

ILLICIT ANTIQUITIES AND THE INTERNET: THE
TRAFFICKING OF HERITAGE ON DIGITAL
PLATFORMS

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The contemporary internet has become the transnational marketplace for the sale and trafficking of illicit products, from drugs and guns to malware and stolen user information. Given the scale of these activities, these marketplaces have drawn the attention of international and national law enforcement bodies as well as scholars of cybersecurity and criminal activities. As such, these platforms have moved to the 'dark web' or other encrypted communication channels and separated from the 'surface web' platforms run by global platform companies, which are the increasing focus of both government regulation and scholars of data privacy law. Among such illicit goods, one is often ignored though globally traded via established marketplaces on social media platforms: looted antiquities. Although representing only a portion of an already small global illicit trafficking network, such activities on internet platforms, particularly Facebook, can cause immense damage to archaeological and cultural heritage sites. Such marketplaces on major internet platforms provide a unique case study in global data privacy and cybersecurity law that has largely gone unstudied. This paper analyzes the trafficking of illicitly acquired antiquities on a variety of internet platforms—particularly Facebook—as an illustration of issues with both the current framework of global data privacy and the moderation and regulation of such transnational criminal activity. This note will review and critique the existing literature on platform moderation and digital infrastructure and propose and examine various solutions to the mechanisms by which illicit activities endure, specifically by focusing on the potential of multistakeholder collaboration to bring effectively targeted moderation to the trade in illicit antiquities online.

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I. INTRODUCTION

Illicit and otherwise socially undesirable activities present particular legal challenges when they take place on the internet, specifically on social media platforms. While laws may or may not speak about whether an activity is permitted, global digital platform companies often control the ways in which enforcement is structured, especially where the law remains silent on the mechanisms of online enforcement. Indeed, social media moderation has become a sort of *de facto* law, using the broad liability umbrella under Section 230 of the U.S. Communications Decency Act of 1996 (CDA) to limit or control speech and to dictate the methods by which platforms comply with all relevant laws that require their action.¹

While scholarly work to date has often focused on the threat of overusing platform moderation to limit speech, this paper presents ways to induce social media platforms to more aggressively moderate commercial speech that, while potentially legal in the United States in its own right, may facilitate acts that are widely recognized as illegal.² Recognizing moderation, as Tarleton Gillespie did, “as an expansive socio-technical phenomenon, [which] functions in many contexts and takes many forms,” this paper is limited to making normative claims about the illicit, online antiquities trade on primarily one platform: Facebook.³ While other platforms play a role in this trade, focusing on Facebook follows a similar logic to the explanation given by bank robber Willie Sutton when asked why he robbed banks: “[b]ecause that’s where the money is.”⁴

1. Communications Decency Act of 1996, 47 U.S.C. § 230 (2018).

2. See, e.g., Daphne Keller, *Who Do You Sue? State and Platform Hybrid Power over Online Speech*, in HOOVER INSTITUTION ESSAYS at 2–3 (Hoover Working Grp. on Nat’l Sec., Tech., and Law, Aegis Series Paper No. 1902, 2019) (examining platforms content removal and moderation powers with regard to freedom of expression).

3. Tarleton Gillespie & Patricia Aufderheide, *Introduction*, in 9 INTERNET POL’Y REV. 2, 3 (2020).

4. *Willie Sutton*, FED. BUREAU INVESTIGATION, <https://perma.cc/8WAU-G7MY> (last visited Dec. 1, 2021).

Indeed, as long as Facebook continues to be a low-risk, high-traffic infrastructure with lax moderation, it will likely continue to be the central nexus of the illegal antiquities trade.

Companies like Facebook have a unique power over all activity, legal or not, on their platforms via moderation. They can more effectively regulate undesirable or illicit activities than international or national law enforcement. Some scholars, such as Kate Klonick, see platform moderators becoming “the new governors” of online activity.⁵ This would entail a triadic model in which internet corporations sit between the state and the content publisher, “economically subject to [the] normative influence of citizen-users and . . . also collaborative with external networks like government and third-party groups.”⁶ On the one hand, Klonick is concerned with the effects that changes might have on free speech on the internet; on the other hand, she analyzes whether the mere threat of regulation could create more accountable and transparent moderation by driving platforms to voluntarily take up “technological due process.”⁷ Based on this idea, some scholars have developed theories that would function on the global level, viewing digital platform moderation policies and decisions as a form of global administrative law (GAL).⁸ Though the platforms are private organizations, their decisions establish global norms and governance policies, similar to the ways in which the Internet Corporation for Assigned Names and Numbers (ICANN), a private nonprofit organization, sets the standards for domain issuance across the internet.⁹

Platforms can be viewed as more than the products of transnational corporations, as they also constitute a form of global communications infrastructure. International legal

5. Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1662–64 (2018).

6. *Id.* at 1663.

7. *Id.* at 1667–69.

8. See generally Benedict Kingsbury, *Frontiers of Global Administrative Law in the 2020s* (Inst. for Int’l L. and Justice, Working Paper No. 2020/2, 2020) (describing the history of global administrative law (GAL) theory and discussing the increasing function of private governance in GAL); Thomas Streinz, *Disentangling Entangled Legalities: The Flawed Dualism of Facebook’s Oversight Board* (July 2, 2020) (unpublished manuscript) (on file with author) (advocating for the use of the conceptualizations of GAL to analyze Facebook’s oversight board).

9. Streinz, *supra* note 8, at 2–3.

scholar Benedict Kingsbury has written on how physical and digital infrastructure can shape laws, noting that platforms are an infrastructure that require “understanding infrastructure not simply as a thing, but as a set of relations, processes and imaginations.”¹⁰ Though only a single platform, Facebook represents an infrastructural system that, when utilized across a wide range of activities, from social activism to genocide, “can alter the practical experience and political impact of time and of space.”¹¹ How this digital infrastructure is governed produces spillover effects in the ‘real’ world, alongside the existing *de facto* regulation of a significant portion of the internet by digital platforms. Indeed, these platforms are not siloed from the rest of the world, but rather represent a “web of private infrastructures that we traverse in our digitally mediated lives.”¹² The trade in looted antiquities depends upon the ‘real’ world to extract artifacts of value from the raw Earth and to ultimately put them in the hands of unscrupulous buyers. The true shift has been in the means by which portions of these exchanges have been digitally mediated, as the infrastructure developed by platforms has made the business of looting and trafficking the goods more efficient and less expensive than ever before.

Given this broader context, the marketing of looted antiquities on a platform’s infrastructure, particularly Facebook, represents a curious legal middle ground for the moderation and regulation of such a prosaic transnational criminal activity. Almost all nations—including the United States—have not only ratified the United Nations Educational, Scientific and Cultural Organization (UNESCO) 1970 Convention on cultural property and incorporated it into their national law, but have also enacted domestic laws forbidding the sale and transfer of knowingly stolen property.¹³ However, unlike other crimes that require the platforms to actively moderate and re-

10. Benedict Kingsbury, *Infrastructure and InfraReg: On Rousing the International Law ‘Wizards of Is’*, 8 CAMBRIDGE INT’L L. J. 171, 179 (2019).

11. *Id.* at 183.

12. Sarah Myers West, *Thinking Beyond Content in the Debate About Moderation*, in 9 INTERNET POL’Y REV 14, 15–16 (2020).

13. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO 1970 Convention]. *E.g.*, 19 U.S.C. § 2602 (2018); see also *The 1970 Convention*, UNESCO, <https://>

spond to takedown notices, like Section 512 of the Digital Millennium Copyright Act (DMCA) for copyright violations or 18 U.S. Code §2258B for the takedown of child abuse imagery, no such requirements exist for looted antiquities.¹⁴ While this trade is an extremely limited activity in both size, with only 271 seizures by customs agencies globally in 2019 (compared with 40,017 seizures of illicit drugs in the same period), and online scope, primarily occurring on Facebook, it is nonetheless a widely criminalized activity worth hundreds of millions of dollars a year (not even considering the incalculable value lost in the destruction of archaeological sites).¹⁵ Facebook did not begin to act on the matter until 2020, after advocacy groups brought the issue to the international media's attention.¹⁶ Even then, it only did so opaquely. Letting platforms self-regulate their moderation without accountability may not be enough to prevent illicit activities. As this Note will show, multiple forms of national and international law can alter the form of transnational criminal activities in multiple nations.

This Note begins with an outline of global antiquities law as it presently exists, establishing how the antiquities trade traditionally operated prior to the internet and how it was regulated. Then, it discusses the role that internet platforms have played in the illicit antiquities trade and the reasons why Facebook, specifically, has become the platform of choice for traffickers. It then provides an analysis of Facebook's response to concerns raised on the matter in the summer of 2020. Then, moving from factual to legal analysis, this Note examines what liability Facebook might face under current legal regimes—both under U.S. and foreign law—noting the multiple ways the platform could seek to avoid liability. Finally, this

perma.cc/H7CM-V29X (last visited Dec. 2, 2021) (noting that 141 states have ratified the Convention).

14. Digital Millennium Copyright Act of 1998, 17 U.S.C. § 512 (2010); 18 U.S.C. §2258B (2008).

15. WORLD CUSTOMS ORG., ENFORCEMENT AND COMPLIANCE: ILLICIT TRADE REPORT 2019, 11, 37 (2019), <https://perma.cc/R2BP-B539>.

16. See Tom Mashberg, *Facebook, Citing Looting Concerns, Bans Historical Artifact Sales*, N.Y. TIMES (June 23, 2020), <https://perma.cc/72VJ-N3XT> (noting that “[t]he decision came after archaeologists and activists who monitor the illicit antiquities trade said they had identified at least 200 Facebook groups with nearly two million members that were using the platform to find black market buyers and to offer tutorials on how best to dig up and deliver the most sought-after items”).

