 236.

38 Fn 34.

39 See for instance Paul Ohm, 'Manipulation, Dark Patterns, and Evil Nudges' (2019) 2019 Jotwell: J Things We Like 1.

40 See for instance Mark Zuckerberg, 'A Blueprint for Content Governance and Enforcement' (Facebook, 15 November 2018) <https://www.facebook.com/notes/mark-zuckerberg/a-blueprint-for-content-governance-and-enforcement/10156443129621634/>.

41 Fn 35.

Yet the impact of recommender systems on the growing number of content creators has remained unexplored from a legal academic perspective. Media reports specifically noted the hardship of small YouTube channels in dealing with automated copyright checks, which lead to the termination of their livestreams, as well as 90-day streaming bans,[42] which may be the equivalent of slowly killing a channel off in the long run. For YouTubers who make a living out of streaming, there is also an important short-term implication in that they can no longer count on any source of revenue from the platform for the duration of the streaming ban.

Similarly, in their attempt to tackle fake followers, platforms are downgrading inauthentic follows, likes or comments by helping shut down bot and engagement apps such as Instagress, Social Growth, Archie, InstarocketProX and Boostio.[43] However, platforms like Instagram still show the sponsored ads of some of these platforms that 'masquerade as analytics apps for assisting influencers with tracking the size of their audience'.[44] While the purpose of removing fake accounts and followers may be legitimate, Instagram's actions in tackling this problem are opaque, making it unclear if there are any negative externalities arising from this process, such as impacting the engagement and growth of channels that are mere errors of the models calculating 'fakeness'.

These are actions taken by platforms against their professional users, who may be individuals or companies, depending on their size or business models.[45] From this perspective, a question arises with respect to whether the platform practices may be considered as economic torts against content creators, as they have the potential to harm both consumers and business entities. In answering this question, the next section will first make an outline of unfair

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42 Richard Priday, 'YouTube's algorithm is causing havoc for gaming livestreamers' (*Wired*, 16 May 2018) <https://www.wired.co.uk/article/youtube-streaming-content-id-ban-algorithm>.

43 Josh Constine, 'Instagram kills off fake followers, threatens accounts that keep using apps to get them' (*Techcrunch*, 19 November 2018)'<https://techcrunch.com/2018/11/19/instagram-fake-followers/>.

44 *Ibid*.

45 Riefa and Clausen, fn 10.

competition in Europe and the United States and will analyze whether it can be applied to safeguard the interests of content creators.

3. Unfair Commercial Practices, Content Creators and Recommender Systems

a. The European Approach

In the European Union, unfair competition rules are brought together in the Unfair Commercial Practices Directive (UCPD).[46] The UCPD is a maximum harmonization instrument of consumer protection, with the aim of establishing uniform rules on unfair business-to-consumer (B2C) commercial practices in order to support the proper functioning of the internal market and establish a high level of consumer protection.[47] Before the adoption of the UCPD, the 1984 Misleading Advertising Directive (1984 Directive) governed the rules against false

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46 Directive 2005/29/EC concerning unfair business-to-consumer commercial practices [2005] OJ L149/22.

