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**The emergence of democratic firms in the platform economy: drivers, obstacles, and the path ahead**  
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## ABSTRACT

In this chapter, an attempt is made to chart a plausible path towards user ownership and governance of social media companies. It first makes a case for why users merit the financial and control rights that are emblematic of ownership, based on a three-fold argument that draws from critical media studies, internet studies and political theories of the firm. Building on this analysis, the following section evaluates the non-charitable purpose trust and the STAK as two vehicles for transferring ownership to users. The penultimate section reflects on how the benefits of stakeholder governance can be maximised through these two purpose-oriented entities. This is done by considering earlier, analogous examples of stakeholder involvement in management, such as works councils, clients' councils and stakeholder mutuals, and identifying the rights they could hold and decisions they could be involved in. On the basis of these examples, a preliminary good governance checklist and decision-making diagram are presented which suggests rights the user representatives could enjoy, the decisions they could be involved in and the actions the company could take to help make their involvement a success.

## 5.1 INTRODUCTION: DISMANTLING WALLED GARDENS

Over the past decade, online social media platforms such as Facebook and Twitter have become ubiquitous. On the surface, all social media platforms share the characteristics of connecting users and, intermediating user-generated content.<sup>623</sup> They provide an indispensable service to many, from being a communication medium with loved ones across continents to being an organizing tool for social movements to being a portal for businesses to advertise their products and services. Scholars have described these platforms – particularly Facebook – as having the qualities of social infra-

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622 An earlier version of this chapter was presented at the Universidad Nacional Arturo Jauretche, Buenos Aires, 29 August 2017. Ideas from this paper were also presented at the Berlin Supermarkt Workshop on 'Building Structured Support for Platform Coops', Berlin, 24 May 2018.

623 L DeNardis and AM Hackl, 'Internet Governance by Social Media Platforms' (2015) 39 Telecommunications Policy 761, 762.

structure<sup>624</sup> or utilities,<sup>625</sup> and these descriptors have also been adopted by the senior management of these platforms in how they discursively represent the activities of their platform.<sup>626</sup> While these social media platforms have been subject to criticism for their practices of tracking users and non-users,<sup>627</sup> their failure to prevent electoral interference in the 2016 election in the United States,<sup>628</sup> and the use of their services to perpetuate hate speech and stir violence,<sup>629</sup> the private ownership of this important infrastructure has been largely left unquestioned.

Instead, attention has been devoted to piecemeal techno-regulatory measures, including draft legislation in the United States that prevents tracking<sup>630</sup> and requires measures to inhibit internet addiction,<sup>631</sup> as well as proposals to unwind anti-competitive mergers.<sup>632</sup> This has been coupled with top-down governance reforms, such as the installation of an Oversight Board to review contentious decisions concerning user content on the Facebook platform.<sup>633</sup>

In previous work, and in particular in chapter 4, an argument was presented for a different approach that may complement these efforts. In that chapter, it was submitted that multi-stakeholder ownership and control of social media companies should be explored as a governance strategy for holding platform companies liable and sharing the revenue generated by them. In section 4.2.1 in particular, the use of stockholding trusts, such as (but not limited to) a non-charitable purpose trust, was presented as one option for platforms to exit to community. In doing so, the financial and control rights that are emblematic of ownership would be shared among investors, founders, employees and, importantly, users of social media platforms. This approach is grounded in the understanding that these platforms are among the companies that by turning information into a scarce

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- 624 Miriyam Aouragh and Paula Chakravarty, 'Infrastructures of Empire: Towards a Critical Geopolitics of Media and Information Studies' (2016) 38 *Media, Culture & Society* 559, 568; Jean-Christophe Plantin and Aswin Punathambekar, 'Digital Media Infrastructures: Pipes, Platforms, and Politics' (2019) 41 *Media, Culture & Society* 163, 169.
- 625 K Sabeel Rahman, 'Regulating Informational Infrastructure: Internet Platforms as the New Public Utilities' (2018) 2 *Georgetown Law Technology Review* 234, 235.
- 626 Anna Lauren Hoffmann, Nicholas Proferes and Michael Zimmer, "'Making the World More Open and Connected": Mark Zuckerberg and the Discursive Construction of Facebook and Its Users' (2018) 20 *New Media & Society* 199.
- 627 Skeggs and Yuill (n 92) 382.
- 628 Tom McCarthy, 'Facebook, Google and Twitter Grilled by Congress over Russian Meddling – as It Happened' *The Guardian* (31 October 2017) <<https://bit.ly/2UBq1vL>>.
- 629 Plantin and Punathambekar (n 624) 170; Roderick Graham, 'Inter-Ideological Mingling: White Extremist Ideology Entering the Mainstream on Twitter' (2016) 36 *Sociological Spectrum* 24, 34.
- 630 Do Not Track Act, S. 1578, 116th Cong. (2019).
- 631 Social Media Addiction Reduction Technology Act, S.2314, 116th Cong. (2019)
- 632 See, e.g., Elizabeth Warren, 'Here's How We Can Break up Big Tech' (*Medium*, 11 October 2019) <<https://bit.ly/3gQCdBp>>.
- 633 See generally, Kate Klonick, 'The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression' (2020) 129 *Yale Law Journal* 2232.

commodity are creating new forms of class relations layered on top of the existing relations between workers and capitalists, farmers and landlords.<sup>634</sup> In these new class relations, there is also a struggle over the forces of production, but this time it is over what Wark calls the '*vector*' – the intellectual property, the financial instruments and the techno-logistical systems that enable the routing of information and the enforcement of its scarcity.<sup>635</sup>

This chapter argues that the redistribution of business ownership is central in furthering interests other than those of a narrow '*vectorialist*' class. User ownership and participation would not only improve the transparency and accountability of such platforms, and ensure users receive a share of the profits earned through their contributions, it would also allow for novel questions: could the newsfeeds and timelines of these social media platforms be redesigned with user input? Could the involvement of users in operational decisions enable the dismantling of walled gardens through the opening of APIs and experimentation with new business models? As such, while acknowledging the important work being done on the creation of 'data trusts' and data cooperatives,<sup>636</sup> it makes a more demanding claim: it seeks more extensive control and financial rights for users in the companies that own the aforementioned intellectual property, business models, user interfaces, physical infrastructures and data archives.

As founder and investor ownership of businesses is the norm in this sector, and employee ownership has received some attention,<sup>637</sup> section 5.2. develops three normative arguments for extending participation rights to persons who are typically referred to as 'users'.<sup>638</sup> The term user here, as in section 4.1, are the persons who interact with an online platform and typically encompasses those who contribute labour value, consumer content, and provide business services. It would not include genuine employees of

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634 Wark (n 608) 42–43.

635 *ibid* 45, 55.

636 Edwards argues that data collection in e-commerce should be re-imagined as a trust relationship in which consumers/ data subjects are both settlors and beneficiaries of a trust, the e-commerce platform a trustee of the personal data in their custody, and the profits from data collection the trust property. In addition to conferring platforms with fiduciary duties of care and loyalty, she proposes that the profits in multiple data trusts be pooled to pay no-fault compensation for privacy harms and the costs of privacy-enhancing technologies. Lilian Edwards, 'Reconstructing Consumer Privacy Protection On-line: A Modest Proposal' (2004) 18 *International Review of Law, Computers & Technology* 313, 331, 333–334; Marina Micheli and others, 'Emerging Models of Data Governance in the Age of Datafication' (2020) 7 *Big Data & Society* 1; Sylvie Delacroix and Neil D Lawrence, 'Bottom-up Data Trusts: Disturbing the "One Size Fits All" Approach to Data Governance' (2019) 9 *International Data Privacy Law* 17.

637 See chapter 2.4 for a relevant discussion on this point.

638 Wark brackets workers of technology companies, users and others who unwittingly produce data for technology companies as part of a 'hacker class'. This is helpful in showing how persons with very different positions in relation to a company may nonetheless have shared class interests. However, in this chapter, it is necessary to consider users as a distinct category so as to build a normative argument for their involvement.

a company, even if they too can sometimes be users.<sup>639</sup> In the context of this chapter, the focus will be on social media platforms rather than hybrid platforms like CoSocial (section 4.1.3.) that had both social media and gig work features. While multiple social media platforms are referred to, the Twitter platform is used as the primary example to buttress these arguments, because it is often used as an archetype of a social media platform and as it has been the target of a #BuyTwitter campaign. However, the overarching points can be applied more broadly to other social media sites.

By deepening the normative argument that social media users generate value that merits ownership and participation rights, it is possible to then turn to how such ownership can be transferred to users in section 5.3. This section briefly discusses the limitations of existing transfer strategies for transitioning share ownership to such users, before arguing that the transfer of shares to irrevocable trusts, such as non-charitable perpetual purpose trusts with user representation would be best suited to the particular characteristics of social media platforms. For this discussion, the advantages and disadvantages of using such a trust will be evaluated at length. There will also be a concise consideration of entities that can be established to fulfil the functions of such a trust in jurisdictions where a non-charitable purpose trust is not available (e.g., a foundation).<sup>640</sup>

Section 5.4. turns to the question of how such a trust (or similar entities) may be governed. This draws inspiration from existing trusts as varied as the Organically Grown Company (which governs an Oregon-based organic produce business) to the DASH trust (which governs a blockchain network). In these entities, there is (multi-) stakeholder representation in the governance of the trust and, thus indirectly, in the governance of the company the trust owns. This section sets out a good governance ‘checklist’<sup>641</sup> that can be used as a guideline to determine the responsibilities that representative bodies of users (e.g., an elected Trust Protector Committee) will be assigned and the governance processes they will be engaged in. This is accompanied with a diagram that can help individual users appreciate how the new decision-making process will operate and, in certain instances, involve the global user base. In doing so, this chapter seeks to chart a plausible path towards user ownership and governance of these companies, as has been

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639 See chapter 2.3 for a relevant discussion on how users of a platform can simultaneously hold different statuses and roles. It would be expected that employees would be included in the capital and governance structure of the company through a separate mechanism, such as an ESOP.

640 On how the foundation in the Netherlands can be used as a ‘civil law’ trust, see Niek Zaman, Cornelis de Groot and Martijn van Steensel, ‘Foundations in the Netherlands: Present and Proposed Legislation and Their Role in the Economy’ in Birgit Weitemeyer and others (eds), *Non Profit Law Yearbook 2016/2017* (Bucerius Law School Press 2017) 267.

641 Michael Useem, ‘How Well-Run Boards Make Decisions’ (2006) 84 *Harvard Business Review* 130.

called for previously.<sup>642</sup> In particular, it seeks to answer the call to address the challenges of governance presented by platforms having a multinational user base.<sup>643</sup> The final section concludes by summarizing the arguments that have been presented and reflects on directions for future legal research on user trusts in the platform economy.

## 5.2 THE CASE FOR USER OWNERSHIP AND GOVERNANCE

As has been discussed in chapters 2.4., 3.2., 4.1., and 7.2.2., there are several normative and empirical arguments for extending workers (ranging from full-time employees to intermittent, non-standard workers) the opportunity to own the business they work for and engage in participatory management.<sup>644</sup> The benefits of employees meaningfully identifying with a business and cultivating a psychological sense of ownership include the leveraging of widely-distributed knowledge to make better, timelier decisions, firm growth and productivity, job satisfaction, and maintaining higher levels of employment.<sup>645</sup> For existing shareholders, and particularly the employing company, it helps ensure the succession of the business even after the original founders and shareholders retire. The question addressed in this section is whether a different class of stakeholder – users – should be given a similar opportunity for ownership and participation management.

In the context of social media platforms, as explained in chapter 4.1.2., users are those who contribute labour value (e.g., “volunteer” moderators, content posters) and consume content (e.g., social media account holders,

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642 Nathan Schneider, ‘User Trusts: Broad-Based Ownership for Online Platforms’ (2020) 43 *Informatik Spektrum* 9, 10.

643 *ibid* 13.

644 Participatory management by workers is understood to extend their voice beyond issues pertaining to working conditions to matters that are conventionally seen to be management’s prerogative, including “investment, marketing, sales, productivity, cost control, business planning and corporate strategy”. David P Ellerman, ‘The Legitimate Opposition at Work: The Union’s Role in Large Democratic Firms’ (1988) 9 *Economic and Industrial Democracy* 437, 439.

645 Gerlsbeck and Herzog (n 229) 308; Isabelle Ferreras, *Firms as Political Entities: Saving Democracy through Economic Bicameralism* (Cambridge University Press 2017) 180; Christopher Mackin, ‘Political Metaphors and Workplace Governance’, *Sharing Ownership, Profits, and Decision-Making in the 21st Century*, vol 14 (Emerald Group Publishing Limited 2013) 367; U. S. Government Accountability Office, ‘Employee Stock Ownership Plans: Little Evidence of Effects on Corporate Performance’ (US General Accounting Office 1987) PEMD-88-1 <<https://bit.ly/35TXfsv>>; Richard B Freeman, Joseph R Blasi and Douglas L Kruse, ‘Introduction’ in Douglas L Kruse, Richard B Freeman and Joseph R Blasi (eds), *Shared Capitalism at Work: Employee Ownership, Profit and Gain Sharing, and Broad-Based Stock Options* (University of Chicago Press 2010) 12; Corey Rosen and Michael Quarrey, ‘How Well Is Employee Ownership Working?’ (1987) 65 *Harvard Business Review* 126, 126.

viewers of targeted advertising) and those who do both (i.e., prosumers).<sup>646</sup> While this term is capacious enough to include business users who provide or advertise their goods and services through a social media platform, their incentives for using the platform and their relationship with the platform company is markedly different from other types of users.<sup>647</sup> This divide primarily arises from differences in payment requirements between business users and individual users. It is worthwhile exploring how the interests of business users are represented in social media platforms – particularly micro, small and medium enterprises – but that is left for future work. In this chapter, the focus will be on non-business, personal users.