Note proposes various potential solutions that might be considered in order to potentially hold Facebook liable in ways that would induce their moderation of the illicit online trade. In so doing, this Note considers a range of topics, from IP theft to the preservation of digital evidence, and asks what role, if any, governmentally mandated regimes should have for regulating the sale of looted antiquities. By examining the nature of the digital illicit antiquities trade on online platforms and the governance of those platforms in response to this trade, this Note hopes to derive insights to support online platform moderation in a broader sense. It concludes that international multistakeholder organizations—composed of at-risk nations, specialized non-governmental organizations (NGOs), and the platform companies themselves—could pool their knowledge, expertise, and data on the trafficking of antiquities and develop technological solutions to effectively moderate it off their platforms.

II. LOOTING AND THE LAW

The international legal framework prohibiting the illicit antiquities trade can be found in the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, signed in November 1970 and effective as of April 1972.¹⁷ While some states previously had their own legal regimes to control the trade in antiquities, the Convention, ratified by 140 states, required states parties to incorporate the treaty into domestic law, stipulating that “[t]he import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit.”¹⁸ The Convention also requested that states parties develop mechanisms by which other states could report antiquities “illegally removed from that State after the entry into force of this Convention in both States” and request their recovery and return, provided that the requesting state could

17. UNESCO 1970 Convention, *supra* note 13; U.N. Treaty Collection, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, <https://perma.cc/MG2W-48RE> (last visited Dec. 2, 2021).

18. UNESCO 1970 Convention, *supra* note 13, art. 3.

demonstrate evidence of illegal removal to the state where the antiquity was trafficked to.¹⁹

The United States incorporated the UNESCO treaty into domestic law with the 1983 Convention on Cultural Property Implementation Act (CCPIA), which declared that

[n]o designated archaeological or ethnological material that is exported (whether or not such exportation is to the United States) . . . may be imported into the United States unless the State Party issues a certification or other documentation which certifies that such exportation was not in violation of the laws of the State Party.²⁰

The CCPIA also provides mechanisms by which countries can request the return of items, as well as ways for the United States and third party nations to create memorandums of understanding to stop the import of antiquities from the third-party nation.²¹ At the federal level, the illicit antiquities trade has also been targeted via the National Stolen Property Act (NSPA), which compels the forfeiture of imported looted antiquities worth \$5,000 or more that a party “receives, possesses, conceals, stores, barter, sells, or disposes” of.²² Should the party cross into the United States or between U.S. states while knowing that the good was stolen, the party can face fines and a maximum of ten years in prison, along with the forfeiture of the good.²³ Finally, the Archaeological Resources Protection Act of 1979 protects artifacts on federal land, making it illicit to “sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange any archaeological resource if such resource was excavated or removed from public lands or Indian lands.”²⁴

Domestic laws outside the United States vary in the activities they criminalize, particularly the laws of those states that are the origin point of many looted antiquities. Additionally,

19. *Id.* art. 7.

20. Convention on Cultural Property Act of 1983, 19 U.S.C. § 2606 (2018).

21. *Id.* § 2602.

22. The National Stolen Property Act of 1934, 18 U.S.C. § 2315 (2018).

23. *Id.*

24. The Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470ee (2018).

these laws may predate the 1970 UNESCO Convention, or criminalize acts beyond the “import, export or transfer of ownership” of antiquities.²⁵ Italian law, for example, aligns more with the Convention’s designation of illicit activities, as it focuses on the movement of cultural heritage outside Italy: “[w]hoever transfers abroad things of artistic, historical, archaeological, ethno-anthropological, bibliographical, documentary or archival interest . . . without a certificate of free circulation or export license, shall be punishable by imprisonment[.]”²⁶ By contrast, Egyptian law captures a much broader scope of activities, including domestic sales, which could potentially hold online platforms liable. It states that the “[t]rade, sale or commerce in antiquities, including all antiquities held as private property, shall be prohibited.”²⁷ Furthermore, all aspects of the exportation of antiquities is proscribed under Egyptian law: “[i]n all cases, [the] trade, sale, commerce in, or disposal of any antiquity [that would result in] transferring said antiquity outside the country, by any means” is prohibited.²⁸ Finally, Syrian law takes a broader approach than Italian law, but does so in less defined terms than Egyptian law, referring only to “smuggl[ing] or attempts to smuggle antiques.”²⁹ There is greater similarity in laws prohibiting the forgery of antiquities, as all three states forbid both the fabrication and the sale of such.³⁰

To understand the methods utilized in the ‘traditional’ looted antiquities trade, it would be beneficial to walk through the facts from a recent well-known case from 2017: *United States of America v. Approximately Four Hundred Fifty (450) Ancient Cuneiform Tablets; and Approximately Three Thousand (3,000) Ancient Clay Bullae*. Steve Green, the president of Hobby Lobby, a

25. UNESCO 1970 Convention, *supra* note 13, art. 3.

26. D.Lgs. 22 gennaio 2004, no.42, in G.U. 24 febbraio 2004, n.45 (It.), art. 174.

27. Law No. 117 of 1983 as amended by Law No. 3 of 2010 (Law on the Protection of Antiquities), *al-Jaridah al-Rasmiyah*, vol. 32 bis, 11 Aug. 1983 (Egypt), art. 8.

28. *Id.*

29. Legislative Decree No. 222 of 1963 as amended in 1999 (Law of Antiquities), 2 Dec. 1999, art. 56.

30. *See id.* art. 58(b) (proscribing the production of archeological forgeries under penalty of imprisonment and fine); Law No. 117, *supra* note 27, art. 43 (proscribing the production of archeological “counterfeits” under penalty of imprisonment and fine).

chain of art and craft stores, sought to acquire antiquities in order to fill his Museum of the Bible; as such, he traveled to the United Arab Emirates in 2010 to meet with Israeli and Emirati antiquities dealers.³¹ Volumes of artifacts were presented to Green, arranged in such a way as to indicate that they had been looted. As described in the indictment, “the artifacts were displayed informally—spread on the floor, arranged in layers on a coffee table, and packed loosely in cardboard boxes, in many instances with little or no protective material between them.”³² After this inspection, Green bought over 5,000 antiquities—cuneiform tablets, clay bullae, and cylinder seals.³³ Furthermore, the sum of US\$1.6 million was sent to five different individuals and seven different bank accounts in order to pay for the artifacts.³⁴ To prepare the items for export to the United States, the provenances were backdated to the 1960s, prior to the 1972 UNESCO effective date. The address of a third party in the United States was used to claim that the goods had been kept in storage in the country since before the 1970s, without informing the third party.³⁵ Finally, the antiquities needed to be smuggled into the United States without being flagged by customs. The antiquities were typically sent to the United States, via international post, in batches, with the packages falsely describing the contents as things like “Tiles (Sample)” while not stating the country of origin or value on the shipping label (despite each package being worth well over US\$2,000).³⁶ This was done intentionally to avoid formal entry requirements. Due to changes in international postal rules, the shipping was later switched to FedEx; several more packages were sent via FedEx before one was inspected by customs and subsequent packages were intercepted.³⁷ The complaint sought forfeiture of the goods because Hobby Lobby had violated U.S. law in falsely declaring the value and contents of the packages to U.S. customs. Soon after the complaint, Hobby Lobby agreed to a settlement that

31. Complaint at 8, *U.S. v. Approximately Four Hundred Fifty (450) Ancient Cuneiform Tablets*, No. 17-3980 (E.D.N.Y. July 5, 2017).

32. *Id.*

33. *Id.* at 10.

34. *Id.* at 11–12.

35. *Id.* at 10.

36. *Id.* at 13–15.

37. *Id.* at 15–18.

saw them forfeit all the items as well as pay a US\$3 million fine.³⁸

The Hobby Lobby case is unusual because of the sheer number of looted artifacts seized. The entire process, however, is standard operating procedure from selection to shipment of the antiquities. The biggest disadvantage to such transactions is the need to rely on personal contacts who are embedded in the trade, such as the antiquities dealers with whom Green worked. As antiquities typically flow from developing countries with weakly enforced protections to buyers in high-income countries, there is often a vast disparity in the acquisition and final sale price.³⁹ The end sellers of the goods can thus charge a premium for their services, meaning that they can easily recoup the costs of paying smugglers or middlemen, who, in turn, profit from the work of the on-the-ground looters. Prices are highly variable, even for those items sold to middlemen, with research finding that looted antiquities in Iraq can range from fifty dollars to tens of thousands of dollars.⁴⁰ Given this dynamic, it is hardly surprising that smugglers and looters soon recognized the potential for social media to directly connect suppliers and buyers.

III. THE INTERNET AND THE ILLICIT ANTIQUES TRADE

The internet has become the new frontier of the illicit antiquities trade. While the trade on social media platforms has not replaced the old networks of traffickers and art dealers, it has allowed looters to network with peers and offer looted antiquities directly. As with other illicit, black-market activities, getting reliable information on the scope and size of the trade is challenging, thereby necessitating the use of proxy measures to gauge volume, with values varying based upon the calculation method. The total annual monetary value of looted artifacts is thought to be anywhere from US\$100 million to US\$2

38. *Hobby Lobby Settles \$3 Million Civil Suit for Falsely Labeling Cuneiform Tablets*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (July 5, 2017), <https://perma.cc/85ZJ-QZ76>.

39. See MATTHEW SARGENT ET AL., TRACKING AND DISRUPTING THE ILLICIT ANTIQUITIES TRADE WITH OPEN-SOURCE DATA 12 (2020) (describing “case studies of the antiquities trade in Cambodia, Egypt, Lebanon, Afghanistan, and Latin America have demonstrated a similar relationship between poverty, both opportunistic and organized looting, and illicit excavations”).