47 See for instance Case C-611/14, *Retten i Glostrup v Canal Digital Danmark A/S*, ECLI:EU:C:2016:800, para. 25; Case C-299/07, *VTB-VAB NV v Total Belgium NV (C-261/07) and Galatea BVBA v Sanoma Magazines Belgium NV*, ECLI:EU:C:2009:244, para. 52. For an overview of the directive see also Civic Consulting, 'Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU', Part 1 – Synthesis Report, December 2011; Abbamonte, 'The Unfair Commercial Practices Directive: An Example of the New European Consumer Protection Approach', 12 *Columbia Journal of European Law* (2006), 695-712; Anagnostaras, 'The Unfair Commercial Practices Directive in Context: From Legal Disparity to Legal Complexity?', 47 *Common Market Law Review* (2007), 147-171; Budaite and van Dam, 'The Statutory Frameworks and General Rules on Unfair Commercial Practices in the 25 EU Member States on the Eve of Harmonisation', *The Yearbook of Consumer Law 2008*, 107-139; Collins, 'EC Regulation of Unfair Commercial Practices', in Collins, (Ed.), *The Forthcoming EC Directive on Unfair Commercial Practices* (Kluwer, 2004), 1-42; Collins, 'The Unfair Commercial Practices Directive', 1(4) *European Review of Contract Law* (2005), 417-441; Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Springer, 2015); Howells, 'Unfair Commercial Practices – Future Directions', in Schulze and Schulte-Nölke (Eds.), *European Private Law – Current Status and Perspectives* (Sellier, 2011), 133-144; Howells, Micklitz and Wilhelmsson (Eds.), *European Fair Trading Law: The Unfair Commercial Practices Directive* (Ashgate Publishing, 2006); Micklitz, 'Unfair Commercial Practices and Misleading Advertising', in Micklitz, Reich and Rott, *Understanding EU Consumer Law* (Intersentia, 2009), 61-117; Poncibò and Incardona, 'The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution', 30(1) *Journal of Consumer Policy Issue* (2007), 21-38; Shears, 'Overviewing the EU Unfair Commercial Practices Directive: Concentric Circles', 18 *European Business Law Review* (2007), 781-796; Wilhelmsson, 'Misleading Practices', in Howells, Micklitz and Wilhelmsson (Eds.), *European Fair Trading Law: The Unfair Commercial Practices Directive* (Ashgate Publishing, 2006), 49-82; Willett, 'Fairness and Consumer Decision Making under the Unfair Commercial Practices Directive', 33 *Journal of Consumer Policy* (2010), 247-273.

advertising to consumers.[48] One year after the adoption of the Unfair Commercial Practices Directive, in 2006, the Misleading and Comparative Advertising Directive (MCAD) entered into force.[49] The latter, based on minimum harmonization,[50] came to replace the 1984 Directive, and its design sought to protect traders against the unfair consequences of misleading advertising. The main difference between the MCAD and the UCPD is that the first generally applies to business-to-business (B2B) transactions,[51] whereas the latter, as mentioned above, applies to B2C relations.[52] The EU Commission acknowledges that the UCPD's 'principle-based provisions address a wide range of practices and are sufficiently broad to catch fast-evolving products, services and sales methods'.[53] The scope of the UCPD is therefore not restricted to the sale of goods, as the UCPD is equally applicable to services, and therefore digital services for that matter, regardless of what specific qualification they may have under national law.[54] Having said this, while a general, principle-based directive such as the UCPD is not bound to a given industry or sector, questions arise as to its suitability for tackling industries that have emerged after its adoption, such as social media.[55]

The structure of the main provisions of the UCPD is laid down as follows. Article 5 sets the general clause according to which a commercial practice is unfair if it satisfies a two-

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48 Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, OJ 1984, L 250. See also Leistner, 'Unfair Competition or Consumer Protection', in Bell and Dashwood (Eds.), The Cambridge Yearbook of European Legal Studies (Hart, 2005), 153.

49 Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ 2006, L 376.

50 Article 7 MCAD.

51 The rules on comparative advertising do apply however also to advertising directed at consumers.

52 Article 1 MCAD.

53 European Commission, 'Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices', SWD(2016) 163 final, at 6.

54 According to Article 2(c) corroborated with Article 3(1) UCPD, it does apply to services. See also Case C-357/16, *UAB 'Gelvora' v Valstybinė vartotojų teisių apsaugos tarnyba*, para. 32. New European rules on digital content may qualify this to be a digital content contract. See European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Certain Aspects Concerning Contracts for the Supply of Digital Content', COM(2015) 634 final. However, until the adoption of such rules, it is likely that the applicable national qualifications would most likely be service or innominate contracts.

