

THE PRIVATE CENSORSHIP OF INTERNET GATEKEEPERS

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I. THE ROLES AND TYPES OF INTERNET GATEKEEPERS

Generally speaking, a gatekeeper is an entity tasked with deciding if a person or thing can pass through a gate controlled by the gatekeeper.¹ Gatekeepers have existed in all historic periods of public communication, and defining their legal status has often caused problems for the law. Generally, newspaper kiosks, postal carriers, or cable and satellite providers are not considered to have a direct impact on the media content they make available to the public.² A postal carrier or cable provider could deprive individual readers or viewers from accessing information by refusing to deliver a paper or fix a network error (thereby also hurting his or her own financial interests), but they are not in a position to decide on the content of newspaper articles or television programs. Such actors had limited potential to interfere with the communication process, even though they were indispensable parts of it; this made them a tempting target for the government seeking to regulate, or at least keep within certain boundaries, the freedom of speech of others by regulating the intermediaries.³

Even though the internet seems to provide direct and unconditional access for persons wishing to exercise their freedom of speech in public, gatekeepers still remain an indispensable part of the communication process. A gatekeeper is defined, as it applies to public communication, as a person or entity who is necessary for publishing the opinion of another person or entity. Examples of gatekeepers include ISPs, blog service providers, social media, search engine providers, entities selling apps, webstores, news portals, news aggregating sites, and the content providers of websites who can decide on the publication of comments to individual posts.⁴ Some gatekeepers may be influential or even instrumental, with a considerable impact on public communication, while others may have more limited powers and may even

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¹ EMILY B. LAIDLAW, *REGULATING SPEECH IN CYBERSPACE* 37 (Cambridge University Press 2015).

² *Id.* at 38.

³ *Id.* at 40.

⁴ *Id.* at 44–45; see generally David Deluliis, *Gatekeeping Theory from Social Fields to Social Networks*, 34 COMM. RES. TRENDS 1, 4–43 (2015).

go unnoticed by the public. It is true of all gatekeepers that they are capable of influencing the public without being government actors, and that they are usually even more effective at influencing it than the government itself.⁵ As private entities, they are not bound by the Constitution to maintain the freedom of speech, so they can establish their own service rules concerning the freedom of speech.⁶

According to the classification model developed by Emily Laidlaw, “internet gatekeepers” form the largest group and they control the flow of information.⁷ Among these entities, the “internet information gatekeepers” form a smaller group, and, through this control, they are capable of affecting individuals’ participation in democratic discourse and public debate.⁸ In this model, a gatekeeper belongs to the latter group if it is capable of facilitating or hindering democratic discourse.⁹ Such activities raise more direct questions regarding the enforcement of freedom of speech, both on the side of the party influenced by the gatekeeper and of the gatekeeper itself.

Laidlaw’s “internet information gatekeepers” can be divided into three groups: (1) “macro-gatekeepers,” which are fundamental parts of using the internet; each and every user needs to use them (e.g., internet service providers and search engine providers); (2) “authority gatekeepers,” which are the operators of websites with considerable traffic; they play a key role in online communication, but they are not indispensable (e.g., mobile internet service providers, social media sites and other popular websites); and (3) “micro-gatekeepers,” which are the minor actors in the flow of information, (e.g., blog service providers, content providers, and moderators of less frequented websites) which are still part of the democratic public sphere due to their contents.¹⁰

In contrast, Natali Helberger and her co-authors apply a different logic and identify two fundamental groups of gatekeepers. Gatekeepers of the first group control access to information directly, while gatekeepers of the second group control access to the important services that are needed to connect the user to various types of content.¹¹ Members of the first group are similar to traditional editors, who decide on the content to be published, while members of the second group become gatekeepers as internet service providers (or

⁵ LAIDLAW, *supra* note 1, at 39.

⁶ *Id.*

⁷ *Id.* at 44.

⁸ *Id.* 44–46.

⁹ *Id.* at 46.

¹⁰ *Id.* at 53–54.

¹¹ Natali Helberger, Katharina Kleinen-von Königslöw & Rob van der Noll, *Regulating the New Information Intermediaries as Gatekeepers of Information Diversity*, 17 INFO 50, 52 (2015).

cable providers in the context of television) due to the structure of the flow of information.¹²

For the purpose of freedom of speech, the most important online gatekeepers may belong to any of these groups, depending on the activity they perform. For example, social media platforms, search engines, and application platforms routinely make “editorial” decisions on making content unavailable, deleting, or removing it (either to comply with a legal obligation, to respect certain sensibilities, to protect their business interests, or to act on their own discretion).¹³ As such decisions have a direct impact on the flow of information, these gatekeepers belong to the first group. When the activities of such gatekeepers are related to sorting content, changing the focus among various pieces of content (that is, the “findability” of such content), or creating a personalized offering for a user, they belong to the second group.¹⁴

Thus—as Uta Kohl notes—the most important theoretical questions pertaining to the gatekeepers of the internet relate to whether they play an active or passive role in the communication process; the nature of their “editorial” activities, and the extent of the similarities between their editorial activities and actual editing.¹⁵ The role of gatekeepers covered in this volume is not passive. They are key actors of the democratic public sphere and are actively involved in the communication process, including making decisions about what their users can access, what they cannot, or what they can access only with substantial difficulty.¹⁶ The European Union (EU) directive—which regulates (in part) the activities of individual gatekeepers—does not require such gatekeepers to acknowledge their own role as editors, but it does allow them to be held liable for infringements in accordance with their relationship with the content.¹⁷ A gatekeeper may not be held liable if it is not actively involved in the public transmission of unlawful content, or if it is not aware of the infringing nature of the content, but it is required to remove such content after becoming aware of the infringement.¹⁸ However, this does not prevent gatekeepers from sorting through the various pieces of content of their own volition and in a manner permitted (not regulated) by

¹² *Id.*

¹³ *See id.* at 54.

¹⁴ *See id.*

¹⁵ Uta Kohl, *Intermediaries within Online Regulation*, in *INFORMATION TECHNOLOGY LAW* 85–87 (Routledge 5th ed. 2016).

¹⁶ *Id.*

¹⁷ Directive 2000/31, of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, arts 12–15.

¹⁸ *Id.*

law.¹⁹ Under the current legal approach, gatekeepers are not considered “media services.” This means that while they do demand protection for the freedom of speech in order to enable their selection activities, they are not bound by the various legal guarantees concerning the right of individuals to access the media.²⁰ Furthermore, they are not subject to obligations that are otherwise applicable to the media as a private institution of constitutional value,²¹ as it is conceptualized in the European legal approach.²²

II. THE “FREEDOM OF SPEECH” OF GATEKEEPERS

Due to the large volumes of data transmitted, gatekeepers use not only human resources but also algorithms to process information.²³ A term borrowed from mathematics, an algorithm is a method, guideline, or set of instructions that consists of a sequence of steps and is suitable for solving a problem.²⁴ In general, computer programs embody algorithms used to instruct a computer how to execute a task.²⁵ In the context of gatekeepers, a decision concerning the flow of information (i.e., the filtering, removal, or higher or lower ranking of content and its presentation to users) is usually “determined” by an algorithm, meaning that the legal status of such decisions, as well as the nature and subject of legal rights and obligations, pose fundamental questions.²⁶ An algorithm is a kind of “editor,” which presents the user with content according to the decisions of its creator and employing data collected about the user during the use of the service or other services (concerning his or her interests and preferences).²⁷ This method is also suitable for manipulating the users *en masse*. For example, in an infamous experiment, groups of Facebook users were exposed to increased

¹⁹ *Id.*

²⁰ See generally ANDRÁS SAJÓ & MONROE PRICE, RIGHTS OF ACCESS TO THE MEDIA (Kluwer Law International, 1995).

²¹ William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, Address at the Dedication of the S.I. Newhouse Center for Law and Justice (Oct. 17, 1979), in 32 RUTGERS L. REV. 173 (1979).

²² See generally COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS, A GENERAL REPORT ON MASS COMMUNICATION: NEWSPAPERS, RADIO, MOTION PICTURES, MAGAZINES, AND BOOKS (University of Chicago Press 1947); WILLIAM E. BERRY ET AL., LAST RIGHTS: REVISITING FOUR THEORIES OF THE PRESS 77–100 (John C. Nerone ed., University of Illinois Press 1995).

²³ See Julian Wallace, *Modeling Contemporary Gatekeeping*, 6 DIGITAL JOURNALISM 274, 277–78 (2018).

²⁴ *See id.*

²⁵ *See id.*

²⁶ FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION 5 (Harvard University Press 2015).

²⁷ See Paul Hilin & Lee Rainie, *Facebook Algorithms and Personal Data*, PEW RES. CTR. (Jan. 16, 2019), <https://www.pewresearch.org/internet/2019/01/16/facebook-algorithms-and-personal-data/> [<https://perma.cc/7GF5-CUHY>].

amounts of positive and negative information—by changing the relevant algorithm—and the emotions of the subjects were thereby influenced in positive and negative directions without the subjects being aware of their participation in the experiment.²⁸

The control exercised by gatekeepers also includes the power to decide who may reach the public, who is banned from the public, who is to follow the rules of the public, and who is to remain silent.²⁹ This makes the legal treatment of algorithms and whether or not their operations are covered by the freedom of speech of utmost importance.³⁰ In previous decades, constitutional protection was granted to actual speech and opinions expressed in public, as well as other forms of expression, the function of which can be considered analogous to “traditional” speech.³¹ For example, video games and search results compiled by search engines are protected by freedom of speech.³²

It is a reasonable question whether or not the “communication” produced with the help of algorithms used by gatekeepers is protected by freedom of speech. If an algorithm conducts editing—meaning it makes decisions concerning the sorting, removing, and ranking of pieces of content—it might be considered “speech.”³³ Such decisions have a fundamental impact on the public appearance of the actual speaker (who is preferred or disfavored by the algorithm), giving the decision of the algorithm a certain communicative content, which is protected under the aegis of freedom of speech.³⁴ Such decisions also convey a material communicative message to other users, which influences the capability of such users to access information. For this reason, such users experience the decision as an “opinion” even more directly.³⁵ On the other hand, it may be argued that a decision made by an algorithm (i.e., a search ranking or the compilation of a news stream) is fully automated and without any actual content. Since an algorithm only sorts through or makes other kinds of decisions concerning the contents of others, it should be considered as an “action” instead of “speech.” Indeed, the

²⁸ Vinu Goel, *Facebook Tinkers with Users' Emotions in News Feed Experiment, Stirring Outcry*, N.Y. TIMES (June 29, 2014), <https://www.nytimes.com/2014/06/30/technology/facebook-tinkers-with-users-emotions-in-news-feed-experiment-stirring-outcry.html> [<https://perma.cc/D5R6-MREH>]. For the company's response, see Adam D. I. Kramer, Jamie E. Guillory & Jeffrey T. Hancock, *Experimental Evidence of Massive-Scale Emotional Contagion through Social Networks*, 111 PNAS 8788 (2014).

²⁹ Andrew Tutt, *The New Speech*, 41 HASTINGS CONST. L.Q. 235, 250 (2014).

³⁰ See *id.* at 253–54.

³¹ *Id.* at 259.

³² *Id.* at 260.

³³ See *id.* at 262–63.

³⁴ *Id.* at 278–79.

³⁵ Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445, 1447 (2013).

algorithms of gatekeepers often operate without any communicative content—think of the operation of the TCP/IP protocol or cache storage, which do not convey any “message” toward users.³⁶

Tim Wu argues that the activities of devices needed to convey speech, but which merely transmit information without making any decision, should not be considered speech.³⁷ A typical embodiment of this proposition in the offline world is a telephone service. On the other hand, cable television services are different, in that cable service providers make decisions on how to present a channel to the audience (“editing”).³⁸ Wu also argues that the activities of an online gatekeeper should be considered “action” instead of “speech” if they are merely functional, in the sense that they are necessary to transmit the speech of others but do not carry any independent meaning themselves. For instance, Wu considers the search rankings of a search engine to be without such meaning.³⁹ The legal approach toward search engines is a complex matter and will be revisited later. Even Wu himself would most likely agree that the activities of Facebook go beyond being merely functional and convey material messages in and of themselves because a personalised news stream is compiled for each user upon login (selecting some of the content available to the user).⁴⁰ It seems inevitable that the activities of an “editing” algorithm will be considered “speech,” as it conveys a material message itself. In addition to the trends in legal development, a reason for this is that such activities are experienced by their recipients as “speech.”⁴¹ However, it seems unlikely that decisions made by algorithms and human beings can be distinguished from each other in a consistent manner.⁴²

If they are not recognized as speech, the most important services of search engines and social media can be regulated without regard for the most fundamental constitutional restrictions. Even if a certain way of presenting content is considered speech, the speech of an algorithm may be regulated in fundamentally different ways in the United States and in Europe.⁴³ Recognition as speech also implies that the algorithms would be expected to respect the limits of freedom of speech, and the providers of services using

³⁶ *Id.* at 1471.

³⁷ See Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1525–33 (2013).

³⁸ See generally *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994); *Turner Broad. Sys., Inc. v. FCC* 520 U.S. 180 (1997).

³⁹ See Wu, *supra* note 37, at 1524–31.

⁴⁰ See *id.* at 1518–24.

⁴¹ Benjamin, *supra* note 35, at 1485.

⁴² *Id.* at 1493.

⁴³ Wu, *supra* note 37, at 1519.

such algorithms would not be exempted from the application of general laws that are not related to the content of speech (e.g., anti-trust or tax laws).

It also seems clear that such “communicating” algorithms do not “make decisions” on their own, and the actual person who created the program is always there in the background making the actual “editorial” decisions, i.e., determining the way the program should operate.⁴⁴ In the end, the “machine does not speak”⁴⁵ and, obviously, it does not therefore become a beneficiary of freedom of speech.

Frank Pasquale dedicated an entire book to the problems posed by algorithms, with a focus on data protection and privacy.⁴⁶ In his presentation of the situation, data collected by algorithms concerning the users are put in a “black box,” the content of which is unknown to the users, as is the extent of the information stored.⁴⁷ Pasquale argues that the algorithms that “decide” issues ranging from lending, employment, investments, and the selection of romantic partners also amplify existing social problems—such as discrimination, racism, and sexism—as they replace human decision-making and operate without any morality or transparency, making it easy for their operators to escape liability.⁴⁸ On the other hand, Anupam Chander argues that these problems are not caused by the online world or the “black box,” as such problems already exist and, therefore, should be handled in the real world; racism is a property of people, not algorithms.⁴⁹ Algorithms can help to solve such problems, if they are calibrated properly, in order to facilitate the combating of such phenomena.⁵⁰ In the near future, the free speech of robots and generally artificial intelligence will raise serious legal concerns. According to Toni Massaro, Helen Norton, and Margot Kaminski, free speech doctrine provides a basis for regulating and protecting the speech of nonhuman speakers.⁵¹

Algorithms can also play a role in the provision of news services—“They can help in compiling personalized collections of news items and supporting the selection of news collection sites, and they may even be capable of

⁴⁴ See Benjamin, *supra* note 35, at 1467.

⁴⁵ *Id.* at 1479.

⁴⁶ See generally PASQUALE, *supra* note 26.

⁴⁷ See *id.*

⁴⁸ See *id.* at 6–14.

⁴⁹ Anupam Chander, *The Racist Algorithm?*, 115 MICH. L. REV. 1023, 1025 (2017) (discussing how the problem is not the algorithm, but the real world in which it operates).