40. *Id.*

billion dollars globally of artifacts stolen from Syria alone between 2011 and 2016.⁴¹ Additionally, the amount of illicit cultural heritage intercepted by national customs authorities is tiny compared to that of other illicitly trafficked goods. According to a 2019 World Customs Organization report, in 2018 there were 227 confirmed cases of trafficked heritage in thirty-four reporting countries, a number that is less than half of the number of cases in 2018 of intercepted khat (a plant-based stimulant popular in the Horn of Africa, Yemen, and Kenya) in the United States alone.⁴² However, thirty-four countries is a small sample size. It may well be the case that stopping the illicit trafficking of cultural heritage is a low priority for most customs agencies. Indeed, the numbers suggest that the lack of accurate estimations may be due to its small size as compared to other black-market activities, such as drugs, guns, and endangered or regulated animals.

The paucity of information about the illicit antiquities trade in the real world is found in the digital world as well, with different reports clashing on its size and organization online. An in-depth RAND report on the digital market for illicit cultural heritage summarized the trade in three points: 1) almost all trade occurs on the surface web (as opposed to the dark web markets); 2) the trade is undertaken mostly by individuals, rather than by organized criminal groups; and 3) the total illicit antiquities trade, online and offline, is in the hundreds of millions of dollars globally.⁴³ Most of the looting is economically motivated and opportunistic, with individuals motivated by the economic opportunity to sell items to much smaller networks of traffickers, who, in turn, sell to dealers.⁴⁴ However, the opportunity to sell directly online allows individuals to try their luck finding buyers on Facebook. Despite looted antiquities being an illicit commodity, the RAND study found no sales of them on the “dark web.”⁴⁵ Often accessed via

41. *Id.* at 11, 21. See also *A Quarter of Population, US\$255 Billion, and 5000 Years of History: The Price of Arab Spring for Syria*, ANTIQUITIES COALITION (Feb. 22, 2016), <https://perma.cc/6JKG-7LFF> (“Since 2011, by data of The Antiquities Coalition, artefacts worth US\$2 billion have disappeared from the territories seized by Jihadists.”).

42. WORLD CUSTOMS ORG., *supra* note 15, at 22–27, 64–69.

43. SARGENT ET AL., *supra* note 39, at xi–xiii.

44. *Id.* at xii.

45. *Id.* at 43–48.

Tor, dark web marketplaces are the hub of online sales for most illicit goods, from drugs to firearms.⁴⁶ The high risk of being caught and severe punishments make the anonymity of encrypted services vital to the continued success of any seller; indeed, the dark web has seen a transition to smaller, less easily discoverable marketplaces after central “hub” marketplaces were compromised by various law enforcement agencies.⁴⁷ However with the antiquities trade, enforcement is done either at the beginning of the process (when looters are caught in the act of looting archaeological sites) or at the end (when illicit antiquities are intercepted in transit by customs authorities). Without new legal mechanisms at the national level or corresponding enforcement, the main risk of losing access to online platform sales is dependent upon enforcement by the platform itself. Social media platforms, then, make the ideal marketplace. For traffickers, risk is miniscule, enforcement via moderation is mostly poor, and the potential audience for the goods is massive.⁴⁸ Finally, although the risks are low, the size of the actual market for illicit antiquities online is not clear. The best estimate from RAND indicates that US\$3.45 million of “Roman antiquities” were traded on eBay in 2018 (though many of the antiquities were likely forgeries).⁴⁹ This is only one category on a single website; with other platforms, like Facebook, no publicly visible way exists to measure transactions on the site’s marketplace. Therefore, the best networks are still those of the well-established personal connections among looters, traffickers, and dealers: these are where the best items are trafficked and laundered through developed and often long-established methods.⁵⁰ Despite this fact, the presence of an online market for illicit antiquities is still of major concern, as the act of looting itself has a severe impact on a site, disrupting or destroying archaeological sites regardless of whether any items are found. Moreover, removing antiquities from their find spot cleanses them of much of their archaeological context, and disrupting archaeological sites makes it exceedingly difficult, if not impossible, for archaeolo-

46. *Id.* at 43.

47. *Id.* at 45–46.

48. *Id.* at xiii, 57.

49. *Id.* at 78–79.

50. *See, e.g., id.* fig. 6.1 (noting the different sources and markets for antiquities).

gists to derive understanding from them in future research investigations.⁵¹ Furthermore, online markets can reach larger audiences and thus teach more individuals how to get involved in looting than would otherwise be possible, making digital-platform-based illicit antiquities markets just as harmful for humanity's understanding of its past as the traditional trade. Additionally, the mere normalization of participation in looting among audiences in countries that are particularly vulnerable to the depredations of looters makes it even more difficult to change norms such that looting is not merely illegal, but socially unacceptable.⁵²

While these estimates do not present such an evocative, or grandiose, image of the trade as some media accounts have presented—mainly in the context of the Islamic State of Iraq and Syria (ISIS) and the financing of terrorism—they make the study of the illicit antiquities trade particularly useful for assessing the moderation of online content.⁵³ Platform moderation may be an effective method of reducing the trade because the trade takes place on clear web platforms, without facing challenges from organized crime. Moreover, given the relatively small size of the overall trade, as compared with the largest global platform companies, the illicit activity in question should be manageable and within the capabilities of those platforms.

51. Ricardo J. Elia, *Looting, Collecting, and the Destruction of Archaeological Resources*, 6 *NONRENEWABLE RESOURCES* 85, 86 (1997) (noting that “[i]n their efforts to supply marketable objects to collectors, looters remove objects from their archaeological context and in the process destroy or disturb the archaeological sites that contained them. As we shall describe below, looting is both intensive in its damage to specific archaeological sites and global in its scale.”).

52. See SARGENT ET AL., *supra* note 39, at 54 (noting how Facebook groups normalize looting and valorize the search for antiquities).

53. See generally Justine Drennan, *The Black-Market Battleground*, *FOREIGN POL’Y* (Oct. 14, 2014), <https://perma.cc/YVJ9-JSY Y> (arguing that targeting ISIS’s trafficking of illicit antiquities could be an effective way of limiting the terrorist organization from funding itself); Benoit Faucon, Georgi Kantchev & Alistair MacDonald, *The Men Who Trade ISIS Loot*, *WALL ST. J.* (Aug. 6, 2017, 7:28 PM), <https://perma.cc/CYQ7-CSB8> (describing the system of middlemen that bought and trafficked illicit antiquities from Syria and Iraq for ISIS); Steven Lee Myers & Nicholas Kulish, *‘Broken System’ Allows ISIS to Profit From Looted Antiquities*, *N.Y. TIMES* (Jan. 9, 2016), <https://perma.cc/J25K-5BW X> (documenting the flow of looted antiquities from Syria and Iraq by ISIS into the western antiquities market).

IV. ILLICIT ANTIQUITIES AND INTERNET PLATFORMS

Facebook did not become the digital platform of choice for public postings of illicit antiquities by happenstance. Rather, it is part of a larger ecosystem of platforms connected to the trade. Facebook's size, technical functionalities, and lax moderation have made it a better platform than other, earlier platforms like eBay. In addition, it provides a broad forum to supplement the tight networks of traffickers found on encrypted chat apps, specifically WhatsApp. Facebook's popularity for illicit antiquities trade makes sense when one considers that its platform functionality fits a comfortable middle ground between the platforms of eBay and WhatsApp. How Facebook responded to that popularity is as important as the reasons that it became so popular for the trade in the first place.

A. eBay

Prior to Facebook, the earliest concerns about the illicit antiquities trade online were aired in the 2000s, when the auction site eBay allowed artifacts to be bought and sold without any sort of regulation or verification of provenance.⁵⁴ Given the lack of middlemen—indeed the lack of any need for a storefront at all—some archaeologists were concerned that it would encourage looters to auction items on the platform.⁵⁵ Despite these fears, eBay did not become a major vector of the illegal antiquities trade. Though some items did appear on the platform, the illicit antiquities sellers fell victim to crowding out by another criminal activity: The sale of *forged* illicit antiquities.⁵⁶ Local craftsmen who sold real local tchotchkes and fake antiquities to tourists who visited their region could now find a global market of buyers on eBay who had low knowledge and were naïve when it came to buying antiquities.⁵⁷ These craftsmen could thus make a profit on a less risky activity, as there was no need to loot potentially monitored archaeological sites or risk illicit artifacts being caught in cus-

54. E.g., Charles Stanish, *Forging Ahead*, 62 *ARCHEOLOGY*, no. 3, May–June 2009, <https://perma.cc/GKE7-95ML>.

55. *Can You Dig It?*, *ECONOMIST* (May 28, 2002), <https://perma.cc/EW5H-2FBH>.

56. Stanish, *supra* note 54.

57. *Id.*

toms.⁵⁸ As buyers continued to buy forgeries on eBay, the quality of the fakes increased to the point that real looted antiquities became indistinguishable from the fakes, and the margins for the forgers only grew larger as they sold more expensive “antiquities.”⁵⁹ This trend persists to this day and, if one were to search eBay for “Gandharan sculpture” or “Egyptian artifacts,” one would encounter dozens, if not hundreds, of fakes being sold as actual antiquities, most clearly fake to the trained eye, but some impressively well done and on offer for thousands of dollars.⁶⁰ However, while eBay’s auctions are efficient, they lack methods by which a buyer and seller can interact prior to the sale so as to establish authenticity. Given that it is relatively easy to create new seller accounts, bad actors like forgers find plenty of opportunities for lucrative one-off deceptions. Ultimately, the anonymity of the sales process and the lack of a network of personal connections doomed the trade on the platform, as without personal or network-based validation of the seller legitimacy there was little trust, and a race to the bottom was unavoidable. Given the failure of eBay to serve as a satisfactory platform, other, more socially linked platforms were needed for illicit antiquities to be trafficked efficiently online.

B. *Telegram and WhatsApp*

In contrast to eBay, Telegram and, to a greater degree, WhatsApp are important for establishing personal connections in the illicit antiquities trade, with ninety percent of communication between brokers and smugglers done on one of these two apps.⁶¹ While Telegram group chats have been used to sell illicit goods like firearms in conflict zones like Syria, this type of usage does not appear to carry over to illicit antiquities, as surveys of the platform’s groups in Syria have found only a few,

58. *See id.* (“This is a far cry from the old days when a real illegal antiquity had to be couriered by a specialist who not only knew how to care for the piece, but how to doctor it up to avoid being arrested at customs.”).