55 Social media was not an established industry in 2005, when the UCPD was adopted, and its growth to the commercial space it represents today could not have been entirely predicted. This does not affect, however, the material and personal scope of the UCPD, see Recital 11 UCPD.

tier test: (i) 'it is contrary to the requirements of professional diligence'; and (ii) 'it materially distorts or is likely to materially distort the economic behavior with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers'. In addition, the same article acknowledges two particular types of commercial practices which may be deemed unfair: (i) misleading practices as set out in Articles 6 and 7; and (ii) aggressive practices as set out in Articles 8 and 9. These two sets of Articles include their own, more specific tests which derogate from the general test in Article 5, although they are set around the same principle – that manipulative commercial practices are prohibited. A black-list is annexed to the UCPD and contains a total of 31 practices which are in all circumstances considered to be unfair.

b. The United States Approach

In the United States, absent a unifying regulatory framework that defines unfair competition in terms of unfair commercial practices, this body of rules seems to be about 'courts try[ing] to stop people from playing dirty tricks'.[56] In tracing some of the history of unfair competition law in the United States, Chafee makes an overview of cases where plaintiffs were given relief by courts for the loss of the possibility of business other than on the grounds of contractual damages.[57] This is a first group of cases he identified to arise between competitors, bringing together 'a small number of torts of strange sorts'.[58] He additionally identifies trademark infringements and imitations of secondary meaning as second and third groups of cases, and

[56] Zechariah Jr Chafee, 'Unfair Competition' (1940) 7 Current Legal Thought 3. See also Harry Nims, 'The Law of Unfair Competition and Trade-marks' (2d ed. 1921 and later editions) at 17, within the introduction to Chapter 2.
[57] See for instance Anon., Y. B. 11 H. IV, f. 47, pl. 21 (C. P. 1410); Ibottson v. Peat, 3 H. & C. 644 (Ex. Ch. 1865); Tarleton v. M'Gawley, Peake 205 N. P. (1804).
[58] *Ibid*, 7.

specifies that unfair competition, while mostly used to identify the latter, gradually started including the second category as well.[59] As all competition may be considered a *prima facie* economic tort, there have also been attempts to apply three tort-related conditions to unfair competition:[60] (i) whether the plaintiff suffered legal harm; (ii) whether the plaintiff was responsible for this harm; and (iii) whether the harm was justified. In Chafee's appreciation, unfair competition theoretically meets all these conditions, since (i) all competition is harmful; (ii) this competition is intended by the competitor; and (iii) even though most competition is justified, if it uses 'unfair or socially undesirable methods', then it becomes unjustified.[61]

While the common law doctrine on unfair competition may pose uncertainty with respect to how courts see the body of cases that are considered to pertain to unfair competition,[62] institutional structures were further developed to deal with harms arising out of unfair competition and its impact on consumer protection. In this respect, the Federal Trade Commission (FTC) is authorized "to gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce […]'.[63] In fulfilling its duties, the FTC has two roles: the role of protecting consumers, as well as that of protecting competition. As a result, the FTC Act prohibits 'unfair or deceptive acts or practices in or affecting commerce'.[64] What is more, according to the US Code, 'unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in

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[59] *Ibid*.
[60] For these elements in early US doctrine, see Holmes, Privilege, Malice, and Intent (1894) 8 HARV. L. REV.; Wigmore, The Tripartite Division of Torts (1894) 8 HARV. L. REV. 200.
[61] Chafee, fn 55, 11.
[62] See also Rudolf Callmann, 'What Is Unfair Competition' (1940) 28 GEO. L. J. 585; Tony Bortolin, 'Foundational Objectives of Laws regarding Trademarks and Unfair Competition' (2017) 107 Trademark Rep 980; Sharon K Sandeen, 'The Erie/Sears/Compco Squeeze: Erie's Effects on Unfair Competition and Trade Secret Law' (2018) 52 Akron L Rev 423; Harold G Fox, 'A Canadian Trade-Mark Decision' (1945) 35 Trademark Rep 124.
[63] FTC Act Sec. 6(a), 15 U.S.C. Sec. 46(a).
[64] Section 5(a) of the FTC Act.