⁵⁰ *Id.*

⁵¹ See Toni M. Massaro & Helen Norton, *Siri-ously? Free Speech Rights and Artificial Intelligence*, 110 NW. U. L. REV. 1169 (2016); Toni M. Massaro, Helen L. Norton & Margot E. Kaminski, *SIRI-OUSLY 2.0: What Artificial Intelligence Reveals about the First Amendment*, 101 MINN. L. REV. 2481 (2017).

generating articles if provided with suitable information.”⁵² Naturally, the editor working behind such an algorithm is responsible for any infringement caused by such articles.⁵³ Sarah Eskens and her co-authors warn that the personalization of news (Cass Sunstein’s “*Daily Me*”) raises several questions that are relevant to media law, at least in Europe.⁵⁴ Such questions are related to issues including the guarantees of open public debate, diversity and pluralism, the elimination of censorship, and the maintenance of social cohesion.⁵⁵ If such a service is not subject to the rules of media regulation (as the news streams of social media sites are not), then it is exempted from the legal obligations that are applicable with regard to the above issues, and this exemption may sooner or later result in the need to change the regulatory provisions.⁵⁶

III. THE PROBLEMS OF THE LEGACY MEDIA ARE PRESENT ON THE INTERNET

A. *Internet Gatekeepers: Media or Tech Companies?*

Large internet gatekeepers consider themselves tech companies.⁵⁷ It is in their best interests to do so, for two reasons. First, the regulations applicable to technology companies are far narrower and less stringent than those applicable to media companies, which are also subject to content regulation, special restrictions on competition, prohibition of concentration, and the obligation to perform public interest tasks.⁵⁸ Second, the moral requirement of social responsibility is far less frequently mentioned concerning the activities of tech companies.⁵⁹ However, the legal classification of a given

⁵² ANDRAS KOLTAY, *NEW MEDIA AND FREEDOM OF EXPRESSION: RETHINKING THE CONSTITUTIONAL FOUNDATIONS OF THE PUBLIC SPHERE* 86 (Hart Publishing 1st ed. 2019).

⁵³ Pieter-Jan Ombelet, Aleksandra Kuczerawy & Peggy Valcke, *Supervising Automated Journalists in the Newsroom: Liability for Algorithmically Produced News Stories* (Revue du Droit des Technologies de l’Information, Working Paper 25/2016, 2016), file:///C:/Users/Seth%20Wiseman/Downloads/SSRN-id2768646.pdf.

⁵⁴ See Sarah Eskens, Natali Helberger & Judith Moeller, *Challenged by News Personalisation: Five Perspectives on the Right to Receive Information*, 9 J. MEDIA L. 259 (2017).

⁵⁵ *Id.*

⁵⁶ KOLTAY, *supra* note 52, at 87.

⁵⁷ Ashley Rodriguez, *Zuckerberg Says Facebook will Never Be a Media Company—Despite Controlling the World’s Media*, QUARTZ (Aug. 31, 2016), <https://qz.com/770743/zuckerberg-says-facebook-will-never-be-a-media-company-despite-controlling-the-worlds-media/> [<https://perma.cc/6RUN-QX76>].

⁵⁸ See VALERIE C. BRANNON, CONG. RES. SERV., R45650, *FREE SPEECH AND THE REGULATION OF SOCIAL MEDIA CONTENT* (2019).

⁵⁹ *Id.*

service does not derive from the self-image of the service provider, but on the nature of its activities.⁶⁰ For this reason, some of the gatekeepers—primarily the social media platforms—are generally considered to be media undertakings.⁶¹

Philip Napoli and Robyn Caplan offer a summary of the questions that arise in this field. The authors argue that—considering their main activities—large online gatekeepers should no longer be considered tech companies.⁶² The identity of these companies is based on the argument that they do not produce any content themselves, but merely facilitate the publication of content created by their users (social media), or provide links to such content upon request by a user (search engines).⁶³ This may be true, but Napoli and Caplan identified a number of features that make the operation of such companies quite similar to the media.⁶⁴ From the perspective of the public sphere, the distribution of content is also of great importance, in addition to that of content creation, and such activities used to form part of the activities of media companies before the emergence of the internet.⁶⁵ These companies employ human workers, either to make certain editorial decisions or to configure the algorithms that make such decisions automatically, and such editorial decision-making is an essential part of their services.⁶⁶ Similarly to “traditional” media, the services of these companies seek to provide the members of their audience (their users) with whatever they want to see, meaning they may not be considered neutral platforms. Last but not least, the main source of income of these companies is advertising—just like the media.⁶⁷ The operators of the most influential online platforms—such as Facebook and Google—are considered media companies by legal scholars, even if not by existing legal doctrine.⁶⁸

⁶⁰ Catherine Heath, *What is a “Tech Company,” Anyway?*, Tech Nation (Nov. 1, 2017), <https://technation.io/news/tech-company-definition/> [<https://perma.cc/ATH8-YLHY>].

⁶¹ Charles Warner, *Fake News: Facebook Is a Technology Company*, FORBES (Nov. 27, 2016, 10:29 PM), <https://www.forbes.com/sites/charleswarner/2016/11/27/fake-news-facebook-is-a-technology-company/#7b65816e1381> [<https://perma.cc/A43W-P6D5>].

⁶² Philip M. Napoli & Robyn Caplan, *Why Media Companies Insist They’re Not Media Companies, Why They’re Wrong, and Why it Matters*, FIRST MONDAY (Apr. 13, 2017) <http://firstmonday.org/ojs/index.php/fm/article/view/7051/6124> [<https://perma.cc/Z5EC-BNZ5>].

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2304 (2014) (discussing how the movement of publishers to social media platforms has caused a shift in free expression).

B. Government Intervention

While this article focuses on the restriction of speech by gatekeepers, it should be noted that the activities of gatekeepers themselves may be restricted by the government, which in turn may have an indirect impact on free speech. In an authoritarian state, this may mean blocking the internet or mobile phone services⁶⁹ or commonly frequented gatekeeper websites,⁷⁰ or it could mean other softer means that are more compatible with the concept of the rule of law, such as holding the gatekeepers liable for infringing content published by others.⁷¹ Even though government regulation or a specific official decision is not directly targeted at the content of speech in such situations, the gatekeepers, by the nature of their activities, are also granted protection by the freedom of speech, meaning that the standards and doctrines relating to the freedom of speech need to be applied to such restrictions.⁷²

C. Private Censorship

The gatekeepers themselves also have various ways of restricting freedom of speech. Such restrictions may be implemented through the configuration of the instructions given to the service (the algorithms employed or the moderators), or ad hoc decisions passed in individual cases concerning specific items of content.⁷³ The service may interfere with the freedom of speech of others to serve its own business or political interests, or it may do so in cooperation with an oppressive regime. It is a rather ironic example of profit maximization, when a tech company that ostensibly stands for the freedom of individuals and businesses in its home country, voluntarily decides to agree to the expectations of a dictatorial regime and implement the censorship required by the regime in its services.⁷⁴

“Private censorship” and gatekeepers are frequently mentioned in the same sentence,⁷⁵ but the definition of “censorship” should be clarified before the ability of such gatekeepers to limit the freedom of speech is accepted as

⁶⁹ *Id.* at 2308–09.

⁷⁰ *Yildirim v. Turkey*, 158 Eur. Ct. H.R. (2012).

⁷¹ E-Commerce Directive, *supra* note 17, arts. 12–14; *Delfi v. Estonia*, App No. 64569/09, Eur. Ct. H.R. (2015).

⁷² KOLTAY, *supra* note 52, at 88.

⁷³ *Id.*

⁷⁴ TIMOTHY GARTON ASH, *FREE SPEECH: TEN PRINCIPLES FOR A CONNECTED WORLD* 362–63 (Yale University Press 2016); Kaveh Waddell, *Why Google Quit China—and Why It's Heading Back*, ATLANTIC (Jan. 19, 2016), <https://www.theatlantic.com/technology/archive/2016/01/why-google-quit-china-and-why-its-heading-back/424482/> [<https://perma.cc/JS8T-C9ND>].

⁷⁵ *See also* Kohl, *supra* note 15.

a proven fact. Traditionally, the concept of censorship was clearly connected to governments and devices that are potentially capable of suppressing freedom of speech.⁷⁶ Censorship is a form of restriction that is applied arbitrarily and without any legal guarantee prior to the publication of a given piece of content, which prevents that content from being presented to the public.⁷⁷ With regard to the modern media, however, the meaning of censorship has expanded considerably since the second half of the twentieth century, and it is used today as a legal term to describe a far wider spectrum of situations. On one hand, censorship is not necessarily limited to government restrictions, as media content may also be restricted in the service of private interests.⁷⁸ On the other hand, censorship is not always the result of external interference; it may also be the result of internal influencing factors, which is known as self-censorship.⁷⁹

Frederick Schauer argues that the meaning of censorship has become vague.⁸⁰ Censorship may originate from the government (Schauer argues that this happens when, for example, criminal proceedings are initiated against an arts centre in Cincinnati for displaying pictures by Robert Mapplethorpe) or from private undertakings (e.g., when General Motors dismisses employees who criticize the reliability of Chevrolet vehicles in public, or when a newspaper editor changes the content of an article written by a subordinate journalist).⁸¹ Furthermore, censorship may be direct (when the government or another actor interferes with the process of publishing an already finished piece of content), or indirect (e.g., when the government arbitrarily deprives an artist of an art grant, thereby preventing the artist from presenting his or her views in public), and may be applied in advance (i.e., effected prior to publication), or *ex post* (i.e., an arbitrary punishment after publication).⁸² The contemporary concept of censorship is so broad that it is hardly usable as a legal category; basically, it refers to an arbitrary act interfering with freedom of speech in a manner that is inconsistent with the principles of free speech.⁸³

In fact, interference by gatekeepers with the communication process—such as when the ranking of an opinion or link is downgraded, a link is deleted from a service, or a comment is moderated during the compilation of

⁷⁶ KOLTAY, *supra* note 52.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ ROBERT C. POST, 'The Ontology of Censorship' in Robert, *Censorship and Silencing: The Practices of Cultural Regulation* 147–68 (Los Angeles, Getty Research Institute for the History of Art and the Humanities 1998).

⁸¹ KOLTAY, *supra* note 52, at 89.

⁸² *Id.*

⁸³ *Id.*

the search results by a search engine or a news feed by a social media platform—does not constitute censorship, even in the broad sense discussed above.⁸⁴ It is much closer to the exercise of rights arising from private ownership and other individual rights, which are permitted in the absence of statutory provisions and may not be considered arbitrary in a legal sense (even if they can be considered arbitrary in another, such as a moral sense).⁸⁵ Nonetheless, regulation may have a role to play with regard to this kind of moral arbitrariness, as gatekeepers are certainly capable of influencing the public—what happens to protesting, tolerance, and civil commitment if speech is monitored, controlled, and suppressed by invisible external powers, even if one cannot cry censorship?⁸⁶

IV. THE PRIVATE CENSORSHIP OF SEARCH ENGINES

A. *On Search Engine Neutrality*

Search engines use algorithms with complex configurations, so the events taking place during the period between a user entering a keyword and a search ranking being compiled by the search engine are hard to detect (indeed, they are impossible to detect for common users).⁸⁷ A result is produced on the basis of a user request, but it is not known how it is created.⁸⁸ This “black box” phenomenon raises various concerns, including issues connected with democratic public life.⁸⁹ First, the criteria taken into account when compiling a search ranking (i.e., the search engine’s “opinion” on the relevance of a website) are not sufficiently clear, so it is difficult to know if a search engine is attempting to manipulate or mislead its users or if it is indeed presenting the results it considers the most relevant.⁹⁰ Second, a search engine relies on a user’s personal data to find the most relevant content for the user, including one’s search history, browsing history, and emails; a practice that might constitute a violation of privacy.⁹¹ Third, customized search results reinforce the “filter bubble” effect⁹² and might work as a “*Daily*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ EVGENY MOROZOV, *THE NET DELUSION: THE DARK SIDE OF INTERNET FREEDOM* 197–203 (PublicAffairs 2011); Tutt, *supra* note 29, at 286.

⁸⁷ KOLTAY, *supra* note 52, at 137.

⁸⁸ *Id.*

⁸⁹ See generally PASQUALE, *supra* note 26.

⁹⁰ Geoffrey A. Manne & Joshua D. Wright, *If Search Neutrality Is the Answer, What's the Question?*, 2012 COLUM. BUS. L. REV. 151, 161 (2012).

⁹¹ Ira S. Rubinstein, *Regulating Privacy by Design*, 26 BERKELEY TECH. L.J. 1409, 1412 (2011).

⁹² See ELI PARISER, *THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU* 66–69 (The

Me.” This “filter bubble effect” means users could be trapped in a circle of content that is identical to or consistent with their own views, thereby weakening social cohesion and limiting the chances of engaging in meaningful public discourse.⁹³ James Grimmelman denies the existence of such effects by relying on the frequently invoked criticism that search engines prefer mainstream, popular, and widely accessed content while marginal, newer, or less commonly accessed pages have a more difficult time when trying to make it to the top of a search ranking. Grimmelman argues that these two criticisms are mutually exclusive and cannot be true at the same time.⁹⁴

Search engine bias is an issue that is often overlooked by the legal literature on search engines. This concern arises from the possibility of manipulating users by suppressing relevant websites, preferring less relevant pages without a valid reason, blurring the line between organic and sponsored search results, etc.⁹⁵ In other words, search engine bias is actually a set of issues pertaining to multiple aspects of the operation of search engines.⁹⁶ Manipulation is in fact a problem, as it could undermine the democratic process by hindering the function of an open and diverse public discourse. A search engine can interfere with the free flow of content or its delivery to the public instead of satisfying the curiosity of users based on their requests, and it can feature only a minor segment of possibly available content in prominent places.⁹⁷ It is common knowledge that users normally pick websites from the top of a search ranking; thus, search engines push forward hits that are popular and relevant to a high number of users.⁹⁸ However, the issue of such practices is more closely related to user awareness and the structural characteristics of search engines than the problem of manipulation.⁹⁹ The activities of search engines may also raise concerns from the standpoints of competition law and fair market practices. Pushing already popular services to the top of search rankings raises barriers to market entry to new actors,¹⁰⁰ and a search ranking may even mislead users by way of manipulation, thereby preventing them from learning about the availability of new service providers

Penguin Press 2011).

⁹³ See CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 2–3 (Princeton University Press 2017).

⁹⁴ James Grimmelman, *Speech Engines*, 98 MINN. L. REV. 868, 908–909 (2014).

⁹⁵ BRACHA & PASQUALE, *supra* note 46, at 1167–70.

⁹⁶ *Id.*

⁹⁷ *Id.* at 1171–73.

⁹⁸ MATTHEW HINDMAN, THE MYTH OF DIGITAL DEMOCRACY 69–70 (Princeton University Press 2009).

