KU LEUVEN

FACULTY OF LAW

Academic year 2018 - 2019

A new freedom of expression for the internet age

Protecting the online market for rules

Promotor: K. LEMMENS

Master thesis, handed in by

Tom VAN ISACKER

for the degree of

MASTER OF LAWS

KU LEUVEN

FACULTY OF LAW

Academic year 2018 - 2019

A new freedom of expression for the internet age

Protecting the online market for rules

Promotor: K. LEMMENS

Master thesis, handed in by

Tom VAN ISACKER

for the degree of

MASTER OF LAWS

ABSTRACT

The freedom of expression was founded in a world starkly different from ours today. Today, we live in the internet age. The main question of this dissertation is how the freedom of expression should evolve to adapt itself to the this new reality. This freedom originated as a protective barrier for speakers against the power of the state. In the internet age, an entirely different power has seen the light of day: the internet intermediaries. These intermediaries provide the infrastructures through which the internet lives. They are everything placed between the internet user and the online content he is trying to reach, such as internet service providers, search engines, social media platforms… They are private entities. However, like the state, they have the power to censor speech flowing through their infrastructure, a power they use daily. The question of this dissertation is thus, more specifically, how the right to freedom of expression should relate to these internet intermediaries.

We argue that internet intermediaries should be defined as private governors of speech, and that they operate in a new speech system consisting of three players: the individual internet users, the state, and the intermediaries. The presence of this new player brings with it new concerns to the freedom of speech. The intermediaries are not constrained in their censorship by the freedom of expression of internet users, as they are private parties. Moreover, there is a lack of transparency and due process, and a lack of equality online. To boot, the state, in its attempt to regulate speech online, targets ever more frequently the intermediaries, leading to further risks to internet users' freedom of expression.

The question is how the freedom of expression deals with these concerns. An analysis of the case-law of the ECtHR shows that currently it provides no good answer. We propose a new framework for the freedom of expression: a freedom of expression 2.0 as a protection of the online "market for rules". This evolved freedom should protect what made the internet such a great ally of the freedom of speech, while at the same time preserving its flexible and global nature. Internet users should be able to choose the rule-sets for speech (set by the intermediaries) under which they live online.

To that end, the freedom of expression 2.0 obliges internet intermediaries to be transparent in their speech policy, and to provide internet users with due process when their speech is censored. In addition, internet intermediaries should in principle be immune from liability for the speech of their users. Finally, the keystone of the freedom of expression 2.0 lies in its cross-roads with competition law. The market for rules must allow internet users choice, and so must be protected against intermediaries trying to contract it, manipulate it, or abuse their market power on it.

ACKNOWLEDGEMENTS

First, I would like to thank my promotor, professor Koen Lemmens, for the valuable feedback he has given me before and during the writing of this master thesis.

I further want to express my gratitude to my family, my friends and my boyfriend, for having supported me not only throughout this process, but throughout the past five years in Leuven and London. They have shaped my life these past few years, and I would be a lesser person without them.

Most of all, I want to thank my parents. They have always been there for me, in the best of times and in the worst of times. And I think about my brother, who can no longer read this, but who has been with me every step of the way.

Table of contents

INTRODUCTION **1**

CHAPTER I. THE INTERNET: FREE SPEECH MANNA **4**

CHAPTER II. THREATS TO FREE SPEECH ON THE INTERNET **7**

SECTION I. SEARCH ENGINES 7

SECTION II. SOCIAL MEDIA PLATFORMS 11

SECTION III. INTERNET SERVICE PROVIDERS 13

SECTION IV. CONCLUSION 15

CHAPTER III. THE ROLE OF INTERNET INTERMEDIARIES IN THE SPEECH SYSTEM **15**

SECTION I. INTERNET INTERMEDIARIES 15

SECTION II. PRIVATE GOVERNORS IN A TRIADIC MODEL OF SPEECH GOVERNANCE 16
§1. The triadic model *16*
§2. Private governors *17*
A. In general 17
B. Social media as illustration 18
1. Why moderate content on social media? 19
2. How to moderate 20
3. The deciders 21
4. The rules 22
§3. Relationships in the triadic model *24*
A. In relation to the speaker 24
B. Relationship public authority – internet intermediary: new-school speech regulation 25

SECTION III. CONCERNS 26
§1. Concerns arising out of new-school speech regulation *26*
A. Collateral censorship 27
B. Coopting internet intermediaries as state agents 28
§2. Concerns arising out of the private governance structure *29*
A. Too much censorship? 29
B. Lack of due process 30
C. Lack of transparency 31
D. Lack of equality/democracy 32
§3. Conclusion *33*

CHAPTER IV. THE FAILURE OF THE FREEDOM OF EXPRESSION **33**

SECTION I. A CASE-STUDY OF THE EUROPEAN COURT OF HUMAN RIGHTS 33

SECTION II. LIABILITY OF INTERNET INTERMEDIARIES 35

SECTION III. INTERNET USERS VERSUS INTERNET INTERMEDIARIES 39

§1. Access to the internet ... *39*
§2. Protection against private censorship? ... *40*
§3. Transparency and due process? ... *43*
§4. Lack of equality/democracy? ... *43*

SECTION IV. CONCLUSION ... 44

CHAPTER V. FREEDOM OF EXPRESSION IN THE INTERNET AGE ... 45

SECTION I. SAVING THE FUNDAMENTAL RIGHT OF FREE SPEECH ... 45

SECTION II. ENFORCING FREE SPEECH RIGHTS AGAINST INTERNET INTERMEDIARIES ... 46

SECTION III. FREEDOM OF EXPRESSION 2.0 ... 50
§1. A market for rules ... *50*
§2. Procedural rights for internet users ... *54*
A. Transparency ... 54
B. Due process ... 56
§3. Principle of immunity of internet intermediaries ... *59*
§4. Protecting the market for rules: freedom of speech as competition law ... *63*
A. Countering anti-competitive / anti-speech practices ... 63
B. Intermediaries as state actors: incompatible with the market for rules and the triadic model ... 66
C. Free speech as an objective of competition law? ... 70

CONCLUSION ... 71

BIBLIOGRAPHY ... 73

LEGISLATION ... 73

CASES ... 74

BOOKS & ARTICLES ... 75

INTRODUCTION

"*Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.*"[1]

"As the old gatekeepers have diminished in importance, a new set of intermediaries has risen to prominence. Cheap speech on the Internet is made possible through the assistance and acquiescence of these intermediaries. Each one can potentially silence speech, good and bad."[2]

1. This dissertation started with a frustration. The freedom of expression is the most important and fundamental right in a democracy. Yet it seems that free speech is under attack on the most important medium for communication today: the internet. Not a day goes by where no news story covers the censorship of one or other individual online, whether it is the removal of a post on a social media platform, the removal of a website by a search engine, the blocking of a website by an internet service provider… Often the victim of censorship claims his right to freedom of expression was violated, but never is there an adequate response to this argument. While there seems to be more and more censorship online, the freedom of expression seems to offer internet users no protection at all. What is the cause of this vacuum, and how can we resolve it?

2. The examination of this question inevitably leads to the power of the internet intermediaries. Internet intermediaries are, in short, everything standing between the internet user and the online content he is trying to reach. It is these internet intermediaries who are responsible for the expanding censorship. Because the internet flows through their infrastructures, they can act as choke points for speech online.

3. The existence and role of the internet intermediaries is the main element which threw the protection afforded under the freedom of expression into disarray. As we shall see, the freedom of expression originated as a protection against the power of the state. Yet internet intermediaries are no public authorities; they are private parties. The freedom of expression is not used to dealing with censorship by one private party over another. On the other hand, there is a sense that internet intermediaries should also not be treated as "just" another private party; surely an individual internet user and the intermediaries are not in the same category when it comes to free speech?

---

[1] Justice Hugo Black, writing for the majority in U.S. Supreme Court, *Marsh v. Alabama,* 7 January 1946, 326 U.S. 501.
[2] F.T. WU, "Collateral censorship and the limits of intermediary immunity", *Notre Dame L.Rev.* 2011, (293) 299.

4. Therefore, the knot which must be untangled first is what the status of internet intermediaries is in our current speech system. The preliminary question to be answered is what the role of internet intermediaries is with regard to speech online. Only then can we ask the question how the freedom of expression should evolve to adapt itself to the new reality of the internet. That is also the central question of this dissertation: How should the right to freedom of expression evolve in order to regain fundamental protection of speech in the internet age?

5. It should come as no surprise that the answer to the question pushes the freedom of expression in an unexpected and original way. The arrival of the internet restructured the speech landscape in a considerable way, necessitating a considerable re-evaluation of the right to freedom of expression.

6. We are not trying to convince one jurisdiction to change its freedom of expression jurisprudence. We want to offer a new framework for the freedom of expression everywhere, whether it can be found in national constitutions, international agreements or otherwise. Our focus thus remains general, as befits the global nature of the internet. Of course, we will from time to time mention some cases or some national or supranational legislation, but these serve only to clarify our general point.

7. This paper is structured as follows: In chapter 1 we discuss the general importance of the freedom of expression, and the early optimism regarding the internet as an engine for free speech.

8. Chapter 2 reverses the viewpoint and looks at how the internet can be harmful to free speech. We discuss some threats to free speech likely to be encountered by individual internet users. Our attention focuses on search engines, social media platforms and internet service providers.

9. Before determining how the freedom of expression can resolve the threats to free speech online, we need to have a basic understanding of how the internet works. In chapter 3, we analyze the role of internet intermediaries in our speech system today. We define them as private governors of speech in a triadic model of speech governance, where the internet user, in his ability to speak, faces the censorial power of the state *and* of the internet intermediaries. We will explore what characterizes the relationships between these three players. At the end of this chapter, we derive the basic concerns to free speech existing in this new constellation.

10. Chapter 4 explores how the current right to freedom of expression deals with the concerns to free speech just identified. We analyze the case-law of the European Court of Human Rights in depth. This not only shows how the most influential human rights court in our region, and probably

worldwide, tackles, or rather fails to tackle, the concerns to free speech in the internet age, but also serves as an example of the struggles of courts everywhere in these matters.

11. Chapter 5 finally proposes a new framework for the freedom of expression, adapting and evolving it to serve the new realities of the internet. Out of a clear understanding of the dynamics of speech on the internet, we propose a freedom of expression 2.0 as a protection of the online "market for rules". Transparency, due process, intermediary immunity from liability for their users' speech, and competition law to protect the market for rules, are the anchor points of the freedom of expression 2.0. It is an invitation to courts everywhere to restore fundamental protection of speech in our times.

