Dystopian Trademark Revelations

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Uncovering dystopian technologies is challenging. Non-disclosure agreements, procurement policies, trade secrets, and strategic obfuscation collude to shield the development and deployment of these technologies from public scrutiny until it's too late to combat them with law or policy. But occasionally, exposing dystopian technologies is simple. Corporations choose technology trademarks inspired by dystopian philosophies, novels or real life, all warnings that their aspirations are dystopian as well. That pronouncement is not necessarily trumpeted on Twitter or corporate websites, however. It's revealed in a more surprising place: trademark registrations at the U.S. Patent and Trademark Office (PTO).

In exchange for registrations, the PTO demands disclosure of details about applied-for trademarks. Those include the mark itself as well as information about how the mark will be used, forcing corporations to admit their intent for their technologies. But those details do not always provide the full picture. PTO disclosures can be strategically supplemented with knowledge of the dystopian inspiration for the marks to understand corporations' plans for their products. This Article uses the marks PALANTIR for big data analytics, PANOPTO for classroom recording systems, and MECHANICAL TURK for on-demand work to illustrate the power of coupling trademark registrations with underlying namesakes to understand technologies' dystopian implementations. Dystopian trademarks signal dystopian technologies, and the public is well-positioned to seek them out and develop strategies to combat their entrenchment.

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INTRODUCTION

In 2015, former National Security Agency (NSA) contractor Edward Snowden released a trove of documents about NSA surveillance programs, incidentally revealing that someone at the NSA is a fan of the dystopian series *The Terminator*. The films feature an artificial intelligence (AI) system called Skynet that gains self-awareness and attacks humanity.[2] Off-screen, the NSA developed an AI system that used bulk data to uncover sensitive information—such as pattern-of-life, social network, and travel behavior—about couriers with relationships to suspected terrorists.[3] Such metadata can be used to inform kill lists.[4] Except the program was inaccurate. It misidentified prominent *Al Jazeera* journalist Ahmed Muffaq Zaidan as a member of both al-Qaeda and the Muslim Brotherhood when he belonged to neither.[5] Patrick Ball, then-Director of Research at the Human Rights Data Analysis Group who previously testified before war crimes tribunals, had choice words for the program: he characterized it as both "ridiculously optimistic" and "complete bullshit."[6] The kicker: the NSA called its program SKYNET, signaling its aspiration to create a dystopian AI system that attacks humanity.[7]

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[2] TERMINATOR SALVATION (2009).

[3] Nat'l Sec. Agency, *SKYNET: Courier Detection via Machine Learning*, THE INTERCEPT (May 8, 2015), https://theintercept.com/document/2015/05/08/skynet-courier/; Nat'l Sec. Agency, *SKYNET: Applying Advanced Cloud-Based Behavior Analytics* (May 8, 2015), https://theintercept.com/document/2015/05/08/skynet-applying-advanced-cloud-based-behavior-analytics/; Martin Robbins, *Has a Rampaging AI Algorithm Really Killed Thousands in Pakistan?*, THE GUARDIAN (Feb. 18, 2016), https://www.theguardian.com/science/the-lay-scientist/2016/feb/18/has-a-rampaging-ai-algorithm-really-killed-thousands-in-pakistan. "AI" is something of a misnomer—the system used machine learning algorithms. *Id.*

[4] Lee Ferran, *Ex-NSA Chief: 'We Kill People Based on Metadata,'* ABC NEWS(May 12, 2014), https://abcnews.go.com/blogs/headlines/2014/05/ex-nsa-chief-we-kill-people-based-on-metadata/.

[5] Cora Currier, Glenn Greenwald, and Andrew Fishman, U.*S Government Designated Prominent Al Jazeera Journalist as "Member of Al Qaida,"* THE INTERCEPT (May 8, 2015), https://theintercept.com/2015/05/08/u-s-government-designated-prominent-al-jazeera-journalist-al-qaeda-member-put-watch-list/. Similarly, it may have wrongly classified thousands of Pakistanis as terrorists, which journalists speculated could have resulted in their deaths. Christian Grothoff & J.M. Porup, *The NSA's SKYNET Program May Be Killing Thousands of Innocent People*, ARS TECHNICA (Feb. 16, 2016), https://arstechnica.com/information-technology/2016/02/the-nsas-skynet-program-may-be-killing-thousands-of-innocent-people/. *Cf.* Martin Robbins, *Has a Rampaging AI Algorithm Really Killed Thousands in Pakistan?*, THE GUARDIAN (Feb. 18, 2016), https://www.theguardian.com/science/the-lay-scientist/2016/feb/18/has-a-rampaging-ai-algorithm-really-killed-thousands-in-pakistan (pushing back on assessment that SKYNET metadata was used to develop kill lists). For a discussion of the legal issues raised by the SKYNET program, see Chris Rogers, *How Should International Law Deal With Doubt in the Era of Drones and Big Data?*, JUST SECURITY (Feb. 22, 2016), https://www.justsecurity.org/29436/ihl-deal-doubt-era-drones-big-data/.

[6] *Id.* For a deeper dive into SKYNET, see Maria Crysanthem, *Who's Off Limits? How Inconsistent Interpretation of the Imminence Requirement Under Article 51 of the UN Charter and Ineffective Accountability Protocols Expand Who Can Be Targeted and When Under the United States Targeted Killing Program*, 45 FORDHAM INT'L L.J. 105, 137-139 (2021).

[7] The word "dystopian" was coined by utilitarian philosopher John Stuart Mill, meaning "the bad place." J.S. Mill, *Hansard Commons* 1517 (Mar. 12, 1868) ("It is, perhaps, too complimentary to call them Utopians, they ought rather to be called dys-topians, or caco-topians. What is commonly

But for the Snowden leaks, SKYNET would have remained secret. Today, corporations developing dystopian technologies, such as those used by governments and public institutions, embrace the NSA's longtime obsession with secrecy by stealthily shielding their products from scrutiny. Catherine Crump, Ira Rubinstein, and Vincent Southerland document how limited jurisdictions have adopted procurement or Community Control Over Police (CCOPS) policies that require public disclosure and discussion of corporate surveillance technologies before deployment.[8] In jurisdictions with and without such oversight policies, Hannah Bloch-Webha explains, Freedom of Information Act requests that could provide technological transparency are often stalled or denied.[9] Neither method applies to private technologies, and further transparency efforts can be foiled by strategic non-disclosure agreements between corporate developers and government purchasers, as Elizabeth Joh details.[10] And for technologies targeted to private institutions or individuals, the combination of niche use and relative obscurity are obfuscation enough. But corporations do something revealing that the NSA generally does not: they register the names of their dystopian technologies as trademarks.[11]

The U.S. Patent and Trademark Office grants trademark registrations in exchange for a series of public disclosures about how those marks will be used.[12] Applicants must disclose the mark itself and identify one or more International Classes into which it falls.[13] These classes represent 45 broad categories in which trademarked products may be used, such as for "computer and scientific services" in Class 42.[14] Applicants must complement the class(es) with detailed goods and services descriptions that describe product or service features, effectively

called Utopian is something too good to be practicable; but what they appear to favour is too bad to be practicable.").

[8] Catherine Crump, *Surveillance Policy Making by Procurement*, 90 WASH. L. REV. 1596 (2016); Ira Rubinstein, *Privacy Localism*, 93 WASH. L. REV. 1961 (2018); Vincent Southerland, *The Master's Tools and a Mission: Using Community Control and Oversight Laws to Resist and Abolish Police Surveillance Technologies*, U.C.L.A. L. REV. (forthcoming 2023). This and subsequent transparency citations are discussed in Amanda Levendowski, *Trademarks as Surveillance Transparency*, 36 BERKELEY TECH. L.J. 439 (2021).

[9] Hannah Bloch-Wehba, *Access to Algorithms*, 88 FORDHAM L. REV. 1265, 1296-1303 (2020).

[10] Elizabeth Joh, *The Undue Influence of Surveillance Technology Companies on Policing*, 92 N.Y.U. L. REV. 101 (2017). If those technologies are used in court, Rebeca Wexler and Sonia Katyal caution that corporations can invoke trade secrecy to shield their technologies from disclosure. Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 STAN. L. REV. 1343 (2018); Sonia Katyal, *The Paradox of Source Code Secrecy*, 104 CORNELL L. REV. 1183 (2019).

[11] The NSA does hold at least one registered trademark. It's for stationery and playing cards, among other paper goods. SCRIBE ZONE, Registration No. 3802712 (Mar. 16, 2021).

[12] Amanda Levendowski, *Trademarks as Surveillance Transparency*. As Rebecca Tushnet observed, there is precious little scholarship about the mechanics of trademark registration. Rebecca Tushnet, *Registering Disagreement: Registration in Modern American Trademark Law*, 130 HARV. L. REV. 867, 870-71 (2017).

[13] TMEP § 1401.02(a).