⁹⁹ *Id.*

¹⁰⁰ BRACHA & PASQUALE, *supra* note 46, 1174.

or suggesting that a prominently featured hit is more relevant than it actually is.¹⁰¹

However, the manipulation of search rankings by a search engine does not raise any concerns, if it happens at all, when a search ranking is considered merely an opinion, protected by freedom of speech.¹⁰² In *Langdon v. Google, Inc.*,¹⁰³ the plaintiff argued that he was prevented from advertising his service as paid content to users because Google rejected his advertisement, and he claimed that the search engine ranked his website below the placing it should have received. The court believed that obligating the search engine to publish a sponsored link or modify its search results would have constituted “compelled speech” that would have violated the freedom of speech of the search engine.¹⁰⁴ In *Search King, Inc. v. Google Tech, Inc.*,¹⁰⁵ the court similarly established that search rankings constitute “opinions of the significance of particular websites as they correspond to a search query,”¹⁰⁶ and if a search ranking is considered to be an opinion afforded constitutional protection, its content may be restricted by law only under exceptional circumstances.

Here, the question arises again as to whether a search engine exercises its freedom of speech during its activities (i.e., if its activities are covered by the freedom of speech or if its transfer of information to its users is more of a functional nature) and, if so, whether its opinion is limited to its rankings and search results (as a piece of “newly produced” content) or it also includes the content of the listed websites (as mediated content). For the purposes of manipulation, a broader (but not unlimited) range of possible interventions might be permitted where the activity is not protected by free speech doctrines, but the possibilities are more limited (indeed, they are limited to exceptional situations) if constitutional protection is afforded. If a search ranking is considered as an opinion on the websites that are most relevant to the user running the search, then the list is by definition a subjective compilation (the result may not be objective due to the requirement of “relevance,” especially when it is customized to each user) and, in turn, it is afforded a wide range of protection under the freedom of speech.¹⁰⁷

¹⁰¹ *Id.* at 1176–79.

¹⁰² *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629–31 (D. Del. 2007).

¹⁰³ *Id.* at 626–28.

¹⁰⁴ *Id.* at 629–30.

¹⁰⁵ *Search King, Inc. v. Google Tech., Inc.*, No Civ-02-1457-M, 2003 WL 21464568 (W.D. Okla. May 27, 2003).

¹⁰⁶ *Id.* at *11.

¹⁰⁷ *Langdon*, 474 F. Supp. 2d at 631–32.

Similar to the concept of network neutrality, the term “search neutrality” was coined in response to the recognition of this problem.¹⁰⁸ The proponents of requiring search engines to operate in a neutral manner argue that search engines need to afford equal access to all content and they must be prevented from interfering with the free flow of information. In this sense, Frank Pasquale considers search engines to be essential cultural and political facilities that must be regulated.¹⁰⁹ It seems clear that a search engine obligated to operate in a neutral manner would be operating as a mere conduit. However, search engines do not seem capable of remaining neutral to the extent internet service providers can, primarily because the very essence of their activities is the selection and ranking of pieces of content.¹¹⁰ They would not be performing their most important role if they were not selecting, ranking, promoting, and relegating content. Whether or not search engines may provide preferential treatment to certain websites without a valid reason or if they can demote other websites arbitrarily seems to be a different issue.

Grimmelmann breaks down the concept of “search engine neutrality” into its parts and seeks to counter each and every component in turn.¹¹¹ He recognizes that search neutrality originates in the old idea of guaranteeing access to the media by means of the law, and he argues that the requirements pertaining to search engines would serve to protect the interests of users (the audience) and not those of content producers.¹¹² However, one might argue that having access has always served the interests of both those accessing content and the providers of such content, and that such interests are hardly separable. The other observations made by Grimmelmann seem convincing: (1) the activities of a search engine may not be based on “equality” because its purpose is selection; (2) they cannot be expected to work “objectively” because the needs of a user can only be guessed; and (3) “bias” is actually a basic function of a search engine, since it needs to rank websites relative to each other.¹¹³ Grimmelmann believes that not even the pursuit of its own interests, for which Google is frequently reprimanded (by promoting its own

¹⁰⁸ Uta Kohl, *Google: The Rise and Rise of Online Intermediaries in the Governance of the Internet and Beyond (Part 2)*, 21 INT’L J. L. INFO. TECH. 187, 221 (2013).

¹⁰⁹ FRANK PASQUALE, *Dominant Search Engines: An Essential Cultural & Political Facility*, in THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 401, 402 (Berin Szoka & Adam Marcus eds., TechFreedom 2010).

¹¹⁰ See JAMES GRIMMELMANN, *Some Scepticism about Search Neutrality*, in THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 435, 442–58 (Berin Szoka & Adam Marcus eds., TechFreedom 2010).

¹¹¹ *Id.*

¹¹² *Id.* at 441.

¹¹³ *Id.* at 442–47.

services through its search engine and by outperforming the similar services of its competitors), is an anomaly that would require legal action. This is because, on one hand, integration with other services could actually improve the performance of the search engine, and, on the other hand, the other services provided by Google are usually superior to those of its competitors, as a successful market presence does not depend exclusively on search rankings compiled by search engines.¹¹⁴

In a general sense, the requirement of search neutrality does not seem to be suited as the basis of a regulatory framework, even though it effectively points out the issues relating to the possible manipulation of search results.¹¹⁵ In a subsequent paper, even Grimmelmann would be willing to accept taking action against such manipulation. In *Search King*, the court agreed with Google in that search rankings are fundamentally subjective and no evidence should be submitted regarding the veracity or falsehood of their content;¹¹⁶ this notion indicates the application of the editor analogy, pursuant to which a search engine is free to compile its search rankings at its own discretion and without any substantive limitation, thereby also shaping the market position of competing enterprises.

However, any manipulation of a search ranking by a search engine would constitute misleading users according to Grimmelmann's advisor analogy, which considers search engines as actors serving the needs of users. In such a situation, a search ranking is considered an opinion on the relevance of websites to a given user and, as such, is considered subjective by nature. However, the use of manipulation would make the process dishonest and would hence entail regulation.¹¹⁷ A search ranking may be incorrect or defective and, like any other possibly false opinion, it can be countered, challenged or rebutted. However, if a search engine demotes a website in order to put its operator in a less advantageous market position while knowing the website concerned would be more relevant to the user than the other website with a higher ranking, the search ranking would not only be false, but knowingly so. In such a situation, it would not matter whether the knowing falsification was made by way of *ex post* manual intervention or by changing the basic settings of the search algorithms. Grimmelmann suggests that such matters could be brought to court under the tort of deceit.¹¹⁸

The arguments used by proponents of the editor analogy are not limited to the freedom of speech of search engines when taking a stand against

¹¹⁴ *Id.* at 451–53.

¹¹⁵ *Id.*

¹¹⁶ *Supra* note 105, at *3–4.

¹¹⁷ *See* Grimmelmann, *supra* note 94, 912–32.

¹¹⁸ *Id.* at 931–32.

government interference.¹¹⁹ For example, Geoffrey Manne and Joshua Wright argue that search neutrality could not be implemented in practice because the operation of a search engine is too complex for a common user to understand, and it would cause difficulties in the course of exercising user rights, while any government interference would be likely to cause more damage than benefit (for the users, among others).¹²⁰ They therefore conclude that the government must be kept from interfering with the activities of search engines.¹²¹ Eric Goldman argues that the bias of search engines is both inevitable and desirable, and it serves the interests of the users by keeping numerous irrelevant and misleading pieces of information and content from them.¹²² The increasing personalization and customization of online searches also make claims of bias immaterial.¹²³ It should be noted in this context that the realization of Sunstein's "Daily Me" scenario would cause additional harm to search engine services, not to mention various privacy-related issues.¹²⁴ Moreover, increased personalization does not exclude the possibility of manipulation but may even increase the impact of it since the practice of manipulation could also be exercised by search engines in a personalised manner.¹²⁵

B. Manipulation by Search Engines

Internal manipulation refers to intervention by the search engine itself, resulting in a search ranking not being compiled entirely on the basis of relevance as the most important criterion, but with a focus on the interests of the search engine operator, its advertisers, or other actors (e.g., a government).¹²⁶

One of the most common scenarios is when a website is demoted on the search ranking due to the business interests of the search engine.¹²⁷ Google offers a number of online services—such as price comparison service, map, news service, translation, webstore, email, etc.—which compete with other

¹¹⁹ See Manne & Wright, *supra* note 90, at 198–204.

¹²⁰ *Id.* at 165–66.

¹²¹ *Id.* at 198–204.

¹²² Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 8 YALE J. L. & TECH. 188, 189 (2006).

¹²³ See *id.*; see also Eric Goldman, *Revisiting Search Engine Bias*, 38 WM. MITCHELL L. REV. 96, 107 (2011).

¹²⁴ Goldman, *supra* note 122, at 194–96.

¹²⁵ *Id.* at 189–91.

¹²⁶ Jennifer A. Chandler, *A Right to Reach an Audience: An Approach to Intermediary Bias on the Internet*, 35 Hofstra L. Rev. 1095, 1108–10 (2007).

¹²⁷ *Id.* at 1107–10.

services that are also trying to reach the public through Google's search engine, among others.¹²⁸ If the website of such a competitor is demoted on a search ranking, it is technically prevented from reaching a significant segment of potential customers.¹²⁹ This problem has been touched upon by several U.S. court cases.¹³⁰ Search King was also offering search engine services as its flagship services when it introduced a new one that established a connection between advertisers and websites.¹³¹ The new service sought to manipulate Google Search by using a linkfarm.¹³² In response to the manipulation attempt, Google blocked the ranking of Search King in its PageRank algorithm.¹³³ The measure taken by the search engine operator was clearly a punishment for Search King's attempted manipulation.¹³⁴ In *Kinderstart.com LLC v. Google, Inc.*, the plaintiff operated a vertical search service used to find useful or interesting content for children.¹³⁵ Google considered the service to be its competitor and reduced the ranking of the website on its search rankings returned in response to typical and frequent keywords overnight.¹³⁶ As mentioned earlier, the court held that Google exercised its freedom of speech by taking such actions. In the view of the court, Google was expressing its opinion, the falsity or veracity of which could not be verified, even though Google itself insisted earlier that its search rankings were objective.¹³⁷

According to Michael Ballanco, if a search ranking is considered a constitutionally protected opinion, a search engine hiding the services of others or listing its own service in more prominent positions than justified should be deemed to be engaging in commercial speech, and the corresponding principles and doctrines should be applied accordingly.¹³⁸ In other words, he argued that the freedom of speech might be limited if users are misled and a false impression is given by search results. If a website is important and relevant for a user (as Google should have assumed if it acted

¹²⁸ *Id.* at 1108.

¹²⁹ *Id.* at 1106–07.

¹³⁰ See *Search King, Inc. v. Google Tech, Inc.*, No Civ-02-1457-M, 2003 WL 21464568 (W.D. Okla. May 27, 2003).

¹³¹ *Id.* at *3.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Chandler, *supra* note 126, at 11.11.

¹³⁵ *Kinderstart.com, LLC v. Google, Inc.*, No. C 06-2057 JF (RS), 2007 U.S. Dist. LEXIS 22637, at *4 (N.D. Cal. Mar. 16, 2007).

¹³⁶ *Id.* at *8.

¹³⁷ James Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 59 (2007).

¹³⁸ Michael J. Ballanco, Comment, *Searching for the First Amendment*, 24 GEO. MASON U. CIV. RTS. L.J. 89, 103–04 (2013).

in good faith even without manipulating its own service), then demoting that website on a search ranking is in fact a false statement.¹³⁹

Most observers considered Google's practice to be a competition law issue.¹⁴⁰ Even though the U.S. Federal Trade Commission did not find that Google used any restrictive practices,¹⁴¹ some authors still think it possible that the company engages in such practices.¹⁴² In 2017, the European Commission imposed a fine of 2.42 billion euro on Google for violating EU anti-trust rules.¹⁴³ It was established that Google had abused its search engine's dominant market position when it afforded preferential treatment to another Google service (its price comparison service) in an unlawful manner.¹⁴⁴ In July 2018, Google broke the record when it received a 4.34 billion euro fine, this time for imposing anti-competitive restrictions on device manufacturers and mobile network operators in order to safeguard its position in the internet search market.¹⁴⁵ While these cases are yet to be closed with final effect, it seems that competition law, and not the right to freedom of speech, is the means that can be used most effectively against Google in the current regulatory environment.

The websites listed as paid advertisements by a search engine raise different problems. The system associates advertisements with certain keywords and search expressions, and it displays advertised websites to users as top hits (e.g., a user searching for the keyword "refrigerator" might find that the first three or four hits are links to websites that sell refrigerators and are willing to pay to be ranked at the top of search rankings).¹⁴⁶ It seems clear that this is a commercial transaction, and users should be advised accordingly. Otherwise, even if a search ranking is considered an opinion, the requirement of separating its own "edited" content from sponsored content would be violated.¹⁴⁷

¹³⁹ Grimmelmann, *supra* note 137, at 60.

¹⁴⁰ *Id.* at 27.

¹⁴¹ Tansy Woan, Comment, *Searching for an Answer: Can Google Legally Manipulate Search Engine Results?*, 16 U. PA. J. BUS. L. 294, 295 (2013).

¹⁴² Joshua G. Hazan, Note, *Stop Being Evil: A Proposal for Unbiased Google Search*, 111 MICH. L. REV. 789, 791 (2013).

¹⁴³ *Id.* at 797.

¹⁴⁴ Press Release, European Comm'n, Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service (June 27, 2017), http://europa.eu/rapid/press-release_IP-17-1784_en.htm [<https://perma.cc/3PZD-PZ8W>].

¹⁴⁵ Press Release, European Comm'n, Antitrust: Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine (July 18, 2018), http://europa.eu/rapid/press-release_IP-18-4581_en.htm [<https://perma.cc/XQ3U-GHYC>].

¹⁴⁶ See the information on Google's advertising policies here: ads.google.com/google/ads.

¹⁴⁷ See Chandler, *supra* note 126, at 1113–15.

An indirect way of manipulating search results could be if Google prevented certain services from purchasing sponsored advertisements. For example, an anti-abortion organization sought to advertise its website through Google AdWords by associating it with the keyword “abortion clinic.”¹⁴⁸ The website featured a list of institutions that do not accept abortion and offer alternative solutions.¹⁴⁹ However, actual abortion clinics complained that the advertisements were misleading to users.¹⁵⁰ Google responded to the complaint, removed the advertisements concerned, and, by doing so, indirectly took a stand on an important public matter.¹⁵¹ The removal was intended to take action against a misleading advertisement, but considering the sensitive nature of the matter, it is difficult to see how a neutral search engine can prevent individuals from exercising their right to free speech in such a manner.¹⁵² Other similar and even more clear-cut cases are discussed frequently in legal literature. For example, political content may not be listed as an advertisement (e.g., Google invoked the sensitivity of the subject matter concerning a book on Guantanamo and Abu Ghraib prisons).¹⁵³ Also, Google’s AdSense—an online advertisement delivery system that connects websites to advertisers—has no problem with blocking persons promoting lewd or obscene content.¹⁵⁴

In addition to economic considerations, Google also seems to pick its clients on the basis of their political opinions.¹⁵⁵ In *Langdon v. Google, Inc.*,¹⁵⁶ the plaintiff operated websites covering the corruption of government politicians in North Carolina and Attorney General Roy Cooper, as well as violations committed by the government of the People’s Republic of China.¹⁵⁷ The latter created a particularly thorny problem for Google, as the company harbored grand plans to enter the Chinese market at the time.¹⁵⁸ Google refused to run the advertisements for the websites and, similar to the outcome of *Search King*, the court ruled that doing so is a way of exercising the company’s freedom of speech, emphasizing that any decision to the

¹⁴⁸ *Id.* at 1112.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Rolfe Winkler, *Google Removes Anti-Abortion Ads Deemed Deceptive*, WALL STREET J. (April 29, 2014, 3:34 PM), <http://blogs.wsj.com/digits/2014/04/29/google-removes-anti-abortion-ads-deemed-deceptive/> [<https://perma.cc/QBZ7-4SHP>].