CHAPTER I. THE INTERNET: FREE SPEECH MANNA

12. The freedom of expression is the most fundamental right in a democracy. Before diving into the waters of the internet, it can be useful to remind ourselves why this is the case. There is a host of different justifications, old and new, as to why the freedom of expression exists. However, we will follow Timothy Garton Ash, who gives a fresh and understandable overview of what it is that the right to freedom of expression protects. Four basic thoughts lie at the basis of our free speech tradition, what Ash calls STGD: Self, Truth, Government and Diversity.[3]

13. First, we need freedom of expression to realize our full individual humanity.[4] What distinguishes us from other animals is our ability to communicate with each other. We establish what we think and who we are through relations with other people. Preventing someone to speak is preventing someone to be human, to be an individual. This is also related to the idea that all men and women are in their core independent, autonomous beings, ruled over only by themselves.[5]

14. The second classic argument is that freedom of speech protects the quest for truth: It is only by the clashing of different ideas that the truth will emerge.[6] John Stuart Mill formulated this most eloquently in On Liberty, where he argues that "the truth" cannot be fixed, and that suppressed ideas can contain the truth or part of the truth.[7] Even if a received wisdom is really true, it needs the debate with other untruths to be kept sharp, because otherwise truths might become held in the manner of prejudices. The American equivalent is the idea of "the marketplace of ideas", which was one of the founding justifications for the protection of speech under the First Amendment.[8]

15. Thirdly, free speech is a requirement of good government.[9] The linked ideas of freedom of expression, democracy, and good policy are firmly rooted in western civilization, going back to the ancient Greeks. Good decisions will be made if everyone who wanted to speak had the ability to do so. In the Greek city-state every citizen could address the assembly, while in modern democracies we vote for our representatives to speak for us.

---

[3] T. G. ASH, *Free Speech: Ten Principles for a Connected World,* London, Atlantic Books, 2016, 73.
[4] T. G. ASH, *Free Speech: Ten Principles for a Connected World,* London, Atlantic Books, 2016, 73-75.
[5] This is the basic thought of the Enlightenment, expressed so wonderfully by Kant, in I. KANT, "An answer to the question: What is Enlightenment?", 30 September 1784, Königsberg, Prussia.
[6] T. G. ASH, *Free Speech: Ten Principles for a Connected World,* London, Atlantic Books, 2016, 75-76.
[7] J.S. MILL, *On Liberty*, London, 1859.
[8] See J.A. BARRON, "Access to the press – A new First Amendment right", *Harv. L. Rev.* 1967, (1641) 1642-43.
[9] T. G. ASH, *Free Speech: Ten Principles for a Connected World,* London, Atlantic Books, 2016, 76-78.

16. The fourth argument for free speech is that it helps us live in diversity.[10] Different people have different ideas on almost anything you can imagine. Instead of grabbing the sword to resolve their issues, people should grab the microphone. Free and open debate is the way in which we can cope with our differences. There will always be disagreement, but free expression will help people understand each other, and will at least allow them to agree to disagree. Especially in our ever more diverse societies, this may be an important consideration.

17. Interestingly, these four arguments can also be found in the established case-law formula of the European Court of Human Rights. It goes: "*Freedom of expression constitutes one of the essential foundations of a democratic society* [democracy and good government] *and one of the basic conditions for its progress* [quest for truth] *and for each individual's self-fulfilment* [self]. *... [I]t is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness* [diversity] *without which there is no 'democratic society'.*"[11]

18. The internet now was frequently hailed in its early period as a medium with great potential for furthering the freedom of speech.[12] In fact, the internet would promote freedom in general. In the early years, libertarians around the world thought they had found their holy grail. Not only would the internet promote freedom, cyberspace could *only* be free. According to them, it was in the nature of the internet to be unregulable by government.[13] This conviction was derived from three characteristics of the internet's architecture[14]: (1) The internet has no way to verify who someone is on the net, or what the attributes of that person are (or whether it even is a real person); all you need is a device connected to the internet. (2) The data "packets" that are transferred over the net are not labeled; they only have an address to be sent to, but apart from that these data packets can contain anything. All packets are transferred over the net, irrelevant of what its contents are. Furthermore, geographical borders are not borders in cyberspace: the internet ignores state boundaries, sending packets to their destination, wherever that may be. (3) As a consequence of the first two, there is no easy way to "zone" the internet: there is no easy way to make access to data depend on the identity of the person or on the content of the data.

[10] T. G. ASH, *Free Speech: Ten Principles for a Connected World,* London, Atlantic Books, 2016, 78-79.
[11] See e.g. ECtHR, *Delfi AS v. Estland*, 16 June 2015, no. 64669/09, §131, and references there.
[12] C. S. YOO, "Free speech and the myth of the Internet as an unintermediated experience", *Wash. L. Rev*. 2010, (697) 697.
[13] See L. LESSIG, *Code and other laws of cyberspace,* New York, Basic Books, 1999, 4-5 (further discrediting this idea of the internet as free by nature).
[14] L. LESSIG, *Code and other laws of cyberspace,* New York, Basic Books, 1999, 28.

19. Speech would not only be free from government intrusion, but also from obstacles raised by private parties. This has become associated most with professor Eugene Volokh, who predicted a world of "cheap speech": Individuals no longer had to rely on the old gatekeepers, such as newspapers, broadcasters, book publishers, retailers and the like, to reach mass audiences; everyone could be a publisher now.[15] Before, a main concern of the freedom of expression was the scarcity of possibilities to speak to a large audience. Because the traditional gatekeepers' first concern is profitability, it was difficult for unpopular opinions going against the accepted status quo to be heard.[16] The internet changed all this. Access to the internet was supposed to solve the issues of who can speak and of who has access to the means to speak.[17]. Almost anyone can now broadcast their views widely and cheaply, even crossing geographical borders and penetrating into different cultures.[18] Reduced costs of distribution meant there is now an immense amount of variety to be found online, where almost everyone can find their niche.[19] The old problem has rather been reversed: where there used to be a scarcity of speaking opportunities, there is now a scarcity of audience attention.[20]

20. A striking example of the hopes of a newfound freedom on the internet can be found in the Declaration of the Independence of Cyberspace (1996), penned by John Perry Barlow, an ardent advocate of internet freedom and founding member of the Electronic Frontier Foundation: "*Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather. […] We are creating a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity*."[21]

---

[15] E. VOLOKH, "Cheap speech and what it will do", *Yale L.J.* 1995, (1805) 1834-38; See also K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1603; L. LESSIG, *Code and other laws of cyberspace,* New York, Basic Books, 1999, 4; K. SULLIVAN, "First amendment intermediaries in the age of cyberspace", *UCLA L. Rev.* 1998, (1653) 1666-67; F.T. WU, "Collateral censorship and the limits of intermediary immunity", *Notre Dame L.Rev.* 2011, (293) 298.

[16] R. TUSHNET, "Power without responsibility: Intermediaries and the First Amendment", *Geo. Wash. L. Rev.* 2008, (986) 989.

[17] J.A. CHANDLER, "A right to reach an audience: An approach to intermediary bias on the internet", *Hofstra L. Rev.* 2007, (1095) 1096.

[18] J.M. BALKIN, "Digital speech and democratic culture: A theory of freedom of expression for the information society", *N.Y.U. L. Rev.* 2004, (1) 7-8.

[19] R. TUSHNET, "Power without responsibility: Intermediaries and the First Amendment", *Geo. Wash. L. Rev.* 2008, (986) 990.

[20] J.M. BALKIN, "Digital speech and democratic culture: A theory of freedom of expression for the information society", *N.Y.U. L. Rev.* 2004, (1) 7; T. WU, "Is the First Amendment obsolete?", *Mich. L. Rev.* 2018, (547) 548.

[21] J.P. BARLOW, "A Declaration of the Independence of Cyberspace", *EFF* 8 February 1996, *https://www.eff.org/cyberspace-independence.*

21. Such rousing language reveals a hope that the internet would be a beacon for the freedom of expression around the world. Kathleen Sullivan went so far as describing the coming of the internet as "*First Amendment manna from heaven*".[22]

CHAPTER II. THREATS TO FREE SPEECH ON THE INTERNET

22. The early period of the internet saw a lot of optimism with free speech proponents. Today a much more nuanced view has become common. Without denying the benefits of the internet for the freedom of speech, scholars have increasingly observed the dark side of the internet.[23] Over the years, it has become clear that the digital environment can create incentives opposed to the freedom of speech. Seeing that the internet has become the primary means for communication, its threats to free speech must also be treated with primary concern.

23. Our focus is on the internet user's experience of the net, and in particular his relation to the powerful internet intermediaries. Of course, the state can also be a hindering factor to speech, but that is a general threat, not specific to the internet. The internet intermediaries are a necessary component of the internet. They make it possible for persons to find each other online and communicate, by providing the necessary infrastructure and by bringing the necessary order to the otherwise chaotic and unruly amount of information online. Three such intermediaries will serve here as examples of threats to free speech on the internet: search engines, social media platforms and internet service providers. These serve as a taste of what an individual internet user might encounter online.

SECTION I. SEARCH ENGINES

24. Search engines are absolutely vital in today's internet environment. One might try guessing URL's to find a particular website, but web users generally employ search engines to find what they are looking for. These intermediaries are our guides to the internet; without them, we would get lost. It is not difficult to realize that such power could be used contrary to the internet user's interest. The navigator might deceive us by leading us around unnecessary detours, or by not leading us to our destination at all.

---

[22] K. SULLIVAN, "First amendment intermediaries in the age of cyberspace", *UCLA L. Rev.* 1998, (1653) 1669.
[23] See J.A. CHANDLER, "A right to reach an audience: An approach to intermediary bias on the internet", *Hofstra L. Rev.* 2007, (1095) 1096; K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1613-1614; T. WU, "Is the First Amendment obsolete?", *Mich. L. Rev.* 2018, (547) 557, and footnotes there; C. S. YOO, "Free speech and the myth of the Internet as an unintermediated experience", *Wash. L. Rev.* 2010, (697) 697-699.

25. First, let's summarize what search engines actually do: the bringing together of speaker and listener, in one way or another. Either a speaker is trying to find an audience or, more frequently, a listener trying to find a speaker. For example, I as listener might be looking for the latest news on Brexit. Googling "Brexit" leads me to the Guardian website (speaker). On the other hand, I as speaker might want to find a forum where I can air my opinion on Brexit. Google might suggest to me Reddit, where I will then find my audience.

26. This connecting of speaker and listener requires two steps. First, the search engine collects all relevant web pages; secondly, it ranks them.[24] In this way, it hopes to lead the searcher to the desired destination as quickly as possible. Without this ordering function of search engines, the web would be an unmanageable chaos of information.

27. It thus quickly becomes apparent where the dangers to free speech lie. These search engines have an enormous power in connecting speaker and listener. The freedom of expression, whatever the theoretical justification for it, is ultimately always a protection of communication, which can only arise in a communicative *relationship* between speaker and listener.[25] Free speech is always a matter of multiple persons. In that sense, the power to connect speaker and listener must be given due consideration.