59. *See id.* (“It was only a matter of time before a few workshops producing the cheap fakes started turning out reproductions that can fool even supposed experts.”).

60. Based on author’s own observations through monthly searches of ‘artifacts’ listed under those terms throughout 2020.

61. SARGENT ET AL., *supra* note 39, at 37.

low-quality antiquities offered on Telegram.⁶² These apps, particularly WhatsApp, have replaced the need for face-to-face meetings when setting up transactions, thereby encrypting existing networks of individual connections rather than expanding the market into new frontiers. This is what these networks have done on Facebook in expanding the range of potential buyers and how information on looting can spread. Indeed, Telegram and WhatsApp antiquities dealing represents a higher echelon of the trade, as closely knit networks are the ones that tend to acquire and move the most valuable artifacts. It is not surprising, then, that both apps are used for the selling of illicit antiquities, as their encryption has made them popular for a whole host of illicit activities.

For the purposes of this paper, Telegram and WhatsApp will be set aside, as the “solution” to their use in the illicit trade involves the same discussions about encryption as for every other criminal activity conducted on the platforms. This is an ongoing debate. Many government actors, including the U.S. Department of Justice, have been pushing for backdoor access to these apps.⁶³ This push has come even as app owners and privacy advocates have warned that building a backdoor into the apps would also give hackers and other malicious third parties the opportunity to bypass the encryption.⁶⁴ While this debate is certainly important, it is fundamentally a question of encryption and moderation. It is therefore outside the scope of this Note, which is instead focused on ways in which platforms can be induced to moderate. Indeed, questions about the illicit antiquities trade and encrypted messaging apps would best fit research focused on encryption. Additionally, as antiquities are frequently offered on Facebook, with subsequent sales conducted on WhatsApp, the downstream effects

62. *Id.* at 48–51.

63. William P. Barr, U.S. Att’y Gen., Statement on Introduction of Lawful Access Bill in Senate (June 23, 2020), in DEP’T JUST. OFF. PUB. AFF., <https://perma.cc/5QVY-YG5Y>.

64. See Andrew Crocker, *The Senate’s New Anti-Encryption Bill Is Even Worse Than EARN IT, and That’s Saying Something*, ELECTRONIC FRONTIER FOUND. (June 24, 2020), <https://perma.cc/Q8LN-CZ94> (“[M]any legislators and law enforcement officials believe that even though any backdoor could be exploited by bad actors and put hundreds of millions of ordinary users at risk.”).

of an improved management of the illicit antiquities trade on Facebook would affect the volume of trade on WhatsApp.

C. Facebook

Facebook's popularity for illicit antiquities trade can best be explained by its hybrid nature. While Facebook itself has a marketplace where people can sell goods, its primary function as a social network for individuals generally, including those engaged in the trade or seeking to join.⁶⁵ Therefore, it is a marketplace and advertising space, largely populated by actors who are as much interested in the networking effects of the community around antiquities trafficking as in selling any goods. The marketplace may offer artifacts, but these items are commonly put up as advertisements that lead interested buyers to move negotiations off Facebook and onto WhatsApp.⁶⁶ Facebook groups can be used to observe and communicate directly with "a cross-section of the trafficking supply chain," allowing new connections to be made that could grow the trade.⁶⁷ In other words, people can learn the basics of looting and be brought into the trade via the shared community knowledge.⁶⁸

The illicit antiquities community on Facebook operates primarily through a number of Facebook groups, both those that are free to join by any Facebook user and those that require moderator access to join (though the requirements to join mostly just consist of answering some basic questions or agreeing to follow the group's rules).⁶⁹ The groups are run by a small number of administrators—488 running ninety-five groups with almost two million members—and, of those administrators, twenty-three control four or more groups, with the average size of each group being under 40,000 members (though some reach more than 150,000).⁷⁰ In addition to offering antiquities for sale, these groups often discuss methods

65. See SARGENT ET AL., *supra* note 39, at 57 (Facebook "offers a way to reach a larger audience that has a casual interest in antiquities.").

66. *Id.* at 59.

67. *Id.* at 62.

68. *Id.*

69. *E.g., id.* at 54.

70. AMR AL-AZM, KATIE A. PAUL & SHAWN GRAHAM., FACEBOOK'S BLACK MARKET IN ANTIQUITIES TRAFFICKING, TERRORISM, AND WAR CRIMES, 19, 43, 61–63 (ATHAR Project 2019).

for finding and looting archaeological sites—a mixture of real techniques, like using Google Earth imagery, and folk beliefs—and showing off looting activities.⁷¹ These groups primarily speak Arabic, as conflict zones in the Middle East are at times both archaeologically rich with little to no state control and are also home to developed networks of traffickers that acquire artifacts and move them out of the region.⁷² While Turkish is also used in some groups (antiquities from Syria are commonly smuggled through Turkey), Arabic is almost exclusively the language for those actually offering items and giving looting tips.⁷³ Though other websites and online forums provide the same (or better) resources and networks as Facebook, the groups on Facebook reach a far larger audience.⁷⁴ They “normalize the idea of looting for profit, offering a base of thousands (and sometimes tens of thousands) of users who are eager to engage in the antiquities trade when the opportunity is presented.”⁷⁵ Though the total two million members in these groups is a small number compared to the 2.8 billion total Facebook users, these numbers are concentrated in a few Arabic-speaking countries where looting is more easily accomplished.⁷⁶ Even if only one percent of those active in the groups were to become active in looting, the damage to the archaeological heritage in those countries would be immense. Additionally, because the *lingua franca* for the trade is Arabic, moderation presents localization challenges that English-only moderation staff cannot solve alone.

Unlike eBay, the prices offered through Facebook’s buy/sell functionality are static, and most looters post looted items for “free,” simply asking users to contact the seller directly via other methods.⁷⁷ Often, items are offered at a far higher price than they are actually worth on the market (with some items being priced as high as US\$200,000) in order to weed out low

71. *E.g., id.* at 10.

72. *E.g., id.* at 17; SARGENT ET AL., *supra* note 39, at 54–62.

73. SARGENT ET AL., *supra* note 39, at 62.

74. *Id.* at 57.

75. *Id.*

76. AL-AZM ET AL., *supra* note 70, at 19, 64–80; *see also* John Gramlich, *10 Facts About Americans and Facebook*, PEW RES. CTR. (June 1, 2021), <https://perma.cc/4DH9-J974> (Facebook “now boasts more than 2.8 billion monthly users worldwide”).

77. *E.g., AL-AZM ET AL., supra* note 70, at 15.

bids during later private communications.⁷⁸ Postings often have replies turned off for several reasons. For one, this directs buyers to private conversations with the seller; for another, it stops other users—including other traffickers—from pointing out if an item one is selling is actually a fake.⁷⁹

The centralization of the online trade on Facebook, along with its increased publicity, led the company to take action against looting in the summer of 2020 by prohibiting the trade altogether. Facebook’s moderation in these circumstances has the potential to alter how the illicit trade operates online completely. Indeed, no other body, private or governmental, has the same ability to control what becomes of the online illicit cultural heritage market. Given the policy implications, it is worthwhile to examine the process by which Facebook makes its moderation decisions and the nature of the rules it ultimately produces.

In a meeting of Facebook’s Public Policy Forum, a bi-monthly meeting to discuss potential changes to the community standards (among other policy topics), the company on June 23rd 2020 issued the minutes of their meeting entitled “Recommendation: Sale of Historical Artifacts.”⁸⁰ According to Facebook, the Forum works to incorporate a multistakeholder approach in its decisions, bringing in civil society organizations before “the Stakeholder Engagement team presents a detailed summary of the feedback we’ve received on each policy proposal, and we lay out the views of our stakeholders on a spectrum of policy options.”⁸¹ Multistakeholder approaches have traditionally been associated with internet governance institutions, like ICANN.⁸² However, in the context of an individual private company claiming to offer a multistakeholder framework, the academic community continues to debate whether this multistakeholderism presents just the

78. *Id.*

79. *Id.* at 20.

80. FACEBOOK PRODUCT POLICY FORUM, RECOMMENDATION: SALE OF HISTORICAL ARTIFACTS (2020), <https://perma.cc/89P6-5DBS>.

81. *Additional Information: Stakeholder Engagement*, FACEBOOK, <https://perma.cc/Q6DY-8E4Y> (last visited Dec. 17, 2021).

82. *See, e.g., Internet Governance – Why the Multistakeholder Approach Works*, INTERNET SOCIETY (Apr. 26, 2016), <https://perma.cc/B9TK-LPJE> (“In March 2016, the [multistakeholder approach] was endorsed by all stakeholders, including ICANN’s Governmental Advisory Committee.”).

appearance of collaborative transparency or whether such an approach can actually influence corporate governance considerations in the ways concern over shareholder value does.⁸³

The minutes first noted on the subject of artifacts traded online that “an estimated 80% of antiquities have ‘sketchy provenances.’”⁸⁴ The report outlined three potential responses: 1) keeping the status quo; 2) enforcing a ban on “an escalations-only basis”; or 3) enforcing a ban “via scaled review.”⁸⁵ The report favored the third option, the most proactive choice. Though it might lead to the perennial concern of overenforcement and push the trade underground, it was still seen as a superior choice to enforcement on an escalation-only basis.⁸⁶ The latter would, in principle, take down illicit trade content only when it drew enough attention or when outside advocacy groups informed the platform.⁸⁷

Even prior to Facebook’s explicit ban, its Community Standards—the published moderation standards by which users can be banned or content deleted from the platform—implicitly banned the discussion of such activities under “Violence and Criminal Behavior,” specifically under the subsection “Coordinating Harm and Publicizing Crime.”⁸⁸ Under this is another subsection, “Harm against property,” which forbids “[s]tatements of intent, calls to action, representing, supporting or advocating for harm against property that depicts, admits to, or promotes the following acts committed by you or your associates” including “theft when committed by you or your associates, as well as positive statements about theft when committed by a third party.”⁸⁹ Looting is theft under this standard because antiquities and/or related items are specifically designated by each state as being “cultural property” and

83. See Laura DeNardis & Mark Raymond, *Thinking Clearly About Multistakeholder Internet Governance*, GIGANET: GLOBAL INTERNET GOVERNANCE ACADEMIC NETWORK, ANNUAL SYMPOSIUM 10 (2013), <https://perma.cc/75ZC-7C8U> (noting that even a “relatively clear example of multistakeholder governance” like ICANN has been subjected to wide-ranging critique).