¹⁵³ Dawn C. Nunziato, *The Death of Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1124 (2005).

¹⁵⁴ Tutt, *supra* note 29, at 275.

¹⁵⁵ *Id.* at 294.

¹⁵⁶ *Langdon v. Google, Inc.*, 474 F. Supp 2d 622 (D. Del. 2007).

¹⁵⁷ *Id.* at 626.

¹⁵⁸ *Id.* at 627.

contrary (i.e., imposing an obligation to publish the advertisements) would constitute compelled speech and would be acceptable only under rather special circumstances.¹⁵⁹ Just like the media, search engines are also free to refuse the publication of third-party content and advertisements.¹⁶⁰

The relationship between Google and China is illuminating for another reason. While Google was present in the Chinese market, it exercised self-censorship of the results of its search engine at the request of the Chinese government.¹⁶¹ While the Western versions of its services also includes preliminary filtering (e.g., for pornographic, violent, or hateful content), the filtering is consistent with reasonable self-regulation exercised in the protection of users. Even though the filtering goes beyond the limitations required under the doctrine of freedom of speech (meaning that even pieces of lawful content might remain unlisted), it does not raise any considerable constitutional concerns in and of itself. However, the limitation of political opinions and the dissemination of information required for the discussion of public affairs is an entirely different story. A visual example mentioned by Grimmelmann is that U.S. users searching for the keyword “Tiananmen Square” are shown by Google’s image search engine the tragic and moving images of the demonstrations in 1989, while the Chinese version of the service returns only idealistic pictures of the square, probably intended for tourists, without any tanks and bodies.¹⁶² It should be mentioned to Google’s credit that the company eventually left the Chinese market due to the high number of data requests submitted by the Chinese government regarding the country’s citizens,¹⁶³ but the plain fact that it was willing to engage in political censorship in the hopes of profit reveals a frightening picture of the power and considerable influence of the company over the public.¹⁶⁴

The case of a search engine owned and developed by the Chinese government may also find its way to a high U.S. court. In *Zhang v. Baidu.com Inc.*,¹⁶⁵ a New York-based civil group brought action against the operator of Baidu—a Chinese search engine—for not listing content posted online by the group that criticized the Chinese government.¹⁶⁶ The plaintiff argued that this action of the defendant constituted various violations, including conspiracy

¹⁵⁹ *Id.* at 630–31.

¹⁶⁰ *Id.* at 632.

¹⁶¹ *Id.* at 627.

¹⁶² James Grimmelmann, *The Google Dilemma*, 53 N.Y. L. SCH. L. REV. 939, 947–50 (2009).

¹⁶³ *Google and China*, N. Y. TIMES (Mar. 23, 2010), <https://www.nytimes.com/2010/03/24/opinion/24wed2.html> [<https://perma.cc/VF2X-CJVR>].

¹⁶⁴ *Id.*

¹⁶⁵ *Zhang v. Baidu.com, Inc.*, 932 F. Supp. 2d 561 (S.D.N.Y. 2013).

¹⁶⁶ *Id.* at 563.

to violate their civil rights,¹⁶⁷ and violation of their civil rights on the basis of race.¹⁶⁸ Again, the court ruled in favor of the search engine operator and established that the selection of pieces of content constitutes an editorial judgement on the part of the operator, making up part of the operator's freedom of speech, and, as such, is protected by the First Amendment.¹⁶⁹ While the decision is consistent with other U.S. courts' jurisprudence on similar matters, it still seems troublesome that government censorship is not fought, but protected with great force by the legal doctrine of free speech.

V. THE PRIVATE CENSORSHIP OF SOCIAL MEDIA PLATFORMS

A. Introduction

Social media platforms have become the primary arena of online public life. Despite their wide spread use, there is no generally accepted definition for such platforms. For the purposes of this article, social media platforms also include video sharing portals—where users can upload publicly available content—as well as platforms where user-generated content (including videos, texts, images, links, etc.) is made available to, and then shared by, an audience selected by the user.

This section presents situations where platforms proceed on their own initiative and decide on the status of user-generated content. Jack Balkin calls this phenomenon private governance,¹⁷⁰ others prefer to use the less euphemistic term private censorship.¹⁷¹ Alternatively, “private regulation” also seems to capture the essence of the matter, whereby a platform provider influences the publication or further accessibility of content published by users to an extent and in a manner permitted by law by exercising its ownership rights over the platform and other rights stipulated in its contract with the users.¹⁷²

As Balkin warned, it seems unreasonable to attempt to discuss compliance with government regulations, regardless of private regulation, considering government regulation incentivizes platform providers to introduce private regulations since the providers have an interest in avoiding

¹⁶⁷ See 42 U.S.C. § 1985 (2006).

¹⁶⁸ See 42 U.S.C. § 1981 (1991).

¹⁶⁹ Zhang, 932 F. Supp. 2d at 568.

¹⁷⁰ Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149, 1153 (2018).

¹⁷¹ Marjorie Heins, *The Brave New World of Social Media Censorship*, 127 HARV. L. REV. F. 325, 325 (2014).

¹⁷² Giovanni De Gregorio, *From Constitutional Freedoms to the Power of the Platforms: Protecting Fundamental Rights Online in the Algorithmic Society*, 11 EUROPEAN J. OF LEGAL STUDIES, 65 (2019).

any troublesome interference by the government.¹⁷³ Such government “incentives” for platforms to self-regulate might also include the use of indirect pressure.¹⁷⁴ The significance of such incentivization should not be ignored, considering that much more speech and opinions are expressed on social media than in traditional media today, and (even though they are not public forums in the sense of property law or applicable legal doctrines) these are public forums in the sense that people use them to talk about public affairs and participate in democratic public life.¹⁷⁵

Platform providers also have other motives for adopting private regulations. An obvious motive for doing so is to protect their business interests. Platform providers have an interest in making sure their users feel safe while using their platform and are not confronted with insulting, upsetting or disturbing content.¹⁷⁶ The moderation and removal of such content is not done in line with the limitations of free speech, meaning that a piece of content may be removed using this logic even if it would otherwise be permitted by law, while a piece of content may remain available even if it violates the limitations of free speech.¹⁷⁷ The typically American-owned and established platforms are in a strange and somewhat ambivalent situation: on one hand, their activities are protected by the First Amendment and the Communications Decency Act, and their developers and employees represent a culture of American-style free speech, but, on the other hand, the private regulation they apply provides far less protection for public speech than the U.S. legal system.¹⁷⁸

From a European perspective, this confusing situation occasionally leads to bizarre consequences. For instance, denial of the Holocaust is prohibited by law in most of Europe, while it is afforded protection under the First Amendment in the U.S.¹⁷⁹ In the name of protecting free speech, Mark Zuckerberg does not wish to ban such utterances on Facebook,¹⁸⁰ but Facebook was informed by the German federal government that it is required by law to do so.¹⁸¹ In a sense, Facebook has no choice but to observe the

¹⁷³ Balkin, *supra* note 170, at 1181, 1195.

¹⁷⁴ *Id.* at 1190.

¹⁷⁵ *Id.* at 1194.

¹⁷⁶ *Id.* at 1195.

¹⁷⁷ *Id.* at 1159.

¹⁷⁸ *Id.* at 1195; Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1625 (2018).

¹⁷⁹ Klonick, *supra* note 178, at 1651.

¹⁸⁰ *Zuckerberg in Holocaust Denial Row*, BBC (19 July 19, 2018), <https://www.bbc.com/news/technology-44883743> [<https://perma.cc/6CMZ-BR44>].

¹⁸¹ Janosch Delcker, *Germany to Zuckerberg: There Won't Be Holocaust Denial on German Facebook*, POLITICO (July 19, 2018, 4:54 PM), <https://www.politico.eu/article/germany-to-zuckerberg->

provisions of German (and, in general, European) law, as failure to do so might make it liable as a hosting service provider, and additional sanctions could also be applied pursuant to the national law of EU Member States (e.g., the owner of a platform might be held liable under criminal regulations, and a legal entity operating a platform could be held liable under certain special rules pertaining to such platforms' operations).¹⁸² Moreover, Facebook also tends to remove pieces of content that are clearly protected by freedom of speech in Europe, in an attempt to provide a "safe space" for its users.¹⁸³

A major problem with private regulation is that it may be both stricter and more lenient than government regulation and, as a result, the regulation of content is unpredictable. Another significant concern is that there is no adequate decision-making procedure in place regarding the removal of pieces of content, meaning that the constitutional safeguards commonly available in legal proceedings (e.g., notification of users concerned, possibility of appeal, public proceedings, the identification of the decision-maker, making decisions in writing so that they might be read, etc.) are absent.¹⁸⁴ The absence of an appropriate procedure—known as due process in U.S. constitutional law¹⁸⁵ and as the right to a fair trial in Europe¹⁸⁶—greatly contributes to the lack of transparency regarding decisions made on the basis of private regulation and does nothing to clarify existing uncertainties concerning the rules applied in such important forums of public life.

The removal of undesirable content is not the only means of implementing private regulation. A far more powerful means is the editing and sorting of content presented to individual users, as well as the promotion and suppression of certain pieces of content, the impact of which is not limited to individual pieces of content but to the entire flow of content on the platform.¹⁸⁷ This measure enables a platform to increase the popularity and

there-wont-be-holocaust-denial-on-german-facebook/ [https://perma.cc/HW2P-8V58].

¹⁸² E-Commerce Directive, *supra* note 17, art 1.

¹⁸³ See, e.g., Cecilia Rodriguez, *Facebook Finally Lands in French Court for Deleting Nude Courbet Painting*, FORBES (Feb. 5 2018, 2:43 PM), <https://www.forbes.com/consent/?toURL=https://www.forbes.com/sites/ceciliarodriguez/2018/02/05/facebook-finally-lands-in-french-court-for-deleting-nude-courbet-painting/> [https://perma.cc/AFT7-4HCS]; Sam Levin, Julia Carrie Wong & Luke Harding, *Facebook Backs Down from "Napalm Girl" Censorship and Reinstates Photo*, GUARDIAN (Sept. 9, 2016, 1:44 PM), <https://www.theguardian.com/technology/2016/sep/09/facebook-reinstates-napalm-girl-photo> [https://perma.cc/W6DB-EXLB].

¹⁸⁴ See Adam Satariano, *Facebook Can Be Forced to Delete Content Worldwide, E.U.'s Top Court Rules*, N.Y. TIMES (Oct. 3, 2019), <https://www.nytimes.com/2019/10/03/technology/facebook-europe.html> [https://perma.cc/422R-LGMJ].

¹⁸⁵ Balkin, *supra* note 170, at 1196–97.

¹⁸⁶ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, art 6.

¹⁸⁷ Josh Constine, *How Facebook News Feed Works*, TECHCRUNCH (September 6, 2016, 3:07 PM),

impact of highly visible content, while marginalizing and limiting the impact of other content. All of this is done in the spirit of providing personalized services and serving individual user needs (as guessed by the platform), relying on information collected about each and every user, their previous online presence, and their platform-generated profile.¹⁸⁸ Thus, each user unknowingly and, indeed, without explicit consent, influences the content of the service he or she receives, while the platform actively exerts an influence over the user's intentions and is capable of influencing the user.¹⁸⁹ The resulting consequences have an impact on the decisions users make as consumers, and also on the discussion of public affairs, access to information, and the diversity of opinion—in other words, the quality of the democratic public sphere.¹⁹⁰

B. The Legal Basis of Private Censorship: Contract Terms

The enforcement of freedom of speech on a social media platform is much more dependent on the rules applied and implemented by each platform than on the government (legal) regulations relating to freedom of speech as a fundamental right.¹⁹¹ The standards, policies, and service terms and conditions applied by social media platforms result in decisions made in bulk, and they cannot be matched by any lengthy legal procedure that might be launched in individual cases. As Marvin Ammori has noted, the legal counsels of platform providers have an enormous and, indeed, global impact on the freedom of speech.¹⁹²

As mentioned in Part 5(A), implementing such private regulations (focusing primarily on protecting the business interests of the service provider concerned) is not the same as extending the scope of the First Amendment to the entire globe, even though aspects and elements of the U.S. approach to free speech might be reflected by these in-house rules. These regulations—in line with the global presence of social media platforms—also

<https://techcrunch.com/2016/09/06/ultimate-guide-to-the-news-feed/> [<https://perma.cc/S7J5-5DCZ>].

¹⁸⁸ Greg Swan, *How the Facebook Algorithm Works + 5 Best Practices*, TINUITI (Apr. 29, 2020), <https://tinuiti.com/blog/paid-social/facebook-algorithm/> [<https://perma.cc/2D9N-X6KJ>].

¹⁸⁹ Evan Selinger & Woodrow Hartzog, *Facebook's Emotional Contagion Study and the Ethical Problem of Co-Opted Identity in Mediated Environments Where Users Lack Control*, 12 RES. ETHICS 35, 36 (2016).

¹⁹⁰ Timothy Summers, *Facebook is Killing Democracy with Its Personality Profiling Data*, CONVERSATION (Mar. 21, 2018, 6:42 AM), <https://theconversation.com/facebook-is-killing-democracy-with-its-personality-profiling-data-93611summers> [<https://perma.cc/4EG9-K7WY>].

¹⁹¹ Frank Pasquale, *Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power*, 17 THEORETICAL INQUIRIES L. 487, 490 (2016).

¹⁹² Marvin Ammori, *The "New" New York Times: Free Speech Lawyering in the Age of Google and Twitter*, 127 HARV. L. REV. 2259, 2263 (2014).

reflect and may even exceed the free speech-related policies and objectives of other jurisdictions.¹⁹³ The platforms may also seek to promote and achieve social goals in addition to their own business objectives.¹⁹⁴ Zuckerberg outlined Facebook's "social mission" in this spirit, explaining that Facebook seeks to reorganize the world's "information infrastructure" by creating a network, the rules of which are determined in a bottom-up process (i.e., from user-level), as opposed to the government imposed top-down legislation.¹⁹⁵ This goal seems surprising to say the least, considering that the rules enforced on the platform are introduced by Facebook (and, in a top-down manner, imposed on the users, similar to an actual government), and it compiles the news feed of its users, even if that process can be influenced by the users. However, the possibility of such influence does not change the fact that Facebook is capable of censoring content (a censorship which, as it originates from the platform's ownership, is certainly not comparable to government censorship) and it does indeed choose to exercise this right.¹⁹⁶

In addition to the ownership of a platform, a contract by and between the platform and each user serves as the legal basis for the platform's capacity to interfere with the freedom of speech of its users.¹⁹⁷ The provisions of that contract are determined solely by the platform. Users are not in a position to request the amendment of the contract, while it may be amended by the platform unilaterally at any time.¹⁹⁸ It is also important that the same contract is concluded with each and every user. Even though the contract, and the interference permitted by it, affects the exercise of a constitutional right and countless debates, conversations, and exchanges of information on public affairs are taking place on the platform at any given time, no interference by the platform can be considered as state action, and the platform itself is not considered a public forum.¹⁹⁹ An action taken by a platform—even if it limits the opinions of its users—cannot be attributed to the government, meaning it is not subject to any constitutional safeguard relating to the freedom of speech.²⁰⁰

¹⁹³ *Id.*

¹⁹⁴ Sharon Gaudin, *Facebook's Latest Goal is to Connect (and Save) the World*, COMPUTERWORLD (Feb. 17, 2017, 9:30 PM), <https://www.computerworld.com/article/3171374/facebooks-latest-goal-is-to-connect-and-save-the-world.html> [<https://perma.cc/6QQC-QBWM>].