28. A listener cannot (and has no obligation to) listen to all speakers. He must necessarily discriminate between speakers and filter out a lot of speech which he is not interested in.[26] How does he do this? A first possibility is that he does this himself. He might for example desire to have a meeting with person A and set it up, but not with person B. However, listeners have also always relied on third parties, intermediaries, to do some selections for them. It is simply not possible for a listener to always make the effort himself.[27] He will rely on a certain newspaper to select the news stories he finds interesting. He will watch a certain television channel to provide him with entertainment. And he will use a search engine to find the online content he is looking for.[28]

---

[24] E. GOLDMAN, "Search engine bias and the demise of search engine utopianism" in A. SPINK and M. ZIMMER (eds.), *Web Search,* Berlin, Springer, 2008, (121) 121-123.
[25] J.A. CHANDLER, "A right to reach an audience: An approach to intermediary bias on the internet", *Hofstra L. Rev.* 2007, (1095) 1101.
[26] J.A. CHANDLER, "A right to reach an audience: An approach to intermediary bias on the internet", *Hofstra L. Rev.* 2007, (1095) 1102.
[27] J.A. CHANDLER, "A right to reach an audience: An approach to intermediary bias on the internet", *Hofstra L. Rev.* 2007, (1095) 1097-98; C. S. YOO, "Free speech and the myth of the Internet as an unintermediated experience", *Wash. L. Rev*. 2010, (697) 701-702.
[28] Why search engine filtering ("bias") is necessary, see also E. GOLDMAN, "Search engine bias and the demise of search engine utopianism" in A. SPINK and M. ZIMMER (eds.), *Web Search,* Berlin, Springer, 2008, (121) 127-129.

29. A problem to the freedom of speech arises where this filtering, this discrimination by the intermediary, does not line up with the criteria the listener would employ.[29] The intermediary connects speaker and listener who would not have connected without its intervention, or does not connect speaker and listener who would have wanted to connect. This problem has always existed where selection intermediaries are used. However, the way in which search engines might engage with it are peculiar to them.

30. At the outset, it must be mentioned that no selection intermediary can ever employ the exact same criteria the listener would employ. However, it can try its best. Search engines try to give what the searcher is looking for by using an algorithm to scour the internet. This algorithm is not designed differently for every specific user (although it might take into consideration personal data about you), but is a general algorithm applicable to all. So from the start it is clear that the selection criteria will not overlap completely. Nonetheless, the algorithm is generally designed to satisfy the searcher. It does this by scouring the internet's web pages containing the search terms, and ranks them according to, for example, how many times other web pages link to that web page.

31. Clearly, such an algorithm will tend to be majoritarian.[30] It will generally accommodate the views of the majority first. This is a bias the searcher might not want, but it seems inescapable (notwithstanding that search is becoming ever more personalized, based on previously harvested data about yourself). There are however other biases a search engine might employ which are not quite so innocent, at which point they can become problematic. Most of these occur where the search engine manually intervenes to promote or depreciate specific search results.

32. There are three ways in which a search engine might not in good faith fulfill its role as selection intermediary. The first is to remove a webpage from its index, making it disappear completely from the search results.[31] The intermediary might have multiple reasons for doing so, some more acceptable than others. It might want to comply with requests by a national government, with legislation, or with court orders to remove certain websites from its search results. For example, some states might require to remove websites with hateful content from its search results. Another

---

[29] J.A. CHANDLER, "A right to reach an audience: An approach to intermediary bias on the internet", *Hofstra L. Rev.* 2007, (1095) 1103.

[30] J.A. CHANDLER, "A right to reach an audience: An approach to intermediary bias on the internet", *Hofstra L. Rev.* 2007, (1095) 1108-09; E. GOLDMAN, "Search engine bias and the demise of search engine utopianism" in A. SPINK and M. ZIMMER (eds.), *Web Search,* Berlin, Springer, 2008, (121) 125.

[31] J.A. CHANDLER, "A right to reach an audience: An approach to intermediary bias on the internet", *Hofstra L. Rev.* 2007, (1095) 1109-1110; E. GOLDMAN, "Search engine bias and the demise of search engine utopianism" in A. SPINK and M. ZIMMER (eds.), *Web Search,* Berlin, Springer, 2008, (121) 123.

example is the Court of Justice of the E.U. (CJEU) created "right to be forgotten", where a search engine can be forced to remove websites from its results where they conflict with an individual's right to privacy.[32] Further, a search engine might also want to remove from its search results links to competitors offering similar services as the company owning the search engine. Google, offering email services with gmail, might for example want to remove results leading to other email services. Finally, though less common for search engines, it might also want to foster a certain image of itself. For example, while not forced to do so, Google will by default filter out pornographic content so as to remain family-friendly, unless a user is explicitly searching for adult content.

33. A second way in which a search engine can be a disturbing factor is not by removing webpages from its results, but by drowning them in the ranking.[33] Most users will not get past the first page of the search results. If a relevant result is depreciated to page 8, 9, or even 12.000, the result will be largely the same as if the search engine had removed the webpage completely.[34] If done deliberately, it is likely done for purely self-serving interests. The search engine might want to drown out a competitor. This method is more subtle than removing the webpage completely from the results. The search engine will always have a plausible defence, namely that this is simply the algorithm at work. Seeing that search engines are largely "black boxes", operating opaquely and without its algorithm being publicly accessible, it is very hard to prove malicious intent. One example of this is a case where the founder of a U.K.-based search engine accused Google of slanting the search results to favour its own services.[35]

34. A third way in which search engines could mislead users is by adding search results to the top of the ranking which wouldn't have been there if the general algorithm had been used.[36] This mainly points to the business model on which most search engines are based: advertisements and sponsored links. Entities pay Google to appear on top of the search results for certain search queries. For example, Amazon might have paid to appear first on the list when searching for

---

[32] CJEU, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, 13 May 2014, C-131/12, ECLI:EU:C:2014:317.

[33] J.A. CHANDLER, "A right to reach an audience: An approach to intermediary bias on the internet", *Hofstra L. Rev.* 2007, (1095) 1110-11; E. GOLDMAN, "Search engine bias and the demise of search engine utopianism" in A. SPINK and M. ZIMMER (eds.), *Web Search,* Berlin, Springer, 2008, (121) 124; F. PASQUALE, *The Black Box Society: The secret algorithms that control money and information*, London, Harvard University Press, 2015, 161.

[34] E. GOLDMAN, "Search engine bias and the demise of search engine utopianism" in A. SPINK and M. ZIMMER (eds.), *Web Search,* Berlin, Springer, 2008, (121) 125.

[35] J. GRIMMELMANN, "Speech engines", *Minn. L. Rev.* 2014, (868) 870.

[36] J.A. CHANDLER, "A right to reach an audience: An approach to intermediary bias on the internet", *Hofstra L. Rev.* 2007, (1095) 1113-15.

"books". Again, another reason for doing so might be the promotion of services offered by the company owning the search engine. Clearly, this third way of influencing the search results introduces a commercial bias into the system.

35. The question, discussed further, is whether and under what circumstances search engines should be allowed to skew the results in the ways just described.

SECTION II. SOCIAL MEDIA PLATFORMS

36. Social media are another category of internet intermediaries. Like search engines, they bring speakers and listeners together. Yet how these intermediaries are experienced differs considerably. A social network is much more personal to the individual user; most people use it to communicate with friends and family and build a personal space on these platforms. It is also more direct. Search engines refer you to a different website, whereas social media platforms are the place where the actual communication happens. Therefore, when speech is censored on these networks, it can feel more intrusive and consequential.

37. Like search engines, these social media platforms could decide to remove content from their platforms completely. The free speech implications of this are even clearer compared to search engines: here the content will actually be removed completely from the internet (whereas search engines can only remove a link to the content).

38. Total removal of user content can happen in two main ways. A first way is to remove specific content a user has posted on the platform. This might consist of a post, or of a reaction to a post. For example, Twitter might decide to remove a tweet hateful to minorities, or Facebook might remove a hateful comment on a news story. A second way consists of removing the complete user profile, barring that person from the platform. This is usually a harsher punishment, reserved for repeat violators or mediatised cases.

39. The reasons for which these platforms remove content are largely similar to the ones discussed for search engines, and in particular: to comply with national laws or court orders, and to foster a certain image. They deserve some elaboration here. Social media have come under increasing pressure to curate their platforms, both by public entities and public opinion. There is a growing social awareness of the impact these platforms can have, and of the responsibility these platforms should carry. Social media users have expectations regarding the permissible content on the platforms they use, while legislators and governments expect platforms to cooperate with them to advance public interests and protect vulnerable individuals.

40. Social media platforms have to juggle with these pressures in an extremely difficult balancing exercise. First, these platforms are ultimately based on the freedom of expression. No intervention remains the default option. Second, different interest groups put pressure on them to move in different directions. There will be NGO's and governments demanding free expression, while other individuals, groups and governments will ask for censoring certain content they deem harmful, despicable, immoral or dangerous. Third, social media are acting in an internet context, i.e. a global context. A truly global social network must work with one set of rules. Not only are there opposing pressures at every turn, but also opposing pressures geographically. How can a global network conciliate all these?

41. Social media struggle with these questions. Some examples can highlight the issues.

42. A good example of the different geographic pressures social media face is the case of Thailand's draconian lèse-majesté laws. In 2007, YouTube was blocked across the country because some videos appeared denigrating the semi-divine king Bhumibol Adulyadej.[37] One clip showed the king with a pair of women's feet above his head (a great Thai insult). Eventually, YouTube reached a deal with Thailand to censor the videos for IP addresses located in Thailand (a technique known as geo-blocking) after which YouTube was once again available in the country.[38]

43. Maybe the most controversial issues arise when social media censor politicians. In Belgium, an up-and-coming far-right politician and controversial figure Dries Van Langenhove saw two of his accounts removed from Facebook with only a few months away from important elections.[39] Van Langenhove strongly condemned the decision, stating that Facebook was meddling in the elections. He asked his followers to put pressure on Facebook to reinstate his accounts and also contacted Facebook himself, with success: one of the accounts was back online the following day.

44. Facebook got embroiled in another scandal when it removed the famous "napalm girl" picture, The Terror of War by Nick Ut.[40] It shows a group of children running away after the South Vietnamese army accidentally dropped a load of napalm on their village. One of the children is a

[37] I. MACKINNON, "YouTube ban after videos mock Thai king", *The Guardian* 7 April 2007, *https://www.theguardian.com/technology/2007/apr/07/news.newmedia*.

[38] T. G. ASH, *Free Speech: Ten Principles for a Connected World,* London, Atlantic Books, 2016, 55; K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1623.

[39] X, "Facebook zet verwijderd profiel Dries Van Langenhove terug online", *HLN* 15 february 2019, *https://www.hln.be/nieuws/binnenland/facebook-zet-verwijderd-profiel-dries-van-langenhove-terug-online~a17ebcb1/*.

[40] S. LEVIN, J. CARRIE and L. HARDING, "Facebook backs down from 'napalm girl' censorship and reinstates photo", *The Guardian* 9 September 2016, *https://www.theguardian.com/technology/2016/sep/09/facebook-reinstates-napalm-girl-photo*.

naked girl, who was hit by napalm and covered in third-degree burns. The picture quickly became a symbol for the atrocities of the Vietnam war.[41] Nonetheless, Facebook decided to remove it because it conflicted with their child nudity policy, stating it was difficult to distinguish between photographs of nude children in one instance or another. However, after serious backlash, Facebook decided to back down and allow the photo on its platform.