[14] TMEP § 1401.02(a).

establishing the scope of a mark's protection.[15] Classes and descriptions are supplemented with specimens, such as packaging, software interfaces or other displays demonstrating the mark's use in connection with each class identified in the application.[16] And the public has access to all of these disclosures, which are freely searchable and publicly available through the Trademark Electronic Search System (TESS).[17]

As I've discussed previously, the federal trademark register routinely reveals details about harmful technologies, including ones that have been used by law enforcement with minimal public input and oversight.[18] The registration for the STINGRAY mark revealed schematics for Harris Corporation's cell site location information interceptors years before the public was even aware such technology existed.[19] The registration for the VIGILANT SOLUTIONS mark uncovered that Vigilant Solutions, an automated license plate reader company capable of tracking massive amounts of location information, publicly uploaded real geolocation data matched with real license plates for multiple vehicles.[20] And the registration for the PREDPOL mark exposed the predictive policing analytics company's discounted contract for Richmond, California, which had not exactly touted its relationship with PredPol.[21] But unlike these prior examples, not every trademark disclosure paints a full picture of corporations' aspirations for their technologies. Sometimes, trademark disclosures must be supplemented.

When corporations adopt trademarks inspired by dystopian fantasy novels, philosophical puzzles, and real-life practices, it signals that the underlying technologies will be dystopian as well. This Article suggests that interrogating those inspirations, coupled with investigating the federal trademark register, can illuminate how marks are implemented for dystopian technologies.

Perhaps it sounds obvious that marks have meanings connected to their underlying goods and services—Barton Beebe has even suggested that this semiotic relationship explains aspects of trademark law.[22] But strategically using the federal trademark register to uncover that connection is less obvious, perhaps due to its relative obscurity. As the Supreme Court has said, "it is unlikely that more than a

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[15] TMEP § 1402.04. Some filers use model goods and services descriptions from the Acceptable Identification of Goods and Services Manual (ID Manual), but they are free to draft their own unique description if they so choose. *Trademark ID Manual, ID Master List,* U.S. PAT. & TRADEMARK OFF. (2022), https://idm-tmng.uspto.gov/id-master-list-public.html; TMEP § 1402.04.

[16] TMEP § 904.03.

[17] *TESS*, U.S. PAT. & TRADEMARK OFF. (2022), https://tmsearch.uspto.gov/bin/gate.exe?f=login&p_lang=english&p_d=trmk. Technically, applications and registrations are viewable through another acronym service, the Trademark Status and Document Retrieval (TSDR) system integrated with TESS. *Id.* For a detailed description of how to search TESS, see Amanda Levendowski, *Trademarks as Surveillance Transparency*.

[18] Amanda Levendowski, *Trademarks as Surveillance Transparency.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] Barton Beebe, 51 U.C.L.A. L. REV. 621 (2004). Semiotics, as Beebe defines it, is "'a domain of investigation that explores the nature and function of signs as well as the terms and processes underlying signification, expression, representation, and communication.'" *Id.* at 626.

tiny fraction of the public has any idea what federal registration of a trademark means."[23] That fraction of the public should be much, much larger.

The federal trademark register can, and should, be used creatively by the public—journalists, civil liberties organizations, activists, and even average people—to discover the real meaning behind corporations' goods and services. This Article illustrates how in three parts.[24] Part I examines the PALANTIR mark for big data analytics, which draws inspiration from the all-seeing Elvish stone appropriated by evil forces in J.R.R. Tolkien's *The Lord of the Rings* series.[25] Part II explores the PANOPTO mark for classroom recording systems, which draws inspiration from the relentless surveillance pioneered by philosopher Jeremy Bentham. And Part III exposes the AMAZON MECHANICAL TURK mark for outsourced work, which draws inspiration from actual men who hid below mechanized chessboards to trick opponents into believing in a mechanized player.

The dystopian aspirations for these technologies are fully revealed through coupling their trademark disclosures with the inspirations behind the marks. This Article concludes that this approach to investigating dystopian trademarks can not only reveal the harms of dystopian technologies but the means of combatting them as well.

I. INTEGRATING TRADEMARK SEARCHES INTO SOCIAL JUSTICE

II. ILLUMINATING PALANTIR

During the Third Age of Middle Earth, evil got a glimpse of a ragtag fellowship's sensitive personal information on their journey to destroy a coveted all-powerful ring.[26] Two Elvish seeing stones were corrupted by the force of darkness Sauron and his servant, the wizard Saruman.[27] Unknowingly, the hobbit Peregrin "Pippin" Took came across Saruman's stone, held it, and accidentally permitted Sauron to peek at his identity and his location.[28] While the *palantiri* reveal real people and events, they are imperfect. One must "possess great strength of will and of mind" to control its profound powers—failure to do so could result in muddled visions and misguided conclusions.[29] And Sauron himself made just such a mistake by believing Pippin was the one bearing the One Ring he'd long sought.[30]

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[23] Matal v. Tam, 582 U.S. ___ (2017) *citing* Application of National Distillers & Chemical Corp., 49 C. C. P. A. (Pat.) 854, 863, 297 F. 2d 941, 949 (1962) (Rich, J., concurring) ("The purchasing public knows no more about trademark registrations than a man walking down the street in a strange city knows about legal title to the land and buildings he passes.").

[24] Amanda Levendowski, *Trademarks as Surveillance Transparency*.

[25] This Article capitalizes corporate or technological names when they are being used as trademarks.

[26] J.R.R. TOLKIEN, THE FELLOWSHIP OF THE RING (Houghton Mifflin Harcourt 2012).

[27] J.R.R. TOLKIEN, THE TWO TOWERS 219 (New Line Cinema 2002). At least seven *palantiri* were made by the elves of Valinor in the First Age. J.R.R. TOLKIEN, THE SILMARILLION 349-50 (Del Rey 1977).

[28] J.R.R. TOLKIEN, THE TWO TOWERS 219 (New Line Cinema 2002).

[29] J.R.R. TOLKIEN, THE SILMARILLION 302 (Del Rey 1977).

[30] J.R.R. TOLKIEN, THE TWO TOWERS 219 (New Line Cinema 2002). This perception was further obfuscated by Aragorn, son of Arathorn, who uses of the palantir to fool Sauron and draw his gaze away from the unsuspecting hobbit. *Id.* at 221-222.

J.R.R. Tolkien's *The Lord of the Rings* series, which describes the palantir, has captured generations of imaginations.[31] One was that of megabillionare Peter Theil.[32] The series, which he read repeatedly, was his favorite as a teenager.[33] As an adult, Thiel found inspiration in the series for one of his companies' names: Palantir.[34]

In 2007, attorneys for Palantir filed a trademark application for PALANTIR with the U.S. Patent and Trademark Office (USPTO) covering select computer services.[35] But that application, and two subsequent ones, do not fully reveal that Palantir specializes in invasive visualizations that approach the purpose of the palantir: seeing other people's sensitive information and weaponizing it for harm. Part A uses the federal trademark register to uncover how the PALANTIR mark developed at the USPTO through three applications spanning five years, culminating with its self-declaration as a corporation specializing big data analytics. Part B illuminates those descriptions with Tolkien's palantir to reveal that, in practice, Palantir is a mark for invasive visualization services.

A. *Investigated as PALANTIR for Big Data Analytics*

The first PALANTIR application was filed on February 20, 2007.[36] The mark was registered in International Class 42, which covers science and technological services, research, and the design and development of computer

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[31] Mine included.

[32] *Peter Thiel*, FORBES (2022), https://www.forbes.com/profile/peter-thiel/ (identifying real time net worth as $5 billion).

[33] George Packer, *No Death, No Taxes*, THE NEW YORKER (Nov. 20, 2011), https://www.newyorker.com/magazine/2011/11/28/no-death-no-taxes?currentPage=all.

[34] The word takes its name from the Elvish words for "far" and "watch over." J.R.R. TOLKIEN & CHRISTOPHER TOLKIEN, THE LOST ROAD AND OTHER WRITINGS (Ballentine Books 1996). Thiel's *Lord of the Rings*-inspire naming conventions did not end with Palantir. He owns four companies with names inspired by the series: Rivendell, the home of the elves, which invested in Facebook, https://www.sec.gov/Archives/edgar/data/1211060/000120919112042645/xslF345X03/doc4.xml; Lembas, a hunger-satiating elvish bread, which also invested in Facebook, *Id*.; Valar Ventures, the ancient spirits of Middle Earth, which is an investment fund. https://valar.com/. And Mithril Capital Management, the ultrastrong and lightweight dwarvish metal, which is a portfolio of venture capital funds. https://www.mithril.com/.

[35] PALANTIR, Registration No. 77111698 (Feb. 20, 2007).

[36] PALANTIR, Registration No. 77111698 (Feb. 20, 2007). It claims that the wording PALANTIR has no meaning in a foreign language, even though this Essay previously noted its meaning in the Elvish language Quenya—though it's doubtful that is what the Trademark Office had in mind. As an additional note, this Essay cites to marks as they are registered, which may differ from applications.

hardware and software.[37] The single goods and services description for PALANTIR gets more granular—but not by much. The application describes PALANTIR, in part, as a "computer service, namely, acting as an application service provider in the field of knowledge management to host computer application software for the collection, organizing, modifying, book marking [*sic*], transmission, storage and sharing of data and information," further qualifying that the product is for "governmental, business, and other institutional customers and not offered in retail stores."[38] Nothing about that description necessarily signals a dystopian corporation—if anything, it's a bit dull.