Three arguments will be presented here for conferring financial and control rights to users. Firstly, users generate *surplus value* for social media platforms that is unacknowledged and uncompensated.<sup>648</sup> Secondly, users contribute to these social media platforms having a distinct *cultural value* as a public sphere, which they should have a say in maintain and preserving. Thirdly, drawing on political theories of the firm which sees firms as political entities, it is submitted that stakeholders other than shareholders should be included in governance. In particular, it is essential to include users to achieve “collective self-determination” in social media companies.<sup>649</sup>

In view of these arguments, it is submitted that users should not be expected to *buy shares* in social media companies individually, but rather they should be considered to *earn participation rights* in these companies through their collective contributions. Thus, while users may be expected to make a nominal contribution towards enjoying these rights, it should not

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646 Referring to the phenomena whereby consumers are expected to co-create and produce and the two processes become effectively indistinguishable. There is voluminous literature on this subject, but for an overview see: Ashlee Humphreys and Kent Grayson, ‘The Intersecting Roles of Consumer and Producer: A Critical Perspective on Co-Production, Co-Creation and Prosumption’ (2008) 2 *Sociology Compass* 963, 964; Detlev Zwick, Samuel K Bonsu and Aron Darmody, ‘Putting Consumers to Work: ‘Co-Creation’ and New Marketing Govern-Mentality’ (2008) 8 *Journal of Consumer Culture* 163, 167. Relatedly, the ‘playbor’ neologism has gained popularity to signify those actions which blur playful leisure and labour. In the digital context see: Trebor Scholz (ed), *Digital Labor: The Internet as Playground and Factory* (1 edition, Routledge 2012). However, the idea of dissolving the distinction between work and play has a far older provenance, particularly in the work of Charles Fourier and William Morris. See Jonathan Beecher, *Charles Fourier: The Visionary and His World* (University of California Press 1986) 274–296; William Morris, ‘Useful Work versus Useless Toil’ in Vernon Richards (ed), *Why Work? Arguments for the Leisure Study* (Freedom Press 1997) 46; David Frayne, *The Refusal of Work: The Theory & Practice of Resistance to Work* (Zed Books 2015) 30–31.

647 Shu Zhang, Jordy F Gosselt and Menno DT de Jong, ‘How Large Information Technology Companies Use Twitter: Arrangement of Corporate Accounts and Characteristics of Tweets’ (2020) 34 *Journal of Business and Technical Communication* 364, 365–366.

648 Here I use Marx’s conception of surplus value as the capitalist-entrepreneur’s appropriation of the value created by workers in excess of their cost of production. Karl Marx, *Capital: A Critical Analysis of Capitalist Production*, vols 1 & 2 (Wordsworth Editions Limited 2013) 127, 134. Also see, Zwick, Bonsu and Darmody (n 646) 179–180.

649 Ferreras (n 645) 11.



be, for instance, the full-face value of shares, as that may be beyond the reach of many users. Relatedly, the forms of participation envisioned for users are not limited to the financial and control rights of ordinary shareholders. Instead, they are a steppingstone towards more extensive forms of collective participation in the day-to-day governance of these companies.<sup>650</sup>

### 5.2.1 Surplus Value extracted from Social Media Users

To forward the first argument, it is helpful to consider an example: that of the online, microblogging platform, Twitter. According to its 2019 Annual Report, Twitter “is what’s happening in the world and what people are talking about right now”, with its primary allure being a global platform for “people to consume, create, distribute and discover content” in a manner that has “democratized content creation and distribution”.<sup>651</sup> It has become the bespoke media outlet for many, for those interested in ‘following’ certain celebrities to those who wish to keep up-to-date about certain causes to those who wish to share news with each other.<sup>652</sup> Entire social justice movements have risen<sup>653</sup> and fallen<sup>654</sup> on Twitter and it has been an especially effective tool for locating and coordinating “massively shared experiences”.<sup>655</sup> Once used mainly as a forum for short, witty remarks and a means for dispatching life updates to friends,<sup>656</sup> the popularity and reach of Twitter has broadened its appeal to politicians, governments and businesses.

However, the users of the Twitter platform are not ordinary consumers, who make use of goods and services produced by others. Users are involved in creating both *use value* and *exchange value* for the platform. Use value refers to the intrinsic utility an object has to its producer or consumer, while exchange value is the value an object can fetch in a marketplace

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650 Schneider, ‘User Trusts’ (n 642) 12.

651 Twitter, Inc., ‘Fiscal Year 2019 Annual Report’ (2019) Annual Report Pursuant to Section 13 or 15(D) of the Securities Exchange Act of 1934 6 <<https://bit.ly/2T8Sqsx>>.

652 Ford Lumban Gaol, Tokuro Matsuo and Ardian Maulana, ‘Network Model for Online News Media Landscape in Twitter’ (2019) 10 *Information* 277, 277; Ariel Hasell, ‘Shared Emotion: The Social Amplification of Partisan News on Twitter’ (2020) 0 *Digital Journalism* 1, 4.

653 See, the example of the Black Lives Matter movement, Pew Research Center, ‘Social Media Conversations About Race’ (Pew Research Center 2016) <<https://bit.ly/3gYe8Zc>>.

654 See, e.g., the role of Twitter in Iran during the 2009-2010 election protests, Evgeny Morozov, ‘Iran: Downside to the “Twitter Revolution”’ (2009) 56 *Dissent* 10.

655 Massively shared experiences is the phrase Twitter CEO Jack Dorsey uses to refer to natural and man-made disasters, planned events such as elections and concerts, etc. David Sarno, ‘Jack Dorsey on the Twitter Ecosystem, Journalism and How to Reduce Reply Spam. Part II’ (*LA Times Blogs - Technology*, 19 February 2009) <<https://bit.ly/3gX8pTC>>.

656 Richard Rogers, ‘Debanalising Twitter: The Transformation of an Object of Study’ in Katrin Weller and others (eds), *Twitter and Society* (Peter Lang 2014).



compared to other commodities.<sup>657</sup> That tweets can have an intrinsic utility can be seen from the aforementioned examples of how Twitter has been used for movement and community building, as well as for entertainment and news. That user production is key to Twitter, is a fact that Jack Dorsey, a co-founder and present CEO of Twitter observed back in 2009:

*“On Twitter, you are not watching the person, you are watching what they produce. It is not a social network, so there is no real social pressure inherent in having to call them ‘friend’ or having to call them a relative, because you are not dealing with them personally, you are dealing with what they are putting out there. [emphasis added]”*<sup>658</sup>

In a limited sense, as users are producing content for their own and collective benefit, it is possible to argue that their production is not being commodified for exchange. Yet, within a data-driven platform business model, the availability of high-quality tweets contributes to more users wanting to join the platform – and thereby be exposed to targeted advertisements. This is why, while there is no cost in creating a user account, user engagement is central to the platform’s revenue.

In contrast to traditional media, from print to radio, it is the users that provide the content that entices others to join the platform and the data that helps make the placement of advertisements more effective. Conversely, on such a microblogging platform, it would not be possible for the business to survive if it had to rely exclusively on paid content producers or if there was an exodus of users, as it would also prompt an exit of advertisers.<sup>659</sup> While the former may have intrinsic utility for a community of users, exchange value is produced through the data that is extracted from tweets, as well as engagement by users with the platform and each other. It is this element of user production that is sold by the platform company as surplus value.<sup>660</sup>

The data produced by users is collected and processed by platforms to build predictive models about users’ behaviour so as to more efficiently facilitate advertisement delivery and auctions for advertisers seeking to secure real estate on users’ newsfeeds and timelines.<sup>661</sup> Advertising, Twitter’s main revenue stream, is contingent on users clicking on promoted

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657 Humphreys and Grayson (n 646) 965.

658 David Sarno, ‘Twitter Creator Jack Dorsey Illuminates the Site’s Founding Document. Part I’ (*LA Times Blogs - Technology*, 18 February 2009) <<https://bit.ly/3zWs25P>>.

659 Christian Fuchs, ‘Labor in Informational Capitalism and on the Internet’ (2010) 26 *The Information Society* 179, 191.

660 Humphreys and Grayson (n 646) 974.

661 Cheng Li and others, ‘Click-through Prediction for Advertising in Twitter Timeline’, *Proceedings of the 21th ACM SIGKDD International Conference on Knowledge Discovery and Data Mining* (Association for Computing Machinery 2015) 1970; Xinran He and others, ‘Practical Lessons from Predicting Clicks on Ads at Facebook’, *Proceedings of 20th ACM SIGKDD Conference on Knowledge Discovery and Data Mining - ADKDD’14* (ACM Press 2014) 1.

tweets, accounts and trends, with Twitter's corporate clients paying the company per click, per follow or per day during an ad campaign promotion.<sup>662</sup> In addition, Twitter has over the course of its operations, earned a substantial chunk of its revenue from syndication agreements with search engines – allowing users' tweets to be embedded in search results – and licensing user data (e.g., concerning interactions, movements and communication) and content to 'data resellers' (e.g., Gnip, Datasift), whose clients range from corporations looking to target potential consumers to governments seeking to monitor dissidents.<sup>663</sup> In short, these platforms become a "sort of universal clearinghouse" for commodifying and valuing social relations for the purpose of exchange.<sup>664</sup>

Yet, compared to those businesses and persons who use Twitter primarily for commercial purposes, the surplus value of 'what is being put out there' is unacknowledged. Twitter users, deploying a form of immaterial labour,<sup>665</sup> create an abundance of informational content, while also making personal data and preferences available. This uncompensated labour contributes to "the social, educational and knowledge commons",<sup>666</sup> that Twitter monetizes for its bottom line. As they are unpaid for this, Twitter not only generates surplus value but also reduces their variable capital costs.<sup>667</sup> Of course, the intrinsic value of individual Tweets to the platform varies considerably: the recitation of facts and sharing of (other's) content may primarily be valuable as an indication of consumer tastes and preferences, while original and creative Tweets may create a following for the user and draw more users to Twitter. Yet in either case, users themselves serve as an "audience commodity" for Twitter and similar social media companies to generate surplus value.<sup>668</sup> That there is exploitation involved in the creation of this commodity is deliberately hidden and only becomes apparent through analysis after the fact.<sup>669</sup> As Humphreys and Grayson argue in general terms about prosumers, irrespective of whether users 'enjoy' this process, to the extent that they produce exchange value, they should be entitled to a portion of that value.<sup>670</sup> In addition to determining

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662 Rowan Wilken, 'Social Media App Economies' in Jean Burgess, Alice Marwick and Thomas Poell (eds), *The SAGE Handbook of Social Media* (SAGE 2018) 273.

663 Victor Luckerson, 'Twitter Is Selling Access to Your Tweets for Millions' [2013] *Time* <<https://bit.ly/3jgkTr5>>; Twitter, Inc., 'Getting Started with the Twitter API' <<https://bit.ly/3A0DZYb>>.

664 Adam Arvidsson, 'Facebook and Finance: On the Social Logic of the Derivative' (2016) 33 *Theory, Culture & Society* 3, 6.

665 Michael Hardt and Antonio Negri, *Multitude: War and Democracy in the Age of Empire* (Penguin 2004) 108.

666 Fuchs, 'Labor in Informational Capitalism and on the Internet' (n 659) 188.

667 *ibid* 191. As the users are unpaid, they are "infinitely exploited".

668 Dallas W Smythe, 'On the Audience Commodity and Its Work' in Meenakshi Gigi Durham and Douglas M Kellner (eds), *Media and Cultural Studies: KeyWorks* (Revised, Blackwell Publishing 2006) 251.

669 Fuchs, *Digital Labour and Karl Marx* (n 43) 287.

670 Humphreys and Grayson (n 646) 976.

whether such compensation should be individual or collective, the chapter also contends that a collective mechanism should be provided for user voice, so to as to de-commodify user production and provide users with greater agency in addressing the platform economy's problems;<sup>671</sup> points that are returned to in the next two sections. The Twitter example helps flesh out the argument, but it is generally applicable to other large, corporate social platforms such as Facebook as well.

An argument can be made about how the extraction of 'information surplus'<sup>672</sup> from users is in itself sufficient for a vulnerable, unrepresented group to be given a voice in a platform business, but the fragility of their position becomes even more apparent when one considers how users' machines are increasingly replacing users themselves in the production of monetizable data. An example of such a 'smart prosuming machine' is the Facebook app in conjunction with users' Wi-Fi connections, which shares users' approximate location information via their IP address with the platform and third-party advertisers – even when the user takes no overt action to share this metadata.<sup>673</sup>

## 5.2.2 Cultural Value of Social Media

Turning to the second argument, there has long been rhetoric surrounding social media platforms creating a global public sphere or public forum.<sup>674</sup> This is not limited to communication between users but includes communication with public authorities and private actors. For some, this connectivity automatically leads to feelings of connectedness.<sup>675</sup> This is particularly true of platforms where users have developed a sense of community due to an ability to *speak to* (rather than *at*) one another, which may be as "meaningful" to its members as real-world interactions.<sup>676</sup> In comparison to the increasingly transient nature of employment in tech companies, several platforms have long-term users whose tenure and contributions may far outstrip that of any individual who works or manages the platform company. For instance, on Everything2, an online community for user-

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671 Tiziana Terranova, 'Free Labor' in Trebor Scholz (ed), *Digital Labor: The Internet as Playground and Factory* (1 edition, Routledge 2012) 69; Schneider, 'User Trusts' (n 642) 13; Fuchs, *Digital Labour and Karl Marx* (n 43) 303.

672 Wark (n 608) 11.

673 George Ritzer, 'Automating Prosumption: The Decline of the Prosumer and the Rise of the Prosuming Machines' (2015) 15 *Journal of Consumer Culture* 407, 417; David Nield, 'All the Ways Facebook Tracks You – and How to Limit It' [2020] *Wired* <<https://bit.ly/3gOMxcT>>; DeNardis and Hackl (n 623) 765.