84. FACEBOOK PRODUCT POLICY FORUM, *supra* note 80, at 6.

85. *Id.* at 8, 10, 12.

86. *Id.* at 14.

87. *Id.* at 10.

88. *Coordinating Harm and Publicizing Crime: Policy Details*, META, <https://perma.cc/5RC2-CT4C> (last visited Dec. 20, 2021).

89. *Id.*

therefore belong to the state in which they are found, under the Convention's standards.⁹⁰ Thus, just as the U.S. government uses NSPA to prosecute individuals involved in the illicit antiquities trade, Facebook could have used the same logic to enforce bans on the illicit antiquities trade on the platform.⁹¹ Facebook's June 2020 decision was to make explicit prohibitions, instead of relying on their existing terms under "Coordinating Harm and Publicizing Crime." Rather than ban a range of activities, all "[c]ontent that attempts to buy, sell, trade, donate, gift or solicit historical artifacts" (including illicit antiquities) was added in June of 2020 to the "Regulated Goods" subsection.⁹² This is a logical placement, meaning that it is not permissible to "buy, sell, trade, donate, gift, or solicit" firearms, nonmedical drugs, marijuana, pharmaceutical drugs, endangered species, alcohol and tobacco, live animals, human blood, or weight loss drugs.⁹³ Given that illicit antiquities groups on Facebook not only sell or trade antiquities, but also share strategies on how to best locate and loot sites and encourage looting as an acceptable activity to a wide audience, these activities are considered acceptable under the language of "buy, sell, trade, donate, gift, or solicit" unless they are to be included as proscribed activities under "Coordinating Harm and Publicizing Crime."⁹⁴

Facebook's response appears to solve the problem, as their Terms of Service bind users to the Community Standards; any content in contravention can be deleted by Facebook's moderators, and the user who posted it can have their account suspended or terminated.⁹⁵ Both postings about illicit antiquities and the user who posted them are regulated. However, several questions remain: What should Facebook do with the content it takes down, given that it might be the only available documentation to prove that an item was looted? How aggressively should Facebook actually enforce its modera-

90. UNESCO 1970 Convention, art. 1.

91. The National Stolen Property Act of 1934, 18 U.S.C. § 2314 (2018).

92. *Restricted Goods and Services: Policy Details*, META, <https://perma.cc/8A53-KXLX> (last visited Dec. 20, 2021).

93. *Id.*

94. *Id.* See AL-AZM ET AL., *supra* note 70, at 8–20 (describing the methods by which dealers in illicit antiquities discuss looting strategies online).

95. *Terms of Service*, FACEBOOK, <https://perma.cc/963A-GDKD> (last visited Dec. 20, 2021).

tion? While related, these questions are distinct. It is important to consider that letting platforms like Facebook manage large swathes of the world's digital infrastructure and setting online moderation as the *de facto* law is a double-edged sword. Letting platforms, rather than the law, moderate content allows for rapid and effective responses to problems found in the digital realm at the national and even global scale (if companies like Facebook actually incorporate the input of stakeholders as they claim to do). Yet, in letting private firms take the role of "the new governors," as Klonick puts it, there is an expectation that the platforms will actually moderate content, as well as an implicit threat of litigation or legislation by governments should they be negligent in this role.⁹⁶ Klonick's and Kingsbury's writings assume that the state can have power over the platform, yet the implicit threat only works if governments actually have that power and possess legal mechanisms with which to regulate digital platforms.⁹⁷ As the next section shall discuss, the nations that are most vulnerable to looting will face steep challenges in finding judicial recourse in the countries where the relevant platforms are based (e.g., the United States in Facebook's case) and even in turning the threat into a legally compulsive force in their own courts and legislatures.

V. LAW, LIABILITY, AND LOOTED ANTIQUITIES

To succeed in challenging Facebook or a related platform in a U.S. court, a plaintiff must overcome the protections granted to the providers of interactive computer services by Section 230 of the Communications Decency Act of 1996 (CDA).⁹⁸ This applies whether a plaintiff seeks to challenge the platform's failure to stop illicit antiquities trafficking, either on a negligence theory prior to its adoption any commu-

96. See Klonick, *supra* note 5, at 1662–69 (describing the expectations and threats bound up in the role of digital platforms as the "new governors").

97. See, e.g., Kingsbury, *supra* note 8, at 15 ("Most private ordering is dependent on state blessing or more active support—or on state promises of non-interference—and state and private are not too sharply separated in many places."); Klonick, *supra* note 5, at 1668 ("[S]ome insertion of traditional government agency functions . . . when matched with an accurate understanding of how these platforms currently moderate content, could provide a potential answer to . . . issues of accountability.")

98. Communications Decency Act of 1996, 47 U.S.C. § 230 (2018).

nity guidelines, or for its failure to actually enforce them, which does not even address questions of standing, remedies, and recourse.⁹⁹ Section 230 is designed as a “safe harbor” against civil liability for both information published by others via a service and, conversely, for any actions the provider takes to moderate any content provided by others on its service.¹⁰⁰ Specifically, Section 230 states that “[n]o 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.”¹⁰¹ Further, it provides protections for good-faith efforts to moderate or restrict access to any content the provider finds “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected,” including by technical means.¹⁰² Section 230 is not a shield against criminal liability for the platform’s actions: “Nothing in this section shall be construed to impair the enforcement of . . . any other Federal criminal statute.”¹⁰³

To date, the courts have broadly read Section 230 as protecting websites and platforms from liability based on content posted on them in a broad swath of categories, from defamation and terrorism to sex trafficking.¹⁰⁴ However, this shield is not unlimited. Congress has the power to modify Section 230, which it did with regard to sex trafficking when it believed that moderation under Section 230 alone was insufficient. The Allow State and Victims to Fight Online Sex Trafficking Act and the Stop Enabling Sex Traffickers Act (FOSTA-SESTA) removed protections from liability for those providers that are “knowingly assisting, supporting, or facilitating” sex trafficking.¹⁰⁵ Some advocates—such as the Antiquities Trafficking and

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *See, e.g.*, *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019) (holding that under Section 230 Facebook cannot be held liable for providing material support to terrorists by hosting content that promotes Hamas); *M.A. v. Vill. Voice Media Holdings*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011) (holding that Backpage was not liable under Section 230 for paid advertisements posted on its site that were used to sexually traffic a minor).

105. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115–164, § 5, 132 Stat. 1253, 1255 (2018).

Heritage Anthropology Research (ATHAR) Project—see FOSTA-SESTA as a template that could apply to the illicit antiquities trade as well. They think it would function as a similar legislative act that narrows Section 230 not to provide protection to the providers and users of interactive computer services from knowingly assisting or facilitating antiquities traffickers.¹⁰⁶ As it stands, however, no carve-out exists for illicit antiquities; for the moment, that is likely the better choice. FOSTA-SESTA was by itself a highly contested exception to Section 230, despite the obviously odious content the legislation intended to stop (especially given political pressures on Congresspeople not to be seen as “soft” on sexual exploitation of minors). ATHAR’s suggested change to Section 230, however is unlikely to get the same level of political support. Therefore, it is preferable to rethink Section 230 and the relationship between interactive computer services and criminal content published on them as a whole, rather than carving out piecemeal legislative exceptions without a unified purpose.

As long as Section 230 of the CDA remains in its current form, U.S. courts will continue to shield platforms like Facebook from liability. This liability bar does not, however, protect such platforms outside the United States, which raises the question of what impact foreign courts could have by compelling Facebook to act in a specific fashion in order to limit the illicit trade, given the ability (or lack thereof) to enforce a judgment in U.S. courts.¹⁰⁷

106. *E.g.*, AL-AZM ET AL., *supra* note 70, at 49.

107. It should be noted that, while many countries lack a Section 230 equivalent, others have followed the “American model” for providing safe harbors. *See* Akhilesh Pillalamarri & Cody Stanley, *Online Content Regulation: An International Comparison*, GEO. WASH. STUDENT BRIEFS (Dec. 8, 2021), <https://perma.cc/KS22-R9XQ> ([M]any countries are moving toward a conditional immunity approach, such as that which exists in Germany, and may soon be implemented in India, the E.U., and the U.K.” in which “an online platform is only granted immunity from liability upon fulfilling specific statutory conditions, such as following local laws.”). Additionally, the United States has taken to adding the language of Section 230 to its international agreements, notably Article 19.17 of the United States-Mexico-Canada Agreement (USMCA). Agreement between the United States of America, the United Mexican States, and Canada art. 19.17, Nov. 30, 2018, <https://perma.cc/D84B-T7HQ>.