But a companion specimen filed on August 6, 2019 reveals more.[39] It appears to be a Q&A page about the operations of one of Palantir's products, Gotham.[40] It explains that Gotham works by "start[ing] with data from multiple sources" and integrating and transforming that data into a "single, coherent dataset."[41] There is one sentence that hints at the vastness of the corporation's ambitions, however. "As data flows into the platform," the specimen explains, "it is enriched and mapped into meaningfully defined objects—people, places, things, and events—and the relationships that connect them."[42] In other words, Palantir provides software that connects virtually everything.

Palantir's second PALANTIR mark, filed for on February 15, 2008, foretells its connection to government surveillance.[43] The application was filed for Class 9, covering a wide range of scientific instruments, including computer software.[44] The goods and services description, in part, identifies "computer software for . . . analysis, viewing, organization . . . and tracking of data and information for use in the financial and intelligence industries."[45] Two of Palantir's specimens were not revealing.[46] But one depicts a computerized version of the cliched corkboard covered in news clippings and Sticky Notes connected by red thread: the specimen featured multiple nodes, apparently labeled, linked together

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[37] *Nice Agreement Current Edition Version*, U.S. PATENT & TRADEMARK OFF. (2022), https://www.uspto.gov/trademarks/trademark-updates-and-announcements/nice-agreement-current-edition-version-general-remarks.

[38] PALANTIR, Registration No. 77111698 (Feb. 20, 2007).

[39] PALANTIR, Registration No. 77111698 (Aug. 6, 2019). The specimen describes this process as creating a "human-centric model." *Id*.

[40] Disclosure of a potential GOTHAM mark could fuel further sleuthing beyond the scope of this Article. Also, Thiel incidentally enjoys products named after icons in the DC and Marvel cinematic universes. *See, e.g.*, GOTHAM, Registration No. 5317300 (Apr. 19, 2013) (Batman's city); VALHALLA, Serial No. 97052777 (Apr. 19, 2013) (Thor's afterlife), and METROPOLIS, Serial No. 97227518 (Jan. 19, 2022) (Superman's city).

[41] *Id*.

[42] *Id*.

[43] PALANTIR, Registration No. 77398599 (Feb. 15, 2008).

[44] TMEP § 1401.02(a).

[45] PALANTIR, Registration No. 77398599 (Mar. 15, 2015).

[46] PALANTIR, Registration No. 77398599 (Mar. 15, 2015) (standard log-in screen); PALANTIR, Registration No. 77398599 (Mar. 4, 2019) (apparent landing page for Gotham software).

with a series of lines.[47] It appears to be the interface of one of Palantir's software programs, one focused on visualizing connections.

Palantir's latest filing is its most detailed to date. Filed on June 3, 2022, the application covers a vast amount of territory in familiar Classes 9 and 42, as well as Class 35 covering advertising and business management.[48] Of the dozens of goods and services descriptions, several stand out.[49] In Class 9, Palantir claims the PALANTIR mark will be used in connection with "data mining," "artificial intelligence, machine learning," "predictive analytics and business intelligence," "visualization . . . and tracking of data and information," "tracking of geospatial, map and location data and information," "software for use in scientific and technological research and development in the field of national security," along with a series of other software products for national security.[50] Class 35 specifies where all this data might be coming from, claiming Palantir's consulting service "concern[] use of data and information by financial institutions, health institutions, non-profit organizations, legal institutions, commercial entities, and government agencies."[51] And Class 42, the lengthiest of any of Palantir's goods and services descriptions, claims select services including "non-downloadable software" for many of the services offered in Class 9, a plethora of products "in the field of national security," and "software as a service (SaaS) featuring . . . interactive visual computing."[52]

Pieced together, Palantir's filings reveal a company that specializes in services and software premised on visualizing massive quantities of data, including for intelligence purposes. Unlikely as it may seem, such a description is not so far afield from Tolkien's palantir under Sauron's control.

B. *Implemented as PALANTIR for Invasive Visualizations*

As Palantir CEO Alex Karp admitted, his corporation "[finds] people in the country who are undocumented."[53] More specifically, Palantir takes people's sensitive information and visualizes it to assist Immigration and Customs Enforcement (ICE) with the surveillance, family separation, incarceration, and

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[47] PALANTIR, Registration No. 77398599 (Feb. 15, 2008). The quality is not great, but one of the visualizations forms a perfect pentagram. *Id*.

[48] PALANTIR, Registration No. 97442809 (Mar. 15, 2015). The company has a fourth PALANTIR filing, but it is duplicative and boring. PALANTIR, Registration No. 3585690 (Mar. 15, 2015) (using same class, description, and select specimens as '99 application).

[49] PALANTIR, Registration No. 97442809 (June 3, 2022).

[50] PALANTIR, Registration No. 97442809 (June 3, 2022).

[51] PALANTIR, Registration No. 97442809 (June 3, 2022).

[52] *Id*.

[53] Will Feuer, *Palantir CEO Alex Karp Defends His Company's Relationship with Government Agencies*, CNBC (Jan. 23, 2020), https://www.cnbc.com/2020/01/23/palantir-ceo-alex-karp-defends-his-companys-work-for-the-government.html. The interview was conducted at Davos. *Id*.

deportation of undocumented immigrants.[54] This decision is not neutral. Bill Ong Hing has characterized U.S. immigration law and policy, including ICE practices, as "dehumaniz[ing], demoniz[ing], and criminaliz[ing]" immigrants of color.[55]

The agency's efforts are powered by massive amounts of data from diffuse sources. Regional and local law enforcement provide addresses and identifying physical descriptions unavailable elsewhere.[56] Thompson Reuters, the parent company of legal research service Westlaw, empowers ICE to access cell phone and utility data, specifically "[f]or people who are not easily traceable via traditional sources."[57] An automated license plate reader (ALPR) surveillance company called Vigilant Solutions lets more than 9,000 ICE officers access to over 5 billion location datapoints.[58] And face surveillance company Clearview AI, enables ICE to search billions of facial photographs for matches.[59] As raw data, these many pieces of information are overwhelming. But as Alvaro Bedoya explained, "[a] panoply of companies collect the data. Palantir connects the dots."[60] Specifically, Palantir "visualize[s]" connections between those dots.[61]

When those connections are visualized, ICE can more efficiently and effectively target undocumented immigrants. In 2016, Palantir enabled ICE to raid homes, batter doors, and deploy flash-bang grenades in the Bronx, during which a

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[54] *The War Against Immigrants: Trump's Tech Tools Powered by Palantir*, MIJENTE (Aug. 2019), https://mijente.net/wp-content/uploads/2019/08/Mijente-The-War-Against-Immigrants_-Trumps-Tech-Tools-Powered-by-Palantir_.pdf.

[55] Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U. SAN FRAN. L. REV. 1 (2009).

[56] George Joseph, *Where ICE Already Has Direct Lines to Law-Enforcement Databases with Immigrant Data*, CODE SWITCH (May 12, 2017), https://www.npr.org/sections/codeswitch/2017/05/12/479070535/where-ice-already-has-direct-lines-to-law-enforcement-databases-with-immigrant-d.

[57] Kyle Keene, *Sole Source Designation—Thompson Reuters CLEAR*, THOMPSON REUTERS (Jan. 17, 2018), https://www.prorfx.com/Storage/110S34471_051/ProRFx/Upload/Attachments/General/Sole%20Source%20Letter%20-Thomas%20Reuters.pdf. In case you thought Lexis was any better, no—its parent company RELX also helps ICE target undocumented immigrants, which can create ethical issues for legal researchers. Sarah Lamdan, *When Westlaw Fuels Ice Surveillance: Ethics in the Era of Big Data Policing*, 102 N.Y.U. REV. L. & SOC. CHANGE (2019).

[58] Vasudha Talla, *Documents Reveal ICE Using Driver Location Data from Local Police for Deportations*, ACLU (Mar. 13, 2019), https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/documents-reveal-ice-using-driver-location-data. Vigilant Solutions uploaded real geolocation data for actual licenses plates as part of its trademark application. Amanda Levendowski, *Trademarks as Surveillance Transparency*.

[59] Kim Lyons, *ICE Just Signed a Contract with Facial Recognition Company Clearview AI*, THE VERGE (Aug. 14, 2020), https://www.theverge.com/2020/8/14/21368930/clearview-ai-ice-contract-privacy-immigration. For a deeper dive into Clearview AI and face surveillance technology, see Amanda Levendowski, *Resisting Face Surveillance with Copyright Law*, 104 N.C. L. REV. 1015 (2022).

[60] Alvaro M. Bedoya, *The Cruel New Era of Data-Driven Deportation*, SLATE (Sept. 22, 2020), https://slate.com/technology/2020/09/palantir-ice-deportation-immigrant-surveillance-big-data.html.