45. It is clear that Facebook often reverses its decision when it feels that public opinion and other pressures do not support it, but what especially stands out is the arbitrariness of the whole process. Sometimes Facebook stands firm on its rules, sometimes it relents immediately, sometimes an account is reinstated while another is not. Facebook seems to turn with the wind. It seems these are uncertain times for free expression, where speech is dependent on the whims of social media platforms…

46. Next to removing content outright, these platforms may also tweak their algorithms and appreciate or depreciate certain content up or down the ranking. The analysis is similar to that of search engines, which is why it won't be repeated again here.

SECTION III. INTERNET SERVICE PROVIDERS

47. Internet service providers (ISP's) are the firms delivering the internet to your home. They own a network of "pipes" through which data packets (the internet) travel.

48. The discussion around ISP's centers on network neutrality. This concept is basically a non-discrimination principle.[42] It prescribes that all internet traffic should be treated in a non-discriminatory fashion, regardless of content, application, device, service, sources or recipients, so that Internet users can freely choose online content, applications, services and devices without being influenced by discriminatory delivery of Internet traffic.[43] ISP's should not be allowed to engage in unreasonable discrimination in their treatment of internet traffic.[44]

49. There is some concern that companies providing internet access will block, degrade or prioritize particular content based on payments or other considerations.[45] Net neutrality is a regulatory

---

[41] X, "The terror of war", *TIME, http://100photos.time.com/photos/nick-ut-terror-war.*

[42] T. G. ASH, *Free Speech: Ten Principles for a Connected World,* London, Atlantic Books, 2016, 357.

[43] L. BELLI and P. DE FILIPPI, "General introduction: Towards a multistakeholder approach to network neutrality", in L. BELLI and P. DE FILIPPI (eds.), *Net neutrality compendium: Human rights, free competition, and the future*, Springer, 2016, (1) 2-4.

[44] S.M. BENJAMIN, "Transmitting, editing, and communicating: determining what the freedom of speech encompasses", *Duke L.J.* 2011, (1673) 1679.

[45] S.M. BENJAMIN, "Transmitting, editing, and communicating: determining what the freedom of speech encompasses", *Duke L.J.* 2011, (1673) 1679-1680.

choice which can be adopted by the authorities to prevent this. The main argument for it is that it seems necessary to ensure that all content (not only commercially profitable content) is transmitted with sufficient quality and that all data packets can count on a "best-effort" delivery.[46] Internet users would consequently have the freedom to choose how to use their own internet connection, without interference from ISP's.[47] Net neutrality would therefore promote the freedom of expression (including the freedom to receive information) of internet users. It also has repercussion from a competition law perspective: net neutrality ensures that all content and application providers compete on a level playing field.[48]

50. A first way ISP's may discriminate content is by blocking specific content.[49][50] An ISP might decide to block certain websites to follow court orders or to avoid liability. They could also try and block content from competitors offering similar services. However, they might have their own peculiar reasons too. For example, a vengeful pro-freedom Swedish ISP, Bahnhof, blocked publisher Elsevier's website after Elsevier had obtained a court order against Bahnhof to block access to Sci-hub, a pirate site offering free access to academic papers.[51] Though Bahnhof might have acted in the name of free speech, its action shows the arbitrary power it has over speech of internet users. Moreover, as opposed to social media platforms, users generally do not think or expect their ISP to block specific content on their own initiative.

51. A second way ISP's can discriminate content is by "access-tiering", meaning that some data-packets flowing through their infrastructure get preferential treatment over others.[52] This might be useful for packets that are sensitive to delay, such as video streaming. However, more

---

[46] L. BELLI and P. DE FILIPPI, "General introduction: Towards a multistakeholder approach to network neutrality", in L. BELLI and P. DE FILIPPI (eds.), *Net neutrality compendium: Human rights, free competition, and the future*, Springer, 2016, (1) 3.

[47] L. BELLI and P. DE FILIPPI, "General introduction: Towards a multistakeholder approach to network neutrality", in L. BELLI and P. DE FILIPPI (eds.), *Net neutrality compendium: Human rights, free competition, and the future*, Springer, 2016, (1) 3.

[48] L. BELLI, "End-to-end, net neutrality, and human rights", in L. BELLI and P. DE FILIPPI (eds.), *Net neutrality compendium: Human rights, free competition, and the future*, Springer, 2016, (13) 13.

[49] J.A. CHANDLER, "A right to reach an audience: An approach to intermediary bias on the internet", *Hofstra L. Rev.* 2007, (1095) 1119.

[50] For a more detailed and thorough analysis of what types of internet traffic management an ISP might undertake, see L. BELLI, "End-to-end, net neutrality, and human rights", in L. BELLI and P. DE FILIPPI (eds.), *Net neutrality compendium: Human rights, free competition, and the future*, Springer, 2016, (13) 17-19.

[51] Z. WHITTAKER, "A Swedish ISP has blocked Elsevier's website in protest for forcing it to block Sci-Hub", *Tech crunch* 5 November 2018, *https://techcrunch.com/2018/11/05/swedish-internet-provider-bahnhof-protest-injunction-elsevier-website/?guccounter=1&guce_referrer_us=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_cs=l6XBuxjtztUgQYxgIL73uA*. (Bahnhof also called the publisher "greedy opportunists").

[52] J.A. CHANDLER, "A right to reach an audience: An approach to intermediary bias on the internet", *Hofstra L. Rev.* 2007, (1095) 1120-21.

tantalizing for network operators is the possibility of charging content providers extra in order for them to prioritize their data packets. In times of congestion, internet users might therefore have a hard time reaching the speech of content-providers not paying extra for priority delivery.[53]

SECTION IV. CONCLUSION

52. Internet intermediaries have the power to censor speech directly, and have moreover the power to rank content. Their actions ultimately originate in one of two entities: Either the intermediary acts on its own initiative, whether for commercial reasons, reputational reasons, design reasons or just because they think it is the right thing to do; or the state (legislator, government, or judiciary) forces intermediaries to take certain actions. The question is how the freedom of expression should deal with these issues.

CHAPTER III. THE ROLE OF INTERNET INTERMEDIARIES IN THE SPEECH SYSTEM

53. Before considering any policy on how to best handle free speech in the internet age, it is imperative to understand the role of internet intermediaries. How exactly do they operate in the internet context? What is their function in relation to the speech system? The goal here is purely descriptive: searching for the best characterisation of internet intermediaries.

54. We will first shortly define internet intermediaries. Then we will define their roles in the internet speech landscape, and examine their relationship with the state and with internet users. Social media platforms will be treated more in depth here, serving as an example for all intermediaries. Finally, we will analyze the main concerns arising out of this new internet speech landscape.

SECTION I. INTERNET INTERMEDIARIES

55. For clarity's sake, it is best to define what exactly we mean by internet intermediaries. They are everything which is interposed between an internet user and the content the user is trying to reach, whether that is information on Wikipedia, entertainment on Netflix or communication with a friend on Facebook. They are infrastructure providers governing the flow of digital information racing through their channels. Because they have that power, they are also potential controllers of speech.

56. Without trying to be exhaustive, here is a list of the most well-known internet intermediaries:

---

[53] J.A. CHANDLER, "A right to reach an audience: An approach to intermediary bias on the internet", *Hofstra L. Rev.* 2007, (1095) 1122.

a. Social media / other platforms

b. Search engines

c. Internet service providers

d. Web hosts

e. DNS providers

f. Transit providers

g. Browsers

h. Payment systems

57. For all the ease with which we use the internet daily, there is nonetheless a hugely complex system behind our internet experience. The internet is indeed an iceberg: Most of us only see the tip of it, and are unaware of what lies in its depths.[54] What we have told here is a simplification, but the further discussion will be exemplary for all private intermediaries.

SECTION II. PRIVATE GOVERNORS IN A TRIADIC MODEL OF SPEECH GOVERNANCE

§1. The triadic model

58. In the past, the system of free speech was largely dyadic: it pitted two players against each other in the battle for free expression. The state (1) tried to control the speech of speakers and publishers (2).[55] The whole tradition of free speech protection was based around this model. The freedom of expression served as a shield against state censorship, a shield held firm by the judiciary.

59. Today, we live in a transformed society. The rise of the internet completely changed the speech landscape. Consequentially, the structure of the internet has to be taken into account when describing this new landscape. And the internet cannot exist without the infrastructure provided by the internet intermediaries. That is why today we can call the system triadic.[56] A new player,

[54] T. G. ASH, *Free Speech: Ten Principles for a Connected World,* London, Atlantic Books, 2016, 348-349.
[55] J.M. BALKIN, "Free speech in the algorithmic society: Big data, private governance, and new school speech regulation", *U.C.D. L. Rev.* 2018, (1149) 1187; T. WU, "Is the first amendment obsolete?", *Mich. L. Rev.* 2018, (547) 548, 578.
[56] Jack Balkin rather uses the term "pluralist", which might be more accurate but is less clear in its meaning. We will therefore refer to the triadic model; see J.M. BALKIN, "Free speech in the algorithmic society: Big data, private governance, and new school speech regulation", *U.C.D. L. Rev.* 2018, (1149) 1187-91.

"the internet", or rather the internet infrastructure providers, has imposed itself between the two traditional players. This paper tries to take this change of landscape seriously, and asks the question not only how the right to freedom of expression, developed in a dyadic system, relates to the internet context, but how the right itself must evolve to face the twenty-first century challenges to free speech.

60. One might argue that a triadic system already existed in the past, seeing that mass media companies also acted as gatekeepers for the speech of others.[57] Newspapers, broadcasters, publishers and movie studios all played a role in the speech landscape in the past. However, there is one big difference between these and the internet intermediaries: Internet intermediaries primarily connect speakers and listeners, without producing the content themselves. By contrast, the mass media of the past were also the creators of their content.[58] Where the internet consists of a huge number of speakers and listeners, the mass media consist of an audience and of a select group of speakers.[59] This difference is also important when characterizing them as "editors". Mass media necessarily have to edit their content, while internet intermediaries don't necessarily have to edit the content flowing through their channels, and even if they do, they are only editing content created by other entities than themselves.[60]

§2. Private governors

A. In general

61. Internet intermediaries are best described as private governors.[61] Two characteristics are essential: (1) they are privately owned entities, not state authorities; (2) they govern the flow of data flowing through their channels, and can thus govern the speech of the internet users relying on their infrastructure. They are self-regulating entities, promulgating rules, implementing them, and

[57] J.M. BALKIN, "Free speech in the algorithmic society: Big data, private governance, and new school speech regulation", *U.C.D. L. Rev.* 2018, (1149) 1192.