Yahoo! Inc., v. La Ligue Contre le Racisme et L'antisemitisme (LICRA) is an early ruling in this area.¹⁰⁸ In *LICRA*, the 9th Circuit examined a lower court's ability to issue a declaratory judgment for Yahoo! in California against LICRA.¹⁰⁹ Yahoo! brought the case in the Northern District of California to invalidate a French court order to prohibit the auctioning of Nazi memorabilia on Yahoo!'s platform, which stemmed from a case LICRA had brought in 2000.¹¹⁰ Though the case ultimately turned on the issue of personal jurisdiction and remanded with instructions to dismiss, the court touched on the question of how complying with French law might or might not impact Yahoo!'s rights in the United States. It did not entirely answer the question but noted the following:

Even if the French court took this step, Yahoo!'s claim to First Amendment protection would be limited. We emphasize that the French court's interim orders do not by their terms require Yahoo! to restrict access by Internet users in the United States. They only require it to restrict access by users located in France In other words, as to the French users, Yahoo! is necessarily arguing that it has a First Amendment right to violate French criminal law and to facilitate the violation of French criminal law by others. As we indicated above, the extent – indeed the very existence – of such an extraterritorial right under the First Amendment is uncertain. In sum, it is extremely unlikely that any penalty, if assessed, could ever be enforced against Yahoo! in the United States. Further, First Amendment harm may not exist at all, given the possibility that Yahoo! has now “in large measure” complied with the French court's orders through its voluntary actions, unrelated to the orders. Alternatively, if Yahoo! has not “in large measure” complied with the orders, its violation lies in the fact that it has insufficiently restricted access to anti-Semitic materials by Internet users located in France. There is some possibility that in further restricting access to these French users, Yahoo! might have to restrict access by American users. But this possibility is, at this point, highly speculative. This level of harm is not sufficient to overcome the factual uncertainty bearing on

108. *Yahoo! Inc. v. La Ligue Contre Le Racisme*, 433 F.3d 1199 (9th Cir. 2006).

109. *Id.* at 1201.

110. *Id.* at 1201–06.

the legal question presented and thereby to render this suit ripe.¹¹¹

LICRA demonstrated the complexities of enforcement, even without questions of Section 230, particularly where there is a conflict of laws between states. Does blocking illegal content via geofencing the block or action to one specific state violate the rights of the platform in another, especially if that data is not necessarily housed in that state requesting the block?

It is not clear how the *LICRA* holding affects the global illicit antiquities context. Unlike matters of speech involving a single nation's law, an unripe issue in *LICRA*, antiquities looting harmonized through international law in contravention of the UNESCO Convention is considered by the majority of the world's states—141 ratifiers in total—to be an illicit activity, and all of these same states recognize, in their domestic law, the illegality of the import and export of looted antiquities.¹¹² Yet, as discussed earlier in this Note, the trade is criminalized by states in different ways, and territorial hurdles pose a limit to the scope of U.S. law abroad. Specifically, while the sale of looted antiquities would be illegal under this statute either when the antiquity was looted from federal lands or imported from abroad via a digital platform, it would likely not be illegal if the sale itself occurred outside the territory of the United States, even if relevant platforms house their data in the United States.¹¹³ This is because U.S. courts apply a presumption against extraterritoriality in interpreting statutes.¹¹⁴ If the extraterritorial reach of a law is not explicitly provided for in

111. *Id.* at 1221–22.

112. UNESCO 1970 Convention, *supra* note 13, arts. 5, 7; *see also Illicit Trafficking*, UNESCO, <https://perma.cc/MH98-L6NP>, (last visited Dec. 18, 2021) (“[T]he 1970 Convention has been ratified by 141 states . . . [that] must submit to the Organization . . . a report on the legislative and administrative provisions which they have adopted . . . to implement the Convention”).

113. *See* The National Stolen Property Act of 1934, 18 U.S.C. § 2315 (2018) (“Whoever receives, possesses, conceals, stores, barter, sells, or disposes of any goods, wares, or merchandise . . . which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken . . . [s]hall be fined under this title or imprisoned.”).

114. *See generally* *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010) (discussing the established statutory interpretation canon of the presumption against extraterritoriality).

statutory text (as Congress has done before with internet-related legislation like the CLOUD Act of 2018), the court must examine the regulated conduct in the context of the statute's focus.¹¹⁵ In *RJR Nabisco, Inc. v. European Community*, the Supreme Court stated:

If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.¹¹⁶

The focus of these statutes would thus be limited to the sale or trafficking of stolen property that either occurred within the United States or has crossed into it, but would not otherwise affect global behavior.

Another option for private parties to enforce platform accountability could be to bring claims under the Alien Tort Statute (ATS), which allows U.S. federal courts original jurisdiction filed by non-U.S. claimants for torts committed in violation of international law.¹¹⁷ However, what claims might be brought under it are weak, given that the 1970 UNESCO treaty bans only the "import, export and transfer of ownership" of illicit antiquities, acts that Facebook itself has neither conducted nor facilitated.¹¹⁸ Additionally, while the ATS also allows standing for violations of customary international law, even if the near universal adoption and enforcement of the 1970 UNESCO treaty and the rules of war constitute enough *opinio juris* to find the looting and trafficking of cultural heritage forbidden under customary international law and state practices consistent with them, that law would be based around the acts of looting and trafficking themselves, and

115. *See id.* ("When a statute gives no clear indication of an extraterritorial application, it has none.").

116. *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 326 (2016).

117. *See* Alien Tort Statute, 28 U.S.C. §1350 (2018) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

118. UNESCO 1970 Convention, *supra* note 13, art. 5.

would not speak to the law about a digital platform hosting discussions of such acts.¹¹⁹ Finally, although *Jesner v. Arab Bank, PLC* ruled that claims against foreign corporations cannot be brought under the ATS, it is unclear whether American corporations can face corporate liability under the ATS, potentially eliminating standing, depending upon future decisions on the subject.¹²⁰

Given the jurisdictional challenges involved in bringing suit against a platform like Facebook in U.S. courts, it is worthwhile to discuss the possibility of global enforcement via enforcement only in the state bringing a claim, as has recently been seen in Canadian courts in the cases of *Google Inc v. Equustek Solutions Inc. I* and *II*. There, the plaintiff claimed Google's indexing of the defendant's website actively violated its intellectual property rights.¹²¹ The Canadian Supreme Court granted an interlocutory injunction and ordered a global takedown, despite Google's contesting claims that such a ruling would violate both international comity and its rights to freedom of expression.¹²² In its first ruling, the Court explained the logic of its decision, noting that:

Google controls between 70–75 percent of the global searches on the Internet and that Datalink's ability to sell its counterfeit product is, in large part, contingent on customers being able to locate its websites through the use of Google's search engine. Only by preventing potential customers from accessing the Datalink websites, could Equustek be protected. Otherwise, Datalink would be able to continue selling its product online and the damages Equustek would suffer would not be recoverable at the end of the lawsuit Google's argument that a global injunction violates international comity because it is possible that the order could not have been obtained in a foreign jurisdiction, or that to comply with it would result in Google violating the laws of that jurisdiction is, with

119. See *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 109, 124–25 (2013) (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)) (noting that federal courts are limited in applying the ATS to “causes of action only for alleged violations of international law norms that are ‘specific, universal, and obligatory’” and that “touch and concern the territory of the United States . . . with sufficient force.”).

120. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1403, 1408 (2018).

121. *Google Inc. v. Equustek Solutions Inc.*, [2017] 1 S.C.R. 824 (Can.).

122. *Id.* paras. 44, 45.

respect, theoretical. As Fenlon J. noted, “Google acknowledges that most countries will likely recognize intellectual property rights and view the selling of pirated products as a legal wrong”. . . . In the case before us, there is no realistic assertion that the judge’s order will offend the sensibilities of any other nation. It has not been suggested that the order prohibiting the defendants from advertising wares that violate the intellectual property rights of the plaintiffs offends the core values of any nation.¹²³

The court argued that, as most nations view the act being enjoined as a legal wrong, there would be no offense against international comity.¹²⁴ Perhaps the same could be said about illicit cultural heritage trafficking. In response to this ruling, Google filed an injunction over the order in the Northern District of California San Jose Division, which granted the injunction using the cover of Section 230’s safe harbor provision.¹²⁵ The court noted that Section 230 “does not allow internet users to escape accountability for publishing unlawful material.”¹²⁶ The court instead emphasized that “. . .it reflects Congress’s policy choice ‘not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.”¹²⁷

Despite the U.S. district court ruling, the Canadian Supreme Court upheld its order to globally de-list the defendant’s domain on the basis that its ruling was not in conflict with that of the Northern District of California. It said that the “effect of the U.S. order is that no action can be taken against Google to enforce the injunction in U.S. courts. That does not restrict the ability of this Court to protect the integrity of its own process through orders directed to parties over whom it

123. *Id.* paras. 18, 44, 45.

124. *See id.* para. 44 (“Google’s argument that a global injunction violates international comity because it is possible that the order could not have been obtained in a foreign jurisdiction, or that to comply with it would result in Google violating the laws of that jurisdiction is, with respect, theoretical.”).

125. *Google LLC v. Equustek Sols. Inc.*, No. 5:17-cv-04207-EJD, 2017 U.S. Dist. LEXIS 182194 (N.D. Cal. Nov. 2, 2017).

126. *Id.* at *4–5.

127. *Id.*

has personal jurisdiction.”¹²⁸ Though *Equustek* presents a solution for countries looking to enforce the global takedowns of materials while trying to comport with international comity, the usefulness of the ruling to enforce the moderation of looted antiquities thus only goes as far as the power of the state ordering an action be taken by a platform to affect the business of the internet company. The importance of Canada to Google’s business is far greater than Egypt’s or Syria’s importance to Facebook. With weak bargaining power, it is comparatively easy for platforms to lean on governments over legislation or court decisions that force unfavorable changes to the platform in those countries. Additionally, the states representing the main points of origin for illicit antiquities—Yemen, Egypt, Libya, Syria, Afghanistan, and Iraq, among others—not only have weak influence over internet platforms, but also have weak judicial systems. Looting thrives where governance is weak, and several of these states are in the midst of internal conflicts or otherwise have weak state institutions, making either individual actions or coordinated state action difficult.

VI. NEW WAYS FORWARD

Given these challenges, what might be done to induce platforms to implement effective moderation policies and actually enforce them, or to hold platforms accountable should they fail to take action to stop the illicit antiquities trade on their respective platform?