[61] *Failing to Do Right: The Urgent Need for Palantir to Resppect Human Rights*, AMNESTY INT'L (Sept. 2020), https://www.amnestyusa.org/wp-content/uploads/2020/09/Amnest-International-Palantir-Briefing-Report-092520_Final.pdf.

man fell to his death.[62] In 2018, ICE agents armed with Palantir software on their phones raided nearly 100 7-Elevens across the United States.[63] And in 2019, Palantir helped ICE agents arrest 680 people in Mississippi in a single day, including parents on the first day of school—after the biggest raid in American history, children arrived to empty homes.[64] Once arrested, ICE detention conditions can be brutal. Also in 2019, the Department of Homeland Security issued a formal report identifying multiple "immediate risks or egregious violations" of ICE detention standards, including solitary confinement for unproven violations, expired food, nooses in detainees' cells, and denying contact visits in centers that could accommodate in-person visitation.[65] In some cases, detention can be deadly. During the Trump Administration, more than 40 immigrants died in ICE custody.[66] Behind it all, it's Palantir's invasive visualizations that turbocharge ICE surveillance, arrests, and detentions. And often, its use is deployed in secret—law enforcement has fought to shield Palantir records from public disclosure.[67] Drew Millard put it bluntly: "Palantir is fucking terrifying."[68]

Not unlike the data visualized by Palantir, Tolkien's palantir was a technology put to evil purposes.[69] It allowed Sauron to manipulate Denathor, the last King of Gondor, by only selectively revealing information—and poisoning his mind in the process.[70] And as Pippin experienced, the palantir also shared invasive visualizations about its user that could cause harm. So, too, does Palantir. Its invasive visualizations are simultaneously selective. Palantir only visualizes sensitive information that helps ICE track undocumented immigrants while obfuscating data that highlights those people's humanity. In turn, its biased

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[62] Simon Davis-Cohen, *New Documentary Reveals Silicon Valley's Role in Notorious Bronx Gang Raid*, THE APPEAL (May 21, 2020), https://theappeal.org/raided-part-2-documentary-bronx-gang-raid/.

[63] George Joseph, *Data Company Directly Powers Immigration Raids in Workplace*, WNYC (July 16, 2019), https://www.wnyc.org/story/palantir-directly-powers-ice-workplace-raids-emails-show/.

[64] *Breaking: Palantir's Technology Used in Mississippi Raids Where 680 Were Arrested*, MIJENTE (Oct. 4, 2019), https://mijente.net/2019/10/palantirpowersraids/. Two children were alone for 8 days after their parents were both arrested by ICE. Edward Ongweso Jr., *Palantir's CEO Finally Admits to Helping ICE Deport Undocumented Immigrants*, VICE (Jan. 24, 2020), https://www.vice.com/en/article/pkeg99/palantirs-ceo-finally-admits-to-helping-ice-deport-undocumented-immigrants; Marisa Franco, *Palantir Filed to Go Public. The Firm's Unethical Technology Should Horrify Us*, THE GUARDIAN (Sept. 4, 2020), https://www.theguardian.com/commentisfree/2020/sep/04/palantir-ipo-ice-immigration-trump-administration. The previous examples are drawn from Marisa's op-ed.

[65] *Concerns About ICE Detainee Treatment and Care at Four Detention Facilities*, OFF. INSPECTOR GEN. (June 3, 2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf.

[66] Anthony Accurso, *More Than 40 Immigrants Have Died in ICE Custody*, PRISON LEGAL NEWS (Apr. 1, 2021),

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[68] Drew Millard, *Cambridge Analytic is Bad, but Palantir is Fucking Terrifying*, THE OUTLINE (Mar. 30, 2018), https://theoutline.com/post/3978/peter-thiel-knows-you-ran-that-red-light.

[69] Whether such vast amounts of data should be collected and stored to begin with is a problem beyond the scope of this Article, but the short answer is no.

[70] J.R.R. TOLKIEN, THE TWO TOWERS (New Line Cinema 2002).

visualizations harm thousands of real people.[71] Palantir's close association with evil is more than incidental. As Thiel told a friend, "I'd rather be seen as evil than incompetent."[72] By choosing the PALANTIR mark for invasive visualization services, Thiel all but ensures that he will be.

There is a coda to the story of Pippin and the palantir. Aragorn, heir of Isildur, uses the palantir to trick Sauron into believing *he* carried the One Ring, drawing the Sauron's attention away from Pippin and the true ringbearer, hobbit Frodo Baggins, allowing Frodo and Samwise Gamgee to destroy the ring.[73] As much as the PALANTIR mark discloses about the corporation's dystopian technologies, its namesake unintentionally reveals a means of combatting them: fool the surveillance tools, fool the forces using them.

III. IMAGINING PANOPTO

Jeremy Bentham was a philosopher and social reformer who may have taken cues for his most famous innovation from slavery.[74] As Simone Browne details, inspiration for Bentham's famed structure designed to promote the sensation of constant surveillance—the panopticon—borrowed from practices for surveilling enslaved people.[75] While traveling by ship in 1785, Bentham wrote about observing "18 young Negresses (slaves) under the hatches."[76] The following year, Bentham pioneered the all-seeing panopticon.[77] He envisioned a circular

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[71] What is the alternative? As several scholars have suggested, it is abolishing ICE. Allison Crennen-Dunlap, *Abolishing the ICEberg*, 96 DENVER L. REV. 148 (2019); Peter L. Markowitz, *Abolish ICE . . . And Then What?*, YALE L.J. FORUM (2019).

[72] *Peter Thiel, Scourge of Silicon Valley*, THE ECONOMIST (Sept. 25, 2021), https://www.economist.com/business/2021/09/25/peter-thiel-scourge-of-silicon-valley. *Cf.* Stephen Bainbridge, *The Economist's Latest Jab at Peter Thiel Goes Awry in Middle-Earth Lore*, PROFESSOR BAINBRIDGE (Sept. 26, 2021), https://www.professorbainbridge.com/professorbainbridgecom/2021/09/the-economists-latest-jab-at-peter-thiel-goes-awry-in-middle-earth-lore.html (engaging in a deep dive into Middle Earth lore).

[73] J.R.R. TOLKIEN, THE TWO TOWERS 221-22 (New Line Cinema 2002). Frodo would be nothing without Sam. J.R.R. TOLKIEN, THE RETURN OF THE KING (Del Rey/Ballantine 2012), THE RETURN OF THE KING (New Linc Cinema 2003) ("I can't carry it for you, but I can carry you.").

[74] JEREMEY BENTHAM, SELECTED WRITINGS (Stephen G. Engelmann, ed., Yale U. Press 2011); SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 31 (Duke U, Press Books 2015). Prior to his journey, Bentham wrote about the harms of slavery. *Id.*

[75] SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 27 (Duke U, Press Books 2015).

[76] SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 30 (Duke U, Press Books 2015).

[77] JEREMY BENTHANM, THE WORKS OF JEREMEY BENTHAM, vol. 4, 41 (William Tait, ed. 1843). His vision is indebted to his engineer and architect brother, Samuel. SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 33 (Duke U, Press Books 2015).

building interrupted by a central tower that could, at any time, be staffed by a watcher looking across and down at subjects without their knowledge.[78] He sought to "extend to night the security of the day," echoing the sentiment animating racist "lantern laws" that required Black and indigenous people to illuminate their faces when unaccompanied by a white person.[79] Subjects were always watchable, but they could not be certain if the watchtower was staffed. Instead, there was the unavoidable potential of any movement being seen. Bentham imagined that the sensation of complete control could be used for "punishing the incorrigible, guarding the insane, reforming the vicious, confining the suspected, employing the idle, maintaining the helpless, curing the sick, instructing the willing . . . or training the rising race in the path of education."[80] Bentham's dystopian panopticon was put into practice in real prisons in England, France, and elsewhere.[81]

In 2018, attorneys for Panopto filed a trademark application for the PANOPTO mark with the USPTO. The mark is used in connection with classroom recording systems.[82] But Panopto's two registrations do not fully reveal that the company creates learning environments characterized by relentless surveillance. Part A uses the federal trademark registerer to uncover how the PANOPTO mark developed over the corporation's two trademark applications. And Part B combines those descriptions with information about the powers of Jeremey Bentham's panopticon to reveal that Panopto is a mark for relentless surveillance.

A. *Investigated as PANOPTO for Classroom Recording Systems*

The first PANOPTO application was filed on February 12, 2008.[83] The mark was registered in classes 9, 42, and 41, the latter of which covers education, providing training, and entertainment.[84] The goods and services description for Class 9 is straightforward, covering "[d]ownloadable computer software for the capture, recording, and distribution of multimedia content via a computer network to personal computers, PDAs, and phones."[85] Class 41 discusses, in part, "providing computer software training," and Class 42, in part, notes "providing installation of software and technical support services."[86] While the goods and services

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[78] SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 30 (Duke U, Press Books 2015)..

[79] SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 24-25 (Duke U, Press Books 2015).

[80] JEREMY BENTHANM, THE WORKS OF JEREMEY BENTHAM, vol. 4, 40 (William Tait, ed. 1843), https://oll.libertyfund.org/title/bowring-the-works-of-jeremy-bentham-vol-4#lf0872-04_head_010. Fellow philosopher Michel Foucault had lot of thoughts about the panopticon. MICHEL FOUCAULT, DISCIPLINE AND PUNISH 203-250 (Vintage Books 1995); MICHEL FOUCAULT, PSYCHIATRIC POWER 73-107 (Picador 2003).