[58] J.M. BALKIN, "Free speech in the algorithmic society: Big data, private governance, and new school speech regulation", *U.C.D. L. Rev.* 2018, (1149) 1192. See also R. TUSHNET, "Power without responsibility: Intermediaries and the First Amendment", *Geo. Wash. L. Rev.* 2008, (986) 988. Making the same argument for social media platforms, see K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1660.

[59] J.M. BALKIN, "Digital speech and democratic culture: A theory of freedom of expression for the information society", *N.Y.U. L. Rev.* 2004, (1) 10.

[60] J.M. BALKIN, "Free speech in the algorithmic society: Big data, private governance, and new school speech regulation", *U.C.D. L. Rev.* 2018, (1149) 1192-93.

[61] Kate Klonick applies the term private governance to social media platforms, but we use it more generally for all internet intermediaries: K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1662-63.

enforcing them against their users.[62] Each intermediary can potentially silence speech, good or bad.[63] The term governor captures the power of these private entities in the internet speech landscape, and their impact on individual users.[64]

62. In the early years of the internet, libertarians around the world were ecstatic. Not only would the internet promote freedom of expression, cyberspace could *only* be free. It was in the nature of the internet to be uncontrollable by government.[65] The society of cyberspace would be "*a fully self-ordering entity, cleansed of governors and free from political hacks*."[66] Little did it occur to them that the powerless public "governors" would be replaced with private governors filling the power vacuum in this self-ordering entity. Though libertarians might deny the problem of private governors, as they are private, from the viewpoint of internet users there is not much difference between a public or private governor when they are censored.

63. The most developed systems of private governance by an internet intermediary are probably those developed by social media platforms. They have evolved into important speech regulators, and make decisions regarding free speech on a daily basis. Though other intermediaries might not have such complex administrations in place to govern speech (most likely because they have no desire for it), social media can act as an example of why intermediaries might want to control speech, how they go about it and of the potential influence internet intermediaries can have on the speech of individuals around the world.

B. Social media as illustration

64. What are the big social media platforms doing? How are they behaving? What are they doing with the speech of their users? These are not easy questions. Generally, the internal processes of these platforms are shrouded in mystery.[67] Sometimes, however, glimpses are offered through

---

[62] J.M. BALKIN, "Free speech in the algorithmic society: Big data, private governance, and new school speech regulation", *U.C.D. L. Rev.* 2018, (1149) 1153, 1184. See also D. JOHNSON and D. POST, "Law and borders – The rise of law in Cyberspace", *Stan. L. Rev.* 1996, (1367) 1387-91.

[63] F.T. WU, "Collateral censorship and the limits of intermediary immunity", *Notre Dame L. Rev.* 2011, (293) 299.

[64] K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1663.

[65] See L. LESSIG, *Code and other laws of cyberspace,* New York, Basic Books, 1999, 4-5 (further discrediting this idea of the internet as free by nature).

[66] L. LESSIG, *Code and other laws of cyberspace,* New York, Basic Books, 1999, 4.

[67] C. BUNI and S. CHEMALY, "The secret rules of the internet: The murky history of moderation, and how it's shaping the future of free speech", The Verge 13 April 2016, *https://www.theverge.com/2016/4/13/11387934/internet-moderator-history-youtube-facebook-reddit-censorship-free-speech;* A. CHEN, "The labourers who keep dick pics and beheadings out of your Facebook feed", *Wired* 23 October 2014, *https://www.wired.com/2014/10/content-moderation/;* C.M. EVERETT, "Free speech on privately-owned fora: a discussion on speech freedoms and policy for social media", *Kan. J.L. & Pub. Pol'y* 2018, (113) 120; M. HEINS, "The brave new world of social media censorship", *Harv. L. Rev.* 2013-

accidental leaks, by (former) employees and by observers who reverse engineer the internal rules. We will thankfully borrow from the work of Kate Klonick, who interviewed the top lawyers employed by Facebook, YouTube and Twitter at the time that the first content-moderation policies were created.

1. Why moderate content on social media?

65. Social media platforms are not simply carriers for user-generated content. These platforms actively monitor and moderate ("censor") the content on their platforms. But a preliminary question is: why do this in the first place, assuming they have no obligation to do so?

66. The main explanation for the moderation of content on social media is economic: platforms need to attract advertisers.[68] Big data is the name of the game.[69] Advertisers want access to the information the social media platforms harvest from their users. Advertisers can then target the specific audience they are trying to reach, through space purchased on the platform. Social media platforms sell user data and user attention to advertisers. In that sense, as Andrew Lewis said, users are not the clients of social media, they are its products.[70] The crucial component in this business model is the amount of data and of users to target. That is why amassing a large user-base is essential for social media.

67. It simply comes down to this: a general user does not want to be confronted with hate speech, pornography, expressions of violence and other uses of free expression that are not illegal *per se*, but are deemed undesirable by the larger population. To foster their "community", social media need to make the platform attractive to its users, and thus moderate the content appearing on the platform. The platform needs to be tuned to the expectations of its users. Furthermore, some advertisers might not wish to be associated with such content, for example when their advertisement appears before a hateful video or next to pornographic images.

68. From a historical point of view, this moderation was not always obvious. That is because these platforms were not created as media companies. They are the work of enthusiastic software developers. Only later in their development did they start to realize that content on their platform

---

14, (325) 326; K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1601, 1630.

[68] T. G. ASH, *Free Speech: Ten Principles for a Connected World,* London, Atlantic Books, 2016 50; K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1627-29.

[69] J.M. BALKIN, "Free speech in the algorithmic society: Big data, private governance, and new school speech regulation", *U.C.D. L. Rev.* 2018, (1149) 1154-55.

[70] Posted under the pseudonym blue_beetle on the website MetaFilter, 26 august 2010.

might also need curation.[71] They became media companies, whether they liked it or not. Nonetheless, the inception of content moderation was still based on the American First Amendment, and was developed by U.S. First Amendment lawyers: The starting principle was and is that everything can be said, as long as it's not forbidden.[72] Free speech was the soil on which social media platforms could grow, while content moderation is the insecticide which keeps them from dying.

2. How to moderate

69. A social media platform has multiple ways to moderate content on their platform. These can be labeled with the help of a few categories: a priori (before the content is posted) vs a posteriori, proactive (moderators actively look for prohibited content) vs reactive (content is reviewed when flagged by users) and automatic (using algorithms) vs manual (human moderators review the content).[73]

70. Before a user posts something, there usually already is an automatic a priori screening of the post before it can appear on the platform. Most users will not be aware of this. For example, when uploading a video, the time it takes to upload will include time for computers to screen the material uploaded.[74] This a priori screening uses algorithms to look for obviously illegal content, such as child pornography or copyright infringements.[75] For example, the algorithm PhotoDNA helps detect child pornography in the time between upload and publication, by comparing the image with a known universe of child pornography images maintained and updated by the International Center for Missing and Exploited Children and the U.S. Department of Homeland Security.[76]

---

[71] J.M. BALKIN, "Free speech in the algorithmic society: Big data, private governance, and new school speech regulation", *U.C.D. L. Rev.* 2018, (1149) 1183; C. BUNI and S. CHEMALY, "The secret rules of the internet: The murky history of moderation, and how it's shaping the future of free speech", The Verge 13 April 2016, *https://www.theverge.com/2016/4/13/11387934/internet-moderator-history-youtube-facebook-reddit-censorship-free-speech*; K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1618-20.

[72] K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1621.

[73] K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1635-36.

[74] K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1636.

[75] K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1637.

[76] C. BUNI and S. CHEMALY, "The secret rules of the internet: The murky history of moderation, and how it's shaping the future of free speech", The Verge 13 April 2016, *https://www.theverge.com/2016/4/13/11387934/internet-moderator-history-youtube-facebook-reddit-censorship-free-speech;* K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1636-37.

71. Proactive a posteriori screening used to be more limited, but has grown in the past few years to fight the online world of ISIS and combat terrorism generally. For example, Twitter has removed more than 270,000 profiles for promoting terrorism in the second half of 2017 alone, the overwhelming majority of which was detected by their own technology.[77]

72. Reactive manual a posteriori screening is the main category. Human moderators will review the content other users flag. They have to follow the rules the company sets, for hate speech, bullying, violence etc. But who really are these moderators, where do they work, and how do they decide?

3. The deciders

73. Who are "the deciders", the people who police content on each respective social media platform?[78] Over time this has evolved, with ever more human moderators getting involved – in 2014, an insider estimated there were well over 100,000 of them.[79] Today it most likely looks something like the structure Facebook has set up.[80]

74. There are three levels of moderators, or "tiers".[81] The third tier reviews the majority of the content users flag, and most of the issues are discarded. This tier is usually outsourced to "call-centers" in India, The Philippines, Eastern Europe, Mexico...[82] Thousands and thousands of these workers exist today; we don't know them, but they are arguably the biggest censors worldwide. The second tier consists of the supervisors of the third tier. They will review priority content, such as incitement to violence, and resolve cases of doubt which have been transferred to them by the third tier. Finally, the first tier are usually lawyers working at headquarters in the United States.

---

[77] THE GUARDIAN, "Twitter bans 270,000 accounts for 'promoting terrorism'", 5 April 2018, *https://www.theguardian.com/technology/2018/apr/05/twitter-bans-270000-accounts-to-counter-terrorism-advocacy*.

[78] Jeffrey Rosen called Nicole Wong, deputy general counsel at Google, "the decider", the person in the world with the most power to determine who may speak and who may be heard: J. ROSEN, "The deciders: The future of privacy and free speech in the age of Facebook and Google", *Fordham L. Rev.* 2012, (1525) 1536.

[79] A. CHEN, "The labourers who keep dick pics and beheadings out of your Facebook feed", *Wired* 23 October 2014, *https://www.wired.com/2014/10/content-moderation/*.

[80] See also C. BUNI and S. CHEMALY, "The secret rules of the internet: The murky history of moderation, and how it's shaping the future of free speech", The Verge 13 April 2016, *https://www.theverge.com/2016/4/13/11387934/internet-moderator-history-youtube-facebook-reddit-censorship-free-speech*.

[81] K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598)1639-40; see also M. AMMORI, "The New New York Times: Free speech lawyering in the age of Google and Twitter", *Harv. L. Rev.* 2014, (2259) 2277-78; A. CHEN, "The labourers who keep dick pics and beheadings out of your Facebook feed", *Wired* 23 October 2014, *https://www.wired.com/2014/10/content-moderation/*.

[82] C. BUNI and S. CHEMALY, "The secret rules of the internet: The murky history of moderation, and how it's shaping the future of free speech", The Verge 13 April 2016, *https://www.theverge.com/2016/4/13/11387934/internet-moderator-history-youtube-facebook-reddit-censorship-free-speech;* A. CHEN, "The labourers who keep dick pics and beheadings out of your Facebook feed", *Wired* 23 October 2014, *https://www.wired.com/2014/10/content-moderation/;* C.M. EVERETT, "Free speech on privately-owned fora: a discussion on speech freedoms and policy for social media", *Kan. J.L. & Pub. Pol'y* 2018, (113) 120.