674 Jose van Dijck, *The Culture of Connectivity: A Critical History of Social Media* (Oxford University Press 2013) 16.

675 Dijck, Poell and Waal (n 34) 2.

676 Rhiannon Bury, 'Technology, Fandom and Community in the Second Media Age' (2017) 23 *Convergence* 627, 628, 630.

submitted writing, user volunteers continued to contribute content long after the administrator-owner of the platform retired from active service.<sup>677</sup> This sense of community does not exist on all social media platforms, despite their marketing rhetoric,<sup>678</sup> with Bury arguing that platforms such as Twitter only allow for a feeling of ‘ambient affiliation’ with a larger group and Facebook diminishes free expression and playfulness due to the publicity of users’ real identities.<sup>679</sup>

Irrespective of the degree to which these platforms individually contribute to meaningful connectedness, the other side of enabling the expression of speech is making decisions about when speech is restricted. The technical and social protocols of content management systems shape what users “like, want, know, or find”,<sup>680</sup> personalised to a degree that it is possible that no two user experiences of a platform are identical.<sup>681</sup> In the process of doing so, decisions are constantly being made about what content is removed or promoted, which in effect moderates the speech and cultural discourse that is allowable on the platform. Content moderation and the role of social media platforms in shaping public values on freedom of expression have received considerable attention in recent years, including from legal scholars (see chapter 4.1.1.), but a lot of this attention has been devoted to how this moderation can be improved. This has included suggestions for increasing the number of (expert) human moderators, and introducing greater transparency in decision-making, and installing better filtering software.<sup>682</sup>

As Gillespie anticipates, these ideas for incrementally improving content moderation have already begun to gain traction. These ideas have informed efforts like the creation of Facebook’s Oversight Board, which has a diverse selection of experts appointed first by the Facebook Board of Directors (and subsequently the Oversight Board itself) to decide on an array of controversial content removal decisions.<sup>683</sup> These recommendations are helpful but curiously, even the more ambitious proposals – such as Dijck’s proposal for social media platforms to pay more attention to institutional pillars of trust (e.g., traditional news outlets) – falls short of user ownership and governance of these platforms.<sup>684</sup> Despite such plat-

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677 Alcides Velasquez and others, ‘Latent Users in an Online User-Generated Content Community’ (2014) 23 *Computer Supported Cooperative Work* 21, 28, 31.

678 Anna Lauren Hoffmann, Nicholas Proferes and Michael Zimmer, “‘Making the World More Open and Connected’: Mark Zuckerberg and the Discursive Construction of Facebook and Its Users:’ [2016] *New Media & Society* 208–209.

679 Bury (n 676) 636–637.

680 Dijck (n 674) 37.

681 Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media* (Yale University Press 2018) 195.

682 *ibid* 198.

683 Klonick (n 633) 2458–2460, 2470.

684 Dijck, Poell and Waal (n 34) 30.

forms “infiltrating in, and converging with” the legacy institutions of democratic societies, producing the social structures in which everyone now lives,<sup>685</sup> these platforms are generally precluded from the expectations of accountability and democratic legitimacy placed on legacy institutions (e.g., traditional news outlets, semi-public companies).

Aside from its utility for communication, some argue that the user-generated content available on their sites, taken as a whole, are valuable as part of humankind’s cultural heritage. Authors have noted the significance of Facebook’s digital archive as “a site of digital global heritage” and analogised the microblogging of Twitter to historical diaries and shared public writings that can provide valuable insight into the cultural milieu of a given time.<sup>686</sup> Indeed, Twitter has such cultural significance in the United States that the Library of Congress began to permanently archive all tweets.<sup>687</sup> While the use of Twitter is not evenly distributed across the world, its APIs provide researchers access to an immense trove of tweets and associated metadata that is invaluable for large-scale studies of social communication. The extent to which these platforms are ‘open’ varies and personal data has to be protected. Yet, if it is accepted that these records have cultural value, then surely there is a basis for arguing that private companies alone should not be responsible for its maintenance. The users who have helped create this cultural value should have a say and a role in preserving it.

As Terranova points out, social networks can be of considerable value, but the issue is with the ends to which these networks are invariably used due to the profit motive that undergirds capitalist social media platforms. She argues that instead of being tailored towards consumption and commodification,<sup>688</sup> networks should be seized and repurposed to truly allow users to build global connections and new competencies.<sup>689</sup> This ‘seizure’ can be through the creation of emancipatory alternatives or by transferring the ownership of these networks to its users.

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685 *ibid* 2.

686 Lee Humphreys and others, ‘Historicizing New Media: A Content Analysis of Twitter’ (2013) 63 *Journal of Communication* 413, 414; Carl Öhman and Nikita Aggarwal, ‘What If Facebook Goes down? Ethical and Legal Considerations for the Demise of Big Tech’ (2020) 9 *Internet Policy Review* 1.

687 Kalev Leetaru and others, ‘Mapping the Global Twitter Heartbeat: The Geography of Twitter’ [2013] *First Monday* <<https://bit.ly/3dlLChZ>>. That being said, the archive does not operate in the way it was originally planned.

688 Sebastian Sevignani, *Privacy and Capitalism in the Age of Social Media* (1st edition, Routledge 2015) 3.

689 Tiziana Terranova, ‘Red Stack Attack: Algorithms, Capital and the Automation of the Common’ in Robin Mackay and Armen Avanesian (eds), *#Accelerate: The Accelerationist Reader* (Urbanomic 2014) 393.

### 5.2.3 Social Media Platform Companies as Political Entities

The third ground elaborates on political theories of the corporation that advance a ‘parallel case’ argument, workplace republicanism, and ‘neo-abolitionism’. In short, the parallel case argument claims that states and firms share certain features, namely hierarchy and capacity to subordinate others to their authority, and as democracy is used to mitigate the excesses of the former, it should also be adopted for the latter.<sup>690</sup> Broadly speaking, according to this view, companies are political entities<sup>691</sup> and subjecting their constituents, such as workers, to the unaccountable authority of “private government” is contrary to human dignity.<sup>692</sup> In contrast to the instrumental rationality of investors keen to maximize their wealth, workers are driven by an expressive rationality where they commit themselves to their work and construct meaning about their life through their work.<sup>693</sup> David Ellerman builds on this by presenting a case for abolishing the employment relationship altogether and replacing it with workplace democracy, on the basis that the employment contract involves the transfer of responsible agency and decision-making powers that are inalienable from the worker. He argues that a system in which human hours are rented by an employer is invalid and inherently fraudulent, even when such *human rental* contracts are voluntarily entered into. He presents analogous examples of how liberal political systems have recognised such inherently fraudulent contracts in the past and consequently abolished contracts such as voluntary slavery agreements and marriage coverture contracts, which also involved the self-incapacitation of human agency and alienation of decision-making. Instead, to retain agency and decision-making power would entail joint work and governance of one’s workplace, as well as the joint appropriation of both the positive and negative fruits of one’s labour.<sup>694</sup> This would also redress the “mismatch” between the group that factually produces wealth but is not recognised for doing so by the law and the group that the law recognises as producing wealth but does not factually do so.<sup>695</sup>

While this argument was presented with workers in mind, the fundamental points about the inalienability of agency and decision-making power can also be made about users who are subject to contracts of adhesion, such as end-user license agreements (EULAs) and terms of service. These

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690 Abraham A Singer, *The Form of the Firm: A Normative Political Theory of the Corporation* (Oxford University Press 2019) 139.

691 Ciepley analogises them to “constitutional republics”. See David Ciepley, ‘Beyond Public and Private: Toward a Political Theory of the Corporation’ (2013) 107 *American Political Science Review* 139, 141.

692 Elizabeth Anderson, ‘Reply to Commentators’, *Private government: how employers rule our lives (and why we don’t talk about it)* (Princeton University Press 2017) 144.

693 Ferreras (n 645) 81–82.

694 David Ellerman, *Neo-Abolitionism: Abolishing Human Rentals in Favor of Workplace Democracy* (Springer 2021) 149, 154.

695 *ibid* 152.

'take it or leave it' agreements determine what is acceptable behaviour on a platform and can be constantly changed by the platform operator, and though they are entered into willingly, they also compromise users' agency and capacity to make decisions.<sup>696</sup> In other words, users should also be considered to be part of the 'real association' of an enterprise, which shares governance and fruits of production. Similarly, just as the firm typically fails to acknowledge the expressive rationality of workers,<sup>697</sup> they also fail to account for how users may invest themselves in a platform.

Thus, those who advocate the firm/state analogy find the representation of only one constituent body, capital, within a firm as being an "illegitimate" basis for governance.<sup>698</sup> A recent advocate of the firm/state analogy, Isabelle Ferreras, has proposed 'economic bicameralism' for mid-to-late-stage companies with distributed ownership, as a way of accounting for both instrumental and expressive rationalities<sup>699</sup> in the governance of a firm. She draws inspiration from the move towards political bicameralism in ancient Rome, the United Kingdom and the United States.<sup>700</sup> In a bicameral structure, both (multinational) labour (i.e., workers) and capital (i.e., shareholders) would be democratically represented in equal 'chambers', replacing a unitary board of directors or a supervisory board of a corporation.<sup>701</sup> This would enable both labour and capital to have parity in decision-making, as a majority vote would be required from each 'chamber' to approve a strategic decision.<sup>702</sup> Her conception of the composition of a labour investors' chamber of representatives is sufficiently capacious to include user involvement, as she acknowledges that in certain industries users may be "just as personally invested as workers".<sup>703</sup> Indeed, if affected interests is the basis for determining representation, there is no reason why stakeholders such as users shouldn't be included alongside workers.<sup>704</sup> Users could be included through a quota of seats in the labour chamber and, given the transnational operations of these corporations, be complemented

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696 Dijck (n 674) 38.

697 Ferreras (n 645) 127.

698 *ibid* 128.

699 Expressive rationality in this context refers to the idea that a firm should reflect the values, commitments and principles of those individuals who engage in activities within the firm. In other words, the firm should allow a full expression of one's self.

700 Ferreras (n 645) 130, 152. Ferreras is, of course, not the first to suggest such a compound board, with Turnbull, for example, having suggested decision-making advantages of converting all firms into 'stakeholder mutuals'. See generally, Shann Turnbull, 'The Competitive Advantage of Mutuals' in Johnston Birchall (ed), *The New Mutualism in Public Policy* (Routledge 2002).

701 This would require an amendment in corporate laws that specify a maximum size of a unitary board or a supervisory board, as these chambers would be larger in size than average boards even if they are representative in nature.

702 Ferreras (n 645) 132, 172, 176.

703 *ibid* 142.

704 Singer (n 690) 142.



by bicameral structures at national or regional levels.<sup>705</sup> As such, economic bicameralism can be seen as an intermediate step towards a democratic firm that is governed by its workers or multiple stakeholder groups.<sup>706</sup>

Previously, Turnbull also found corporations to be political entities, but developed his conception of a 'stakeholder corporation' on the basis that unitary control by directors is inherently problematic. He argued that unitary control is riven with conflicts of interest, and hampered by both a lack of independent, qualitative information as well as an overload of information.<sup>707</sup> In lieu of unitary control, he proposed that publicly traded companies (operating a traditional pipeline business) be converted into 'stakeholder mutuals', where employee representatives, consumer/user representatives, supplier representatives and community representatives are appointed to a 12-member Stakeholder Council, the Chairperson of which also serves as the independent Chairperson of the company's management board.<sup>708</sup> Notably, this proposal does not challenge the contested shareholder primacy system nor interfere with shareholders' property rights as it is shareholders who continue to have the right to appoint the directors of the management board.

In spite of this drawback, Turnbull's stakeholder mutual model provides a useful heuristic with which to think about the installation of a user trust and its potential relations and transactions with other bodies within a social media company. At the same time, to address the criticisms of scholars who are sceptical of such forms of representative economic democracy not being sufficiently far-reaching, it is necessary to consider how user involvement can be made more participatory.<sup>709</sup>

A counterargument can be made here that in spite of the normative arguments in favour of user participation, it is bluntly inefficient to do so. As Hansmann has observed previously (also see chapter 7.1., 7.2.4.), involving heterogeneous interests in the governance of a company entails higher costs, in terms of *collectively making* decisions and *suffering* from the consequences of poor decisions.<sup>710</sup> In brief, it is costly to collect information from users with diverse preferences and to practically organize decision-making processes involving a heterogeneous group. Instead, Hansmann claims that defaulting to investor ownership involves the lowest costs of ownership (i.e., as all investors have a singular objective) and fewer transaction costs with other stakeholders.<sup>711</sup> This serves to explain the prevalence of the for-profit company and conversions (or degeneration) of coopera-

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705 Ferreras (n 645) 149.

706 *ibid* 174, 178; Cohen (n 180) 378.

707 Turnbull (n 700) 174.

708 *ibid* 189.

709 Gregory K Dow, *Governing the Firm Workers' Control in Theory and Practice* (Cambridge University Press 2003) 30.

710 Hansmann (n 362) 39–42; Singer (n 690) 150.

711 Hansmann (n 362) 22.

tives into for-profit companies.<sup>712</sup> However, as Singer notes, the claim that the collective action and transactions costs of investor ownership are low leads to the question: “why not just transact through the market?”.<sup>713</sup> Singer submits that the existence of an investor-owned firm instead of a market inherently indicates that these costs are not absent, even when the views of only one group are given primacy. In other words, there is space for democratic firms, even if they are not the most efficient, as no firm is optimally efficient. In his words, cooperatives are “efficient enough”.<sup>714</sup> As he later explains, this space for democratic firms exists between a *minimal viability horizon*, where the democratic firm presents a preferable alternative to market contracting, and a *maximal viability horizon*, where the costs of membership exceed that of market contracting.<sup>715</sup>

User trusts (and similar entities), arguably, can also operate in this space to help the companies they own achieve a distinct purpose, even if they are not the most efficient. The next section elaborates on some of the options for creating, and transferring shares to, such trusts.