[81] MICHAEL FOUCAULT, PSYCHIATRIC POWER 73 (Picador 2003).

[82] PANOPTO, Registration No. 5513873 (July 10, 2018).

[83] PANOPTO, Registration No. 5513873 (Feb. 12, 2008).

[8484] It also, less relevantly, covers sporting and cultural activities. *Nice Agreement Current Edition Version*, U.S. PATENT & TRADEMARK OFF. (2022), https://www.uspto.gov/trademarks/trademark-updates-and-announcements/nice-agreement-current-edition-version-general-remarks.

[85] PANOPTO, Registration No. 5513873 (July 10, 2018).

[86] PANOPTO, Registration No. 5513873 (July 10, 2018).

descriptions communicate that the PANOPTO mark will be used for recordings and attendant support services, the descriptions do not specify that the technology will be used in educational settings. That information is also not disclosed by the specimen, which features a series of relatively innocuous interfaces.[87]

Three years later, Panopto secured another version of the PANOPTO mark, this time in Classes 9, 42, and 38, covering telecommunications services.[88] The expanded registration covers more goods and services—more than a dozen descriptions across all three classes.[89] Rather than merely recording, the "computer software and downloadable mobile applications" in Class 9 can be used for "livestreaming and for capturing, uploading, editing, showing, displaying, storing, managing, monitoring, analyzing, and searching" not only of videos but "audiovisual and other media content."[90] This time, however, the registration clarifies that the software and apps will be used "in the fields of education, distance learning, e-learning, interactive remote learning, recorded lectures, [and] collaborative learning."[91] This new information is echoed in Classes 38 and 42, though the former concerns educational use for a constellation of telecommunications services and the later applies to "providing temporary use of non-downloadable computer software" and "[c]loud storage services."[92] Class 42 clarifies that Panopto's provision of software is for "capturing . . . displaying . . . monitoring . . . [and] analyzing . . . of videos, audiovisual and other media content."[93]

These filings paint the picture of PANOPTO as a product that records educational lectures for later monitoring, presumably by faculty and students. PANOPTO may seem afield from the all-seeing panopticon, but it is not. Faculty and students are not necessarily the ones monitoring the PANOPTO recordings—in practice, PANOPTO recordings can always monitor *them*. Faculty and students will never be certain whether they are being monitored or how that monitoring might be weaponized against them. And that constant wariness is at the core of Bentham's panopticon.

B. *Implemented as PANPTO for Relentless Surveillance*

While the panopticon relies on its central tower being hypervisible, Panopto attempts the opposite tact. According to the company's website, "[t]he best kind of education technology is the kind you don't even realize is there. So we've worked

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[87] The lone clue is that the mock folder for the recording is called "Experimental Microbial Genetics," which certainly sounds quite academic. PANOPTO, Registration No. 5513873 (Feb. 12, 2018).

[88] PANOPTO, Registration No. 6447844 (Aug. 10, 2021); *Nice Agreement Current Edition Version*, U.S. PATENT & TRADEMARK OFF. (2022), https://www.uspto.gov/trademarks/trademark-updates-and-announcements/nice-agreement-current-edition-version-general-remarks.

[89] PANOPTO, Registration No. 6447844 (Aug. 10, 2021).

[90] PANOPTO, Registration No. 6447844 (Aug. 10, 2021). It also covers a series of software and mobile applications for teleconferencing and similar support.

[91] PANOPTO, Registration No. 6447844 (Aug. 10, 2021).

[92] PANOPTO, Registration No. 6447844 (Aug. 10, 2021).

[93] PANOPTO, Registration No. 6447844 (Aug. 10, 2021).

with academic technology teams, faculty, and staff to build a lecture capture system that fades into the background."[94] Instead, however, students have become hyperaware of being watched, just as Bentham's panopticon intended.[95]

After recent high-profile incidents featuring leaked class recordings, students know that their every question and comment is captured, displayed, and monitored by Panopto, their professors, and their peers.[96] As Panopto also advertises on its website, "[t]here's nothing you can't show."[97] That includes, for example, recordings capturing racist remarks. In 2021, a Zoom recording of Georgetown Law Professor Sandra Sellers was released, showing her and a colleague after class lamenting that "Blacks" were consistently among their lowest-performing students.[98] The conversation and its aftermath were written about

[94] *Lecture Capture Software*, PANOPTO (2022), https://www.panopto.com/panopto-for-education/lecture-capture/.

[95] Classroom recording can also create legal issues, as well as privacy and security ones. Alexis Anderson, *Classroom Taping Under Legal Scrutiny—A Road Map for a Law School Policy*, 66 J. LEGAL EDU. 372 (2017), https://jle.aals.org/cgi/viewcontent.cgi?article=1486&context=home (detailing legal issues); Shaanan Cohney, Ross Teixeira, Anne Kohlbrenner, Arvind Narayanan, Mihir Kshirsagar, Yan Shvartzshnaider, Madelyn Sanfilippo, *Virtual Classrooms and Real Harms: Remote Learning at U.S. Universities*, USENIX SYMPOSIUM ON USABLE PRIVACY & SEC. (July 16, 2021), https://arxiv.org/pdf/2012.05867.pdf (outlining privacy and security challenges). One legal issue beyond the scope of this Article is that Panopto recordings may raise copyright issues about faculty lectures and materials. In 2021, I supervised Georgetown Intellectual Property and Information Policy student attorneys Harry Levin and Elise Widerlite to draft a series of FAQs about faculty ownership in online course materials. *FAQ: Copyright Ownership & Online Course Materials*, AUTHORS ALLIANCE (June 22, 2021), https://www.authorsalliance.org/2021/06/22/faq-copyright-ownership-online-course-materials/.

[96] Anjali Chakradhar, *Invasive Learning Tech Scans My Retina, Records Voice Prints, And Gobbles Up My Data*, USA TODAY (Mar. 2, 2021), https://www.usatoday.com/story/opinion/voices/2021/03/02/virtual-learning-data-privacy-students-rights-column/6871758002/ ("The popular lecture streaming software Panopto stores minute-by-minute metrics on engagement of individual students.").

[97] *Lecture Capture Software*, PANOPTO (2022), https://www.panopto.com/panopto-for-education/lecture-capture/.

[98] Mark Joseph Stern, *Black Georgetown Law Students Weren't Surprised by a Professor's Racist Remark*, SLATE (Mar. 11, 2021), https://slate.com/news-and-politics/2021/03/georgetown-law-professor-racist-remarks-sandra-sellers-black-students.html. Someone will want me to clarify that Sandra Sellers and her co-teacher David Batson were adjunct faculty, but their status does not change that two colleagues at my institution were caught on video making racist remarks about students. The Batson/Sellers recording was caught on Zoom, not Panopto, but the surveillance issues remain consistent across both platforms. All discussion is based on publicly available information.

multiple times by the *New York Times* and the *Washington Post*.[99] Neither teacher still works at Georgetown Law.[100]

But not all leaked recordings reveal racism.[101] Some will reveal clumsy conversations, sensitive disclosures or embarrassing incidents. Not just by faculty, but by students as well. What if a big city student stereotypes the challenges faced by rural farmers in a property class? Or a student shares their own abortion story while the professor covers *Roe* and *Dobbs* in a conservative state? Or, to lower the stakes, what if an unpopular student lets one rip during a lecture? Without Panopto, those students may be ashamed, shunned or humiliated by their peers, but other students' abilities to spread the word about in-class events are logistically limited. Panopto enables students to share those recordings to amplify students' embarrassment or even endangerment—not just immediately, but indefinitely.[102]

This is not to say that what happens in the classroom must stay in the classroom.[103] Faculty and students can and do discuss incidents like these with other people, but photography is powerful.[104] And unlike dinner conversations, phone

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[99] Michael Levenson, *Georgetown Law Fires Professor for 'Abhorrent' Remarks About Black Students*, N.Y. TIMES (Mar. 11, 2021), https://www.nytimes.com/2021/03/11/us/georgetown-university-sandra-sellers.html%20/; Lauren Lumpkin, *Georgetown Law Professor Terminated After 'Reprehensible' Comments About Black Students*, WASH. POST (Mar. 11, 2021), https://www.washingtonpost.com/local/education/georgetown-law-sandra-sellers-black-students/2021/03/11/c798eae0-827d-11eb-ac37-4383f7709abe_story.html; Lauren Lumpkin, *Second Georgetown Law Professor Leaves in Midst of Investigation Over Conversation About Black Students*, WASH. POST (Mar. 12, 2021), https://www.washingtonpost.com/local/education/georgetown-university-david-batson/2021/03/12/cb5e0568-837a-11eb-9ca6-54e187ee4939_story.html.