They resolve the most difficult issues, and set and review the rules for which content is or is not allowed.

4. The rules

75. To start, it is important to distinguish between the internal rules of a platform and the public rules a platform discloses to their users, or, as Facebook calls them, "community standards". The internal rules are usually more detailed and more complex, and subject to more alterations.[83]

76. In the process of a growing user-base and a growing need for moderators, a shift has occurred from a standards-based approach to a rules-based approach.[84] Standards are loose "rules", mostly restatements of purposes or broad objectives, which are vague but also more sensitive to context, and require a careful analysis of the person deciding.[85] A standard might be: "only family-friendly content allowed on the platform". Rules, on the other hand, are more specific and detailed, which makes them easier and thus cheaper to apply. However, they are less context-sensitive, allow less discretion and can lead to unjust results.[86] Rules might consist of: when a nipple can be shown on the platform; whether a gay kiss is allowed; whether nude artworks are permitted; etc.

77. Because of the growing user-base of social media platforms, simple standards became too difficult to enforce. As more and more moderators were required, the risk of diverging decisions to the same issues became bigger. Furthermore, the growth of the platforms was global. The risk of different cultural biases of moderators in different parts of the world became a threat too. That is why the development of specific rules became necessary: to manage the amount of flagged content, and to ensure an objective screening by culturally diverse moderators.[87]

---

[83] M. AMMORI, "The New New York Times: Free speech lawyering in the age of Google and Twitter", *Harv. L. Rev.* 2014, (2259) 2277; C. BUNI and S. CHEMALY, "The secret rules of the internet: The murky history of moderation, and how it's shaping the future of free speech", The Verge 13 April 2016, *https://www.theverge.com/2016/4/13/11387934/internet-moderator-history-youtube-facebook-reddit-censorship-free-speech;* K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1619 footnote 144, 1639.

[84] K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1631-1635. This process can also be seen in C. BUNI and S. CHEMALY, "The secret rules of the internet: The murky history of moderation, and how it's shaping the future of free speech", The Verge 13 April 2016, *https://www.theverge.com/2016/4/13/11387934/internet-moderator-history-youtube-facebook-reddit-censorship-free-speech.*

[85] K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1631-32.

[86] K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1632.

[87] C. BUNI and S. CHEMALY, "The secret rules of the internet: The murky history of moderation, and how it's shaping the future of free speech", The Verge 13 April 2016, *https://www.theverge.com/2016/4/13/11387934/internet-moderator-history-youtube-facebook-reddit-censorship-free-speech;* K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1632-1635; see also M. AMMORI, "The New New York Times: Free speech lawyering in the age of Google and Twitter", *Harv. L. Rev.* 2014, (2259) 2278.

78. The establishment of these rules is not arbitrary. They are developed through a process of internal communication and external communication with third parties. Inside and outside influences together shape these rules.

79. As inside influence counts simply the process of moderating.[88] Every day something new will arise, new situations will demand review, and these experiences might end up establishing a new rule. That means that users also have a part to play in the rule-setting process. Most content review starts with users flagging posts by other users. Through this, the platform will get a sense of what their users deem undesirable content on their social media platform. Users are thus not completely ignored by the giants. Together, they can influence policy.

80. Outsiders can also be very influential in the rule-making process. A first outsider is the state.[89] Public power can be directed through multiple channels. It can simply use its legal powers to force platforms to enforce certain rules. As we shall see, the best example of this is the German *Netzwerkdurchsetzungsgesetz*, a federal law forcing platforms to review flagged hate speech and take it down within twenty-four hours or face heavy fines. But a state (or supranational authority like the E.U.) does not have to go that far to exert influence. "Jawboning" is another way to make platforms do what legislators want.[90] The government might threaten platforms with regulation, making the platforms move in the direction the government wants. That way, the government largely achieves its goal, while the platforms are still in control. Finally, a platform might change its policy voluntarily to get on good terms with the government; being on the friendly side of government might be a good long-term strategy.[91]

81. Third-party influencers form a second outsider. This group consists of a diverse bunch of characters: NGO's, activists and celebrities. NGO's can fulfill two roles: the role of watchdog of the platforms, investigating how they moderate and censor speech on their platforms and publicizing their critique; and the role of influential policy-maker, trying to convince platforms

[88] C. BUNI and S. CHEMALY, "The secret rules of the internet: The murky history of moderation, and how it's shaping the future of free speech", The Verge 13 April 2016, *https://www.theverge.com/2016/4/13/11387934/internet-moderator-history-youtube-facebook-reddit-censorship-free-speech;* K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1657-58.
[89] K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1650-52.
[90] J.M. BALKIN, "Free speech in the algorithmic society: Big data, private governance, and new school speech regulation", *U.C.D. L. Rev.* 2018, (1149) 1179.
[91] J.M. BALKIN, "Free speech in the algorithmic society: Big data, private governance, and new school speech regulation", *U.C.D. L. Rev.* 2018, (1149) 1179-80.

to adopt certain standards or rules. Their flagging of content might also be taken more seriously.[92] Individual activists can also make their voices heard, publicly or by privately contacting the rule-making managers in the social media corporations.

82. Celebrities exert no small amount of influence either. When a celebrity criticizes the rules of social media platforms, they will often get a response where an individual user might be ignored.

83. The traditional media count as third outsider. In itself they might not have much influence, but when stories of disgruntled users or celebrities get widely distributed, this will of course amplify the issue.[93] Social media platforms will act swiftly to address a matter once it is discussed in the traditional media. By choosing which criticism to air, the traditional media therefore also influence the rule-making process.

84. The moderators enforce the rules, but in this system of private governance we might also call them judges.[94] The social media judiciary decides what stays up and what goes down. Like judges, they get trained to be unbiased and objective. They have to enforce rules taking into account all the relevant facts, and only the relevant facts. They use analogical reasoning to develop the rules, considered in common law the basis of legal reasoning.[95]

85. Social media have served as an example of the way in which internet intermediaries might interfere with the speech of internet users. The label of private governor has become clear, as well as the difference with traditional media companies. Where mass media companies might be gatekeepers of speech, the internet intermediaries are (potential) governors of speech.

§3. Relationships in the triadic model

A. In relation to the speaker

86. The speaker using digital infrastructure now faces two entities who will determine how he can speak in practice. From the side of the state, he can expect old-school speech regulation. The freedom of expression is not absolute, and the state can take legitimate measures – enforced by the judiciary – constraining some aspects of speech. For example, the state might prohibit

---

[92] K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1655-57.
[93] K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1652
[94] Cf. K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1641-42.
[95] K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1641-46.

incitement to violence. This will of course apply to speech on digital platforms as well. The relationship state/speaker has traditionally been the study-object of the right to freedom of expression: how far can the state go?

87. From the side of internet intermediaries, on the other hand, the speaker faces private governance of speech. These rules can go a lot further in restraining certain types of speech (e.g. sexual speech) than the state is allowed to. But while a speaker cannot choose the state in which he lives, he might choose (to some extent) the internet intermediaries he employs.[96] If unsatisfied with the rule-set of Instagram, he can switch to Tumblr.

88. In both cases, the speaker can have some influence by voicing his concerns to the state or to the social media platform. He can communicate to the state through voting in elections, through spreading his views to the public in a number of ways, through protesting etc. In the case internet intermediaries, a speaker obviously has no possibility to vote on the rules. However, users might have specific ways to make their voices heard not available in their relationship to the state. For example, they can have influence on the social media platform's rules by flagging content they deem undesirable. Furthermore, if a user feels that his worries are not taken seriously, he can exit the platform completely.

B. Relationship public authority – internet intermediary: new-school speech regulation

89. With the triadic model, a new relationship in the speech system has taken shape. How does this relationship characterize itself?

90. The unconscious recognition of the triadic model by speech regulators has given rise to a new type of speech regulation, what Jack Balkin calls new-school speech regulation.[97] The authorities noticed two things: First, that trying to police themselves what speakers say on the internet has become practically impossible. Internet users can be difficult to identify (e.g. the use of pseudonyms), they can be in a different jurisdiction, and they might not have the resources to pay penalties.[98] Secondly, internet intermediaries, and in particular social media platforms and search

[96] D. JOHNSON and D. POST, "Law and borders – The rise of law in Cyberspace", *Stan. L. Rev.* 1996, (1367) 1398-99.
[97] J.M. BALKIN, "Old-school/new-school speech regulation", *Harv. L. Rev.* 2014, 2296-2342; see also J.M. BALKIN, "Free speech in the algorithmic society: Big data, private governance, and new school speech regulation", *U.C.D. L. Rev.* 2018, (1149) 1173-1182.
[98] J.M. BALKIN, "Free speech in the algorithmic society: Big data, private governance, and new school speech regulation", *U.C.D. L. Rev.* 2018, (1149) 1175; F.T. WU, "Collateral censorship and the limits of intermediary immunity", *Notre Dame L.Rev.* 2011, (293) 300.

engines, are well-placed to monitor the content flowing through their channels.[99] As a consequence, new-school speech regulation does not target the speaker or publisher (that would be old-school speech regulation), but targets the intermediary digital infrastructure.[100]

91. The clearest example of this is *NetzDG,* a German law designed to rein in hate speech online, which entered into full force in 2018.[101] The law obliges large social media platforms to remove hate speech within 24 hours or 7 days after notification (users flagging content) and provides fines of up to €50 million for non-compliance.

92. Another example, not in the context of social media but of search engines: the Court of Justice of the E.U. effectively practiced new-school speech regulation in its *Google Spain* decision.[102] The remedy for the right to be forgotten was not aimed at the website of a particular newspaper, but at Google's search engine. The search engine should remove links to information about people which is inadequate, irrelevant or no longer relevant, or excessive, in the light of the time that has elapsed.

SECTION III. CONCERNS

93. Internet intermediaries are systems of private governance which have reshaped the free speech landscape. This expansion of a dyadic to a triadic model also presents an expansion of concerns regarding freedom of expression. Threats do not just come from one direction, but from two. Next to classic concerns of state censorship, what new challenges does the internet age advance?

§1. Concerns arising out of new-school speech regulation

94. With new-school speech regulation, state authorities are increasingly aiming their arrows at the internet intermediaries. Efficiency dictates they do so. However, this evolution might result in serious threats to a speaker's freedom of expression on the internet. First, collateral censorship becomes a serious possibility; secondly, the state starts coopting internet intermediaries as state agents.

---

[99] J.M. BALKIN, "Free speech in the algorithmic society: Big data, private governance, and new school speech regulation", *U.C.D. L. Rev.* 2018, (1149) 1175.

[100] This was already predicted by David Post in 1995, noting the difficulty of regulating individual users, compared with the ease of targeting the central bottlenecks, the network administrators: D.G. POST, "Anarchy, state, and the internet: an essay on law-making in cyberspace", *J. Online L.* 1995, art. 3, para. 31.