¹⁹⁵ Anupam Chander, *Facebookistan*, 90 N.C. L. REV. 1807, 1814 (2012).

¹⁹⁶ *Id.* at 1816.

¹⁹⁷ Jacquelyn E. Fradette, Note, *Online Terms of Service: A Shield for First Amendment Scrutiny of Government Action*, 89 NOTRE DAME L. REV. 947, 948 (2013).

¹⁹⁸ *See id.* at 961.

¹⁹⁹ *Id.* at 957.

²⁰⁰ *See id.* at 953–57.

In practical terms, the solution to any conflict or dispute that may arise between a platform provider and a user concerning free speech is to be found among the rules of contract law and not the various principles of constitutional law.²⁰¹ When a user decides to subscribe to a platform, and accepts the terms and conditions of that platform by a simple click of a mouse, he or she becomes subject to “private regulation,” including all content-related provisions, and the safeguards of free speech are no longer applicable concerning the user’s relationship with the platform.²⁰² It should not come as a surprise that the contracts used by all major platforms are carefully considered and precisely drafted documents (or, conversely, that they use vague language for the very reason of extending the discretionary powers of the platform). A comparative analysis prepared by Michael Rustad and Thomas Koenig provide a detailed overview of such contract terms and conditions.²⁰³ Their investigations point out numerous concerns pertaining to consumer protection, including the difficulty of reading the provisions, the arbitration clauses used in such contracts—which make it difficult for users to file a lawsuit—and the vague meaning of various provisions.²⁰⁴

Section 3.2 of Facebook’s Terms of Service requires compliance with the Community Standards of the service, making those standards part of the contract itself.²⁰⁵ The content-related provisions of the regulation are covered in the following Part 5(C) in more detail, but it should be noted that these provisions look *prima facie* as if they were actual pieces of legislation, even though the wording occasionally seems somewhat clumsy, inaccurate, discursive and vague. This regulation is the code of free speech for Facebook users, which each of its users must accept, thereby submitting to the control and discretion of Facebook’s moderators.²⁰⁶

From the perspective of formalities and constitutionality, this aspect of the platform’s functioning is not objectionable. The current legal framework does not provide users with any powerful means should they find themselves in a quarrel with the platform. Even though Section 230 Communications Decency Act of 1996 (CDA) incentivizes platforms not to use private regulation by granting them immunity regarding illegal content available on

²⁰¹ *Id.* at 971.

²⁰² *Id.* at 977.

²⁰³ See Michael L. Rustad & Thomas H. Koenig, *Wolves of the World Wide Web: Reforming Social Networks’ Contracting Practices*, 49 WAKE FOREST L. REV. 1431, 1478–99 (2014).

²⁰⁴ See *id.* at 1478–1510.

²⁰⁵ *Terms of Service*, FACEBOOK ¶ 3.2.1, <https://www.facebook.com/terms.php> [<https://perma.cc/7NML-ESHT>] (last visited Dec. 14, 2020).

²⁰⁶ See *id.* at ¶ 1.3.

the platform, it certainly does not prohibit private censorship.²⁰⁷ Moreover, the European concept of the liability of host providers (as adopted pursuant to Article 14 of the E-commerce Directive) is a direct incentive for platforms to implement private censorship through its notice-and-takedown system.²⁰⁸ In regard to the lack of a balance of power between service providers and users, any dispute that may arise between them regarding the enforcement of their contract may be settled within the legal framework of consumer protection.²⁰⁹ However, this option is available only if the concerned user qualifies as a consumer, meaning that it is not available to “institutional” users (e.g., media businesses).²¹⁰

Furthermore, consumer protection does not seem to provide any broad possibilities for protecting the freedom of speech of users when the platform’s policies and their application is reasonable and justifiable but not arbitrary, which they typically are; even though they might be questionable, it does not suggest any violation of the consumers’ rights in and of themselves.²¹¹ Moreover, it seems difficult to object to the application of such policies on a legal basis, considering that a platform is free to determine its own policies and instruct its moderators without being required to respect the constitutional safeguards and legal limitations of freedom of speech. The only option for a user is to show that the platform removed a piece of content it was not authorized to remove—something that seems nothing short of impossible to demonstrate due to the widely defined limitations of content and the broad discretionary powers of the platform.²¹² A user may also try to make use of the existing anti-discrimination rules if his or her right to equal treatment is violated, but producing adequate evidence in such a situation (showing that a piece of content was removed from one user but was not deleted when someone else posted it) seems rather difficult, and the enormous volume of content and the absence of a monitoring obligation on

²⁰⁷ Heins, *supra* note 171, at 328.

²⁰⁸ Aleksandra Kuczerawy, *The Power of Positive Thinking: Intermediary Liability and the Effective Enjoyment of the Right to Freedom of Expression*, 8 J. INTELL. PROP., INFO. TECH., & E-COMMERCE L. 226, 228 (2017).

²⁰⁹ See generally Kevin Park, Note, *Facebook Used Takedown and It Was Super Effective! Finding a Framework for Protecting User Rights of Expression on Social Networking Sites*, 68 N.Y. U. ANN. SURV. AM. L. 891 (2013).

²¹⁰ *Schrems v. Facebook Ireland Ltd*, COLUM. GLOBAL FREEDOM EXPRESSION, <https://globalfreedomofexpression.columbia.edu/cases/maximilian-schrems-v-facebook-ireland-limited/> [https://perma.cc/6RQC-Q2X8].

²¹¹ Patrick Leerssen, *Cut Out by the Middle Man: The Free Speech Implications of Social Network Blocking and Banning in the EU*, 6 J. INTELL. PROP., INFO. TECH., & E-COMMERCE L. 99, 106 (2015).

²¹² Fradette, *supra* note 197, at 957.

the side of the platform (which may be invoked as a defence by the platform) also considerably limit the chances of success for a user.²¹³

Two further arguments also seem to reinforce the discretionary powers of a platform. First, a platform itself has a right to free speech when it sorts user-generated content, and it exercises this very right in the course of compiling lists of content that are visible and easily accessible to users.²¹⁴ This argument might be challenged, in that the removal of pieces of content on the basis of a policy does not convey any actual meaning that could be considered an utterance or opinion in and of itself, with the possible exception that the platform seeks to provide a peaceful, calm, safe and secure environment for its users. Second, it could be argued that no single platform is large enough to become the single ruler of the public sphere, and a user who falls victim to private censorship can choose to present his or her opinion by other means, such as a personal blog, website, email list, etc.²¹⁵ However, this argument is somewhat countered by the fact that certain platforms (Facebook and Google's search engine) have become so dominant and are used by so many people every day that they are *de facto* indispensable factors in the public communications process.²¹⁶ Indeed, individual users can speak more freely elsewhere, but that speech is likely to have a much more limited impact.

Two recent German cases clearly show the contradiction and ambiguity in applying the constitutional free speech doctrines to a contractual relationship between a social media platform and its user. In *Themel v. Facebook Ireland*, the court held that the deletion of the plaintiff's comment by Facebook constituted a breach of contract, as the platform is required to respect her right to freedom of expression under the German Constitution (Grundgesetz, Article 5).²¹⁷ As to the facts of the case, on August 7, 2018, *Spiegel-Online*—a German news website—posted an article on its Facebook page, titled “Austria Announces Border Controls.”²¹⁸ There was a harsh debate in the comments under the Facebook post, and Heike Themel—a German politician and member of the right wing AfD Party—was referred to

²¹³ E-Commerce Directive, *supra* note 17, at 15.

²¹⁴ Park, *supra* note 209, at 901.

²¹⁵ Heins, *supra* note 171, at 327.

²¹⁶ See CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY (Harvard Business School Press 1999).

²¹⁷ *Munich Higher Regional Court Court: Facebook May Not Remove Comments at Your Discretion*, DAILY NEWS (Sept. 8, 2018), <https://www.dailynewsen.com/business/munich-higher-regional-court-facebook-may-not-remove-comments-at-your-discretion-h10529.html> [<https://perma.cc/AGS5-3YSH>].

²¹⁸ *Themel v. Facebook Ireland*, COLUM. GLOBAL FREEDOM EXPRESSION, <https://globalfreedomofexpression.columbia.edu/cases/heike-themel-v-facebook-ireland-inc/> [<https://perma.cc/VPV4-PKCN>].

as “Nazi-slut.”²¹⁹ She responded to that comment by quoting a German poem: “I can’t compete in an argument with you. You are unarmed and this wouldn’t be very fair from my side.” Facebook deleted the comment and suspended her account for thirty days.²²⁰ This decision was based on Facebook’s Community Standards, Policy Twelve, which prohibits hate speech on the platform.²²¹ The court held that the application of Policy Twelve violated Section 241(2) of the German Civil Code, which states that “[a] [contractual] obligation may also, depending on its contents, oblige each party to take account of the rights, legal interests and other interests of the other party.”²²² As the Community Standards give Facebook the power to decide on its own which posts or comments violate its rules, the court noted that this power contradicts the Civil Code’s requirement.²²³ The court emphasized that Facebook—as a social media platform—provides a “public marketplace” for an exchange of views and opinions, and that legally permissible expressions cannot be deleted from the platform.²²⁴ As Themel’s comment did not constitute hate speech, Facebook’s deletion of the comment and suspension of Themel’s account was unlawful.²²⁵

In another German case—*User v. Facebook Ireland, Inc.*—the court arrived at a completely opposite conclusion.²²⁶ The court rejected the plaintiff’s argument that her right to freedom of expression had been infringed.²²⁷ Prior to the decision, in July 2018, a Facebook user commented below a post concerning integration of migrants in Germany: “Respect! That is the keyword! Fundamentalist Muslims regard us as soft grown heathens, pig-gluttons and our women as whores. They do not respect us.”²²⁸ On July 16, 2018, Facebook deleted the user’s comment and blocked his profile for thirty days.²²⁹ After Facebook refused to reverse its course of action, the plaintiff sought a preliminary injunction before the Regional Court in Heidelberg. The central issues before the court were whether Facebook was entitled to remove the post and block the user, and whether Facebook’s Community Standards were consistent with Section 307 of the Civil Code,

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ DAILY NEWS, *supra* note 217.

²²⁴ *See id.*

²²⁵ COLUM. GLOBAL FREEDOM EXPRESSION, *supra* note 218.

²²⁶ *User v. Facebook Ireland, Inc.*, COLUM. GLOBAL FREEDOM EXPRESSION, <https://globalfreedomofexpression.columbia.edu/cases/user-v-facebook-ireland-inc/> [<https://perma.cc/7EXT-LK48>].

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

which states in its Paragraph (1) that “provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user. An unreasonable disadvantage may also arise from the provision not being clear and comprehensible.”²³⁰ The court noted that Facebook’s standards list the types of expression which are not protected, and define the boundaries of what can be considered restricted speech.²³¹ In addition, the rules indicate the kind of consequences each user faces if they violate these standards. Accordingly, the court held that the standards cannot be considered non-transparent, and they did not discriminate against users inappropriately.²³² As a conclusion, the court found that Facebook’s rules adequately take into consideration the right to freedom of expression and—even though aggressive opinions or extreme expressions are protected under the Constitution—Facebook as a private party does not have to grant its users the full right to freedom of expression that is provided by the state in the constitutional context.²³³

These two decisions take two distinct paths. The latter decision fits into the usually applied legal framework, which—through the recognition of the platform’s property and free speech rights—allows Facebook to delete more or less any users’ content it finds inappropriate. Alternatively, the former decision aims to restrict the platform’s powers in this regard. The decisions depict the possible strengths and weaknesses of mandating the law of contracts to solve free speech issues arising between private parties.

C. Moderation and Private Censorship

1. The Pros and Cons of Moderation

The moderation of user-generated content by a platform interferes with the free speech of its users. Platforms that decide to moderate such content are walking a tightrope between the “chaos of too much freedom” and the “sterility of too much control.”²³⁴ Not surprisingly, balancing is not exactly easy. Platforms might be pressured by governments into removing content that is not necessarily illegal without conducting an adequate procedure for a number of reasons.²³⁵ Additionally, platforms have several reasons of their

²³⁰ *See id.*

²³¹ *See id.*

²³² *Id.*

²³³ *Id.*

²³⁴ James Grimmelmann, *The Virtues of Moderation*, 17 *Yale J. L. & Tech.* 42, 42 (2015).

²³⁵ Benjamin F. Jackson, *Censorship and Freedom of Expression in the Age of Facebook*, 44 *N.M. L.*

own for interfering with their users' free speech. The primary reason, as mentioned above, is the protection of their own business interests by way of filtering and removing content that might scare away other users or any major business partner or advertiser of the platform.²³⁶ Content that is inconsistent with the political agenda or social mission of a platform provider may also fall victim to moderation.²³⁷

The possibility of private censorship is quite worrisome from the perspective of free speech and the public sphere. The possibility of speaking through the largest and most important platforms cannot be substituted by speaking on minor platforms that reach fewer people (and which may also moderate user content) or, in particular, by publishing material on an unmoderated personal blog or private website. Major platforms are the hubs of public life, where any interference with the process of expressing opinions might result in far-reaching consequences.²³⁸ Furthermore, the goal of providing most users with a peaceful, safe, and secure environment (thereby also serving the business interests of the platform concerned) could also be brought in line with the policies of oppressive regimes; for some, the temptation of being allowed to enter the vast market of China might be worth paying the price of meeting the requirements of government censorship.²³⁹ It seems unlikely that social media platforms would seek to overthrow an oppressive regime by way of a revolution; probably they would be more interested in not having bad press, avoiding disputes with certain governments, and increasing their market share and revenues.²⁴⁰

Moderation and the decisions made by a platform concerning individual pieces of content do not follow the legal standards of free speech but seek to satisfy the requirements of an external environment (i.e., government requirements) and the assumed expectations of users.²⁴¹ The higher the frequency of individual interactions between users, and the more lively communication on the platform is, the higher the economic value of the platform becomes.²⁴² Consequently, protecting opinions that are most valuable for the public sphere is unlikely to be the primary goal of social media platforms, as those opinions—even though they are related to public

REV. 121, 127–28 (2014).

²³⁶ *Id.* at 130–31.

²³⁷ *Id.* at 131.

²³⁸ *Id.* at 132–33.

²³⁹ Sarah Joseph, *Social Media, Political Change, and Human Rights*, 35 B.C. INT'L & COMP. L. REV. 145, 178 (2012).

²⁴⁰ *Id.*

²⁴¹ Klonick, *supra* note 178, at 1627–30.

²⁴² *Id.*

affairs—are often subject to debate, might be divisive, insulting or provocative, and could urge people to engage in a debate and think for themselves.²⁴³ Such opinions could be frightening and might drive away some users, unlike other harmless pieces of content most users are comfortable with. Videos showing playful kittens and family photographs prevail over powerful political debates, as they are more important, and from a financial perspective, more valuable to social media platforms. While keeping a peaceful environment might attract more users to a platform and, by doing so, could enable more people to exercise their freedom of speech, the platform also restricts the freedom of speech of its users. Consequently, the primary aim of communication between users is not to discuss public affairs openly, as that very goal is in fact restricted by the platform itself.²⁴⁴ At the end of the day, it seems unclear whether private interference with freedom of speech could be particularly beneficial to the public.