### 5.3 PROPOSAL: SHARE TRANSFERS FOR USER OWNERSHIP & PARTICIPATION

A particularly large trust has captured news headlines at the time of writing, due to the installation of Facebook’s Oversight Board. Facebook irrevocably granted US\$ 130 million to a trust so as to fund an Oversight Board LLC, responsible for administering the Facebook Oversight Board for at least six years.<sup>716</sup> However, as mentioned above, the Oversight Board is not democratically elected by users nor are the trustees that are responsible for preserving the independence of the Board accountable to the Oversight Board itself – they remain accountable to Facebook. Facebook even remains responsible for approving the amendment of the Oversight Board’s Bylaws with respect to the scope of their review powers.<sup>717</sup>

The form of user ownership and participation discussed in this chapter, as with chapter 4.2.1., envisions a more prominent role for users. In terms of governance, this could range from having a say in who the directors of a social media company are to preventing the takeover of the company to even having an influence on the terms of the end-user license agreements, terms of service agreements and content moderation policies that users are

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712 Silvia Sacchetti and Johnston Birchall, ‘The Comparative Advantages of Single and Multi-Stakeholder Cooperatives: Reflections for a Research Agenda’ (2018) 7 *Journal of Entrepreneurial and Organizational Diversity* 87, 89.

713 Singer (n 690) 154.

714 *ibid.*

715 *ibid* 156.

716 Klonick (n 633) 2467.

717 *ibid* 2468, 2474.

subject to. In terms of financial rights, this chapter shares the scepticism of other researchers about individual payments to users (e.g., ‘data dividends’, user wages), especially as it may be attached to the requirement for allowing companies a wide scope to exploit user data in jurisdictions where statutory privacy protections are weak.<sup>718</sup> Even if the receipt of such dividends or wages did not involve such compromises, the amount paid to individual users would likely be very small. Instead, collective accumulation of dividends in a trust (or similar entity) that owns the shares of the social media company would permit uses for collective ends, such as user advocacy and research.

### 5.3.1 Making Organisational Choices

At the outset, it may not be obvious why a trust or a trust-like entity such as a foundation should be the appropriate mechanism for realising user ownership and participation. Others have suggested that alternative or ‘commons-based’ social media platforms should be organised on a non-commercial, non-profit basis but have not gone into much detail about the various options available, even among entities like trusts.<sup>719</sup> Theorists of organizational choice have modelled various advantages and disadvantages of choosing a for-profit company, over a for-profit cooperative or non-profit entity. For instance, in an organisation dominated by consumers, the absence of a profit motive leads to a greater focus on product/service quality and consumer surplus than with both for-profit companies and cooperatives.<sup>720</sup> This is, however, costly as it entails greater expenditure on those who manage such non-profits, so as to ensure such a beneficial outcome. In contrast, where there is a sufficiently high cost of decision-making, for-profit companies are preferred, even if there is a trade-off with lower quality. Cooperatives are seen as a compromise that arise when the costs of collective decision-making are not particularly high, as they require lower managerial expenditure and can strike a balance between ensuring members a patronage refund and improving consumers’ surplus.<sup>721</sup> There are efforts to reduce the cost of collective decision-making among heterogeneous, globally-dispersed groups (see chapter 7 generally), but usually, low collective decision-making costs requires low membership numbers and/or member homogeneity.<sup>722</sup>

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718 Hayley Tsukayama, ‘Why Getting Paid for Your Data Is a Bad Deal’ (*Electronic Frontier Foundation*, 26 October 2020) <<https://bit.ly/3jqFzwn>>; Fuchs, *Digital Labour and Karl Marx* (n 43) 303.

719 Fuchs, *Digital Labour and Karl Marx* (n 43) 301; Schneider, ‘User Trusts’ (n 642) 11.

720 Patrick Herbst and Jens Prüfer, ‘Firms, Nonprofits, and Cooperatives: A Theory of Organizational Choice’ (2016) 87 *Annals of Public and Cooperative Economics* 315, 327.

721 *ibid* 328.

722 *ibid* 335.

Moreover, growth in competition also has an effect on organizational choice and changes of organizational form, with it being claimed that for-profit companies are best placed to respond to competitive pressures. Conversely, according to Herbst and Prüfer, cooperatives and non-profits are able to better serve less competitive markets.<sup>723</sup>

In terms of analogous examples, the existence of multi-stakeholder<sup>724</sup> cooperatives that typically (but not exclusively) provide welfare services (e.g., elderly care) or employ disadvantaged groups provides a precedent on how the interests of multiple stakeholder groups can be reconciled on an even footing. However, the formation of such cooperatives typically entails a high buy-in cost for the members directing the formation of the cooperative, such as the workers.<sup>725</sup> In countries such as Italy, with an enabling legal framework for workers to buy-out distressed companies, workers are able to draw on severance pay, mobility allowances and unemployment insurance benefits to finance the restarting of the business.<sup>726</sup> They are also able to access revolving loans that are dedicated towards supporting the cooperative ecosystem and worker buy-outs.<sup>727</sup> Similarly, in France after the passage of decree no. 2014-1758 of 31 December 2014, worker buyouts are incentivized. The law permits the worker cooperative (*SCOP d'amorçage*) that is established in the process of acquiring a company to immediately implement worker self-management in the business, even while workers have a minority of share capital in the SCOP. This is because the initial capitalization of the SCOP is financed by issuing non-voting shares to external investors, on the basis that workers are required to buyback these shares and hold at least 50% of the issued shares within seven years.<sup>728</sup>

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723 *ibid.*

724 In some jurisdictions, they are known as social or solidarity cooperatives. *See* chapter 6.4.2.

725 Sacchetti and Birchall (n 712) 92.

726 Marcelo Vieta, 'The Italian Road to Creating Worker Cooperatives from Worker Buyouts: Italy's Worker-Recuperated Enterprises and the Legge Marcora Framework' (European Research Institute on Cooperative and Social Enterprises 2015) 9; Cristina Di Stefano, 'The Business Transfer through the Cooperative Model. A Comparative Analysis Italy-France' (2018) 7 *The Journal of Entrepreneurial and Organizational Diversity* 62, 67.

727 Di Stefano (n 726) 68–69.

728 *ibid* 70.

A similar enabling legal framework is lacking for transfers to user ownership of companies of the size and scale described in this chapter.<sup>729</sup>

Trusts in common law jurisdictions are flexible entities and so can have the attributes of one or more of the organisations outlined above, depending on how the trust instrument is drafted. They can be used for charitable or non-charitable purposes and can be irrevocable, in the sense that the terms of the trust cannot be altered by the settlor once it has been created. This means that if a grant of, for instance, shares are properly made to the irrevocable trust, the transaction cannot be unilaterally reversed. While the 'unitary' trust model is common, with a trustee being exclusively responsible for administering the trust, there are also 'directed' trusts in which one or more persons is given the authority to direct how the trustee exercises their powers.<sup>730</sup> This can include a body that is representative of one or more stakeholder groups affected by the operation of the trust, such as employees or clients. Moreover, the growing use of non-charitable purpose trusts allows for the fiduciary duties of a trustee (and related actors) to be oriented towards the purpose(s) outlined in the trust instrument, rather than the interests of beneficiaries.<sup>731</sup> A foundation under Dutch law, while being distinct from a trust, does not have members<sup>732</sup> and its board of directors discharge the foundation's specific purpose(s) as set out in its articles of incorporation.<sup>733</sup> These purposes can be commercial or non-commercial, but there are restrictions on distributions of profit. The foundation cannot have

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729 *But see*, the 'community right to bid' in the United Kingdom, which permits community groups to nominate buildings (e.g., local pubs) and land as assets of community value. If the owner of a property that is listed as an asset of community value seeks to liquidate the asset and sell it, they must inform the local authority, who in turn will inform the nominating body. If there is an expression of interest by a community to buy the property within six weeks, a moratorium is placed on the sale for six months so that the community group can prepare their bid. Lynn (n 369) 43, 61. As part of the recast Renewable Energy Directive, Member States are expected to create an enabling framework for multi-stakeholder renewable energy communities that produce and consume renewable energy. Stakeholders would include SMEs, local municipalities and even investors. Lowitzsch suggests adapting Kelso's CSOP (chapter 4) for renewable energy communities as a suitable business model to operate within this new framework to, for instance, acquire solar panels or biogas reactors. He has outlined what such a 'RE-CSOP' would look like in Germany but it remains to be seen whether Member States and renewable energy communities embrace such a proposal. *See* Jens Lowitzsch, 'Consumer Stock Ownership Plans (CSOPs) – The Prototype Business Model for Renewable Energy Communities' (2019) 13 *Energies* 1, 3; Jens Lowitzsch (ed), *Energy Transition: Financing Consumer Co-Ownership in Renewables* (Springer 2019) 165. *Also see*, Directive (EU) 2019/944 of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast) [2019] OJ L 158/125, art. 22.

730 Todd D Mayo, 'Trust Governance Models' (2017) 4 *The International Family Offices Journal* 28, 30.

731 Susan N Gary, 'The Oregon Stewardship Trust: A New Type of Purpose Trust That Enables Steward-Ownership of a Business' (2020) 88 *University of Cincinnati Law Review* 707, 710.

732 Article 2:285(1), Dutch Civil Code [DCC].

733 Article 2:286(4)(b), DCC.

the purpose of making distributions to founders of the foundation, those who participate in its corporate bodies (e.g., directors), or to other parties, with the exception that in the case of the last group, distributions can be made for charitable or social purposes.<sup>734</sup>

An entity such as an irrevocable perpetual purpose trust or a foundation has three advantages in governing social media companies. Firstly, they can be designed to have social or idealistic purposes (i.e., a ‘mission’),<sup>735</sup> with constraints on distribution. Irrespective of whether the constraints are statutorily or voluntarily imposed, residual earnings could be kept within the entity or reinvested in the company. This would allow the entity to place greater emphasis on fulfilling its purposes, such as improving user representation in the company and user experience of the platform, over returning dividends to investors or serving the interests of members. Arguably, a mission-driven entity of this kind is most suitable for the needs of social media users as (a) they are concerned about the usability of the platform and (b) they do not stand to gain much financially through the distribution of residual earnings on an individual basis.

Secondly, social media platforms like Facebook are natural monopolies (see chapter 4.1.) and the advantage that for-profit companies have in negotiating market competition will diminish as certain actors solidify their dominant position in a given market. On this basis, dominant social media platforms may be particularly suited to ownership by mission-driven entities, which make up for their shortcomings in terms of competitiveness with their focus on quality.

Thirdly, the costs of direct ownership of social media companies and the lack of an enabling legal framework to reduce these costs, makes *indirect* ownership through a mission-driven entity more attractive. This is in contrast to more direct forms of multi-stakeholder ownership that is proposed by the FairShares Model.<sup>736</sup> The aforementioned financial incen-

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734 Article 2:285(3), DCC.

735 There are several advocates of non-charitable purpose trusts, who among other things argue that such trusts could be used for noble ends that do not fall under the strict definition of charity. Waters, for instance, refers to the example of how a purpose trust could be used for the purpose of supporting an amateur drama group whose members keep changing. Donovan Waters, ‘Non-Charitable Purpose Trusts in Common Law Canada’ (2008) 28 *Estates, Trusts & Pensions Journal* 16, 16.

736 In line with the arguments presented in this chapter, this model acknowledges stakeholders’ intellectual, human, social and financial investments to a firm by providing them with control and financial rights. Ridley-Duff, ‘The Internationalisation of the FairShares Model: Where Agency Meets Structure in US and UK Company Law’ (n 7) 313. However, with respect to users in particular, it suggests direct ownership over shares which may be expensive and difficult to operate without some form of indirect representation when the global user base can run into the millions or billions. Rory Ridley-Duff, *The Case for FairShares: A New Model for Social Enterprise Development and Strengthening of the Social and Solidarity Economy* (FairShares Association 2015) 35–36, 52–54. There is, however, much to learn from the FairShares model in planning, organising and governing a multi-stakeholder, democratically-managed firm, as discussed later in the chapter.

tives for worker buyouts do not exist for user ownership and would be prohibitively expensive if used to acquire companies of the size of major social media platforms. Similarly, alternative leveraged buyout strategies, such as ESOPs and CSOPs,<sup>737</sup> while providing salutary examples, would be difficult to implement in this context. The archetypical CSOP envisioned by the Kelsos, for instance, would encounter difficulties in finding a lender or guarantor willing to extend the large sums necessary to acquire majority ownership of a large social media company.

Moreover, these costs are not limited to financial costs but include costs of collective decision-making. On social media platforms, collective action and coordination costs are accentuated as users are globally distributed and their use of the social media platform varies greatly.<sup>738</sup> While there is considerable experimentation underway on how this coordination problem can be solved and globally dispersed individuals can enjoy financial rights (see chapter 4.2.), one option for addressing this problem at present is by having a representative user governance. Even with indirect ownership and representative governance, it is possible to design a governance system that involves extensive user participation.

Bearing this in mind, it is possible to conceive of transfer strategies which, with the right policy support, could materialise user ownership of social media companies. The following sub-section provides an overview of what a non-charitable purpose trust and a Stichting Administratiekantoor (STAK) (a particular use of a foundation) is. It then discusses how a share transfer to user ownership could be conducted with the use of these two entities.

### 5.3.2 Non-Charitable Purpose Trusts

Purpose trusts are trusts that are created for specific, non-charitable purposes rather than for identifiable beneficiaries.<sup>739</sup> While people may benefit from purpose trusts, this benefit is indirect. In general, legislation concerning such trusts require that the purposes are specifically defined in writing, are certain, reasonable, not immoral or against public policy,

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737 Kelso and Kelso (n 415) ch 7.

738 Facebook's experiment with direct user control over policies (e.g., terms of service) was unsuccessful due to very low turnout. Nielsen argues that the reason for this lack of participation is because the vast majority of users are lurkers, rather than active participants. Adi Robertson, 'Facebook Used to Be a Democracy – but Nobody Voted' [2018] *The Verge* <<https://bit.ly/2WdjIPr>>; Jakob Nielsen, 'The 90-9-1 Rule for Participation Inequality in Social Media and Online Communities' (*Nielsen Norman Group: World Leaders in Research-Based User Experience*, 8 October 2006) <<https://bit.ly/3iZdkEx>>.