[101] Gesetz 1 september 2017 zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken, BGBI. I S. 3352.

[102] CJEU, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, 13 May 2014, C-131/12, ECLI:EU:C:2014:317; J.M. BALKIN, "Free speech in the algorithmic society: Big data, private governance, and new school speech regulation", *U.C.D. L. Rev.* 2018, (1149) 1201-07.

A. Collateral censorship

95. Collateral censorship is possible where one private party (A) can control the speech of another private party (B).[103] If the controlling party A is made liable for the speech of B, A might be overly enthusiastic in censoring B to avoid liability. The problem is not that suppression of speech is the result of this liability, but that the controlling party might suppress more speech than the original speaker would.[104] The danger thus becomes clear: where internet intermediaries are made responsible for the removal/filtering/blocking/monitoring of content, they might have a tendency to censor more than they are required to. When in doubt, censor. [105] A chilling effect on speech is obvious.[106]

96. Collateral censorship results from the different incentives the original speaker and the intermediary have.[107] An original speaker has a positive incentive to say the things he wants to say, whether he receives a benefit from it or otherwise.[108] The intermediary, on the other hand, has no original incentive to "speak", but rather has an incentive to censor, since its incentive lies primarily in avoiding liability. An intermediary might therefore tend to switch from an open posting system to a pre-screened one, where content has to be approved before being posted. Much speech could be lost that way because an operator with limited resources might not get to it all.[109] But more importantly, it will censor content that increases its risk of liability and thus remove any content which is only the slightest bit suspicious.[110]

97. This problem is not new. A good example of its pre-internet recognition is the U.S. Supreme Court decision in *Smith v. California*: *"[I]f the bookseller is criminally liable without knowledge of the contents .... he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature.... And the bookseller's burden would become the public's burden, for by*

---

[103] J.M. BALKIN, "Free speech in the algorithmic society: Big data, private governance, and new school speech regulation", *U.C.D. L. Rev.* 2018, (1149) 1176; K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1608.
[104] A. HAMDANI, "Who's liable for cyberwrongs?", *Corn. L. Rev.* 2002, (901) 916; F.T. WU, "Collateral censorship and the limits of intermediary immunity", *Notre Dame L.Rev.* 2011, (293) 296.
[105] F.T. WU, "Collateral censorship and the limits of intermediary immunity", *Notre Dame L.Rev.* 2011, (293) 295-296.
[106] This danger was recognized by the U.S. 4th Circuit Court in one of the foundational judgements on §230 CDA, which provides immunity to internet intermediaries, in *Zeran v America Online, Inc.,* 12 November 1997, 129 F.3d 327.
[107] A. HAMDANI, "Who's liable for cyberwrongs?", *Corn. L. Rev.* 2002, (901) 916; F.T. WU, "Collateral censorship and the limits of intermediary immunity", *Notre Dame L.Rev.* 2011, (293) 296-297, 304.
[108] See F.T. WU, "Collateral censorship and the limits of intermediary immunity", *Notre Dame L.Rev.* 2011, (293) 304-306.
[109] F.T. WU, "Collateral censorship and the limits of intermediary immunity", *Notre Dame L.Rev.* 2011, (293) 300.
[110] U.S. 4th Circuit Court, *Zeran v America Online, Inc.,* 12 November 1997, 129 F.3d 327, at 333; F.T. WU, "Collateral censorship and the limits of intermediary immunity", *Notre Dame L.Rev.* 2011, (293) 301.

restricting him the public's access to reading matter would be restricted .... [H]is timidity in the face of his absolute criminal liability [ ] thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered." [111]

98. This could clearly lead to some undesirable results. For example, if an intermediary was made liable for defamatory content, it might be moved to also remove contents which are mere opinion or even factually correct but risky, such as whistleblowing.[112] Such liability may therefore even hinder socially desirable content.[113]

99. The threat of collateral censorship was also one of the many criticisms of *NetzDG*.[114] A Declaration on Freedom of Expression was signed by a host of German organisations and academics making this point.[115] The Global Network Initiative also condemned the law.[116]

100. Furthermore, a system where liability is not strict but depending upon notice does not remove the danger of collateral censorship.[117] The intermediary could tend to take down most content that is flagged, for the same reasons as before. Every individual or company unhappy with some content might therefore effectively become a censor every time it complains to the intermediary.[118]

B. Coopting internet intermediaries as state agents

101. This is the flip side of new-school speech regulation. State authorities rely on internet intermediaries to enforce rules they cannot enforce themselves. They can rely on the developed private governance structures of e.g. social media (the ability to govern speech on its infrastructure) to enforce the rules for them. In that way, the private governance structures are

---

[111] U.S. Supreme Court, *Smith v. California*, 14 December 1959, 361 U.S. 147.
[112] F.T. WU, "Collateral censorship and the limits of intermediary immunity", *Notre Dame L.Rev.* 2011, (293) 300.
[113] F.T. WU, "Collateral censorship and the limits of intermediary immunity", *Notre Dame L.Rev.* 2011, (293) 296.
[114] See P. OLTERMANN, "Tough new German law puts tech firms and free speech in spotlight", *The Guardian* 5 January 2018, *https://www.theguardian.com/world/2018/jan/05/tough-new-german-law-puts-tech-firms-and-free-speech-in-spotlight*; C. RADSCH, "Proposed German legislation threatens broad internet censorship", *Committee to Protect Journalists* 20 April 2017, *https://cpj.org/blog/2017/04/proposed-german-legislation-threatens-broad-intern.php*
[115] X., "Declaration on Freedom of Expression", *https://deklaration-fuer-meinungsfreiheit.de/en/*
[116] GLOBAL NETWORK INITIATIVE, "Proposed German legislation threatens free expression around the world", *http://globalnetworkinitiative.org/proposed-german-legislation-threatens-free-expression-around-the-world/*
[117] U.S. 4th Circuit Court, *Zeran v America Online, Inc.,* 12 November 1997, 129 F.3d 327, at 333; F.T. WU, "Collateral censorship and the limits of intermediary immunity", *Notre Dame L.Rev.* 2011, (293) 301.
[118] F.T. WU, "Collateral censorship and the limits of intermediary immunity", *Notre Dame L.Rev.* 2011, (293) 301.

effectively coopted as state agents.[119] This represents a double win for the state: their rules can be effectively executed, while the costs lie with the private governor.

102. The problem arising here is one of accountability and democracy. First, can the state really just shift the burden of execution to a private party? Aren't there some areas where the state cannot privatize its power? You could compare this to the debate over whether the state should be allowed to privatize the prison system. Isn't there a conflict of interest where for-profit companies become the enforcers of public rules for the public interest? And what about accountability? These private enforcers have not been elected by the public, nor are they accountable to a directly elected body; what can the public undertake if they are dissatisfied?

103. In the debate surrounding *NetzDG,* senior member of the German parliament Thomas Jarzombek summarized the problems with new-school speech regulation: "*The core problem is that companies can play judges*."[120] We would change one word: The core problem is that companies *must* play judges.

§2. Concerns arising out of the private governance structure

104. Because social media platforms act as private governors, some concerns arise which are not usually present when the state is acting. These can be divided into substantive issues and procedural issues. As substantive issue counts the curation of content on the platform: This can be stricter, more censoring, than what a state would be allowed to under the freedom of expression. As formal issues count a lack of due process for those whose content has been removed, a lack of transparency and a lack of user equality.

A. Too much censorship?

105. Seeing that internet intermediaries are not state authorities, they are usually not subject to free speech norms. This brings with it the freedom to censor more content than the state would be allowed to. Many examples exist of social media removing content which the state would not be allowed to censor: sexual content, violent content, shocking content... [121] It raises the question

---

[119] J.M. BALKIN, "Free speech in the algorithmic society: Big data, private governance, and new school speech regulation", *U.C.D. L. Rev.* 2018, (1149) 1179.

[120] M. SCOTT and J. DELCKER, "Free speech vs. censorship in Germany", *Politico* 4 January 2018, *https://www.politico.eu/article/germany-hate-speech-netzdg-facebook-youtube-google-twitter-free-speech/*

[121] M. AMMORI, "The New New York Times: Free speech lawyering in the age of Google and Twitter", *Harv. L. Rev.* 2014, (2259) 2274-76; J.M. BALKIN, "Free speech in the algorithmic society: Big data, private governance, and new school speech regulation", *U.C.D. L. Rev.* 2018, (1149) 1194-95; M. HEINS, "The brave new world of social media censorship", *Harv. L. Rev.* 2013-14, (325) 325-327.

whether there is too much censorship online? Should not the freedom of expression protect individuals against such overbroad censorship?

106. In the United States this is an even bigger issue than in Europe. That is because in Europe, hate speech laws are generally allowed by the judiciary. In the U.S., however, the First Amendment is interpreted more strictly, leading to a ban on hate speech laws. Nonetheless, all major social media platforms have rules against hate speech, which have only proliferated over the years. Yet even where they are allowed, hate speech laws have always been notoriously difficult to apply. Therefore, there will always be many cases where a moderator might remove something as hate speech, even though the national courts might have decided differently.

107. Note that I am talking strictly about platforms' *own* rules here. Where the state targets platforms with speech regulation, this leads to problems already discussed before. However, the two can exist together. For example, Facebook has its own hate speech rules in place. Nonetheless, under *NetzDG* in Germany they are now also legally obliged to remove hateful content within 24 hours. The increasing possibility of censorship thus becomes clear.

108. One might argue that this is not a problem: internet intermediaries are not state actors, but private parties. That usually means they are not constrained by free speech norms. However, this misses the point of the triadic model. It is not because they are private parties that concerns about freedom of expression are without value. Billions of people use their infrastructure daily to communicate with each other. One cannot ignore this fact.

B. Lack of due process

109. The evolution of internet intermediaries, especially of social media platforms, to the status of truly private governors in practice goes hand in hand with rising expectations of due process. Where the triadic model has unconsciously entered the mind of policy-makers when they enact new-school speech regulation, the same is true for users expecting procedural fairness from these platforms.[122] People understand that they are not merely private companies like so many others. They have considerable power over users' speech. Though they might establish rules on what is and is not allowed on the platform, surely that doesn't mean they can act as absolute monarchs over their digital realms?

[122] See e.g. the Manila Principles on Intermediary Liability, drafted by civil society groups around the world in 2015, *https://www.manilaprinciples.org/principles*

110. Due process is a long way from being established on social media today.[123] Generally, due process means a right to be notified of your wrongdoing, a right to be heard on the matter, and usually a right to appeal the decision before independent and impartial judges. For example, Facebook does not give users the option to appeal the removal of a post, only pages and profiles.[124] Once it's gone, it's gone forever. More generally, not one platform gives the user a right to be heard before their post is removed. The process always starts with the removal of content, after which you might have a possibility to "appeal" the decision.[125] However, this "appeal" is not really an appeal, since it will be the first time you are actually heard.