or affecting commerce, are […] declared unlawful'.[65] This codification supplements the Supreme Court's interpretation of unfairness in *FTC v. Raladam Co*.[66] Unfair or deceptive practices include those practices that fulfill two separate conditions: (i) cause or are likely to cause reasonably foreseeable injury within the US; or (ii) involve material conduct occurring within the US.[67]

The FTC's first systematic examination of the unfairness doctrine it has legitimacy to enforce occurred in 1964 and dealt with the adoption of the 'Trade Regulation Rule for the Prevention of Unfair or Deceptive Acts or Practices in the Sale of Cigarettes', where it imposed three criteria for a practice to be deemed unfair:[68]

> '(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise-whether in other words, it is within at least the penumbra of some common law, statutory, or otherwise established concept of unfairness;
>
> (2) whether it is immoral, unethical, oppressive, or unscrupulous;
>
> (3) whether it causes substantial injury to consumers (or competitors or other businessmen).'

In spite of inconsistent applications of this unfairness doctrine, the Supreme Court affirmed the FTC's role in tackling unfair practices in *FTC v. Sperry & Hutchinson Co. (S&H)*, where it held:[69]

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[65] 15 U.S.C. Sec. 45(a)(1).
[66] 283 U.S. 643 (1931). See also Stephen Calkins, 'FTC Unfairness – An Essay' (2000) 46 Wayne L. Rev. 1935; Larry Saret, Unfairnesswithout Deception:Recent Positions of the Federal Trade Commission, 5 LOY. U. CHI. L.J. 537, 555 (1974).
[67] 15 U.S.C. Sec. 45(a)(4)(a); This also includes unfair methods of competition used in export trade against competitors engaged in export trade, even though the acts constituting such unfair methods are done without the territorial jurisdiction of the United States. Apr. 10, 1918, ch. 50, §4, 40 Stat. 517.
[68] TERESA M. SCHWARTZ, 'REGULATING UNFAIR PRACTICES UNDER THE FTC ACT: THE NEED FOR A LEGAL STANDARD OF UNFAIRNESS' (1977) 11(1) Akron Law Review 1, 4. See also Cohen, Dorothy. "Unfairness in Advertising Revisited." Journal of Marketing 46, no. 1 (1982): 73-80. doi:10.2307/1251161.
[69] United States Supreme Court, FTC v. Sperry & Hutchinson Co. (S&H) (1972), 244.

> ‘[L]egislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.’

The FTC further developed its unfairness doctrine through truth-in-advertising cases,[70] shaping the practice that ‘[w]hen advertisers make unsubstantiated claims for products, the FTC has the authority to bring law enforcement actions against them.’[71]

As of 1994, however, unfairness became linked to a further test that involves harm specifically relating to consumers themselves:[72]

> ‘The Commission shall have no authority […] to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.’

With contradicting wording and inconsistent interpretations, the unfairness doctrine used by the FTC remains unclear.[73] This is especially difficult to gauge with respect to its

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[70] J. R. H., IV. ‘Unfairness in Advertising: Pfizer, Inc.’ Virginia Law Review 59, no. 2 (1973): 324-54. doi:10.2307/1071996.
[71] Thomas Pahl, ‘Reconsidering Advertising Substantiation Forum and Remedy Policies’, 2017 ANA/BAA Marketing Law Conference, 14 November 2017, <https://www.ftc.gov/system/files/documents/public_statements/1280233/pahl_-_ana_speech_11-14-17.pdf>.
[72] 15 U.S.C. S 45(n) (1999).
[73] Paul Sobel, ‘Unfair Acts or Practices under CUTPA - The Case for Abandoning the Obsolete Cigarette Rule and following Modern FTC Unfairness Policy (2003) 77(2) Connecticut Bar Journal 105; Elise M. Nelson, Joshua D. Wright, ‘Judicial Cost-Benefit Analysis Meets Economics: Evidence from State Unfair and Deceptive Trade Practices Laws’ (2017) 81(3) Antitrust Law Journal 997; Dara J Dionande, ‘The Re-Emergence of the Unfairness Doctrine in Federal Trade Commission and State Consumer Protection Cases’ (2004) 18 Antitrust