739 For those with an English law background, it is necessary to explain that a purpose trust is distinct from a *Quistclose* trust as the intention behind creating a purpose trust is not to have the trust property revert to the lender/settlor after the purpose is fulfilled (although an improperly constituted purpose trust could lead to a resulting trust in favour of the settlor). Mark Hubbard, *Protectors of Trusts* (Oxford University Press 2013) 193.



and capable of being fulfilled. Antoine notes that the holding of land, for instance, is generally excluded as a valid purpose, at least in offshore purpose trust legislation.<sup>740</sup> In contrast to other types of trust, the trustee's fiduciary obligations are to fulfil the purposes of the trust through the administration of the trust property (e.g., shares in a company) rather than to a specified class of beneficiaries.

Offshore jurisdictions have developed this type of trust for commercial and tax planning purposes (Anguilla,<sup>741</sup> Bahamas,<sup>742</sup> Barbados,<sup>743</sup> Belize,<sup>744</sup> Bermuda,<sup>745</sup> British Virgin Islands,<sup>746</sup> Brunei Darussalam,<sup>747</sup> Cayman Islands,<sup>748</sup> Cook Islands,<sup>749</sup> Cyprus,<sup>750</sup> Dubai DIFC,<sup>751</sup> Guernsey,<sup>752</sup> Isle of Man,<sup>753</sup> Jersey,<sup>754</sup> Labuan,<sup>755</sup> Mauritius,<sup>756</sup> Nevis,<sup>757</sup> St. Kitts and Nevis,<sup>758</sup> St Vincent and the Grenadines<sup>759</sup> and San Marino<sup>760</sup>), most often to "provide further insulation for so-called asset protection trusts by having the shares of the private trust company that holds the trust assets themselves held by an off shore trust company on purpose trusts".<sup>761</sup> However, an increasing number of onshore jurisdictions are also introducing legislation to regulate such trusts.<sup>762</sup>

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740 Antoine (n 421) 51.

741 Trusts Act, 2014, s. 14 [Anguilla].

742 Purpose Trust Act, 2004, s. 3 [Bahamas]. Section 3 expressly contemplates the possibility of a purpose trust holding, or investing in, the shares of a company.

743 Trusts Miscellaneous Provisions Act, 2018-49, ss. 8-9 [Barbados].

744 Belize Trusts Act, 1992, s. 15 [Belize].

745 Trusts (Special Provisions) Amendment Act, 1998, s. 12A [Bermuda].

746 Trustee Ordinance, 1961, s. 84(2); The Virgin Islands Special Trusts Act, 2003 [British Virgin Islands].

747 International Exempt Trusts Order, 2000, s. 77 [Brunei Darussalam].

748 In the Cayman Islands, Part VIII of the Trusts Law (2017 Revision) [Cayman Islands] provides for special trusts that arguably go beyond non-charitable purpose trusts in diverging from general principles of trust law.

749 International Trusts Act, 1984, s. 12(2) [Cook Islands].

750 International Trusts Act, 1992, s. 7(3) [Cyprus].

751 Trust Law, 2005, s. 31 [Dubai DIFC].

752 Trusts (Guernsey) Law, 2007, s. 12 [Guernsey].

753 Purpose Trusts Act, 1996, ss. 1 & 9 [Isle of Man].

754 Trusts (Jersey) Law, 1984, s. 22 [Jersey].

755 Offshore Trusts Act, 1996, s. 4(3) [Labuan].

756 Trusts Act, 2001, s. 19 [Mauritius].

757 International Exempt Trust Ordinance, 1994, s. 8 [Nevis].

758 Trusts Act, 1996, s. 13(4) [St. Kitts and Nevis].

759 International Trusts Act, 1996, s. 12 [St. Vincent and the Grenadines].

760 L'Istituto del Trust, 2010, art. 2 [San Marino].

761 Kelvin FK Low, 'Non-Charitable Purpose Trusts: The Missing Right to Forego Enforcement' in Richard C Nolan, Kelvin FK Low and Tang Hang Wu (eds), *Trusts and Modern Wealth Management* (Cambridge University Press 2018) 503.

762 Also see section 409 of the Uniform Trust Code which envisions the possibility of non-charitable purpose trusts being used for a wide variety of purposes. However, the Uniform Trust Code has yet to be adopted in many US states.

In onshore jurisdictions, the concept of non-charitable purpose trusts is only discussed summarily, even in texts used by legal practitioners.<sup>763</sup> It is treated as an arcane structure due to the fact that they have been primarily used to benefit pets upon the passing away of their owners<sup>764</sup> and for the maintenance of tombs.<sup>765</sup> However, the adoption of legislation permitting and regulating purpose trusts in offshore jurisdictions has invigorated scholarly and political discussion on grounds of policy (e.g., terrorism financing; money laundering) and principle (i.e., whether a trust can be recognised if it does not have identifiable beneficiaries).<sup>766</sup> This will only increase as onshore jurisdictions, including several US states such as Delaware,<sup>767</sup> begin to introduce purpose trust legislation themselves. Potentially, the production of advanced forms of artificial intelligence (AI) systems, coupled with the need to extend these nonhuman objects with certain rights, may also spur interest in using purpose trusts.<sup>768</sup>

It is appreciated that, by advocating the use of such trusts, this chapter is stepping into one of the most heated debates in trust law jurisprudence: the recognition of non-charitable purpose trusts that do not have identifiable beneficiaries to enforce them.<sup>769</sup> Such trusts represent a significant departure from how trusts have developed in common law jurisdictions in that the common law only provide limited exceptions to the ‘beneficiary rule’,

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763 John Thurston, *A Practitioner's Guide to Trusts* (Bloomsbury Professional 2013) 494–495.

764 *Re Dean* (1889) 41 Ch D 552. This case involved a trust in which an annuity was paid to a trustee to maintain the horses of the settlor for up to 50 years.

765 *Pirbright v Sawley* [1896] WN 86. This case involved the gift of consols by the settlor to churchwardens so that they may use it to maintain his burial inclosure. This gift was valid for 21 years.

766 See the debate between Matthews and Duckworth concerning STAR trusts, a type of purpose trust, in the Cayman Islands. Duckworth effectively drafted the STAR legislation, while Matthews deemed them to be “semi-wacky”. Paul Matthews, ‘Shooting STAR: The New Special Trusts Regime from the Cayman Islands’ (1997) 11 *Trust Law International* 67, 67; Anthony Duckworth, ‘STAR WARS: The Colony Strikes Back’ (1998) 12 *Trust Law International* 16; Paul Matthews, ‘STAR: Big Bang or Red Dwarf?’ (1998) 12 *Trust Law International* 98; Anthony Duckworth, ‘STAR WARS: Smiting the Bull’ (1999) 13 *Trust Law International* 158; Paul Matthews, ‘Paul Matthews Writes...’ (1999) 13 *Trust Law International* 168.

767 The Delaware Statutory Trust (DST) facilitates much of the same organizational flexibility as a Delaware Limited Liability Company (LLC), but it notably puts the trust property outside of the ownership of the settlor and at the same time limits the discretion of trustees and rights of beneficiaries. See Hubbard (n 739) 196. To create a perpetual purpose trust, the limited situations in which the trust can be dissolved (e.g., when its purpose(s) have been fulfilled) have to be specified in the governing instrument of the DST and, unlike LLCs, no statutory provisions regarding dissolution can be triggered by the vote or consent of a certain percentage of members. In short, there are fewer statutory preconditions to the perpetuity of a DST than an LLC.

768 Michael Vincent, ‘Computer-Managed Perpetual Trusts’ (2011) 51 *Jurimetrics* 399.

769 Alastair Hudson, *Great Debates in Equity and Trusts* (Palgrave 2014) 99.

primarily catering to charitable purposes.<sup>770</sup> Purpose trusts have long been seen to be controversial as they raise questions as to who a court should direct performance toward when a trustee fails to meet their obligations.<sup>771</sup> The fact that the purposes of a trust may be defined imprecisely make such a breach a material risk.<sup>772</sup> Furthermore, non-charitable purpose trusts conceptually contravene the well-established rule in *Saunders v. Vautier*,<sup>773</sup> which entitles beneficiaries under certain circumstances to dissolve a trust and convey the trust property to the beneficiaries. Clearly, upholding such a principle becomes impossible in the absence of beneficiaries. Purpose trusts may also seek to have perpetual life, which would violate the rule against perpetuities that exists in many common law jurisdictions to prevent the drafters of legal instruments to exercise control over private property long after their death. It is because purpose trusts are such a “radical departure from the common law” that prominent onshore financial centres such as Singapore and Hong Kong have resisted proposals to introduce non-charitable purpose trusts.<sup>774</sup> This controversy has not only doctrinal implications but also ramifications for the validity of such trusts in jurisdictions other than the one in which it was settled. This in turn may impact user and platform company views regarding the feasibility of such trusts. It is therefore important to briefly explain how the view of purpose trusts has evolved in recent years.

Legislatures around the world have taken several steps to address these concerns as a practical matter, even if doctrinal concerns remain. Purpose trusts seek to supplant the accountability and disciplining function of beneficiaries through the appointment of a trust enforcer.<sup>775</sup> Enforcers monitor whether a trustee is achieving the purpose of the trust and have the power to take action against the trustee if they fail to do so. This can include initiating legal proceedings for the benefit of the trust, requesting disclosures, and seeking judicial opinions in connection with the trust.<sup>776</sup> Most often, the role of enforcer is carried out by a private protector, either appointed in the trust agreement or by a court, with a state representative such as the Attorney General occasionally ensuring that the protector enforces the trust or fills in if an enforcer has not been appointed (e.g., in The Bahamas or Bermuda). The enforcer is generally considered to be a fiduciary, which is either mentioned in the law (e.g., in Belize, the British Virgin Islands, the Cayman Islands, Guernsey) or is presumed to be the case.<sup>777</sup>

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770 “A trust to be valid must be for the benefit of individuals...or must be in that class of gifts for the benefit of the public which the courts...recognize as charitable in the legal...sense of the term” in *Bowman v. Secular Society Ltd* [1917] A.C. 406 at 441, HL, per Lord Parker.

771 *Morice v. Bishop of Durham* (1804) 9 Ves 399.

772 On the issue of a purpose being too broad or vague, see *Re Endacott* [1960] Ch 232.

773 (1841) 4 Beav 1158; 41 ER 482.

774 Low (n 761) 487.

775 Hubbard (n 739) 199.

776 Purpose Trust Act, 2004 [The Bahamas], s. 6.

777 Antoine (n 421) 57.

Scholars such as Low have raised concerns about privately-appointed enforcers being lax in their enforcement function or having conflicts of interest, due to the enforcer having duties to the trustee(s) or duties to no one.<sup>778</sup> As a consequence, if the non-charitable purpose trust is rendered invalid, a resulting trust may be created in favour of the original settlor and entail attendant tax consequences.<sup>779</sup> To guard against this risk, most jurisdictions provide for a court to be able to remove an enforcer if they are unable or unwilling to perform their duties.<sup>780</sup> However, a public protector (e.g., an Attorney-General) empowered to ensure that protectors comply with their enforcement duties may be ill-equipped to do so as, among other things, they may never receive notice of there being a breach of the trust's terms.<sup>781</sup> In offshore island jurisdictions there is also the risk that there is a lack of an arms-length relationship between the trustee and privately appointed protectors, leading to conflicts-of-interest.<sup>782</sup>

Another option is to bifurcate the role of the enforcer, with one person (natural or legal) acting in the usual role of beneficiaries and another (e.g., a trust protection committee) being responsible for overseeing whether the mission of the trust is being pursued and approving any distributions made from the trust. This is akin to the role that state entities like the U.K.'s Charity Commission have in overseeing whether trusts settled in the U.K. are genuinely charitable. In the case of non-charitable perpetual purpose trusts, this oversight function is legitimized by having the Trust Protector Committee democratically elected by a platform's users. To overcome the challenge presented by multiple and fake accounts, the users who choose to participate in the election of the Committee must submit a credible form of identity – this may be a government-issued ID at present but could eventually be a form of self-sovereign identification that preserves their privacy. While all users may not participate in this election process – as with any election – the purposes of the trust would require the elected Trust Protector Committee to cater for the interests of all users, including those who remain anonymous. This is a practice that was adopted by the aforementioned Organically Grown Company in 2018.<sup>783</sup>

Moreover, despite the controversy over non-charitable perpetual purpose trusts, particularly in English legal scholarship, case law indicates that Australian<sup>784</sup> and Canadian<sup>785</sup> courts are willing to recognize the validity of such trusts under limited circumstances. Even English courts have accepted such trusts on the condition that there are definable classes

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778 Low (n 761) 486, 506.

779 *ibid* 491–493.

780 Hubbard (n 739) 203.

781 Low (n 761) 507.

782 Hudson (n 769) 110.

783 The Purpose Foundation (n 396) 24, 26.

784 *Dubois v. Hodgson* [1999] NSWSC 1065, at [par. 29-31] (Austl.).

785 *Keewatin Tribal Council Inc. v. Thompson (City)*, [1989] 5 W.W.R. 202, at 217 (Can.).

of persons who can enforce the non-charitable purpose of the trust even if they only benefit from the fulfilment of the purpose of the trust indirectly.<sup>786</sup> While this line of cases concerns unincorporated non-charitable associations such as football clubs, religious organizations, and a group of employees, it could potentially include a multi-stakeholder association of employees, users, founders and investors as well. The fact that the main international Convention on Trust law<sup>787</sup> acknowledges purpose trusts as valid trusts, the Uniform Trust Code<sup>788</sup> regulates purpose trusts, and that the legislatures of U.S. states like Oregon have recently passed legislation to regulate non-charitable perpetual purpose trusts,<sup>789</sup> highlights growing mainstream acceptance.