2. The Legal Status of Moderation—Possible Analogies

In the U.S., Section 230 of the Communications Decency Act grants immunity for social media platforms against legal liability and urges them to moderate their users' speech as "good Samaritans."²⁴⁵ The discretion of platform providers concerning the removal of content and the suspension or banning of users is unrestricted, so it does not raise any free speech concern.²⁴⁶ The situation is quite similar in Europe, where Article 14 of the E-commerce Directive grants conditional exemption for such platforms and permits them to moderate (more accurately, does not prohibit the moderation of) user content at their own discretion.²⁴⁷ Free speech considerations do not materially affect the proceedings conducted against users pursuant to their contract with the platform.²⁴⁸

It seems extremely risky to grant social media platforms almost unlimited discretion in assessing pieces of content. The wording of the guidelines and codes on which their decisions are based tend to be vague, and decisions are passed quickly and without transparency or procedural safeguards. When considering the factors a moderator is likely to take into account when trying

²⁴³ See generally Jackson, *supra* note 235.

²⁴⁴ *Id.*

²⁴⁵ Andrew M. Sevanian, *Section 230 of the Communications Decency Act: A "Good Samaritan" Law without the Requirement of Acting as a "Good Samaritan,"* 21 UCLA ENTERTAINMENT L. REV. 121, 125 (2014).

²⁴⁶ *Id.*

²⁴⁷ See generally *The E-Commerce Directive Article 14: Liability Exemptions for Hosting Third Party Content*, U. OSLO FAC. L. 1 (2011).

²⁴⁸ See *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1118 (N.D. Cal. 2011).

to determine if a specific piece of content conforms to the platform's policies, one should remember the famous axiom Justice Potter Stewart used when trying to define hard-core pornography—"I cannot define it, but I know it when I see it."²⁴⁹ If a moderator believes or the internal procedure (which is not transparent to users) concludes that a piece of content must be removed, it will be removed. An issue—the adjudication of which could take years for a judiciary—is thus decided by a moderator within a few hours.²⁵⁰

Any approaches previously followed in the context of regulating the media and communications seem to serve as but poor analogies when assessing the nature of private regulation. As we have seen earlier, a social media platform is a public forum in the legal sense of the term, and it is certainly not a government entity.²⁵¹ A platform is not a "speaker" in the sense that it does not publish its own content and does not associate itself with its users' content in any way;²⁵² the removal of or refusal to remove certain pieces of content, then, expresses nothing but a judgement that a given piece of content is either inconsistent or in conformity with the applicable policies of the platform.²⁵³ A platform is not an "editor," or at least it is not similar to press editors, because it does not initiate or commission the production of content and does not purchase content for its own purposes.²⁵⁴ However, it is an editor in the sense that it makes decisions concerning pieces of content and filters, removes or keeps available content.²⁵⁵ It also controls all communications through the platform. All in all, it is clearly not neutral toward content.

The regulation of radio and television broadcasting before the emergence of digital technology relied on the use of scarce resources and serves as a poor analogy. The only reason for not disposing of such regulation wholesale when technological scarcity becomes nothing but history—as has already happened—is the grotesque phenomenon that the abundance of speech creates a particular kind of scarcity. The incomprehensible volume of information and communication users must face makes it very difficult for users to access valuable content and real news sources.²⁵⁶ However, this does not make it necessary to regulate platforms using the old methods, which

²⁴⁹ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

²⁵⁰ See generally Grimmelman, *supra* note 234.

²⁵¹ Jackson, *supra* note 235, at 151.

²⁵² Christina Mulligan, *Technological Intermediaries and Freedom of the Press*, 66 SMU L. REV. 157, 174 (2013).

²⁵³ Klonick, *supra* note 178, at 1647.

²⁵⁴ *Id.* at 1660.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 1661.

would mean using broadcasting as an analogy and would result in the revival of the previous system of licensing. The third possible analogy would be the analogy of a common carrier (such as telephone or postal service providers), the application of which would mean that moderation of and any interference with the process of communication between users (apart from providing the necessary technical means) and platforms would be prohibited for platform providers. Again, this option seems unfeasible, as platforms would be required to operate with total neutrality even though doing so would be incompatible with their needs and interests and would likewise make it impossible for them to comply with government requests (aimed at removing illegal content).

As Kate Klonick pointed out, a social media platform—in the absence of a more appropriate analogy—must be considered as a new and independent regulator (a governor).²⁵⁷ It has established controls and operates its own infrastructure which is used by users for communication according to its own interests.²⁵⁸ It also has a centralized organization that follows its own pre-determined rules (even if those are not necessarily accessible to outsiders in detail) and makes *ex ante* or *ex post* decisions regarding various pieces of content.²⁵⁹ In other words, a platform decides on pieces of content using a particular aggregational theory of free speech. It seeks to become and remain open and attractive for as many users as possible, while trying to protect its users from insults or other forms of communication that could scare them away.²⁶⁰ This strange, aggregated, and hybrid system brings together the principles of the First Amendment and the European approach to free speech, all interpreted and applied according to the interests of the platform itself, with possible differences in each state or region (according to the respective territory's government's approach toward free speech and the platform's free activities), through decision-making procedures that are not transparent to the parties concerned.

3. Community Standards and Codes of Conduct

Facebook's Community Standards get longer and longer each year, and they now go into much more detail than an average piece of legislation.²⁶¹

²⁵⁷ *Id.* at 1662–63.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ Brett J. Johnson, *Facebook's Free Speech Balancing Act: Corporate Social Responsibility and Norms of Online Discourse*, 5 U. BALT. J. MED. L. & ETHICS 17, 31–32 (2016).

²⁶¹ *Facebook's Community Standards*, FACEBOOK, <https://www.facebook.com/communitystandards/> [<https://perma.cc/9DFP-C3WJ>] (last visited Oct. 1, 2020).

For example, the limitation of hate speech, as well as nudity and other sexual content, are major topics that are relevant to the freedom of speech.²⁶² Let us examine the standards set by Facebook itself regarding these issues.

We define hate speech as a direct attack on people based on what we call protected characteristics—race, ethnicity, national origin, religious affiliation, sexual orientation, sex, gender, gender identity and serious disability or disease. We also provide some protections for immigration status. We define attack as violent or dehumanizing speech, statements of inferiority, or calls for exclusion or segregation. We separate attacks into three tiers of severity, as described below . . .

Do not post:

Tier 1 attacks, which target a person or group of people who share one of the above-listed characteristics or immigration status (including all subsets except those described as having carried out violent crimes or sexual offenses), where attack is defined as:

- any violent speech or support in written or visual form;
- dehumanizing speech or imagery including (but not limited to):
- reference or comparison to filth, bacteria, disease, or faeces;
- reference or comparison to animals that are culturally perceived as intellectually or physically inferior;
- reference or comparison to subhumanity;
- mocking the concept, events or victims of hate crimes even if no real person is depicted in an image;
- designated dehumanizing comparisons in both written and visual form.²⁶³

Any content attacking a group of people based on “protected characteristics” is considered objectionable hate speech that is removed from the platform.²⁶⁴ Facebook provides a list of such protected characteristics, and the broadly-defined circumstances are interpreted and applied by moderators.²⁶⁵ While criminal codes tend to use general wording and prohibit, for example, any “incitement to hatred,” Facebook’s Community Standards describe the forms of prohibited speech and also allow for broad discretion in the limitation of such speech. Excerpts from Facebook’s manual for moderators—published by *The Guardian* in 2017—bring up specific examples.²⁶⁶ Regarding violent content, the publication of “credible

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ See *Facebook Files*, GUARDIAN <https://www.theguardian.com/news/series/facebook-files> [<https://perma.cc/4NJZ-5HAS>] (last visited Nov. 7, 2020).

violence” is prohibited.²⁶⁷ While a statement like “I hope someone kills you” may not be removed, the statement “I hate foreigners and I want to shoot them all” would be. The publication of the statement “someone shoot Trump” is prohibited, while a message like “let’s beat up fat kids” would not be removed.²⁶⁸ The mechanistic application of these rules (usually by an algorithm) leads to absurd consequences at times. For example, Facebook removed excerpts from the Declaration of Independence in July 2018 because the phrase “merciless Indian savages” violated the platform’s Community Standards.²⁶⁹

Following various debates and scandals, the Community Standards have become increasingly nuanced over the years. These standards are not necessarily the source of worry. They often correspond to the legal limitations of free speech, although there are quite a few legal limitations that are missing from the Community Standards, such as the prohibition of defamation and insult.²⁷⁰ For example, Facebook does not prohibit the defamation of public figures; only hate speech directed at, credible threats against, and the bullying of such persons would be removed from the platform.²⁷¹ It was revealed during a public debate in the summer of 2018 that Zuckerberg does not believe denials of the Holocaust—i.e., speech that is commonly prohibited in Europe—should be removed.²⁷² Individual governments may have the means to make the platform respect and comply with their statutory provisions (as discussed above), but it nevertheless seems disturbing that, at the end of the day, the freedom of speech of billions of users depends on the whims of a single person and his personal taste, preferences, and business interests.

Furthermore, Facebook’s Community Standards specify numerous circumstances and examples that affect content which is not necessarily prohibited even in Europe (e.g., attacks against certain groups of people by comparing them to animals that are culturally perceived as intellectually or physically inferior or to an inanimate object).²⁷³ This extends the limitations of free speech, and it does so by using procedures that lack transparency, lack

²⁶⁷ *Facebook’s Manual on Credible Threats of Violence*, GUARDIAN (May 21, 2017, 1:00 PM), <https://www.theguardian.com/news/gallery/2017/may/21/facebooks-manual-on-credible-threats-of-violence> [<https://perma.cc/ZG86-X6XD>].

²⁶⁸ *Id.*

²⁶⁹ *Facebook Finds Independence Document “Racist,”* BBC (July 5, 2018), <https://www.bbc.co.uk/news/technology-44722728> [<https://perma.cc/RRA9-VRWN>].

²⁷⁰ *See id.*

²⁷¹ *See id.*

²⁷² Kara Swisher, *Zuckerberg: The Recode Interview*, VOX (Oct. 8, 2018, 2:21 PM), <https://www.recode.net/2018/7/18/17575156/mark-zuckerberg-interview-facebook-recode-kara-swisher>.

²⁷³ FACEBOOK, *supra* note 261.

relevant safeguards and guarantees, and fail to avoid the perception of arbitrariness in disputes.²⁷⁴ As Nicolas Suzor noted when excerpts from the manual became public, “without good data about how Facebook makes such decisions, we can’t have informed conversations about what type of content we’re comfortable with as a society.”²⁷⁵

Facebook’s attitude toward nudity is another suitable example to show how private regulation may sometimes result in grotesque outcomes.²⁷⁶ Note that the platform’s policies have been changed considerably in response to occasional outbreaks of scandal and public outrage. Pursuant to the current standards:

We restrict the display of nudity or sexual activity because some people in our community may be sensitive to this type of content. Additionally, we default to removing sexual imagery to prevent the sharing of non-consensual or underage content. Restrictions on the display of sexual activity also apply to digitally created content unless it is posted for educational, humorous, or satirical purposes.

Our nudity policies have become more nuanced over time. We understand that nudity can be shared for a variety of reasons, including as a form of protest, to raise awareness about a cause, or for educational or medical reasons. Where such intent is clear, we make allowances for the content. For example, while we restrict some images of female breasts that include the nipple, we allow other images, including those depicting acts of protest, women actively engaged in breast-feeding, and photos of post-mastectomy scarring. We also allow photographs of paintings, sculptures, and other art that depicts nude figures.²⁷⁷

Video footages of abortions are also permitted on the platform as long as they do not depict nudity.²⁷⁸ Thus, seeing the destruction of a living organism—a

²⁷⁴ Nicolas Suzor, *After the “Facebook Files,” the Social Media Giant Must Be More Transparent*, CONVERSATION (May 22, 2017, 3:40 AM), <http://theconversation.com/after-the-facebook-files-the-social-media-giant-must-be-more-transparent-78093> [<https://perma.cc/97LJ-K9VF>].

²⁷⁵ *Id.*

²⁷⁶ Associated Press, *The “Dangerous” Consequence of Facebook’s Stance on Nudity*, N.Y. POST (Jan. 16, 2020, 2:33 PM), <https://nypost.com/2020/01/16/the-dangerous-consequence-of-facebooks-stance-on-nudity/> [<https://perma.cc/MN35-AL49>].

²⁷⁷ *Adult Nudity and Sexual Activity*, FACEBOOK, https://www.facebook.com/communitystandards/adult_nudity_sexual_activity [<https://perma.cc/manage/create?folder=82568-82687-82690-103141>] (last visited Nov. 7, 2020).

²⁷⁸ Nick Hopkins, *Revealed: Facebook’s Internal Rulebook on Sex, Terrorism and Violence*, GUARDIAN (May 21, 2017, 1:00 PM), <https://www.theguardian.com/news/2017/may/21/revealed-facebook-internal-rulebook-sex-terrorism-violence> [<https://perma.cc/GUG8-78SE>].

human fetus—is permitted, while nobody should be exposed to the sight of an exposed female breast.

Previously, the platform prohibited the publication of images of breastfeeding mothers and works of art showing a naked human body.²⁷⁹ Even today, showing the nipple of a woman is still not permitted.²⁸⁰ Gustave Courbet created his famous painting showing a vagina (*L'origine du monde*) in 1866, which is currently on display in the Musée d'Orsay in Paris.²⁸¹ Facebook blocked the painting multiple times for depicting nudity, and the case was eventually brought to court when the account of a French teacher was suspended for publishing the image.²⁸² The court held that the absence of an advance notice regarding the foreseen measure was, in fact, a breach of contract between the platform and its user, but the injured party was not awarded any damages.²⁸³ It seems that such content-related restrictions cannot be challenged in court, but a user may be afforded some sort of procedural and consumer protection. The list of works of art that have fallen victim to Facebook's rules of decency is quite long and includes, among others, the sculpture of the *Little Mermaid* in Copenhagen,²⁸⁴ Bologna's *Fountain of Neptune*,²⁸⁵ the *Venus of Willendorf*,²⁸⁶ and paintings by Rubens.²⁸⁷ Eventually, the Community Standards were amended to provide

²⁷⁹ Mark Sweney, *Mums Furious as Facebook Removes Breastfeeding Photos*, GUARDIAN (Dec. 30, 2008, 8:17 PM), <https://www.theguardian.com/media/2008/dec/30/facebook-breastfeeding-ban> [<https://perma.cc/49XU-AVDW>].

²⁸⁰ Rob Price, *Facebook Bans Most Photos of Female Nipples for "Safety" Reasons, Exec Says*, BUS. INSIDER (Apr. 26, 2018, 7:30 PM), <https://www.businessinsider.com/freethenipple-facebook-bans-photos-female-nipples-safety-2018-4> [<https://perma.cc/4C9L-BTG9>].

²⁸¹ Philippe Sotto, *French Court Issues Mixed Ruling in Facebook Nudity Case*, U.S. NEWS (Mar. 15, 2018), <https://www.usnews.com/news/business/articles/2018-03-15/french-court-issues-mixed-ruling-in-facebook-nudity-case> [<https://perma.cc/H4FU-UDM7>].