One possibility, popular with some commentators, is to legislate moderation—that is, to define what a platform like Facebook could be liable for in failing to moderate.¹²⁹ This legislative approach advocated by anti-trafficking organizations seeks action in the United States, where most major digital platforms are based, arguing that Section 230 should have an exception to the civil liability safe harbor for the illicit antiqui-

128. *Equustek Solutions Inc. v. Jack*, 2018 BCSC 610, para. 22 (Can.).

129. *E.g.*, AL-AZM ET AL., *supra* note 70, at 48–49. It is important to note that liability is not one size fits all, as compared to Section 230 in the United States. The European Union’s proposed Digital Services Act would require host companies to remove illegal materials once flagged and require platforms of certain sizes (of which Facebook would qualify) to annually report on their content moderation. *Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and Amending Directive 2000/31/EC*, COM (2020) 825 final (Dec. 15, 2020).

ties trade on digital platforms just as the liability shield around sex trafficking was removed under FOSTA-SESTA.¹³⁰ Yet, it is important to consider the legislative history of the two acts. Both were highly controversial among advocates of internet freedoms, who feared that they would weaken Section 230 and cause platforms to over-police expression that was legal in order to ensure that no chance of liability would occur.¹³¹ Moreover, the passage of FOSTA-SESTA was, in part, due to the subject matter involved; sex trafficking, particularly child sex trafficking, is considered particularly heinous and, as such, necessitates narrower safe harbors to combat it (being a political subject that no Congressperson would want to be seen as “soft” on). By contrast, given the small size of the illicit antiquities trade online—as well as its low position of importance among the crimes on which governments place priority—if one sought to weaken Section 230’s protections for this trade, such an approach would be politically more feasible as a subdiscussion in a broader reform of Section 230 with regard to the responsibility of the providers of interactive computer services in all categories of crime. Given the size of digital platforms like Facebook, this action would either result in strictly narrowing the *legal* content allowed or in making platforms open to wider liability. This discussion is already active in the U.S. Congress, as the Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms Act (SAFE TECH Act) was proposed in the U.S. Senate in February 2021.¹³² The SAFE TECH Act’s major relevant section is the provision excluding the ‘Good Samaritan’ protection such that it “shall not apply to any request for injunctive relief arising from the failure of an interactive computer service provider to remove, restrict access to or availability of, or prevent

130. See AL-AZM ET AL., *supra* note 70, at 49 (“[I]f Facebook and other technology firms can be held responsible for one crime on their platforms, they should be held responsible for all crimes on their platforms.”).

131. See generally CDT *Opposes Latest Threat to Hosts of Online Content*, CTR. FOR DEMOCRACY & TECH. (Feb. 22, 2018), <https://perma.cc/4YK8-KH5W> (stating the Center for Democracy and Technology’s opposition to FOSTA/SESTA); STOP FOSTA & SESTA, <https://perma.cc/JRU6-KJL2> (last visited Dec. 21, 2021) (outlining key arguments made by opponents of the legislation).

132. Warner, Hirono, Klobuchar Announce the SAFE TECH Act to Reform Section 230, MARK R. WARNER (Feb. 5, 2021), <https://perma.cc/C47C-6YAV>.

dissemination of material that is likely to cause irreparable harm.”¹³³ However, even if the trafficking of illicit antiquities would meet the requirements of “material that is likely to cause irreparable harm,” the injunctive relief would require third parties to proactively bring those claims.¹³⁴

It is important to note, however, that a modification of U.S. law could have global implications comparable to the “Brussels Effect,” whereby E.U. regulatory standards that are the strictest in a given area become the *de facto* standards across the globe as businesses choose to adopt that highest standard everywhere.¹³⁵ Just as the Brussels Effect caused many technology firms to implement the General Data Protection Regulation (GDPR) globally, in part or in whole, a U.S. reform of Section 230 that changes platform liability for moderating illicit activities on their platform could become the global standard with which platforms comply.¹³⁶ Unlike active uses of the extraterritorial effect to curtail a transnational criminal activity—such as the increasing use of the U.S.’s Foreign Corrupt Practices Act to target corrupt government actors who utilize the American and international financial systems—the passive extraterritorial effect could reduce the illicit trade without applying actual extraterritorial reach.¹³⁷ Though such a change would be unilateral, without input by the nations affected most by the illicit trade, the practical result could be the end of the illicit antiquities trade on social media platforms.

Another approach might take some inspiration from the regulation of another, far more common illicit activity on the web, namely, copyright violation. The Digital Millennium Copyright Act (DMCA) of 1998 provides a shield from liability

133. Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms (SAFE TECH) Act, S. 299, 117th Cong. § 2 (2021).

134. *Id.* § 2.

135. See Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1 (2012) (developing the concept of the “Brussels Effect” as a theory to understanding the E.U.’s regulatory impact globally).

136. See ANU BRADFORD, *THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD* 131–69 (2020) (detailing how the “Brussels Effect” shapes digital markets).

137. E.g., *Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest*, WHITEHOUSE.GOV (June 3, 2021), <https://perma.cc/A4UX-BZS4>.

when, as Section 512 describes, the platform, “upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material.”¹³⁸ The responsibility of the notice and takedown process is on the rights holder.¹³⁹ Further, the DMCA’s success comes, in large part, from the interested party, copyright holders, in ensuring that copywritten material is protected.¹⁴⁰ The ability of major copyright holders and associated well-funded interest groups to mobilize legal resources makes complying with the DMCA the optimal choice for platforms, lest they leave themselves open to civil liability from organizations that can match their own legal resources. There is no such lobby for the protection of antiquities—the organizations that draw attention to the matter are small, largely run by academics, and minimally funded. Such organizations would lack the resources to organize efficient takedown notices, let alone to pursue litigation. However, platforms can incorporate a takedown structure into their own oversight processes, perhaps by including the same stakeholders as those involved in the decision to introduce the ban on the sale of antiquities via the Public Policy Forum.¹⁴¹ These stakeholders would grant them the power to request the takedown of groups or content engaged in the trade or its active promotion. Under this framework, however, the burden of moderation still falls on advocacy organizations, regardless of their desire or capability to do such a task.

In addition to the question of whether to compel moderation using legal mechanisms, there are separate issues with either compelling or encouraging platforms to preserve evidence of potential illicit antiquities being offered on them. Platforms have already faced criticism for their willingness to completely erase content in the name of moderation. YouTube, for example, deleted days’ worth of footage of the Syrian Civil War from its platform and, by doing so, removed some of the only evidence of war crimes carried out by various

138. Digital Millennium Copyright Act of 1998, 17 U.S.C § 512 (2010).

139. See *What Is The DMCA Notice and Takedown Process?*, COPYRIGHT ALLIANCE, <https://perma.cc/QK9E-XAT7> (last visited Dec. 21, 2021) (“The DMCA notice and takedown process is a tool for copyright holders to get user-uploaded material that infringes their copyrights taken down off of websites.”).

140. *Id.*

141. *E.g.*, *Additional Information: Stakeholder Engagement*, *supra* note 81.

actors in the war.¹⁴² Similarly, the posting of artifacts on Facebook may be the only publicly visible point by which these artifacts can be linked to their looted provenance. Without such evidence, it is extremely difficult to prove when and where an artifact was taken from a State.¹⁴³

Whether its goal is to eliminate content or to remove and preserve it, the moderation solution should incentivize enforcement via *discerning* violative acts, rather than merely *seeing* them. That is, the solution should adopt selective moderation rather than blanket methods. One such example of a well-publicized “seeing” method of moderation is Facebook’s good-faith attempts to prevent nudity on the platform, which resulted in the removal of nude images in both contemporary and classical art.¹⁴⁴ Though such moderation achieves its goal, it does so at unnecessarily high costs. Greater moderation against the sale or solicitation of looted antiquities on platforms should not also remove legitimate discussions of antiquities, archaeology, and the sale of legitimately sourced artifacts.

142. Avi Asher-Schapiro, *YouTube and Facebook are Removing Evidence of Atrocities, Jeopardizing Cases Against War Criminals*, INTERCEPT (Nov. 2, 2017), <https://perma.cc/UEC4-GHMY>.

143. Photography of an artifact *in situ*, or in the museum or collection it was stolen from, is often the only way for a State to prove that an item was looted from them, and thereby such evidence is a critical part of the CCPIA seizure and forfeiture request to have an item repatriated. *See generally* Convention on Cultural Property Act of 1983, 19 U.S.C. § 2607(2018) (“No article of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution after the effective date of this chapter, or after the date of entry into force of the Convention for the State Party, whichever date is later, may be imported into the United States.”) Outside of Facebook, a noteworthy case where the looter’s own images could link their origin was that of Giacomo Medici, whose massive looting operation in Italy was only discovered after the death of one of his associates led to the discovery of hundreds of Polaroids of looted artifacts used to show interested buyers. These Polaroids were instrumental in getting back looted Italian antiquities from many of the world’s most prestigious art museums, including the Metropolitan Museum in New York and the Getty Villa in Los Angeles. Sir, *How Much Is that (2nd Century B.C.E.) Vase in the Window? Part III*, ASS’N FOR RES. INTO CRIMES AGAINST ART, (Apr. 11, 2015) <https://perma.cc/JTJ3-AFTG>.

144. *See* Aimee Dawson, *Facebook Censors 30,000 Year-old Venus of Willendorf as ‘Pornographic’*, ART NEWSPAPER (Feb. 27, 2018), <https://perma.cc/NF4R-RWFB> (describing one such instance of many bans of well-known art, in this case a 30,000 year-old sculpture of a nude woman).