applicability to an industry such as social media, where individual qualities (e.g. consumer) are difficult to pin down, and doctrines such as 'public policy' have not yet been interpreted by courts. More recent FTC complaints seem to acknowledge and attempt to curtail data brokerage and security practices,[74] yet the application of the unfairness doctrine to these instances is more based on deceptiveness than unfairness.[75] In addition, the existence of professional or semi-professional users of social media platforms who may not be consumers or competitors but who may be harmed by unfair practices raises further concerns that have yet to be settled.

4. Social Media Platforms and Content Creators: New Impetus to Extend the Scope of Unfair Practices

So far, this paper has described both technology (recommender systems) and the law on unfair competition (unfair practices) in the EU and the US. In this section, the discussion shifts to the application of the identified regimes to the recommender systems used by social media platforms which may negatively impact content creators.

In so far as recommender systems are used to curtail the reach of content created by influencers on social media, they deprive creators of business opportunities, or depending on the business model, even of revenue used to support oneself. Of course, a thorough assessment of this loss ought to equally take into account the contractual relationship between the platform and its creators. If a platform prohibits a specific type of behavior (e.g. behavior that

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53; Maureen K Ohlhausen, 'Weigh the Label, Not the Tractor: What Goes on the Scale in an FTC Unfairness Cost-Benefit Analysis' (2015) 83 Geo Wash L Rev 1999.

[74] Complaint, Nomi Techns., Inc., F.T.C. No. 132 3251 (Sept. 3, https://www.ftc.gov/system/files/documents/cases/I 50902nomitechcmpt.pdf. See also Cobun Keegan and Calli Schroeder, 'Unpacking Unfairness: The FTC's Evolving Measures of Privacy Harms' (2019) 15 JL Econ & Pol'y 19, 29; G S Hans, 'Privacy Policies, Terms of Service, and FTC Enforcement: Broadening Unfairness Regulation for a New Era' (2012) 19 Mich Telecomm & Tech L Rev 163; Timothy E Deal, 'Moving beyond Reasonable: Clarifying the FTC's Use of Its Unfairness Authority in Data Security Enforcement Actions' (2016) 84 Fordham L Rev 2227; Dennis D Hirsch, 'That's Unfair - Or Is It: Big Data, Discrimination and the FTC's Unfairness Authority' (2014) 103 Ky LJ 345;

[75] Jennifer L West, 'A Case of Overcorrection: How the FTC's Regulation of Unfair Acts and Practices Is Unfair to Small Businesses' (2017) 58 Wm & Mary L Rev 2105, 2106.

encourages self-harm or dangerous activities, very popular on channels that live off prank videos), the platform is contractually entitled to take the remedies it bound its users to when they concluded an agreement and made an account on that platform. However, with questionable content that is on the edge of platform community guidelines, it becomes harder to interpret what remedies ought to come into play, for two main reasons.

First of all, in fulfilling their content moderation function, social media platforms enjoy a tremendous amount of discretion which they exercise according to internal policies, but which also react to various events that shape public policy. When YouTuber Logan Paul made the video where he was laughing at a man who committed suicide in a Japanese forest, YouTube allegedly removed Paul from the lucrative Google Preferred program.[76] However, given his channel's recovered popularity, it may very well be that this suspension was only temporary. The mere fact that it is not clear what platforms can and actually do when faced with measures against creators whose content they want to control or curtail is a sign of the discretionary use of the power platforms hold over the head of creators.