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ Doug Bolton, *Facebook Removes Image of Copenhagen's Little Mermaid Statue for Breaking Nudity Rules*, INDEPENDENT (Jan. 6, 2016, 2:23 PM), <https://www.independent.co.uk/life-style/gadgets-and-tech/news/little-mermaid-copenhagen-denmark-removed-by-facebook-nudity-rules-a6799046.html> [<https://perma.cc/Z47S-NUYZ>].

²⁸⁵ Edward Helmore, *Facebook Blocks Photo of Neptune Statue for Being "Explicitly Sexual,"* GUARDIAN (Jan. 2, 2017, 3:37 PM), <https://www.theguardian.com/world/2017/jan/02/facebook-blocks-nude-neptune-statue-bologna-italy> [<https://perma.cc/6WWV-A65U>].

²⁸⁶ Alexandra Ma, *Facebook Banned a User from Posting a Photo of a 30,000-Year-Old Statue of a Naked Woman—and People Are Furious*, BUS. INSIDER (Mar. 1, 2018 2:59 PM), <https://www.businessinsider.com/facebook-bans-venus-of-willendorf-photos-over-nudity-policy-2018-3> [<https://perma.cc/E4TW-D847>].

²⁸⁷ Daniel Boffey, *Barefaced Cheek: Rubens Nudes Fall Foul of Facebook Censors*, GUARDIAN (July 23, 2018, 11:31 PM), <https://www.theguardian.com/technology/2018/jul/23/barefaced-cheek-rubens-nudes-fall-foul-of-facebook-censors> [<https://perma.cc/57TE-W7SL>].

that “[w]e also allow photographs of paintings, sculptures, and other art that depicts nude figures.”²⁸⁸

The removal of the most famous photograph taken during the Vietnam War was also followed by public outrage.²⁸⁹ The image shows people—including a crying naked girl—running away from a napalm attack. In response to the public reactions, the platform eventually permitted the publication of the photo.²⁹⁰ At the same time, Facebook maintained its position that footage of human decapitations posted by Mexican drug cartels is not inconsistent with its Community Standards.²⁹¹ However, it eventually changed its opinion in response to public criticism.²⁹² Platforms also have a history of limiting the expression of political opinions, as happened with YouTube when the platform suspended certain U.S. right wing channels.²⁹³ The platform claimed that the suspension happened due to an error by its recently hired moderators.²⁹⁴ During the parliamentary elections in Hungary, Facebook removed a video posted by a cabinet member which purported to show the failure of integrating immigrants in Vienna, Austria, thereby seeking to promote the anti-immigration rhetoric of his political party in Hungary.²⁹⁵ Although the video was eventually permitted by the platform, it seems worrisome that it has such a propensity to interfere with political discourse in this manner and during a most sensitive period (election campaigns) when free speech should be afforded the greatest possible protection.²⁹⁶ At the same time, Twitter does not remove President Trump’s tweets, even though it seems clear that some of these tweets are inconsistent with the platform’s policies, because they are obviously news sources of great value and attract users to the platform.²⁹⁷ Instead, they “flag” many of his

²⁸⁸ FACEBOOK, *supra* note 277.

²⁸⁹ Julia Carrie Wong, *Mark Zuckerberg Accused of Abusing Power after Facebook Deletes “Napalm Girl” Post*, GUARDIAN (Sept. 9, 2016, 2:15 AM), <https://www.theguardian.com/technology/2016/sep/08/facebook-mark-zuckerberg-napalm-girl-photo-vietnam-war> [<https://perma.cc/T5WG-SPDN>].

²⁹⁰ Levin, Wong & Harding, *supra* note 183.

²⁹¹ Leo Kelion, *Facebook Lets Beheading Clips Return to Social Network*, BBC (Oct. 21, 2013), <https://www.bbc.co.uk/news/technology-24608499> [<https://perma.cc/FHP6-H8Y3>].

²⁹² Haroon Siddique, *Facebook Removes Mexican Beheading Video*, GUARDIAN (Oct. 23, 2013, 5:16 AM), <https://www.theguardian.com/technology/2013/oct/23/facebook-removes-beheading-video> [<https://perma.cc/4AWK-TGKM>].

²⁹³ Adi Robertson, *YouTube Says New Moderators Might Have Mistakenly Purged Right-Wing Channels*, VERGE (Feb. 28, 2018, 5:07 PM), <https://www.theverge.com/2018/2/28/17064470/youtube-infowars-right-wing-channels-strike-ban-moderator-mistake> [<https://perma.cc/V76R-7HBM>].

²⁹⁴ *Id.*

²⁹⁵ David Gilbert, *Why Facebook Censored a Racist Video from Hungary’s Government—Then Put It Back*, VICE (Mar. 9, 2018, 11:41 AM), https://www.vice.com/en_us/article/gy87m4/why-facebook-censored-a-racist-video-from-hungarys-government-then-put-it-back [<https://perma.cc/C68N-5TVD>].

²⁹⁶ *Id.*

²⁹⁷ Barbara Ortutay, *Here’s Why Twitter Won’t Ban Donald Trump*, BLACK AM. WEB (July 23, 2018),

tweets as potential fake news, thereby orientating their audience, but also creating opportunities for discourse.²⁹⁸ Naturally, the platform's decision can be approved of from the perspective of free speech.

The EU urged social media platforms to adopt a stricter position on hate speech in 2016.²⁹⁹ As a result, Facebook, Microsoft, Twitter, and YouTube signed a code of conduct on countering illegal hate speech online.³⁰⁰ This code is the EU's first attempt to force platforms to follow suitable procedures. Under the code, the platforms undertook to conduct effective proceedings, to review notifications appropriately, and to decide on pieces of content on the basis of their own policies and with due regard to national legislation transposing Council Framework Decision 2008/913/JHA.³⁰¹ The platforms agreed to "review the majority of valid notifications for removal of illegal hate speech in less than 24 hours and remove or disable access to such content, if necessary."³⁰² The European Commission is to review compliance with the obligations undertaken annually, and it has already established that the platforms remove countless posts and profiles each year.³⁰³ Nonetheless, the EU is considering further measures to take in case the issues of hate speech and extremism are not handled by the platforms in a reassuring manner.³⁰⁴

<https://blackamericaweb.com/2018/07/23/heres-why-twitter-wont-ban-donald-trump> [<https://perma.cc/49BN-C2KV>].

²⁹⁸ Philip Bump, *Twitter Keeps Flagging Trump for Disinformation because Trump Keeps Tweeting Disinformation*, WASH. POST (Dec. 2, 2020), <https://www.washingtonpost.com/politics/2020/12/02/twitter-keeps-flagging-trump-disinformation-because-trump-keeps-tweeting-disinformation/> [<https://perma.cc/F7VC-GRY7>].

²⁹⁹ *Countering Illegal Hate Speech Online, #NoPlace4Hate*, EUR. COMMISSION (Mar. 18, 2019), http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54300 [<https://perma.cc/MA6E-DSZE>].

³⁰⁰ *Id.*

³⁰¹ See EUR. COMMISSION, *supra* note 299.

³⁰² Press Release, European Comm'n, European Commission and IT Companies Announce Code of Conduct on Illegal Online Hate Speech (May 31, 2016), https://ec.europa.eu/commission/presscorner/detail/en/IP_16_1937 [<https://perma.cc/WX6V-R66V>].

³⁰³ Press Release, European Comm'n, Countering Illegal Hate Speech Online (Jan. 19, 2018), https://ec.europa.eu/commission/presscorner/detail/en/MEMO_18_262 [<https://perma.cc/N6FG-HZKX>].

³⁰⁴ Press Release, European Comm'n, Countering Illegal Hate Speech Online - Commission Initiative Shows Continued Improvement, Further Platforms Join (Jan. 19, 2018), http://europa.eu/rapid/press-release_IP-18-261_en.htm [<https://perma.cc/KR48-HBKV>]; Daniel Boffey, *EU Threatens to Crack Down on Facebook Over Hate Speech*, GUARDIAN (Apr. 11, 2018, 5:18 AM), <https://www.theguardian.com/technology/2018/apr/11/eu-heavy-sanctions-online-hate-speech-facebook-scandal> [<https://perma.cc/YY46-6A2U>].

D. Editing and Content Diversity on Social Media Platforms

The real power of a platform to influence the discussion of public affairs is not rooted in the capacity to remove individual pieces of content or ban users. Platforms use algorithms that enable them—on the basis of data collected about each user—to personalize each and every piece of content accessible to and consumed by their users.³⁰⁵ An obvious example is Facebook’s news feed, which includes only a small portion of all content published by a user’s acquaintances and the pages he or she follows.³⁰⁶ Obviously, this practice is also justified by practical considerations since the platform keeps the content available to users in an organized way by showing them the content they are most likely to be interested in.³⁰⁷ However, we do not know what basis the platform relies on when sorting content, how it tries to balance between public issues and holiday photos, and what the business interests are or could be behind featuring certain content. It should be noted that not all social media platforms “edit” user content as comprehensively as Facebook, but each platform filters through all available content to show users what they will most likely be interested in.

In general, an issue that arises in relation to the compilation of a news feed and the pieces of content shown to a user is whether it can be considered protected speech by the platform. While such an argument would seem difficult to maintain in the context of filtering and removing content, it could be possible that the compilation of a news feed does eventually produce some kind of content that did not exist before. The individual components of the news feed were not produced or commissioned by the platform, but the work of compilation was indeed performed by the platform according to its own decisions and considerations. On one hand, if such a compilation is protected under freedom of speech, it would be difficult to influence it from the outside. On the other hand, if the compilation is considered similar to the editing activities of traditional media, it might be possible to apply the rules and doctrines of such media with some reasonable adjustments. In the words of Robin Foster,

There are no exact parallels for the new digital intermediaries identified here—most are not neutral “pipes” like ISPs, through which all internet content flows (although Twitter is close to this); nor are they pure media

³⁰⁵ Will Oremus, *Who Controls Your Facebook Feed*, SLATE (Jan. 3, 2016, 8:02 PM), http://www.slate.com/articles/technology/cover_story/2016/01/how_facebook_s_news_feed_algorithm_works.html [<https://perma.cc/NH4K-ABNR>].

³⁰⁶ *Id.*

³⁰⁷ *Id.*

companies like broadcasters or newspapers, heavily involved in creative and editorial decisions. But they do perform important roles in selecting and channelling information, which implies a legitimate public interest in what they do.³⁰⁸

Paul Bernal even calls the supposed neutrality of gatekeepers (Facebook among them) a “myth.”³⁰⁹ Content selection is not a neutral or even value-neutral activity and it reflects a platform’s numerous interests.³¹⁰ This might not be a problem in and of itself, but it raises concerns when users are not familiar with those interests and values; users cannot really know (or it would take extreme effort on their side to discover) what information is really out there apart from the content they are shown.³¹¹ As Klonick highlights, it is not a priority for social media platforms at this time to ensure adequate opportunities for all to participate in public discourse.³¹²

It seems that the architecture of a platform, the editorial decisions governing its general operations, and its underlying values are more important than any individual decision made by a platform in response to a notice concerning specific content, as those factors determine the overall functioning of the platform, and have an impact on the ability of all to access the information.³¹³ The provision of a personalized service to users could act to suppress their overall picture of news and information on public affairs.³¹⁴ This means that the number of news reports produced by traditional media could be drastically reduced at the whim of Zuckerberg.³¹⁵ The reasons for this are predominantly financial, not a matter of principles: Facebook is in fact in competition with such media, even if it does not produce any content, and the company seeks to maximize its revenues from those media in return

³⁰⁸ ROBIN FOSTER, *NEWS PLURALITY IN A DIGITAL WORLD* 28 (University of Oxford 2012).

³⁰⁹ See PAUL BERNAL, *THE INTERNET, WARTS AND ALL: FREE SPEECH, PRIVACY AND TRUTH* 101 (Lionel Bently, et al. eds., Cambridge University Press 2018) (“The illusionary idea of platform neutrality is just one of the myths that supports our fantasies surrounding free speech in particular.”).

³¹⁰ See *id.* at 73 (“[D]ifferent power groups like to use [net neutrality] in effect as a cover story for protecting their commercial interests.”).

³¹¹ See *id.* at 88 (“[M]uch of [Facebook’s] algorithmic work is designed specifically to determine which items are made more or less visible because they understand how this can benefit them.”).

³¹² Klonick, *supra* note 178, at 1665.

³¹³ See Frank Fagan, *Systemic Social Media Regulation*, 16 *DUKE L. & TECH. REV.* 393 (2018).

³¹⁴ *Id.* at 415 (“Seeking positive responses and avoiding negative ones leads a person to choose like-minded acquaintances and generally select a network composition that reflects her personal beliefs. [This] helps explain why social networks systemically exhibit high levels of herding and polarization, and why they tend to aggressively reinforce existing patterns of belief.”)

³¹⁵ Emily Bell, *Why Facebook’s News Feed Changes Are Bad News for Democracy*, *GUARDIAN* (Jan. 21, 2018, 7:32 AM), <https://www.theguardian.com/media/media-blog/2018/jan/21/why-facebook-news-feed-changes-bad-news-democracy> [<https://perma.cc/4P8U-XP45>].

for presenting their content to its users.³¹⁶ The provision of personalized services and news services in particular can reduce the diversity and selection of news that individual users come across when using the platform.³¹⁷ In the era of traditional media, it was inevitable for readers to see content they did not specifically look for or agree with, but the comfort of personalization eliminates this unpleasantness. The personalization of news goes against the very concept of the marketplace of ideas, as users do not meet opinions that contradict their own personal views and opinions unless they specifically look for them.³¹⁸

A platform may also interfere with its news feed in line with its political views and social objectives, and this very capacity poses a direct threat to the public sphere and the democratic expression of opinions. This phenomenon was demonstrated by a scandal in 2016 when tech-blog *Gizmodo* reported allegations from Facebook staff members that the company suppressed conservative topics and sources deliberately and in a systemic manner.³¹⁹ The platform had claimed previously that the content of Trending Topics (a service listing topics that are most actively discussed by other users of the platform, aka hot topics) is compiled by algorithms exclusively on the basis of actual user activity and without any direct human intervention.³²⁰ However, former employees of the company reported that they had to select the topics on the basis of political considerations.³²¹

According to reports, links to certain conservative websites were not allowed in the Trending Topics section, even if they were among the most frequently shared content on the platform.³²² The case clearly showed that the selection of pieces of news that were to be featured and widely discussed on Facebook was not influenced by neutral algorithms but human editors—known as “news curators.”³²³ In essence, the scandal resulted in the defeat of

³¹⁶ See Mathew Ingram, *The Facebook Armageddon*, COLUM. JOURNALISM REV. (Feb. 20, 2018, 1:45 PM), https://www.cjr.org/special_report/facebook-media-buzzfeed.php [https://perma.cc/DYG4-Y8LE].

³¹⁷ Fagan, *supra* note 313, at 415.

³¹⁸ Sarah Eskens et al., *supra* note 54, at 281.

³¹⁹ Michael Nunez, *Former Facebook Workers: We Routinely Suppressed Conservative News*, GIZMODO (May 9, 2016, 9:10 AM), <https://gizmodo.com/former-facebook-workers-we-routinely-suppressed-conser-1775461006> [https://perma.cc/D4U3-TQMT].