[100] One was fired and one resigned. Michael Levenson, *Georgetown Law Fires Professor for 'Abhorrent' Remarks About Black Students*, N.Y. TIMES (Mar. 11, 2021), https://www.nytimes.com/2021/03/11/us/georgetown-university-sandra-sellers.html%20/. Some free speech and academic freedom advocates disagreed with that decision. Robert Shibley, *One Georgetown Law Professor Fired, One Resigns After Conversation About Black Students' Academic Performance Accidentally Recorded*, FIRE (Mar. 18, 2021), https://www.thefire.org/one-georgetown-law-professor-fired-one-resigns-after-conversation-about-black-students-academic-performance-accidentally-recorded/ (Foundation for Individual Rights and Expression Executive Director criticizing Sellers' termination and noting other discussions of Georgetown policies and the faculty handbook); John K. Wilson, *In Defense of Sandra Sellers and David Batson*, ACADEME BLOG (Mar. 15, 2021) (https://academeblog.org/2021/03/15/in-defense-of-sandra-sellers-and-david-batson/) (scholar and author of *The Myth of Political Correctness* critiquing due process regarding Sellers' firing).

[101] Others will. Susan Svrluga, *Students at Georgetown Law call for changes after professor used slur in class*, WASH. POST (Feb. 17, 2022 8:51 PM), https://www.washingtonpost.com/education/2022/02/17/georgetown-law-professor-video-slur/ (leaked Panopto recording revealed professor using an anti-Asian racist slur toward a student).

[102] *Cf.* MEG LETA JONES, CTRL+Z (XX) (discussing the right to be forgotten available in the European Union).

[103] However, articulating a generalizable rule governing the excusable external sharing of Panopto recordings is beyond the scope of this Essay. No doubt a worthy task for moral philosophers. *See generally* MICHAEL SCHUR, HOW TO BE PERFECT (Simon & Schuster 2022).

[104] Taking it up to 11, Susan Sontag declared, "[t]o photograph people is to violate them, by seeing them as they never see themselves, by having knowledge of them that they can never have . . . Just as a camera is a sublimation of the gun, to photograph someone is a subliminal murder—a soft

calls or group chats, videos go viral.[105] That risk poses a problem for students. As Jenny Lee contextualized the issues with Panopto, "schools have long been spaces for free expression, discovery, error-marking, and personal growth, [but] surveillant technologies increasingly chill the risk-taking that is beneficial to a learning environment."[106] The presence of Panopto creates conditions for students to suppress their own speech out of concerns that classroom recordings will be weaponized against them. Those fears are not unfounded, particularly in a polarized political climate. Silence becomes students' singular protection.

Unlike Bentham's panopticon, however, Panopto's classroom recordings can be pedagogically useful, particularly to disabled students.[107] Aside from providing recordings that can be paused or rewatched, Panopto offers a range of accessibility features including screen reader support, keyboard access with shortcut keys, captions, and uses WCAG 2.1, the gold standard for compliance with the Americans with Disabilities Act (ADA).[108] Providing recordings to all students also removes disabled students' need to engage in expensive, exhausting, and even embarrassing accommodation processes around disability disclosure and documentation.[109] During the ongoing COVID-19 pandemic, recordings remain important for students who fall ill. But students' classroom privacy and coursework accessibility should not be positioned as opposing values. The existence of Panopto's relentless surveillance poses a harm to all students. As Ifeoma Ajunwa, Kate Crawford, and Jason Schultz observed, "[w]hen we consider privacy invasions in only in terms of the harms that accompany them, we neglect the fact that diminished privacy . . . represents a harm in and of itself."[110] Educating faculty about the tradeoffs of recordings and letting them choose a suitable option for their

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murder, appropriate to a sad, frightened time." SUSAN SONTAG, ON PHOTOGRAPHY (New Library Press 2001).

[105] By the time Sellers was fired, the video had been viewed more than 750,000 times. https://www.nytimes.com/2021/03/11/us/georgetown-university-sandra-sellers.html%20/.

[106] Jenny Lee, *What Do the Guards Think? Tracing the Discourse of Employee Surveillance in Academic Institutions*, at 26 (May 11, 2020) (thoroughly examining the deployment of Panopto at Georgetown Law), https://repository.library.georgetown.edu/bitstream/handle/10822/1059444/Lee_georgetown_0076M_14690.pdf?sequence=1.

[107] Clifton Kandler & Melanie Thorley, *Panopto: the Potential Benefits for Disabled Students*, 8 COMPASS: J. OF LEARNING & TEACHING 12 (2016) (observing "significant immediate and subsequent students, both disabled and, more widely, non-traditional"). Students who speak English as a second language are also likely to find class recordings valuable.

[108] *Learn About Accessibility Features*, PANOPTO (2022), https://support.panopto.com/s/article/Learn-About-Accessibility-Features. For a deeper dive into WCAG and accessibility, see Blake E. Reid, *Internet Architecture and Disability*, 95 INDIANA L.J. 591 (2019).

[109] *See* Katherine Macfarlane, *Disability Without Documentation*, 90 FORDHAM L. REV. 59 (2021) (describing the burdens that documentation imposes on disabled people seeking accommodations under the ADA); Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Disclosure*, 53 LAW & SOC'Y REV. 4 (2019) (explaining popular perceptions of fraud and fakery associated with disability accommodations that can embarrass students).

[110] Ifeoma Ajunwa, Kate Crawford & Jason Schultz, *Limitless Worker Surveillance*, 105 CAL. L. REV. 735, 776 (2017).

pedagogies, offering live-streaming as an alternative to recording,[111] supplementing with human notetakers,[112] and working with a differently named vendor may mitigate some dangers of always-on classroom recordings.[113]

The PANOPTO mark, coupled with understanding Bentham's panopticon, reveals that something as innocuous as "instructing the willing" with classroom recording software has an insidious side.[114] The technology represents what Woody Hartzog, Evan Selinger, and Johanna Gunawan call "privacy nicks" by normalizing students' surveillance.[115] Students are opted into the system's relentless surveillance with no ability to opt out.[116] Like the prisoners, workers, and even students subject to the panopticon, Panopto numbs students to surveillance by creating a constant sensation of being watched that suppresses their expression. But viewing the PANOPTO mark through the lens of the panopticon provides a clue about how to escape its relentless surveillance. As Anne Bunon-Ernst and Guillame Tusseau suggest in their reflections on Bentham's panopticon, it can always be challenged with resistance.[117]

IV. INTERPRETING MECHANICAL TURK

In 1809, Napoleon Bonaparte lost an unusual chess match.[118] Dressed in a turban and traditionally Turkish clothing, Bonaparte's opponent dared to shake his head when the emperor attempted several illegal moves and eventually swept the

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[111] While this mitigates some risks of recordings, it does not eliminate them.

[112] E.L. Tremblay & Ashwin Ramaswami, *AI Transcription Isn't Working for Students with Disabilities*, GEO. L. & TECH. REV. (Nov. 2022), https://georgetownlawtechreview.org/ai-transcription-isnt-working-for-students-with-disabilities-heres-how-to-fix-it/GLTR-11-2022/.

[113] John Villasenor, *Why I Won't Let My Classes Be Recorded*, THE CHRONICLE OF HIGHER ED. (Jan. 10, 2020), https://www.chronicle.com/article/why-i-wont-let-my-classes-be-recorded/?bc_nonce=0fhsnk1myd7s2amt9gkvh1e&cid=reg_wall_signup. While live streams can still be recorded, it creates more friction than an easily available Panopto recording.

[114] JEREMY BENTHANM, THE WORKS OF JEREMEY BENTHAM, vol. 4, 40 (William Tait, ed. 1843).

[115] Woodrow Hartzog, Evan Selinger & Johanna Gunawan, *Normalizing Surveillance* (work-in-progress) (manuscript on file with author). Growing accustomed to Panopto's relentless surveillance may normalize other types of academic surveillance, such as remote proctoring software, which is biased against low-income students, trans students, disabled students, and students of color. Lindsey Barrett, *Rejecting Test Surveillance in Higher Education*, 1 MICH. ST. L. REV. at 1-2 (forthcoming 2023). It's also uniquely invasive: remote proctors often see where students take their exams, and some can access students' desktops or devices. Sarah Craig, *Welcome to Surveillance University, Where Privacy No Longer Matters*, THE GEORGETOWN VOICE (Feb. 19, 2020), https://georgetownvoice.com/2022/02/19/welcome-to-surveillance-university-where-privacy-no-longer-matters/.

[116] Diane Klein, *And Now, Charybdis: The Risks of Recording (Especially Synchronous) Classes* (Mar. 25, 2020), https://academeblog.org/2020/03/25/and-now-charybdis-the-risks-of-recording-especially-synchronous-classes/.

[117] Anne Brunon-Ernst & Guillame Tusseau, *Epilogue: The Panopticon as Contemporary Icon?*, BEYOND FOUCAULT: NEW PERSPECTIVES ON BENTHAM'S PANOPTICON 192 (Anne Brunon-Ernst, ed., Ashgate 2012); Rose Harris Birtill, *"A Row of Screaming Russian Dolls:" Escaping the Panopticon in David Mitchell's "*number9dream," 44 SUBSTANCE 55, 66 (2015) (offering a gloss on Brunon-Ernst and Tusseau).