Second of all, the evidence relating to how this discretion is exercised is under the full control of the platform. If Instagram removes a user account, that creator no longer has access to any of the analytics which are normally shared by Instagram with its users, even though such analytics are only a sliver of the wealth of information Instagram would have mapped with respect to that profile. This leads to a situation where both within and outside of the conflict resolution mechanisms provided for by platforms, the creator will always be in a worse situation, as they will not be able to prove their claims regarding potential harm.

These limitations ought to be kept in mind when dealing with the two jurisdictions outlined above. In the case of the European UCPD, the main legal problem rests in its scope,

[76] BBC News, 'YouTube punishes Logan Paul over Japan suicide video' (BBC News, 11 January 2018) <https://www.bbc.com/news/world-asia-42644321>.

which is only applicable to B2C transactions.[77] Therefore, even before considering any of the tests in the UCPD, there is an immediate question of whether the UCPD is at all applicable. The answer to this question needs to consider the diversity of content creators: some of them have companies, or are registered freelancers, whereas some do not or are not. More specifically, as consumers are defined as 'any natural person who […] is acting for purposes which are outside his trade, business, craft or profession',[78] it remains to be seen if individual users who have not taken any measures to set up an additional legal status for their online presence will still be able to fit under this definition, as being a content creator is not a profession or a craft (most content creators start off with close to no video and photo editing skills themselves), and it is counter-intuitive to consider it a trade or a business, if the individual user has obtained an economic label. This shortcoming is a direct result of the grey area created by the rise of peer-to-peer transactions, which have so far not had any impact on regulatory reform at European level.

Given the scope, it could be argued that mega- and micro-influencers who have the identity of an economic operator would not be covered by the UCPD. However, considering individual users (e.g. nano-influencers without a company or freelance status) as consumers, an argument can be made in that they are protected against unfair commercial practices, as content creators would *be* the consumers. In so far as unfair commercial practices are deemed to cause the content creator to make transactional decisions they otherwise would not have taken,[79] and this transactional decision can be expressed as an action or equally as no action (e.g. not being able to access their channel/accounts), it can be considered that content creators may use this legal framework to argue that platform discretion leading to harm is a an unfair commercial practice. This argument is strengthened by the view that professional diligence,

[77] Fn 51.
[78] Article 2(a) UCPD.
[79] Article 5(2)(b) UCPD.

the other leg of the general UCPD test, is violated by the discretionary exercise of platform power over its creators.

In the US, while the FTC Act does not limit its scope to B2C relations, Section 5 raises similar concerns as in the EU. Two arguments can be made to support the view that the FTC unfairness doctrine applies to cases of poor algorithmic governance affecting the interests of content creators. On the one hand, it could be argued that the practice of banning or curtailing the economic activity of content creators hurts their audience, which has no way of avoiding such measures. However, in this case, the 'substantial' nature of the injury will be difficult to determine. One estimation of this nature could take into account the way in which followers interact with their favorite content creators, as they form real fan armies that often protect their favorite against other influencers on the Internet. On the other hand, similarly to the analysis of European rules above, the consumers referred to in Section 5 could be content creators themselves, as consumers are considered as natural persons under FTC law,[80] and no additional conditions apply.

The considerable hurdle, however, would be to link any one of these arguments to the concept of public policy. As data brokers make generate new business models at skyrocketing speeds, and US regulators are slow in creating new policies around them, the question of what public policy is when considering the platform restriction of the economic activities of content creators is currently left to academic imagination.

This paper aimed to look into recommender systems that curtain the economic activities of content creators and argue that current unfair competition frameworks in the EU and US are a good starting point for the correction of the harms that may arise when social media platforms exercise harmful discretion towards content creators. However, it is also a framework that needs expanding and even updating to current economic activities and actors involved in social

[80] 15 USC § 6603(h)(6)(A).

media transactions. This expansion is necessary to provide overdue checks and balances to platform powers in the context of content moderation, especially since this topic will only grow in the coming years.