³²⁰ *See id.*

³²¹ *Id.*

³²² Philip Bump, *Did Facebook Bury Conservative News? Ex-Staffers Say Yes*, WASH. POST (May 9, 2016, 10:45 AM), https://www.washingtonpost.com/news/the-fix/wp/2016/05/09/former-facebook-staff-say-conservative-news-was-buried-raising-questions-about-its-political-influence/?noredirect=on&utm_term=.8338634b2401 [https://perma.cc/BTQ5-3DLU]; Nunez, *supra* note 319.

³²³ Sam Thielman, *Facebook News Selection is in Hands of Editors Not Algorithms, Documents Show*, GUARDIAN (May 12, 2016, 12:51 PM), <https://www.theguardian.com/technology/2016/may/>

an important taboo and a paradigm shift regarding the role of the platform: Facebook became an actual news editor and, as such, became similar to traditional media.³²⁴ Even though Trending Topics was phased out by the platform eventually,³²⁵ it is hard not to believe that similar news editing practices might be used by other services of the platform or outside the US. If Facebook is considered a news editor, it might just be reasonable to extend the scope of legal provisions applicable to the news editors of the “traditional” media to social media platforms.

E. Fake News and Private Regulation

The spread of fake news is hard to stop by legal regulation. It also seems unlikely that the rules and regulations applied by the platforms themselves could provide a comprehensive and comforting solution to this problem because, as Bernal pointed out, the spread of scare stories, insults, and bad-spirited gossip is not a fault but an inevitable consequence of the features of the system.³²⁶ However, negative publicity could be detrimental to a platform, so platforms inevitably try to tackle the spread of fake news and often surpass their legal obligations that require them to do so. Measures taken in this regard might include raising tariffs for or reducing the prominence in the news feed of sites that present false and fictitious statements as news.³²⁷ Other options could be to increase transparency in connection to paid advertisements and sponsored content, so that users could know who paid for the dissemination of a given piece of content.³²⁸ It has also been suggested that social media platforms should recruit fact-checkers to verify pieces of content and either designate pieces of fake news as such or, alternatively, inform the platforms of such news, so they could demote the ranking of or even ban such websites.³²⁹ Ironically, designating a piece of

12/facebook-trending-news-leaked-documents-editor-guidelines [https://perma.cc/3QAU-82V4].

³²⁴ Natali Helberger & Damian Trilling, *Facebook is a News Editor: The Real Issues to be Concerned About*, LSE (May 26, 2016), <http://blogs.lse.ac.uk/mediapolicyproject/2016/05/26/facebook-is-a-news-editor-the-real-issues-to-be-concerned-about/> [https://perma.cc/K3CP-H7GF].

³²⁵ Chris Morris, *Facebook Kills “Trending” Topics, Will Test “Breaking News” Label*, FORTUNE (June 1, 2018, 11:27 AM), <http://fortune.com/2018/06/01/facebook-kills-trending-news-topics/> [https://perma.cc/8MDU-29LG].

³²⁶ Paul Bernal, *Facebook: Why Facebook Makes the Fake News Problem Inevitable*, 69 N. IR. LEGAL Q. 497, 527–29 (2018).

³²⁷ Richard L. Hasen, *Cheap Speech and What It Has Done (To American Democracy)*, 16 FIRST AMEND. L. REV. 201, 226–30 (2018).

³²⁸ Lili Levi, *Real “Fake News” and Fake “Fake News,”* 16 FIRST AMEND. L. REV. 232, 285 (2018).

³²⁹ See Jessica Stone-Erdman, *Just the (Alternative) Facts, Ma’am: The Status of Fake News under the First Amendment*, 16 FIRST AMEND. L. REV. 410, 439 (2017) (“Nonpartisan, ethical journalists and fact-checkers – and not the government – must remain the driving force behind regulating fake news.”);

news as fake (as Facebook attempted) only increased the popularity and reinforced the credibility of the false information among users.³³⁰ The activities of fact-checkers are indeed quite similar to news editing, and this increases the similarities between social and traditional media even further.

Essentially, the report by the High Level Expert Group on Fake News and Online Disinformation builds its strategy against fake news on the basis of strengthening the transparency of the platforms and leaving the private regulation performed by social media platforms untouched.³³¹ The report suggests that platforms give more and more options for their users to personalize the service they receive.³³² It would indeed be a welcome improvement if the “*Daily Me*” were not produced by a platform in a non-transparent manner and on the basis of obscure databases and personal profiling, but such empowerment of the users could also reinforce the filter-bubble effect. Other suggested measures—such as the ideas that a platform should recommend additional news from reliable sources to its users in addition to popular topics, that it should give more visibility to reliable news sources,³³³ and that users should be enabled to exercise their right to respond to allegations³³⁴—would increase the similarities between platform moderators and traditional news editors, as well as between social media platforms and traditional news media.

The Communication published by the European Commission in April 2018 follows a similar path.³³⁵ Essentially, it seeks to encourage private regulation by platforms while pointing out that the introduction of legal obligations might follow if private regulation fails to deliver the desired outcome (even though the indirect liability regime established by the E-

Sarah Perez, *Facebook Expands Fact-Checking Program, Adopts New Technology for Fighting Fake News*, TECHCRUNCH (June 21, 2018, 10:59 AM), <https://techcrunch.com/2018/06/21/facebook-expands-fact-checking-program-adopts-new-technology-for-fighting-fake-news/?guccounter=1> [<https://perma.cc/PT9Z-YFRV>].

³³⁰ Catherine Shu, *Facebook Will Ditch Disputed Flags on Fake News and Display Links to Trustworthy Articles Instead*, TECHCRUNCH (Dec. 20, 2017, 10:55 PM), <https://techcrunch.com/2017/12/20/facebook-will-ditch-disputed-flags-on-fake-news-and-display-links-to-trustworthy-articles-instead/> [<https://perma.cc/G52W-8249>].

³³¹ See EUROPEAN COMM’N, FINAL REPORT OF THE HIGH LEVEL EXPERT GROUP ON FAKE NEWS AND ONLINE DISINFORMATION 22–25 (2018), <https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation> [<https://perma.cc/Q25K-YXSF>].

³³² *Id.* at 33.

³³³ *Id.*

³³⁴ *Id.*

³³⁵ See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, EUR. COMMISSION (Apr. 26, 2018), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0236> [<https://perma.cc/D2PZ-988W>].

commerce Directive would not be changed).³³⁶ In a sense, this document represents a milestone in EU media regulation. It does not simply encourage self-regulation (which is not an absolute novelty in media policy), where a non-governmental organization, which does not form part of the regulated media landscape itself, supervises the operation of the media. Instead, it reinforces private regulation (i.e., the regulation of content by the platforms themselves) by also suggesting the possibility of obligating social media platforms to implement such regulations.³³⁷

According to this approach, platforms must decide the permissibility of various content themselves, even going beyond the provisions of the E-commerce Directive.³³⁸ By taking this step, a government would hand over almost all regulatory responsibilities to social media platforms while reserving only the control of this rather peculiar supervisory regime. All in all, this would be a move toward an unknown model of co-regulation that has never existed before. This model appears not only in various documents of the EU but also in regulatory initiatives taken by certain Member States, the first example being the above-mentioned law of Germany,³³⁹ where regulation is not directed at illegal content as such, but it requires social media platforms to take action while also serving as a basis for government intervention, should the statutory procedures be violated or the expected results (i.e., the speedy removal of content violating the Criminal Code) not be delivered.

F. The Political Bias of a Platform

As noted above in numerous contexts, the activities social media platforms carry out concerning the user content they manage is not neutral. Either because they seek to comply with legal regulations or since they act on their own initiative, the operators of these platforms carry out a kind of editorial task that involves the assessment and evaluation of such content. The private regulation implemented by platforms is not value-neutral either, as it clearly reflects their objective of providing a “safe space” to as many users as possible; this objective, however, is not always compatible with the goal of acting as a robust defender of free speech. This lack of neutrality gains

³³⁶ *Id.*

³³⁷ *See id.* (“The Commission calls on all relevant players to significantly step up their efforts to address the problem adequately. It considers that the actions outlined [in the document], if implemented effectively, will materially contribute to countering disinformation online.”).

³³⁸ E-Commerce Directive, *supra* note 17.

³³⁹ *Netzwerkdurchsetzungsgesetz* [Network Enforcement Act], Sept. 1, 2017, *Bundesgesetzblatt*, Teil I [BgbI. I] at 1328 (Ger.).

a completely new quality if the editorial decisions the platform makes are guided by an ideology or a goal of achieving or promoting certain social objectives (if this social objective is other than the open discussion of public affairs or free public sphere).

Social media platforms usually seem to be the champions of free speech, but as Bernal notes, “in practice free speech is just a tool for them. They will champion it when it suits them and not champion it when it does not.”³⁴⁰ Facebook is often compared to a nation state.³⁴¹ Even though social media platforms have far more extensive ways of modelling private regulation than a nation state, the analogy applies in that nation states are neutral from a religious or philosophical point of view, but they are not value-neutral.³⁴² A social media platform can also make value-based decisions, and could ban hateful people from its system. If we accept the public sphere to be a fundamental institution (it would be difficult not to do so), surrendering ideological neutrality and embracing bias would lead to serious problems, even though it cannot be prohibited using the currently available legal and regulatory means. However, Western countries are democracies, meaning the limits of free speech (among other things) are set out and compliance with the rules is supervised by elected officials, courts, and other authorities operating within a framework of constitutional safeguards and guarantees. If a social media platform were a state, it most certainly would not be a democracy.

According to the findings of one survey, the owners and executives of U.S. tech companies established in Silicon Valley hold liberal, cosmopolitan, and globalist political views and support the extension of human rights—in all matters that do not interfere with their business interests.³⁴³ However, they are against government regulation in general, and labor and employment policies in particular, on which matters they tend to agree with conservative libertarians.³⁴⁴ With regard to Facebook, signs of ideological bias also exist.³⁴⁵ The manifesto published by Zuckerberg in 2017 clearly reflects a

³⁴⁰ BERNAL, *supra* note 309, at 127.

³⁴¹ See Chander, *supra* note 195, at 1808 (“Facebook has become so powerful and omnipresent that some have begun to employ the language of nationhood to describe it.”).

³⁴² Chander, *supra* note 195, at 1818–19 (noting that “Facebook enforces a policy against nudity”).

³⁴³ David E. Broockman et al., *Wealthy Elites’ Policy Preferences and Economic Inequality: The Case of Technology Entrepreneurs 1* (Sept. 5, 2017) (unpublished working paper) (accessible online).

³⁴⁴ Farhad Manjoo, *Silicon Valley’s Politics: Liberal, with One Big Exception*, N.Y. TIMES (Sept. 6, 2017) <https://www.nytimes.com/2017/09/06/technology/silicon-valley-politics.html>. [<https://perma.cc/6PKB-8EG6>].

³⁴⁵ See Mark Zuckerberg, *Building a Global Community*, FACEBOOK (Feb. 16, 2017), <https://www.facebook.com/notes/mark-zuckerberg/building-global-community/10154544292806634/> [<https://perma.cc/39WU-3CCS>].

political agenda (albeit a rather naive one, considering the chances of its implementation) to build a global community above and beyond nation states.³⁴⁶ The wording goes beyond the goal of providing a safe space, and envisages the abandonment of the concept of nation states.³⁴⁷ Naturally, this idea is not new in the era of globalization, but reading between the lines, one might find the objective of surpassing “national” societies (an aim which is still somewhat surprising in the age of world trade), international organizations, and an increasingly united Europe.

It became clear during the Trending Topics scandal in 2016 that Facebook is capable of exerting direct political influence, even without any noble cause or a publicly acknowledged ideological stance.³⁴⁸ Google was also exposed to harsh criticism for firing an employee for advancing harmful gender stereotypes when he wrote a memo challenging the ideological bias of the platform.³⁴⁹ The “echo chamber” criticized in the memo, i.e., the tech giant itself, which normally presents itself as a defender of free speech both toward its employees and users, decided to remove the author from his position instead of engaging in a debate.³⁵⁰ Other studies revealed that pieces of content are selected on an ideological basis,³⁵¹ and this suspicion is quite difficult to dispel (or prove) for the very reason that the decision-making mechanisms of these platforms lack transparency.³⁵² The owners and executives of social media platforms can exercise their freedom of speech, including making decisions concerning the infrastructure they own, but a platform can also be harmful to democratic public life if it grows really large but fails to manage debates conducted on the platform with due regard to the

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ See *supra* part 5(d), at 42–45 (discussing editing and content diversity on social media platforms).

³⁴⁹ Daisuke Wakabayashi, *Contentious Memo Strikes Nerve inside Google and Out*, N.Y. TIMES (Aug. 8, 2017, 11:02 PM), <https://www.nytimes.com/2017/08/08/technology/google-engineer-fired-gender-memo.html> [<https://perma.cc/J377-QJ2W>].

³⁵⁰ *Id.*

³⁵¹ See Craig Parshall, *The Future of Free Speech, Free Press, and Religious Freedom on Facebook, Google, Apple, etc* 3 (Oct. 3, 2013) (unpublished draft) (available as PDF with National Religious Broadcasters) (“[The National Religious Broadcasters have] documented various acts of viewpoint censorship by Apple (in removing the Manhattan Declaration and the app of Exodus International from its iTunes platform because of the orthodox Christian opinion they expressed regarding same sex relationships and marriage); by Facebook regarding anti-gay content; and by Google in refusing pro-life, Christian advertising, by discriminating against churches and religious groups in its Google for Non Profits web tool, and by being complicit with China’s censorship of religious ideas.”).

³⁵² See *Assessment of the Code of Practice on Disinformation – Achievements and Areas for Further Improvement*, EUR. COMMISSION 9 (2020) (“The evidence provided to the Commission shows persisting insufficiencies in the implementation of policies designed to ensure an adequate level of transparency for political and issue-based ads.”).

notion of the “marketplace of ideas,” i.e., it attempts to influence such exchanges using obscure means that lack transparency.

VI. CONCLUSION

As Kohl notes, search engines may be “exposed to strong, possibly irresistible pressures” from economic and government actors, reinforcing their role as gatekeepers and possibly having a detrimental impact on the democratic process.³⁵³

It is difficult to dispute that search engines should be considered “editors.” This position is supported by (1) the preliminary and self-regulatory filtering of content that could offend users (pornography, violence, etc.); (2) the role search engines play in the removal of links to content violating copyrights, personality rights or other rights; and (3) the possibility of manipulating their search results in their own or someone else’s interest. However, such activities should not be confused, as the activities mentioned in points (1) and (3) are conducted by a search engine at its own initiative, while the activities mentioned in point (2) are required by the government, even though all of these activities are similar, in that each of them represents a deviation from the mission of the search engine, and the compilation of search rankings that are most relevant to users is influenced by external considerations. This is a kind of editorial activity, which, coupled with the special role search engines play in the online public sphere, makes them highly influential entities that cannot be considered passive at all.

Social media platforms also tend to set the limits of free speech on their own platform without any particular external restriction. For these fundamental reasons, platforms may not be considered neutral intermediaries and their activities must be recognized as being similar to those of traditional media editors. Once they are recognized as such, the next obvious issue is the enforcement of media policy goals and the possible application of the available means of media regulation to the new services. Regardless of the present or future obligations a government or EU law may impose on social media platforms, governments and platforms exist in a state of forced interdependence; the both enforced, and voluntary application of the law by the platforms supersedes and limits the application of the actual legal doctrines of free speech.

³⁵³ Kohl, *supra* note 108, at 234.