Any reforms to alter platform moderation should incentivize goal-oriented intelligence and moderation that narrowly, and transparently, defines what constitutes a violation of the platform's rules on the illicit antiquity trade. Facebook, in an attempt to show transparency, established an oversight board focused on content moderation. As it stated, “[t]he purpose of the Oversight Board is to protect freedom of expression by making principled, independent decisions about important pieces of content and by issuing policy advisory opinions on Facebook’s content policies.”¹⁴⁵ Relevant international guidance for moderation may also be useful here. In particular, a 2019 report on moderation and hate speech from the U.N. General Assembly that outlined moderation standards to police hate speech could serve as a guide.¹⁴⁶

Facebook’s own oversight efforts and global interest in guiding moderation could encourage other platforms to continue to input stakeholder guidance beyond the initial rule-making phase. While weak states and small advocacy organizations, on their own, cannot legally compel Facebook to change, they could use their existing advocacy efforts to integrate themselves permanently into the platform’s oversight efforts. This would benefit Facebook by helping to formulate policy on matters such as evidence retainment, while also obtaining the substantive changes that they seek. Such a program is not without flaws, since, by ‘co-opting’ themselves into the platform, such agents would legitimize the monopoly that platforms have over large portions of the internet. However, unless governments take steps to either limit the monopoly power of digital platforms or, as Gillespie has suggested, break platforms down into smaller, more manageable units, such co-operation may be the most practical and effective choice.¹⁴⁷ Facebook’s Oversight Board may promise to be transparent,

145. FACEBOOK OVERSIGHT BOARD, OVERSIGHT BOARD BYLAWS 5 (2021).

146. See David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶¶ 44–45, U.N. Doc. A/74/486 (Oct. 9, 2019) (emphasizing the role companies have in moderation and in helping states fulfill their obligations to protect human rights).

147. See Tarleton Gillespie, *Content Moderation, AI, and the Question of Scale*, 7 *BIG DATA & SOC’Y*, no. 2, 2020, at 4 (noting that as it is “size, not scale, that makes automation seem necessary” that the size of platform companies can be changed).

but it will need to more concretely present transparent data in the form of oversight reports that articulate the ‘how and why’ of each content policy choice and the process by which those conclusions were reached; the metrics used to evaluate the policy’s success; and follow-up reports providing data of the effectiveness of the moderation policies when they are effective.¹⁴⁸ Anything less would leave the public on the dark side of Facebook’s moderation “black box.”¹⁴⁹

In matters of transnational, digital crime, however, multistakeholder approaches that work with—but not in—platforms to halt illicit activities have been successful in several areas. For instance, the International Center for Missing & Exploited Children (ICMEC), the international arm of the U.S. Congress-established National Center for Missing and Exploited Children (NCMEC), has become the central data source for stopping the global spread of child sexual abuse materials (CSAM) online.¹⁵⁰ ICMEC is a global central database for Project VIC, which uses PhotoDNA, a technology developed by Microsoft’s research subsidiary in 2009, to create digital hashes, or ‘fingerprints’ of CSAM reported to the NCMEC’s CyberTipline (which in turn acts as the U.S. congressionally established central reporting mechanism for CSAM).¹⁵¹ This hash database not only allows international and national law

148. Cf. FACEBOOK OVERSIGHT BOARD, *supra* note 144, at 17 (“In addition to making each decision publicly available and archived in a database of case decisions, the board will also release annual reports that provide a summary of the cases it selects and reviews, as well as an overview of its operations.”).

149. See generally FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* 1–18 (2015) (establishing the concept of the “black box” in which the methods and steps taken to reach decisions made by algorithmic, data-driven, or digital processes are obscured from those affected by the decision and third-party observers).

150. See *Our Mission*, INT’L CTR. FOR MISSING & EXPLOITED CHILD., <https://perma.cc/FT2G-8TD4> (last visited Dec. 22, 2021) (“We partner with leading technology companies and the financial industry to identify and develop new global solutions that protect children from sexual abuse, exploitation, and the risk of going missing.”); see also *Leadership Profiles*, NAT’L CTR. FOR MISSING & EXPLOITED CHILD., <https://perma.cc/4Z3B-RUS6> (last visited Dec. 22, 2021) (“Since 1984, NCMEC has operated under U.S. Congressional authority to serve as the national resource center and clearinghouse on missing and exploited children.”).

151. *The Project VIC Technology Ecosystem*, PROJECT VIC INT’L, <https://perma.cc/95WY-NBFT> (last visited Dec 23, 2021); see also *National Strategy for Child Exploitation Prevention and Interdiction*, U.S. DEP’T JUST. (Oct. 14, 2020),

enforcement agencies to readily determine if CSAM materials are newly created or already documented, but allows digital platforms to incorporate the dataset into their own moderation technologies, preventing hashed imagery from being uploaded and potentially automatically flagging the uploader for future law enforcement investigations.¹⁵² The success of multistakeholder approaches to combating the international spread of illicit digital content involving NGOs, governments themselves, and digital platforms has been noted by legal scholar Evelyn Douek, as being thanks to the platforms' functioning as "content cartels."¹⁵³ The moderation power of digital platforms allows them an immense, often nontransparent latitude of power, which when coordinated across the industry through multistakeholder organizations can effectively expel certain content from the majority of the internet.¹⁵⁴ However, while this coordination can tackle universally agreed upon illegal materials, Douek notes that these "cartels" can also potentially encroach on activities that are less well-defined, such as defining what content is considered extremist and/or promoting terrorism, and thus should be removed from platforms.¹⁵⁵ An industry-led multistakeholder organization, the Global Internet Forum to Counter Terrorism (GIFCT), has been established to coordinate such definitions and data.¹⁵⁶

Unlike child abuse imagery or terrorism-related content, the illicit antiquities trade lacks a similar multistakeholder partnership, though not for a lack of international NGOs with which the platforms could work. These include the International Council of Museums, which monitors trends in antiquities trafficking and publishes "Red Lists" of types of heritage trafficked from high-risk areas, and the International Foundation for Art Research, which maintains the Art Loss Register, a

<https://perma.cc/HMY8-E7RW> ("Project VIC has thousands of law enforcement users in the United States and 32 countries.").

152. Jennifer Langston, *How PhotoDNA for Video is Being Used to Fight Online Child Exploitation*, MICROSOFT (Sept. 12, 2018), <https://perma.cc/S3M7-A4RH>.

153. EVELYN DOUEK, *THE RISE OF CONTENT CARTELS* 6 (2020).

154. *Id.* at 20–22.

155. *E.g., id.* at 20–25.

156. *Id.* at 8–10, 24.

database of stolen art and antiquities.¹⁵⁷ Both organizations use their expertise to pool relevant provenance data, but the value of that data is only useful to good-faith actors—those involved in the illicit antiquities trade are well aware of the bad provenance of their work.¹⁵⁸ While such passive, data gathering activities may be rightly criticized for their inability to affect the trafficking of antiquities in a global art market where the enforcement of prohibitions are left to states and coordination is typically only bilateral, their institutional expertise and data could manifest effective utility when paired with platforms that have rule-making power across their entire domain. In the spectrum of “content cartel” activities described by Douek, online antiquities trafficking is a narrow, illicit commercial activity that requires specialized data to identify, which would be closer to the activities of ICMEC than the more prosaic concepts of extremist content monitored by GIFCT.¹⁵⁹ Though the removal of antiquities trafficking content cannot feasibly be solved by a purely technological solution, there is little “contestability of the category definition” of what constitutes the sale of illicit antiquities online and implicates (illicit) commercial speech.¹⁶⁰ This speech is often afforded the same protection as noncommercial, and especially political, speech, at least in the United States’ jurisprudence.¹⁶¹ The costs for platforms are not technological, but epistemological. Whereas it would be inefficient and infeasible for each platform to develop their own child abuse imagery database, it is similarly

157. *E.g.*, *About Us*, ART LOSS REGISTER, <https://perma.cc/6XH6-QRR2> (last visited Dec. 23, 2021); *Red Lists*, INT’L COUNCIL MUSEUMS, <https://perma.cc/5YYG-4QEV> (last visited Dec. 23, 2021).

158. It has been even noted that the Art Loss Register can be used by traffickers to make their looted antiquities appear more legitimate. Antiquities looted directly from archaeological sites go unreported in the Registry—one cannot report something stolen that is unknown to everyone but the thief, artifacts without provenance lack a history of possession. A seller of trafficked antiquities could run an unprovenanced looted antiquity through the Registry and advertise the fact it was not in that database of stolen art. See Charlotte Burns, *Stolen Art? Why No One Can Say for Sure*, ART NEWSPAPER (June 1, 2015), <https://perma.cc/XN22-KAW8> (discussing the case of Subhash Kapoor, an art dealer who knowingly sold looted antiquities, and acquired Art Loss Register Certificates for some of the looted antiquities).

159. DOUEK, *supra* note 152, at 28–30.

160. *Id.* at 34.

161. *Id.*

impractical for such platforms to acquire their own specialized knowledge of the antiquities trade to moderate a comparatively small illicit activity with little public or governmental attention, despite its significant harms to global heritage preservation. A multistakeholder approach would both solve the coordination problem and potentially bring representatives of primary antiquities source states into the moderation process, as opposed to depending on legislative reforms in the major data-law-setting jurisdictions.

VII. CONCLUSION

The power of global digital platforms to shape the methods by which whole categories of illicit goods are bought and sold is substantial. While the illicit antiquities trade thrived prior to Facebook, social media platforms have offered an alternative and a wider-reaching means to advertise looted artifacts and to inspire others to join in the looting of unprotected archaeological sites. The economic power of these platforms is immense, especially when compared to the weak, war-torn economies of nations like Syria or Yemen that are the major sources of illicitly trafficked antiquities. Given the difficulty of achieving judgment against such platforms in American courts in order to induce them to take further efforts against the illicit antiquities trade, or to punish them in domestic courts, nations and other stakeholders may ultimately have to either push for regulatory change through domestic American law or work within the platform's infrastructure in order to achieve the desired enforcement goals. However, the potential for multistakeholder solutions, in which states, platforms, and antiquities experts can collaborate to establish a centralized resource for monitoring and disrupting the trafficking of illicitly acquired antiquities online, is ripe and could be the optimal balanced solution between external, unsynchronized state regulation, and platform self-regulation.