Another legislative measure that has been taken that supports the creation of such trusts is the abolition of the rule against perpetuities in several jurisdictions, including in the US states of Delaware and, if used for stewardship purposes, Oregon.<sup>790</sup> Thus, in spite of some of the pushback on the creation of such trusts and arguments that such trusts may not be recognised for contravening public policy,<sup>791</sup> Antoine suggests that purpose trusts are in fact increasingly being recognised in jurisdictions in which they are not expressly regulated in domestic law.<sup>792</sup> For instance, jurisdictions like Canada (and Canadian states) have shown a willingness to defer offshore jurisdiction where the trust is settled.<sup>793</sup>

786 Re Denley's Trust Deed [1968] All E.R. 65, 69 (UK); Re Lipinski's Will Trusts [1976] 1 Ch. 235, 249 (UK); Grender v. Dresden [2009] EWHC 214 (Ch) at [par. 18] (UK). Hudson refers to these as "people trusts," e.g., non-charitable purpose trusts "the intention of which is to benefit identifiable people as beneficiaries" instead of just an abstract purpose. Hudson (n 769) 173. The fact that The Perpetuities and Accumulations Act, 2009, c. 18, § 18 refers to the duration of non-charitable purpose trusts also indicates that such trusts can be settled; however, it is doubtful that its duration could be more than 125 years. Professor Hudson recommends that, to comply with this perpetuities period, there should be a provision limiting the future members' entitlement to the trust property, although the 2009 Act may rescue even the trusts that fail to do so. *ibid* 196.

787 Convention on the Law Applicable to Trusts and on their Recognition (adopted 1 July 1985, entered into force 1 January 1992) 23 I.L.M. 1389 (Trust Convention) § 2.

788 UNIF. TRUST CODE § 409 (2016).

789 Oregon's Legislative Assembly recently passed a bill that would facilitate the creation of trusts for non-charitable business purposes, known as stewardship trusts. OR. REV. STAT. § 130.193. While it was possible to establish a non-charitable purpose trust in Oregon prior to enactment of this statute, this new law explicitly defines the scope of non-charitable business purposes, provides details on the ownership interests that the trust can have as an asset, and makes the 90-year expiry limit of trusts a default rule that can be varied. *See id.* §§ 130.193(1)-(2), 105.965(8).

790 Gary (n 731) 721, 725. Also see, Del. Code Ann. Tit. 25, § 503(a).

791 Low (n 761) 504; Hudson (n 769) 99.

792 Antoine (n 421) 43-44.

793 Donovan Waters, 'Protectors and Enforcers of Trust: Drafting the Trust Instrument' (2000) 8 237, 259. Also see, *Peace Hills Trust Co. v Canada Deposit Insurance Corp* [2007] ABQB 364, Alberta QB at [29].

### 5.3.2.1 Business Transfers Using a Non-Charitable Perpetual Purpose Trust

It is now possible to turn to ‘ideal-type’ transfer mechanisms, which draws inspiration from earlier efforts in proposing mechanisms to transfer control to stakeholders.<sup>794</sup> As a first step, the management board of the social media company can reflect on the relevance, feasibility and sustainability of representing users in the governance, management and ownership of the company. One option for doing so could be by using some of the tools of the FairShares Model v3.0, which suggests six key questions as a starting point for businesses interested in multi-stakeholder ownership and governance. These are:

1. “How can [the business] configure the ownership, governance and management systems to distribute wealth and power to all stakeholders?
2. What is the purpose(s)...of the enterprise (network)?
3. What values and principles guide the choice of goods/services offered?
4. Who are [the business’s] primary (secondary) stakeholders?
5. What values and principles guide production and consumption?
6. How are social, environmental and economic impacts reviewed? [insertions mind]”<sup>795</sup>

This will have to be accompanied by a process of considering how existing shareholders can be persuaded about the benefits of such a transfer.<sup>796</sup> As part of this process, the management board can commission a study about users’ receptivity to the idea of user ownership and governance. This may involve convening focus groups, a dedicated online forum, or an Ask-Me-Anything session on Reddit, among various options. During this process, the management board will also initiate a feasibility study of the financial costs and legal implications involved in transferring shares of the business to a trust, as well as other potential transfer strategies, so as to give users a more comprehensive overview of the proposed undertaking. These consultations may be concluded through a non-binding referendum on the subject.<sup>797</sup>

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794 Lowitzsch, ‘Consumer Stock Ownership Plans (CSOPs) – The Prototype Business Model for Renewable Energy Communities’ (n 729); Dow, *Governing the Firm Workers’ Control in Theory and Practice* (n 709). It is, of course, possible that such transfer mechanisms will be a modified version of the path outlined here. For instance, there may be a greater role for user buy-in than currently suggested or there may be financial investors who become involved to help leverage the buyout.

795 FairShares, ‘Introducing the FairShares Model V3.0’ (*P2P Foundation*, 2 February 2018) <<https://bit.ly/3ApFcZ1>>.

796 Ridley-Duff, *The Case for FairShares* (n 736) 52–54.

797 Dow, for instance, has proposed a referendum-style system in which workers vote to transition to worker ownership, and if passed, begin a process of buying-out the shares via a labour trust using their own salaries. Dow, *Governing the Firm Workers’ Control in Theory and Practice* (n 709) 263–268.

Secondly, if the referendum vote has passed, a non-charitable perpetual purpose trust can be settled in Delaware, Oregon or other US states that permit the formation of such trusts. The purposes of the trust, such as ‘holding the shares of the social media company’, ‘promoting user representation in the company’ and ‘improving user experience of the platform’ will be stipulated in the trust instrument. As this will lock-in the mission of the trust, it is important that these purposes are clear but sufficiently wide to permit some leeway in achieving them. Oregon’s recently enacted ‘Stewardship Trust’ statute provides an indication of what such a user trust could look like.

The corporate trustee will have legal title to the shares of the company that the user trust will acquire, but as a directed trust, they will owe certain duties to the trust enforcer and trust protector committee which could be elected from the global user base. The trustee will be required to inform and report to the trust enforcer, as they would typically be expected to do with trust beneficiaries.<sup>798</sup> As a directed trust, the trust protector committee will effectively be able to exercise all of the rights that belong to a trustee,<sup>799</sup> including voting the shares that are transferred to the trust, appointing or removing directors of the company, and directing how dividends earned from the shares should be reinvested.<sup>800</sup> All three actors within the trust’s governance structure will have fiduciary duties, and will to an extent check each other. The trust protector committee can remove both the trust enforcer and the trustee by majority vote but can only replace the latter.<sup>801</sup> The trust enforcer and the trustee can act to protect the purposes of the trust, should it be jeopardised by the actions of the trust protector committee.<sup>802</sup> It is also expected that the trust protector committee will keep the trustee adequately informed about the administration of the trust and its activities as they may otherwise have inadequate information.<sup>803</sup>

In addition, the trust instrument will set out the specifics regarding the composition of the trust protector committee and the election procedure. Eligibility criteria for election could include time using the platform, content generated for the platform, income earned (if any), quality of content (e.g., based on reviews from other users), reputation among peers, or a combination thereof. In principle, the trust could cover multiple operating platforms (e.g., Facebook and Instagram) owned by a single company, so long as the trust protector committee has space for user representatives from each platform.<sup>804</sup> The election itself could use a simple approval voting system, as in the DASH network, where a set number of candidates with the highest

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798 Or. Rev. Stat. § 130.193(3).

799 Or. Rev. Stat. § 130.193(7)(f).

800 Gary (n 731) 727.

801 Or. Rev. Stat. § 130.193(7).

802 Uniform Trust Code § 813 (amended 2010). Given the extensive powers conferred on the trust protector committee, the fiduciary liability of the trustee is limited.

803 Mayo (n 730) 36.

804 Gary (n 731) 732.



votes get elected. Alternatively, one of the voting or appointments systems mentioned while discussing CoSocial (chapter 4.2.) could be used. The trust protector committee should have a minimum of three members,<sup>805</sup> but could opt for a larger board to accommodate diverse groups of users. The successful candidates can be paid a competitive but proportionate sum and covered with liability insurance, given their role as fiduciaries. To ensure that users can continue to participate and develop a feeling of ownership in a representative system, group decision-making and opinion surveying platforms like Loomio<sup>806</sup> and Pol.is<sup>807</sup> could be utilised.

Thirdly, once the trust has been created, it can gradually acquire shares from the social media platform's parent company or subsidiary, as is appropriate. Initially, as with non-leveraged ESOPs, acquisition may be through donations of shares and cash with which the trust can purchase more shares. These shares may be reissued treasury shares that the company had bought back from investors at an earlier stage or, alternatively, could be a new class of shares that provide rights that are not already granted to the trust as a shareholder (e.g., separate meetings held by shareholders of the same class).<sup>808</sup>

Fourthly, as (positive) experience with the user trust grows, the social media company can begin to use its earnings to buy back shares from minority shareholders and issue non-voting, preferred shares to attract new investors with the explicit purpose of using this inflow of capital to buy more voting shares.<sup>809</sup> Over subsequent years, the trust will then be able to appoint more user representatives to the management board of the social media company. The Organically Grown Company, a non-charitable perpetual purpose trust first introduced in chapter 4.2.1.1., does not distribute profit that is earned by the enterprise to the trust but instead reinvests it in the business, to service debt, to maintain reserves, to pay

805 Or. Rev. Stat. § 130.193(4).

806 Benjamin Matthews, 'Precarity, Globalism and Resistance in Emergent Collectivism: The Case of Enspiral' (2017) 13 *Global Media Journal* 1, 5; Loomio, 'Overview' (2021) <<https://bit.ly/360GR9s>>. Loomio allows any person within a group to raise issues (a 'context') for discussion and 'proposals' on how to address this issue. Other members of the group can vote on these proposals with a click of a button and if they wish, concisely express their views on why they voted a certain way. The programme summarizes the discussion as it progresses using infographics like voting pie-charts that get updated in real-time, making discussions easy to follow for any participant who joins at a late stage. This in turn allows better proposals to evolve from the foregoing discussions, without going off topic or forgetting a good point raised by a participant. The discussion is concluded by an 'outcome' that clearly articulates how an issue is to be handled and who will do so. The promise of this platform is demonstrated not only by how they've been embraced by social economy actors, like other cooperatives, but also by legislative (e.g., Welsh National Assembly) and executive bodies (e.g. Taiwan's Ministry of Economic Affairs) to conduct inquiries and public consultations.

807 Tom Simonite, 'The Internet Doesn't Have to Be Bad for Democracy' [2017] *MIT Technology Review* <<https://bit.ly/3jxdcgb>>.

808 Colenbrander and Lambooy (n 438) 13–14.

809 The Purpose Foundation (n 396) 84; Gary (n 731) 730.

dividends to preferred shareholders and to meet redemption requests.<sup>810</sup> This may be well-suited to user trusts as it can help avoid the trust having taxable income and determining how to value the individual contributions of users, while still giving the trust protector committee a role in how those earnings are spent. By holding a growing proportion of a platform's outstanding shares, the trust can also act as an anti-takeover device.<sup>811</sup>

### 5.3.3 Stichting Administratiekantoor (STAK)

The trust structure described above can be closely replicated with other entities in jurisdictions where a trust is not available. While the major social media platforms (by revenue) are predominantly based in the United States, as figure 3 in chapter 2 shows, they are also present in China and Russia. For the sake of completeness, it is worthwhile to consider how a civil law jurisdiction without a domestic equivalent of the trust would organise a similar transaction. The Netherlands is an interesting example in this respect due to the STAK's legal personhood, its autonomy from the interests of founders and beneficiaries, and its relative freedom from public supervision.<sup>812</sup>

A Dutch foundation, like a non-charitable purpose trust, is an 'orphan' entity as it lacks members and its board is oriented around a charitable or commercial purpose.<sup>813</sup> It is created by a notarial deed and its articles of association specify, among other things, the manner of appointing and dismissing directors.<sup>814</sup> Similarly, as a memberless entity, there is no general assembly with a residual power to make decisions such as amending the articles of association of the entity. Instead, the articles of association must specify how such an amendment is to be made.<sup>815</sup> As of 1 July 2021, the entry into force of the *Wet Bestuur en Toezicht Rechtspersonen (WBTR)*<sup>816</sup> includes new governance rules for foundations. This includes the possibility of choosing between a one-tier board and a two-tier board, where there is a supervisory board and management board respectively.<sup>817</sup> The management board of the foundation has exclusive and mandatory authority to manage the affairs of the foundation.<sup>818</sup> The supervisory board, if it exists, is responsible for supervising and advising the management board.<sup>819</sup> The board(s)

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810 Gary (n 731) 730.

811 *ibid* 711.

812 Ineke A Koele, 'The Dutch Private Foundation in Comparison with Trusts: For the Same Purpose but Rather Different' (2016) 22 *Trusts & Trustees* 140, 144.

813 Article 2:285(1), DCC; *ibid* 141; Charles Langereis and Oktay Düzgün, 'The Dutch Foundation within International Structures' (2010) 16 *Trusts & Trustees* 490, 490.

814 Article 2:286(4)(c), DCC.

815 Article 2:293, DCC.

816 Stb 2020/507

817 It is now, for instance, possible for a foundation to have a supervisory board with the power to dismiss a director. See Article 2:292a(3), DCC.

818 Article 2:291(1), DCC.

819 Article 2:292a(2), DCC.

must act in the interest of the legal entity and the enterprise or organisation connected with it, bearing in mind the foundation's specific purposes.<sup>820</sup>

The STAK is a type of fiduciary foundation through which legal and economic entitlement to an asset (e.g., shares) is split between the STAK itself and the holders of depository receipts that are issued by the STAK.<sup>821</sup> In other words, in a business transfer scenario, the STAK would have legal entitlement to shares transferred to it and can exercise shareholder rights, but those shares are managed in the interest of depository receipt holders. The depository receipts represent the contractual claims and rights and obligations that the holders have towards the STAK.<sup>822</sup> While depository receipt holders are typically limited to enjoying economic rights (e.g., dividends, distributions upon liquidation), as has been previously argued with respect to depository receipts of STAKs used for employee participation,<sup>823</sup> the depository receipts could additionally allow for receipt holders to have meetings and appoint members of the management board of the STAK. Potentially, user representation on the board of a STAK may enable the existence of an independent voice on the board of the social media company.<sup>824</sup> This may be particularly desirable if the company wishes to ward off potential acquirors; a consideration that is particularly material in the platform economy (see chapters 2 and 4).<sup>825</sup>

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820 Articles 2:291(3), 2:292a(2), DCC.