[118] Evan Andrews, *How a Phony 18th Century Chess Robot Fooled the World*, HISTORY (Oct. 27, 2016), https://www.history.com/news/how-a-phony-18th-century-chess-robot-fooled-the-world.

pieces from the board.[119] His opponent was skilled, trouncing most challengers, playing against dignitaries throughout Europe and the United States, and positively befuddling challengers and spectators alike.[120] Because this opponent was not a man—it was a machine. Invented by Wolfgang von Kempelen, the so-called Mechanical Turk flummoxed the likes of Catherine the Great, Benjamin Franklin, and even Charles Babbage, who is often attributed with inventing the computer.[121] None could discern how the machine worked.[122] But the real trick was that the Mechanical Turk was not truly a machine. It was secretly fueled by manpower. Hidden inside a cabinet below the chessboard was a real man manipulating chess pieces from within.[123]

In 2012, attorneys for Amazon filed a trademark application for the AMAZON MECHANICAL TURK mark with the USPTO.[124] The mark is used in connection with a website for directing an on-demand workforce.[125] While Amazon's registration hints at its service's dysfunction, it is not obvious that the MECHANICAL TURK mark will be used to erase the tangible presence of human labor and present the false impression that machines do the heavy lifting. Part A uses the federal trademark register to expose how Amazon did tip its hand about aspects of its Mechanical Turk platform. And Part B aligns those disclosures with information about the Mechanical Turk to reveal that MECHANICAL TURK is a mark for invisible labor.

A. *Investigated as MECHANICAL TURK for On-Demand Work*

[119] *Id.*; Krešimir Josić, *No: 2765: The Turk*, U. HOUSTON ENGINES OF OUR INGENUITY (2022), https://www.uh.edu/engines/epi2765.htm (featuring a photograph of the reconstructed Mechanical Turk); Lincoln Michel, *The Grandmaster Hoax*, THE PARIS REVIEW (Mar. 28, 2012), https://www.theparisreview.org/blog/2012/03/28/the-grandmaster-hoax/.

[120] *Id.*

[121] Lincoln Michel, *The Grandmaster Hoax*, THE PARIS REVIEW (Mar. 28, 2012), https://www.theparisreview.org/blog/2012/03/28/the-grandmaster-hoax/. He didn't. While Babbage was an imaginative inventor, it was a woman named Ada Lovelace whose machine-executable algorithm laid the foundations for computer programming. For a deeper dive into Lovelace's contributions, see CLARE L. EVANS, BROAD BAND: THE UNTOLD STORY OF THE WOMEN WHO MADE THE INTERNET (Portfolio 2018); Eugene Eric Kim & Betty Alexandra Toole, *Ada and the First Computer*, 280 SCI. AM. 76 (1999), http://www.cs.virginia.edu/~robins/Ada_and_the_First_Computer.pdf.

[122] Von Kempelen was a royal advisor in Empress Maria Theresa of Austria-Hungary's court. He was decidedly not Turkish, possibly had never met a Turkish person, and still sought to exoticize his machine to appear like an "'oriental sorcerer.'" KATE CRAWFORD, ATLAS OF AI 67 (Yale U. Press. 2021). Yikes.Lincoln Michel, *The Grandmaster Hoax*, THE PARIS REVIEW (Mar. 28, 2012), https://www.theparisreview.org/blog/2012/03/28/the-grandmaster-hoax/. While Edgar Allen Poe did not discern the specific secrets of the Mechanical Turk, he correctly claimed it was a hoax and wrote an entire essay debunking the machine's secrets. Edgar Allen Poe, *Maelzel's Chess Player*, 2 SOUTHER LIT. MESSENGER 318 (1836), https://www.eapoe.org/works/essays/maelzel.htm.

[123] KATE CRAWFORD, ATLAS OF AI 67 (Yale U. Press. 2021).

[124] For the majority of this Essay, I'll simply refer to this mark as MECHANICAL TURK.

[125] AMAZON MECHANICAL TURK, Registration No. 85640270 (June 18, 2013).

Attorneys for Amazon filed the lone AMAZON MECHANICAL TURK application on May 31, 2012.[126] The mark was registered in classes 38, 42, and 45, which covers, in part, social services rendered by others to meet individuals' needs.[127] The goods and services description for Class 38 outlines services that, in part, "provid[e] multiple-user access to computer networks for the electronic transmission of information, documents, visual, audio, and audiovisual works, data, and images."[128] Class 42 gets to the heart of the Mechanical Turk platform, detailing a website "featuring technology that enables users to obtain work instructions and work assignments directed to an on-demand workforce via the Internet and other computer or communications networks."[129] And Class 45 dials back the detail to cover "[s]ocial networking services provided via the Internet or other computer or communications network" and, importantly, "providing user authentication services for e-commerce transactions."[130]

Amazon's specimens give a peek into the Mechanical Turk interfaces and forums. The first specimen depicts the Mechanical Turk interface for the service in full color.[131] Headings describe the requested task, such as categorizing products on Amazon.com, and identify the requester, Amazon Requester Inc.[132] It provides an expiration date for the task, as well as the time allotted to complete it—for the Amazon task, five minutes.[133] It includes the quantity of available tasks, called Human Intelligence Tasks (HITs)—11,193—as well as the reward: $0.06.[134]

Subsequent specimens echo these disclosures. The second specimen similarly captures the Mechanical Turk interface, this time with different tasks and requesters and only in black and white.[135] The final specimen snaps the specifics of the Mechanical Turk platform into sharp relief. "Get started with Amazon Mechanical Turk," says one screenshot, "create tasks" or "make money."[136] For those still curious about its mechanics, another screenshot boasts that Mechanical Turk is "human intelligence through an API. Access a global, on-demand, 24x7 workforce."[137] But the specimen does not only speak in generalities or platitudes. "amazon Mechanical Turk (MTurk) operates a marketplace for work that requires human intelligence . . . While computing technology continues to improve, there are still many things that human beings can do much more effectively than

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[126] AMAZON MECHANICAL TURK, Registration No. 85640270 (May 12, 2012).

[127][127] It also, less relevantly, covers sporting and cultural activities. *Nice Agreement Current Edition Version*, U.S. PATENT & TRADEMARK OFF. (2022), https://www.uspto.gov/trademarks/trademark-updates-and-announcements/nice-agreement-current-edition-version-general-remarks. It also covers legal services and security services for the physical protection of tangible property and individuals, a truly odd combination. *Id.*

[128] AMAZON MECHANICAL TURK, Registration No. 85640270 (June 18, 2013).

[129] AMAZON MECHANICAL TURK, Registration No. 85640270 (June 18, 2013).

[130] AMAZON MECHANICAL TURK, Registration No. 85640270 (June 18, 2013).

[131] AMAZON MECHANICAL TURK, Registration No. 85640270 (May 31, 2012).

[132] AMAZON MECHANICAL TURK, Registration No. 85640270 (May 31, 2012).

[133] AMAZON MECHANICAL TURK, Registration No. 85640270 (May 31, 2012).

[134] AMAZON MECHANICAL TURK, Registration No. 85640270 (May 31, 2012). Additional screenshots included with this specimen feature a Facebook page and Amazon.com login page. *Id.*

[135] AMAZON MECHANICAL TURK, Registration No. 85640270 (Feb. 5, 2013).

[136] AMAZON MECHANICAL TURK, Registration No. 85640270 (Sept. 7, 2018).

[137] *Id.*

computers," the specimen explains.[138] "Traditionally," it continues, "tasks like this have been accomplished by hiring a large temporary workforce (which is time consuming, expensive, and difficult to scale or have gone undone."[139] Not so with Mechanical Turk, which empowers corporations and individuals "to access thousands of high quality, global, on-demand workers—and then programmatically integrate the results of that work directly into their business processes and systems . . . at a lower cost that was previously possible."[140]

B. *Implemented as MECHANICAL TURK for Invisible Labor*

The Mechanical Turk platform erases the humanity of the people who perform labor on it by getting people to perform like machines and hiding their labor. As Kate Crawford framed it, "[o]n Amazon's platform, real workers remain out of sight in service of an illusion that AI systems are autonomous and magically intelligent."[141] To do that, however, Mechanical Turk platform operates "as a sort of open technological hoax."[142] Human labor fuels the platform, but workers and their labor are obfuscated from requesters. The Amazon manager who created Mechanical Turk identified it as "[a] machine/human computing arrangement which advantageously involves humans" in his patent, a description that creates emotional distance between Amazon, requesters, and the platform's "on-demand workforce."[143] Requesters, most often corporations or academics, post tasks to the platform without interacting with the workers who take them on.[144] Within the platform, workers are depersonalized—they are identified as numbers, not names.[145]

The work itself veers into dystopian territory. Tasks can be psychologically brutal, such as viewing photographs of beheadings.[146] Yet workers are paid poorly for their uniquely human abilities. Largely young and college-educated workers

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[138] *Id.*

[139] *Id.*

[140] *Id.*. Additional screenshots included with this specimen feature Mechanical Turk discussion forums, another Facebook page, and another version of HIT requests formatted differently—and more clearly, frankly—than prior depictions. *Id.*

[141] KATE CRAWFORD, ATLAS OF AI 68 (Yale U. Press 2021).

[142] Elizabeth Stephens, *The Mechanical Turk: A Short History of 'Artificial Artificial Intelligence,'* 1 CULTURAL STUDIES 23 (2022).