821 G van Solinge and MP Nieuwe Weme, 'Historie En Gebruik van Certificering', *Asser 2-IIIb NV en BV - Corporate Governance* (Fourth, Wolters Kluwer 2019) para 656. 'Double certification' is also possible in the sense that a legal certificate holder may hold the certificates for the benefit of another.

822 Rick van der Velden and Matthijs Vogel, 'The Dutch Foundation as Fiduciary Entity: Dutch Tax Aspects' (2016) 22 *Trusts & Trustees* 696, 696.

823 With reference to employee representatives on a STAK's board of directors, see, Inge M Meeuwenoord, 'Share Options as an Instrument to Attract & Retain Talent for Dutch Startups' (Masters, University of Twente 2014) 13. This is also in line with the recommendation of the Stichting Nederlands Participatie Instituut (SNPI) that depository receipt holders have at least two-thirds representation on the board of a STAK. The SNPI is the main body promoting the financial participation of employees in the Netherlands. Pascale Nieuwland-Jansen, 'Iedereen aandeelhouder' (*Wetenschappelijk Bureau Groenlinks*, 2 July 2020) <<https://bit.ly/3hlnOfq>>; Kaarsemaker and Poutsma (n 292) 202.

824 The Dutch Corporate Governance Code contains a definition of 'independence' for supervisory board members but lacks an overarching definition of independence that applies to all types of business organization. In spite of this absence, under article 2:118a(3), DCC, for user-directors to be independent, they should not be employees or regular advisors of the company. This article concerns public limited liability companies in particular (NVs) but is a useful guide.

825 In fact, when it comes to listed public limited liability companies (NVs), Dutch financial supervision rules require foundations that were created as anti-takeover devices to be independent from the companies they are shareholders of, so as to avoid mandatory bid rules once the foundation holds more than 30% of shares. See Article 5:71(1)(d) Wft.

### 5.3.3.1 Business Transfers using a STAK

As the first step will be the same as with a non-charitable perpetual purpose trust, for the second step a STAK will be incorporated through a notarial deed with the aforementioned features in mind. This will require drafting articles of association which specifies the name of the STAK, its objects/purposes (as above),<sup>826</sup> the procedure for appointing and dismissing management board members (as well as supervisory board members, if any), its registered office in the Netherlands and instructions on how to distribute the assets of the STAK at the time of dissolution.<sup>827</sup> As with the non-charitable purpose trust illustration above, the purposes of the STAK have to be set out clearly and capaciously, as it is difficult to amend the purposes once the STAK is established.<sup>828</sup> It is possible to include a clause in the articles of association permitting amendments to the article, but as Zaman and colleagues note, “an amendment of the objects clause may be in violation of the principles of reasonableness and fairness” under article 2:8 DCC and will need to be determined on a case-by-case basis.<sup>829</sup> At the time, it will also be important to specify the terms of the administration of the STAK with respect to the fiduciary relationship between the STAK and its depository receipt holders.<sup>830</sup>

As this chapter calls for social media users to exercise their rights collectively, the company could establish another foundation that has the purpose of collectively holding the depository receipts issued by the STAK and for organising the representation of the global user base in the STAK’s management board (i.e., the Depository Receipt Holders’ Foundation).<sup>831</sup>

Again, as with the trust protector committee, it is not necessary to be overly prescriptive about how this is done as the appropriate appointment mechanism may vary on a case-by-case basis. Regardless of the mechanism chosen, users would not be expected to individually hold depository receipts and exercise the contractual rights that come along with it, as foundations are memberless entities. Instead, the board of the Depository Receipt Holders’ Foundation would be a specialised body for doing so.

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826 To be clear, these purposes will not be deemed charitable or in the ‘common good’, as Dutch law has a broad but nevertheless limited set of charitable purposes: “welfare, culture, education, science, research, protection of nature and environment, healthcare, development cooperation, animal welfare, religion, philosophy, spirituality, public housing, furthering of the democratic legal order, and the (financial) support of other charitable institutions”. Martijn van Steensel and Rick van der Velden, ‘Dutch Foundations for Charitable Purposes’ (2018) 24 *Trusts & Trustees* 601, 602.

827 Article 2:286(4), DCC.

828 Article 2:293, DCC.

829 Zaman, de Groot and Steensel (n 640) 227.

830 *ibid* 270.

831 Langereis and Düzgün discuss the possibility of a separate legal entity holding depository receipts issued by a STAK. Charles Langereis and Oktay Düzgün, ‘The Netherlands: The Dutch Foundation – a Vehicle for Effective Business Solutions’ (2011) 17 *Trusts & Trustees* 577, 578.

While foundations only require one director, board size considerations may be similar to the trust protector committee. As with trust structures, there is considerable flexibility in how the governance of a foundation is designed, including the composition of the management board, eligibility requirements,<sup>832</sup> the board members' roles and their decision-making processes.<sup>833</sup> As with the STAK, it is necessary for these directors to act in the interest of the foundation and its affiliated enterprise or organisation, bearing in mind the foundation's specific purposes. There are also constraints on the distribution from foundations, but board members can be paid salaries and expense allowances, so long as they are reasonable.<sup>834</sup>

Similarly, to the non-charitable perpetual purpose trust example, the next two steps in the transfer process would also involve donations to help the STAK acquire shares from the holding/parent company of the social media platform,<sup>835</sup> and the issuance of preferred, non-voting shares to future investors. These shares may be a different class from other shares (e.g., Class B shares) and provide control rights that are unavailable to other shareholders who may have the other, Class A shares (e.g., right to prior consent before the company's articles of association is amended). Class B shareholders would not only be able to participate and vote in annual general meetings with the other Class A shareholders but would also be able to convene their own shareholder meetings if needed.<sup>836</sup> Over time, the increase in shares held by the STAK will allow for it to appoint user representatives to the board of the social media company. As the number of shares held by the STAK grows, it is important that there is an assimilation of the shares held by the STAK and the depository receipts held by the Depository Receipt Holders' Foundation, so as to ensure that the STAK is fully transparent for local tax purposes. If the shares and depository receipts are not assimilated, it may be deemed that there was a transfer of assets.<sup>837</sup> To achieve this, an equivalent number of depository receipts could be issued to the foundation for each share offered to the STAK and share dividends issued to the STAK could be immediately transferred to the Depository Receipt Holders' Foundation.<sup>838</sup> It will prevent the STAK from having taxable income of its own. Instead, the depository receipt holders'

832 There are some requirements. For instance, a supervisory board member cannot serve on the board of 5 or more legal entities. See Article 2:297b(1), DCC.

833 Following the enactment of the WBTR, management and supervisory board members of foundations may no longer be part of decision-making on subjects in which s/he has a (in)direct interest. The conflicted members are expected to recuse themselves from those specific decisions. Also, there are limitations on directors having multiple voting rights, with it no longer being possible for a single director to cast more votes than the other directors combined. Articles 2:291(3), 2:292a(7), 2:291(6), DCC

834 Langereis and Düzgün (n 813) 491.

835 Article 2:291(7), DCC; Kaarsemaker and Poutsma (n 292) 202.

836 Articles 2:78a (for BVs) and 2:189a (for NVs).

837 Dirk-Jan Maasland, Rogier Ploeg and Jules de Beer, 'Private Wealth 2021' (*Chambers and Partners*, 2021) <<https://bit.ly/3zAEAhC>>.

838 van der Velden and Vogel (n 822) 697–698.

foundation may be subject to local income tax. As with non-charitable perpetual purpose trusts, the lack of a general assembly of members means that it is impossible for a takeover to occur and extinguish either foundations' purpose.<sup>839</sup>

The transfer process can be depicted as follows in figure 12:

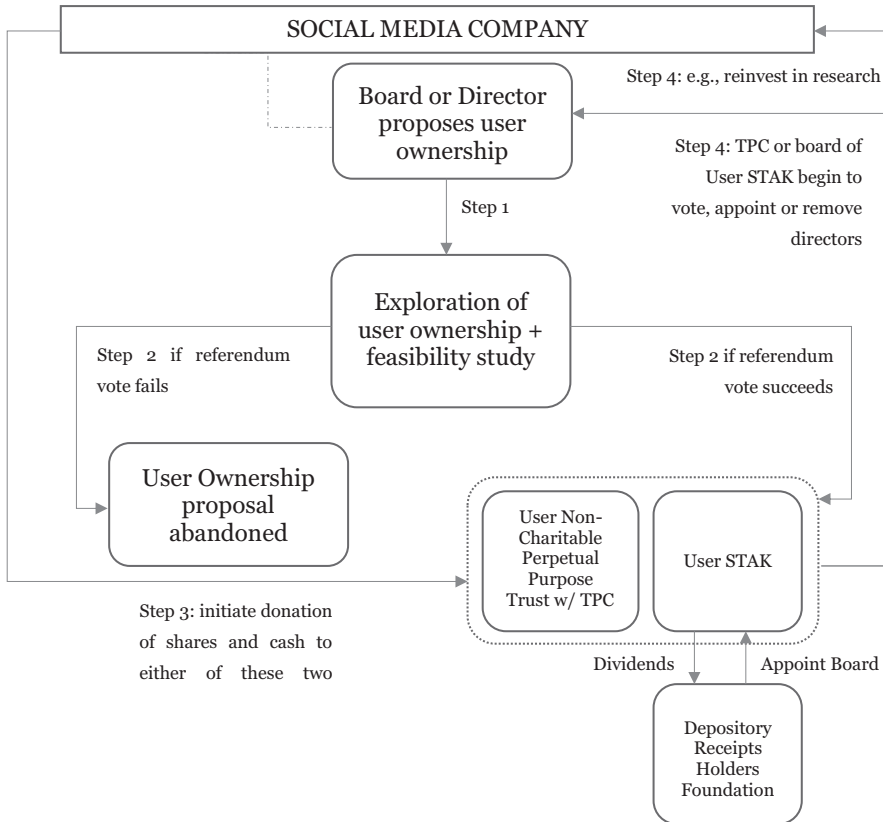


Figure 12: Share Transfer Process for User Ownership and Participation

It is important to note that this does not reflect all the forms of participation that may exist in the corporation, which as mentioned previously, may separately include employee participation.

839 RAF Timmermans, *Bescherming van beursvennootschappen door uitgifte van preferente aandelen* (1st edn, Uitgeverij Kluwer BV 2018) 588. Again, this is provided that the company concerned is a listed NV and the foundation was created for protectionist purposes.

#### 5.4 DEVELOPING A GOOD GOVERNANCE CHECKLIST FOR REPRESENTATIVE USER BODIES

The penultimate section of this chapter is concerned with outlining the functions, rights and obligations of a trust protector committee (in the case of a non-charitable perpetual purpose trust) and the management board of a STAK (in the case of a foundation). There are few specific mandatory rules for determining these functions, rights and obligations, and as such a good governance checklist can serve as an appropriate tool for ensuring that these user representative bodies discharge their administrative and oversight responsibilities well. As a corollary, a visual representation of the decision-making process following the installation of a user trust or user STAK, can help illustrate for users what rights and responsibilities they gain as a consequence of the transition.

The functions, rights and obligations of a fiduciary body that represents a particular constituency of a social media company are different than the functions of executive management or the board of directors of a company. A good governance checklist therefore has to account for the particular added value that stakeholder oversight has to offer. While a user trust for social media companies does not yet exist in the form described in this chapter,<sup>840</sup> there are examples of stakeholder bodies that have a measure of voice concerning operational and strategic decisions (e.g., client councils, works councils), as well as earlier proposals of stakeholder corporations to draw inspiration from.

In the Netherlands, as briefly discussed in Chapter 3, works councils have extensive rights to advise and consent on important decisions made by employers. These are outlined in sections 25 and 27 of the Works Councils Act (*Wet op de ondernemingsraden, WOR*). In addition, for the particular context of users, it is of interest that certain types of consumers also have extensive participation rights. The Participation by Clients of (Health-)Care Institutions Act (*Wet Medezeggenschap Cliënten Zorginstellingen, WMCZ*) [as amended], requires that all healthcare organisations have a client advisory council that are appointed from the clients of the healthcare organisation.<sup>841</sup> Each council averages between five to ten patient representatives, and in the case of long-term health care organisations, can also include spouses of deceased patients and volunteers. The council receives funding from the healthcare organisation to cover its overheads.<sup>842</sup> It has the right to receive information,<sup>843</sup> consent to specific operational matters and health-

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840 Schneider and Mannan (n 621).

841 Alexander Haarmann, *The Evolution and Everyday Practice of Collective Patient Involvement in Europe* (Springer International Publishing 2018) 98.

842 WMCZ, s. 6(3).

843 WMCZ, s. 6(1).



care quality plans,<sup>844</sup> be consulted on major corporate strategies,<sup>845</sup> engage in meetings on organisational policy with the healthcare provider,<sup>846</sup> and request an inquiry into mismanagement at the Enterprise Chamber of the Amsterdam Court of Appeal.<sup>847</sup> The council is also entitled to provide unsolicited advice and nominate at least one member of the healthcare organisation's supervisory board.<sup>848</sup> While these extensive legal rights exist, some researchers have flagged that these councils remain passive and that perceptions among council members about their ability to *exercise* their rights to consultation and consent are low.<sup>849</sup> Nevertheless, while the legislation was not able to democratise all aspects of healthcare provision, one author considers it to be successful in having the providers and recipients of healthcare to "talk with, instead of talk about, each other".<sup>850</sup>

It is this feature of hearing multiple competing views and (hopefully) resolving tensions that arise in the process that is precisely one of the attractions of multi-stakeholder governance in private enterprises, perhaps even more so than in the context of healthcare and other semi-public institutions (e.g., housing, education) where there is at least an expectation of public oversight by democratically-accountable political institutions. Turnbull refers to the example of Japan's *keiretsu* councils where stakeholders such as suppliers and consumers were brought into a common forum to discuss the concerns of each group.<sup>851</sup> In his view, the existence of such stakeholder bodies allows for feedback on decisions and quality of management. To ensure that the interests of stakeholders are adequately taken into account, these stakeholders could also be involved in executive management and director evaluations, so that shareholders can be better informed about their performance.<sup>852</sup> In short, the involvement of multiple stakeholders can help keep management in check.<sup>853</sup>

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844 The list is provided in WMCZ, s. 8(1). This includes, for example, general policies with regard to quality, safety and hygiene. The advice of the council on these matters is obligatory, not optional.