[143] Hybrid Machine/Human Computing Arrangement, Registration No. 7197459 (Mar. 27, 2007), https://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO1&Sect2=HITOFF&d=PALL&p=1&u=%2Fnetahtml%2FPTO%2Fsrchnum.htm&r=1&f=G&l=50&s1=7,197,459.PN.&OS=PN/7,197,459&RS=PN/7,197,459/; AMAZON MECHANICAL TURK, Registration No. 85640270 (June 18, 2013).

[144] *Research in the Crowdsourcing Age: A Case Study*, PEW RESEARCH CENTER (July 11, 2016), https://www.pewresearch.org/internet/2016/07/11/the-requesters-a-mix-of-academics-and-businesses/.

[145] Oscar Schwartz, *Untold History of AI: How Amazon's Mechanical Turkers Got Squeezed Inside the Machine*, IEEE SPECTRUM (Apr. 22, 2019), https://spectrum.ieee.org/untold-history-of-ai-mechanical-turk-revisited-tktkt.

[146] Andy Newman, *I Found Work on an Amazon Website. I Mad 97 Cents An Hour*, N.Y. TIMES (Nov. 15, 2019), https://www.nytimes.com/interactive/2019/11/15/nyregion/amazon-mechanical-turk.html.

complete monotonous, and occasionally dangerous, tasks for significantly less than minimum wage.[147] In 2017, one study discovered that the average Mechanical Turk worker only earns $2 an hour, and fewer than four percent of workers broke $7.25 an hour.[148] Wages are further depressed by Amazon itself, which takes piece of each transaction, up to 50 percent.[149] Further, not all of workers' time at the computer is compensated. They are not paid for the time they spend identifying tasks, grabbing glasses of water or visiting the bathroom.[150] Sometimes, requesters deny payment entirely.[151] As one worker named Erica explained, "I've felt so ripped off that I've walked away and cried."[152] Requester problems are so common that workers created an entire website—ironically called "Turkopticon"—as a means of swapping stories and sharing warnings.[153] Despite the psychological and financial drawbacks of Mechanical Turk, more than 100,000 people do work for the platform.[154] And more than 800 scholarly papers based on workers' responses have been published.[155]

In an early interview about Mechanical Turk, Amazon founder Jeff Bezos explained that the platform would be fueled by "artificial artificial intelligences" rather than the obfuscated labor of human beings.[156] Specimens for the MECHANICAL TURK mark reveal that the platform briefly embraced Jeff Bezos' dystopian description of its human-driven services by using "artificial artificial intelligence" unironically it as a tagline.[157] Bezos' remarks reveal that both Mechanical Turks operationalize the same illusion: make human labor appear not only mechanical, but invisible.

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[147] *Research in the Crowdsourcing Age: A Case Study*, PEW RESEARCH CENTER (July 11, 2016), https://www.pewresearch.org/internet/2016/07/11/turkers-in-this-canvassing-young-well-educated-and-frequent-users/.

[148] Kotaro Hara, Abi Adams, Kristy Milland, Saiph Savage, Chris Callison-Burch, Jeffrey P. Bigham, *A Data Driven Analysis of Workers' Earnings on Amazon Mechanical Turk*, CHI (2018), https://arxiv.org/ftp/arxiv/papers/1712/1712.05796.pdf. Some workers speculate that Amazon's increased rate fees has further driven down rewards. Alana Semuels, *The Internet is Enabling a New Kind of Poorly Paid Hell*, THE ATLANTIC (Jan. 23, 2018), https://www.theatlantic.com/business/archive/2018/01/amazon-mechanical-turk/551192/.

[149] *Pricing*, AMAZON MECHANICAL TURK (2022), https://www.mturk.com/pricing.

[150] *Id*.

[151] Andy Newman, *I Found Work on an Amazon Website. I Mad 97 Cents An Hour*, N.Y. TIMES (Nov. 15, 2019), https://www.nytimes.com/interactive/2019/11/15/nyregion/amazon-mechanical-turk.html.

[152] Alana Semuels, *The Internet is Enabling a New Kind of Poorly Paid Hell*, THE ATLANTIC (Jan. 23, 2018), https://www.theatlantic.com/business/archive/2018/01/amazon-mechanical-turk/551192/.

[153] *About*, TURKOPTICON (2022), https://turkopticon.net/.

[154] Djellel Difallah, Elana Filtova & Panos Ipeirotis, *Demographics and Dynamics of Mechanical Turk Workers*, ACM WSDM (Feb. 5-9, 2018), https://www.ipeirotis.com/wp-content/uploads/2017/12/wsdmf074-difallahA.pdf.

[155] *Research in the Crowdsourcing Age, A Case Study*, PEW RESEARCH CENTER (July 11, 2016), https://www.pewresearch.org/internet/2016/07/11/research-in-the-crowdsourcing-age-a-case-study/.

[156] Jason Pontin, *Artificial Intelligence, With Help From Humans*, N.Y. TIMES (Mar. 25, 2007), https://www.nytimes.com/2007/03/25/business/yourmoney/25Stream.html.

[157] AMAZON MECHANICAL TURK, Registration No. 85640270 (May 31, 2012).

The original Mechanical Turk is no more. In the mid-1800s, the machine embarked on a final world tour before finding a home in Philadelphia's Chinese Museum.[158] The MECHANICAL TURK mark takes its inspiration from that machine, but its final fate may be more inspiring to those seeking to oppose the normalization of invisible labor. The Mechanical Turk disappeared not because of its hoax-ridden history or racist imagery, but because it was destroyed in a fire.[159]

V. CONCLUSION

Not all dystopian trademarks are for dystopian technologies. Soylent, a buzzy meal replacement beverage, takes its name from the seventies sci-fi flick *Soylent Green*.[160] The eponymous Soylent Green refers to meal replacement wafers are made from people.[161] Real-life Soylent, unsurprisingly, is not.[162] But dystopian trademarks are a signal that journalists, civil liberties organizations, researchers, activists, even everyday people should pay closer attention.

Palantir, Panopto, and Amazon use their technologies to build a more dystopian world—one where people are always tracked, where students are always watched, and where workers are always erased. The clarity of this revelation comes from investigating the federal trademark register and illuminating that information with each marks' dystopian namesake. But trademark goods and services descriptions are carefully drafted, and they do not always provide a complete picture of the underlying technologies. Instead, trademark disclosures can be supplemented with real-world knowledge that puts the marks into context.

This approach provides the public with richer, more realistic goods and services descriptions that proclaim these technologies' true purposes. Examining PALANTIR through Tolkien's palantir reveals that the mark is for invasive visualizations. Evaluating PANOPTO through Bentham's panopticon uncovers that the mark is for relentless surveillance. And exploring MECHANICAL TURK through Von Kempelen's mechanical Turk exposes that the mark is for invisible labor. These revised goods and services descriptions are made possible by thoroughly understanding the dystopian namesakes that inspired these trademarks.

The public can use the federal trademark register to understand dystopian technologies.[163] But the register can, and should, be put to myriad other creative uses—my scholarship provides but two examples.[164] As a powerful public tool, the

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[158] Evan Andrews, *How a Phony 18th Century Chess Robot Fooled the World*, HISTORY (Oct. 27, 2016), https://www.history.com/news/how-a-phony-18th-century-chess-robot-fooled-the-world.

[159] Lincoln Michel, *The Grandmaster Hoax*, THE PARIS REVIEW (Mar. 28, 2012), https://www.theparisreview.org/blog/2012/03/28/the-grandmaster-hoax/.

[160] SOYLENT GREEN (1973).

[161] *Id*.

[162] *Nutritional Facts*, SOYLENT (2022), https://soylent.com/products/soylent-drink-creamy-chocolate.

[163] *See also* Amanda Levendowski, *Trademarks as Surveillance Transparency*.

[164] Amanda Levendowski, *Trademarks as Surveillance Transparency*, 36 BERKELEY TECH. L.J. 439 (2021). Analyzing colonialist and racist trademarks is one example. Starbucks sought to register trademarks for its iconic Sidamo, Harar, and Yigracheffe coffees—except that the company discouraged Ethiopia, the coffees' place of origin, from seeking trademarks for the names. Janet

federal trademark register should be used to promote transparency about marks for invasive, abusive, and provocative goods and services. In this instance, combining trademark disclosures with on-the-ground information reveals deeper details about how those goods and services operate in practice. But this trio of examples also provides an unexpected playbook for combatting dystopian technologies: fool it, resist it, and, if all else fails, destroy it.

Adamy & Roger Throw, *Ethiopia Battles Starbucks Over Rights to Coffee Names*, WALL ST. J. (Mar. 5, 2007), https://www.wsj.com/articles/SB117287359624625257. The corporation successfully filed, though has since abandoned, the SHIRKINA SUN-DRIED SIDAMO mark. SHIRKINA SUN-DRIED SIDAMO, Registration No. 78431410 (June 8, 2005). And Jeep filed for the JEEP CHEROKEE mark in the nineties. JEEP CHEROKEE, Registration No. 74353583 (Jan. 29, 1993). The Cherokee Nation has been vocal opponents of the name in recent years. Anne White, *Chief of Cherokee Nation Says 'It's Time' for Jeep to Stop Using Name*, CAR AND DRIVER (Mar. 4, 2021), https://www.caranddriver.com/news/a35568468/cherokee-nation-jeep-stop-using-name/.