845 The list is provided in WMCZ, s. 7(1). This includes, for example, changes to the purposes of the healthcare organization or a transfer of control.

846 WMCZ, s. 11(1). The council can meet the supervisory board at least once a year.

847 WMCZ, s. 12(1). Marloes Zuidgeest and others, 'Legal Rights of Client Councils and Their Role in Policy of Long-Term Care Organisations in the Netherlands' (2011) 11 BMC Health Services Research 215, 215–216.

848 WMCZ, ss. 9(1), 10.

849 Zuidgeest and others (n 847) 219.

850 Haarmann (n 841) 121.

851 Turnbull (n 700) 177.

852 *ibid* 190.

853 Lynne L Dallas, 'Two Models of Corporate Governance: Beyond Berle and Means' (1988) 22 University of Michigan Journal of Law Reform 19, 80.

Collective governance of user trusts and user STAKs also allows the business to be more viable than if there was individual governance,<sup>854</sup> given the nature of social media platforms and the significant differences between how persons use the platform. Implementing open, but stringent, eligibility and recruitment criteria for both nominating users (e.g., to the TPC or the depository receipts' holders' foundation) and candidates – irrespective of the precise method used – is a prerequisite for such representative governance to be successful. To provide an example, the Organically Grown Company not only requires employee-stakeholders to express an interest in being involved in their governance process, they also must have spent a certain period of time with the company and passed a written test demonstrating their knowledge about the company's mission and governance processes.<sup>855</sup> Without prescribing specific criteria, social media users wishing to nominate user representatives may also be required to demonstrate a continued use of the platform over a specified period of time, a willingness to reveal limited identifying information (to avoid fraud), and prove their knowledge of the user trust's mission and governance processes. The user candidates for the TPC or the user STAK board, additionally, could be required to meet certain expertise requirements (e.g., in technology, financial administration, risk management) and demonstrable familiarity with the social media company's corporate governance. This would allow these representatives to appropriately execute some of the common tasks of their role, such as reviewing conflicts of interests, setting compensation policies, and removing fiduciaries.

In view of the above, the preliminary checklist in Table 10 is intended to help allocate the rights of prospective TPCs of user trusts and board members of user STAKs when overseeing the social media company during the acquisition of shares process. As can be seen this not only includes the rights that ordinary shareholders of a company have, but additional rights that priority shareholders sometimes enjoy. These priority rights may, in part, draw inspiration from the rights of workers in a works council or clients in a healthcare clients' council. While being ambitious and future-facing, it stops short of seeking rights and powers that are statutorily reserved for certain corporate bodies, such as the power of the management board to set company policy, as they are non-delegable to other bodies.<sup>856</sup>

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854 Singer (n 690) 159.

855 Gary (n 731) 729.

856 See, e.g., Colenbrander and Lambooy (n 438) 10, 16.

In the case of user trusts, where possible, rights could be conferred by amending the articles of association of the social media company to grant user trusts with information, consultation, (non-binding) advisory rights etc. based on their representative nature. Alternatively, in the case of a user STAK, if it has been exclusively issued a separate class of priority shares (e.g., Class B shares mentioned above), this class of shares would be able to convene a separate meeting, which as a distinct corporate body, could be granted certain consultative and consent rights.<sup>857</sup> While it is possible that there will be resistance to these exceptional rights being conferred to user trusts or user STAKs – for instance, by minority shareholders – the fact that the company’s management board has expressed its intent to transition to ‘user ownership’ would preclude them from being caught off-guard. As indicated in chapters 5.3.2.1 and 5.3.3.1, the transfer process may involve gradually buying out other shareholders or, instead, gradually issuing new shares to the user trust or user STAK to dilute other shareholders.

Finally, the set of rights and decisions indicated in Table 10 is accompanied by an illustrative action point that operationalises the rights of these representatives in addressing a particular decision. Ticking ‘yes’ or ‘no’ next to these action points will allow the settlors of the trust or STAK to identify ‘pain points’ that need to be considered. In other words, relevant stakeholders (e.g., users) can bring to the company’s attention that the user representatives are not meaningfully being involved in certain decisions and thereby rights that they have been conferred are being hampered.

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857 *ibid* 15–16. Colenbrander and Lambooy contend that Dutch companies could create a ‘stakeholder council’ or a ‘priority foundation’, with rights of information, consultation and non-binding advice, so long as they are not allocated rights that are statutorily granted to the general meeting of shareholders, the management board, and the supervisory board (if present). However, a priority foundation, if they are granted all shares of a distinct class of shares (e.g., Class B shares) could convene a distinct meeting for Class B shareholders, which would be recognized as a corporate body under articles 2:78a and 2:189a, DCC. As such, this distinct meeting of Class B shareholders as a corporate body could potentially exercise rights and powers referred in articles 2:78a and 2:189a, DCC. As the authors explain, this includes the rights to issue new shares (articles 2:96, 2:206, DCC), establish a list of management board decisions that need prior approval of another corporate organ (articles 2:129(3) and 2:239(3), DCC), and give binding instructions to the management board (articles 2:129(4) and 2:239(4) DCC). These are not exhaustive, as long as the separate meeting of priority shareholders are not delegated rights and powers that are exclusively vested in the general meeting, management board or supervisory board.

Table 10: Preliminary Good Governance Checklist with illustrative rights of user representatives and decisions they are involved in. Action points indicate how company can support user representatives in exercising their rights.

Rights Involved	Decisions Involved	Inspiring Example(s)	Illustrative Action Point	Yes	No
<i>Right to Information</i>	Company giving notice and documents to the user representatives	WMCZ, s. 6(1)-(2)	Sensitive company data made available in a secure (digital) environment		
<i>Right to Meeting</i>	Speaking at annual general meeting	-	Proxy Statement has a distinct section on how the activities of the company in the previous year affected users		
<i>Right to Consult</i>	Policies concerning the use of the platform (e.g. Terms of Service, End-User License Agreements)	WOR, s. 22(1)-(2)	Company funds consultation of expert on policy for user representatives		
	Policies concerning advertising and other forms of monetisation of the platform	WOR, s. 22(1)-(2)	Company funds consultation of expert on policy for user representatives		
	Offering a new service or function	WOR, s.25(1)(k)	User representatives are given a clear explanation of how the service operates before it is released		
	Changing or terminating a service or function	WOR, s.25(1)(k)	User representatives are given a clear explanation of the implications of the service or function between terminated		
	Preparation of company's budget and annual accounts approval	WOR, s.31a, WMCZ, s. 7(1)(g)	User representatives allowed AMA session with global userbase to explain implications for users		
	Taking out or extending a major loan	WOR, s. 25(1)(i)-(j)	Clear, objective, and early summary of implications		
	Make a significant investment on behalf of the company	WOR, s. 25(1)(h)	Outside expert brought in to explain how this may benefit company and users		
	Acquisition of new company	WOR, s. 25(1)(b)	Meeting organised with directors of new company		
	Important measure in the interest of the environment or climate change	WOR, s. 25(1)(l)	Awareness raising activity organised with global userbase on benefits and how they may contribute		

<b>Rights Involved</b>	<b>Decisions Involved</b>	<b>Inspiring Example(s)</b>	<b>Illustrative Action Point</b>	<b>Yes</b>	<b>No</b>
	Change of registered office of the company	WOR, s. 25(1)(f)	Clear and early explanation of implications of move on users		
	Liquidation of company	WOR, s. 25(1)(c)	User representatives given early explanation and instructions on data interoperability, so that they may help advise user base		
<i>Right to Consent</i>	Policies concerning content moderation	-	Clear, objective explanation of policy given before release		
	Use of a reputation or rating system	WOR, s. 27(1)(c), (g), (l)	User representatives are given a clear explanation of how the system operates before released, to discuss with userbase		
	Change of corporate control (e.g., merger)	-	Minimum notice period for such decisions is stipulated		
	Remuneration Policy for Directors	Or. Rev. Stat. § 130.193(7)(f)	User representatives given comprehensive information about remuneration policy in similar companies		
<i>Right to Inquire</i>	Requesting Inquiry Procedure (Enquêteprocedure) or Internal Investigation	Arts. 2:346(1)(e), 2:350, DCC	Ready access to the documents and resources needed for user representatives to submit request.		
<i>Right to Nominate</i>	Appointment of Director	Or. Rev. Stat. § 130.193(7)(f)	Candidates have separate meetings with user representatives		
<i>Right to Non-Binding Advice (unsolicited)</i>	User Interface (UX) Design	-	User representatives are given access to a UX design expert		

For users, the benefits of such representative structures could be explained through the use of visuals that illustrate the decision-making process. An example is provided below in figure 13<sup>858</sup>:

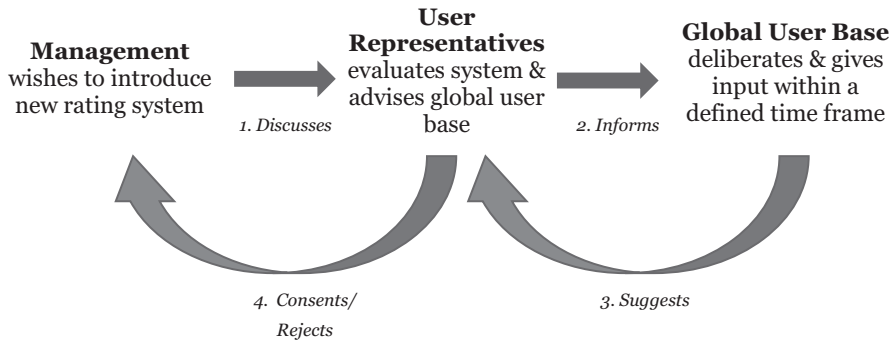


Figure 13: Diagram representing decision-making process for introducing a new rating system in a social media company with a user trust/user STAK.

## 5.5 CONCLUSION & FUTURE RESEARCH

In this chapter, an attempt has been made to answer the call for charting a plausible path towards user ownership and governance of social media companies. It first made a case for why users merit the financial and control rights that are emblematic of ownership, based on a three-fold argument that draws from critical media studies, internet studies and political theories of the firm. Firstly, users provide surplus value to social media companies that are otherwise unacknowledged. Secondly, social media has a cultural value that users should have a role in preserving. Thirdly, social media companies – like companies in general – are not only economic actors but are also political entities. Scholars who advocate the firm/state analogy, workplace republicanism and neo-abolitionism view the absence of democracy within companies as delegitimizing of their authority and an affront to human dignity.

Building on this analysis, the following section considers what an appropriate vehicle for transferring ownership to users would be. It homes in on the non-charitable perpetual purpose trust and the STAK (from a common law and civil law jurisdiction respectively) due to their inherent flexibility and mission-orientation. This section argues that indirect user ownership via either of these entities is preferable to direct user ownership, given the relative costs of collective decision-making that would be

858 This figure was inspired by a diagram prepared by Riverwest Public House. Riverwest Public House, 'Annual General Meeting: May 31 from 5-8pm' (*Riverwest Public House Cooperative*, 19 April 2015) <<https://bit.ly/3yhbrfF>>. Thank you to Danny Spitzberg for bringing it to my attention.

involved. After outlining what a user trust or user STAK would look like, the penultimate section reflects on how the benefits of stakeholder governance can be maximised. This is done by considering earlier, analogous examples of stakeholder ownership, such as works councils, clients' councils and stakeholder mutuals, and identifying the rights they could hold and decisions they could be involved in. On the basis of these examples, a preliminary good governance checklist is presented which suggests rights the user representatives could enjoy and the decisions they could be involved in. This includes, but extends beyond, the participation rights of shareholders. The checklist also includes an illustrative action point that operationalises the rights of these representatives in addressing a particular decision. Ticking 'yes' or 'no' next to these action points allows the parties involved in setting up the governance of the trust or STAK to identify pain points that need to be considered.

In spite of there being a growing interest in movements such as platform and open cooperativism, exit to community, steward ownership and mutualism, research on transferring ownership of existing social media companies to users remains very limited. Similarly, research on how social media users can contribute to effective stakeholder governance of these companies is non-existent. This chapter works towards addressing this gap, but at the same time reveals the need for several stream of future research. Firstly, there is need to study how personnel employed or representing the company, who may be involved in a hypothetical transfer process (e.g., manager, directors), would perceive the impact of such a transfer on the company's financial performance and competitiveness.<sup>859</sup> Secondly, there is a need to conduct further research on how specific tax benefits may make such share transfers more attractive. As an example, in non-leveraged ESOPs, a company can reduce their taxable income when they make donations to an employee ownership trust. When founders sell 30% or more of their shares to an ESOP, they can reinvest the proceeds in the shares or bonds of qualifying US businesses within a 15-month period. Capital gains tax would only be paid if these qualifying shares or bonds are resold – unless they become part of the founder's estate, when this tax is not levied at all.<sup>860</sup> Future research could focus on the implications of extending similar tax benefits to user trusts.

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859 Lore Wellens and Marc Jegers, 'Beneficiaries' Participation in Nonprofit Organizations: A Theory-Based Approach' (2011) 31 *Public Money & Management* 175, 180.

860 Ohio Employee Ownership Center, 'Selling Your Business to Your Employees: Employee Stock Ownership Plans (ESOP) & Worker-Owned Cooperatives' (Ohio Employee Ownership Center 2010) 5; NCEO, 'A Detailed Overview of Employee Ownership Plan Alternatives' (*National Center for Employee Ownership*, 14 May 2021) <<https://bit.ly/3AkNqBE>>.