111. But what is the value of due process when you don't know the rules on the basis of which you can defend yourself?

C. Lack of transparency

112. Arguably, transparency is also part of due process. Art. 7 European Convention on Human Rights states there can be no punishment without law. This must include an obligation to make the law public, so that individuals can behave accordingly. However, the practices of internet intermediaries can be murky to say the least. Even where there is a public statement of speech policy, such as social media's "community guidelines", we have seen that the internal rules might differ from those public ones.

113. But it goes further than direct rules on censorship. Frank Pasquale believes we live in a "black box society": ruled by entities operating in the dark.[126] Internet intermediaries can operate as black boxes. Not only do we not always know the reasons for censorship, we might not even know censorship is happening. The term "censorship" is used here broadly: it also refers to the ranking practices intermediaries use, especially search engines and ISP's. Unbeknownst to us, a search engine might have demoted a search result, or an ISP could be slowing down certain content. "*Opacity creates ample opportunities to hide anticompetitive, discriminatory, or simply careless*

---

[123] C.M. EVERETT, "Free speech on privately-owned fora: a discussion on speech freedoms and policy for social media", *Kan. J.L. & Pub. Pol'y* 2018, (113) 120.

[124] C.M. EVERETT, "Free speech on privately-owned fora: a discussion on speech freedoms and policy for social media", *Kan. J.L. & Pub. Pol'y* 2018, (113) 120; K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1648.

[125] For a more detailed account of the biggest social networks, see Online Censorship, "How to appeal", *https://onlinecensorship.org/resources/how-to-appeal*.

[126] F. PASQUALE, *The Black Box Society: The secret algorithms that control money and information*, London, Harvard University Press, 2015, 311 p.

conduct behind a veil of technical inscrutability."[127] Transparency might therefore be a principle that is needed now more than ever.[128]

114. Of course, a lot of people might not bother to inform themselves of the rules, just like they don't read general terms and conditions. But the same is true with national legislation. The only people reading and informing themselves of laws are people working in the legal field. However, when something goes wrong, the law can suddenly become very important to an individual. Knowing that there *are* laws which the public *can* know, is essential in a system of due process.

D. Lack of equality/democracy

115. As we have seen, not everyone is equal in cyberspace. Some people have more influence on the policy of social media platforms than others. Especially NGO's and celebrities have an outsider influence on the rules. But just as users start expecting more procedural fairness from their private governors, so does a call for participation and democracy in the platform's rule-making process increase.

116. It can go even further than disproportionate influence on the rules: some rules might simply not apply to powerful individuals where they would to a normal user.[129] The best example of this is of course @realDonaldTrump. His use of social media has been very contentious. A lot of people say that some posts should be deleted for being hateful to minorities. Within Facebook, there was a debate over posts by Donald Trump calling for a ban on muslims entering the United States.[130] Some employees thought these posts should be removed based on the company's hate speech rules, but Mark Zuckerberg himself decided differently. He deemed it inappropriate to censor the then presidential candidate. A spokeswoman later said that Facebook wanted to remain impartial in the presidential election.

117. Facebook struggles with these questions not out of a moral or legal dilemma, but out of an economic dilemma. Facebook has received quite some criticism in the United States for being too "liberal", censoring conservatives and pushing them out of the ether. Removing posts by the

---

[127] F. PASQUALE, *The Black Box Society: The secret algorithms that control money and information*, London, Harvard University Press, 2015, 163.
[128] F. PASQUALE, *The Black Box Society: The secret algorithms that control money and information*, London, Harvard University Press, 2015, 88-89.
[129] K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1654-55, 1665.
[130] D. SEETHARAMAN, "Facebook employees pushed to remove Trump's posts as hate speech", *The Wall Street Journal* 21 October 2016, *https://www.wsj.com/articles/facebook-employees-pushed-to-remove-trump-posts-as-hate-speech-1477075392*.

immensely popular Donald Trump might have resulted in conservatives leaving the platform. On the other hand, the polarization in the U.S. almost forces companies to pick a side, bringing platforms in a difficult situation.

118. That the reason for bending the rules is economic does not erase the fact that some individuals might get a VIP treatment on social media. A new class of privileged people is forming online. Where the French Revolution led to equality before the law, the Internet Revolution could lead to inequality before cyber-law.

§3. Conclusion

119. In the triadic speech system, we are concerned with actions by the state and actions by the internet intermediaries. States can enact new-school speech regulation, leading to collateral censorship and cooptation of private intermediaries. From the side of the intermediaries, there is the concern that they can censor too much speech, that they are not transparent, that due process is missing, and that there is a lack of equality in cyberspace.

120. We now turn to the right to freedom of expression. In the following chapter, we examine how this right, as it is interpreted today, confronts (or fails to confront) these concerns. The final chapter will propose a new framework for the freedom of expression in order to better deal with the concerns of the internet age.

CHAPTER IV. THE FAILURE OF THE FREEDOM OF EXPRESSION

121. Is the freedom of expression obsolete? Tim Wu asked this polemical question regarding the U.S. First Amendment, though in a different context.[131] What use to us, internet users, is this right nowadays? Even having to ask the question should send a shiver of unease through free speech advocates. It seems that today the main avenues of speech are unprotected by this most fundamental democratic right.

SECTION I. A CASE-STUDY OF THE EUROPEAN COURT OF HUMAN RIGHTS

122. The Council of Europe has recognized the problems we have described. In a 2018 Recommendation of the Committee of Ministers on the roles and responsibilities of internet intermediaries, it proposes a host of measures to cope with these concerns.[132] It broadly states that

---

[131] T. WU, "Is the first amendment obsolete?", *Mich. L. Rev.* 2018, 547-582.
[132] Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries (7 march 2018), *https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680790e14*.

member states have a positive obligation to protect individual internet users from actions of internet intermediaries[133], and that intermediaries should respect the human rights of their users.[134] More concretely, it states that member states should not impose a general obligation to monitor content using intermediaries' infrastructure; that the policies of intermediaries should be drafted in an inclusive and participatory manner; that those policies should be transparent and comprehensible; that actions taken by intermediaries to curate content should be in accordance with those policies and applied in a non-discriminatory way; and that the individual should have appropriate remedies (due process) when faced with censorship.

123. However, it is unclear where the freedom of expression steps in to facilitate these goals. Of course, this is only a Recommendation which has no authority to decide on the application and interpretation of the freedom of expression, but it also does not try to give this right a firm place in the devised framework. It simply states that intermediaries have an "obligation to", and relies on the positive obligations of member states under the ECHR and their "laws and regulatory frameworks". It is also unclear on how far content moderation online can go. On the one hand, it states that intermediaries should respect the freedom of speech of their users[135], but on the other hand allows them to implement their own content-restriction policies.[136]

124. We will take a look at the decisions of the European Court of Human Rights to try and find where fundamental protection of individual internet users stands today. This will help us understand where protection now stands according to the most influential human rights court worldwide, but will also serve as an analysis and example of where generally the problems with the right to freedom of expression lie today.

125. Two obstacles stand in the way of finding clear rules in the European case-law. The first is a general one and follows from the method of interpretation of the ECHR, namely proportionality. Every case has to be assessed in its own context, making it sometimes difficult to extrapolate a general rule. Secondly, we are dealing here for a large part with relations between private parties (internet users and intermediaries), while only Contracting States can be sued before the European Court. It is to be seen how the Court resolves (or fails to resolve) this issue, and whether private parties are under some kind of obligation under the Convention.

[133] Preamble (6).
[134] Art 2.1.1.
[135] Art 2.3.1.
[136] Art 2.3.2.

SECTION II. LIABILITY OF INTERNET INTERMEDIARIES

126. This paper deals primarily with the rights of individual internet users rather than those of the intermediaries. Nonetheless, the protection of intermediaries can be relevant for internet users too, as the analysis of new-school speech regulation has shown. What then is the protection of intermediaries offered under the Convention?

127. The most important case in this respect is *Delfi AS v. Estland*.[137] Delfi was an internet news portal, one of the largest in Estonia. Below each news article, users had the possibility of placing a comment which would be uploaded automatically, but was also subject to a notice-and-take-down procedure. Delfi also prohibited some types of comment in a rule-set to be found on the website, and reserved itself the right to delete such comments. An article about a certain company attracted some hateful and defamatory comments aimed at the sole shareholder of that company. Six weeks later that shareholder requested Delfi to take the comments down, which it did. Nevertheless, Delfi was sued and eventually found liable for those comments. The national court held that Delfi, together with the actual commentators, was to be regarded as publisher of the comments because they offered the possibility of commenting, they controlled it, and they gained from it economically.

128. The Grand Chamber ruled (15 to 2) that there was no violation of art. 10 of the European Convention on Human Rights (right to freedom of expression). It considered firstly that the comments, which were hateful and incited to violence, were of a clearly unlawful nature. Regarding the context, it stated that Delfi initiated discussions by publishing its own (balanced and neutral) article, that it opened up the possibility of commenting, and that commentators lost control of their comment once it was posted, concluding that Delfi had a substantial degree of control over the comments. Delfi also gained economically from the comments (the more comments, the more visitors, the more ad revenue). Furthermore, the alternative liability of the actual authors of the comments was insufficient, since anonymity online can be problematic for initiating proceedings. The Court stated that in principle art. 10 is not violated where such entities having substantial control are found liable for clearly unlawful comments posted on their website. That Delfi had an online rule-set, that it had a filtering system for certain words, that moderators occasionally removed comments proactively, and even that it had a notice-and-take-down system in place was not enough for its liability to be deemed a violation of art. 10. The Court also

[137] ECtHR, *Delfi AS v. Estland*, 16 June 2015, no. 64669/09.

mentions that after the domestic judgement the amount of comments on the website did not decrease.

129. Although the Court mentions that its judgement is only relevant to large commercial media companies operating online (and by extension probably to all "active internet intermediaries" who produce their own content)[138], and not to social media platforms or pure internet fora, applying the reasoning in Delfi to these entities would not seem to encounter any major hurdles. Such platforms could also be held to have "substantial control" over user-generated content: they open up the possibility for it and they can control the post once it is uploaded. They also gain from it economically, and the original author of the post might be difficult to identify.

130. This judgment is problematic from two different points of view. First, from the standpoint of the intermediaries, this decision opens up the prospect of being confronted with an endless amount of damages claims. When even a notice-and-take-down procedure is not enough, the liability imposed is practically strict and based on constructive knowledge, not actual knowledge. Three options remain: to invest in and install a large system of prior or proactive moderation of comments; to face the claims for damages; or to remove the possibility of commenting completely.

131. The second standpoint, more interesting to us, is that of the individual internet user. Seeing that the intermediary can easily be found liable in a wide array of cases, collateral censorship is a huge danger. The Court considers that hate speech and incitement to violence are clearly unlawful (therefore entailing almost strict liability of the platform), while the boundaries of these notions are not at all uncontested…[139] Considering the user's standpoint also points out why this case is so bizarre. The most compelling arguments against holding Delfi liable flow from the freedom of expression of individual internet users. However, the case is treated under the heading of the freedom of expression of Delfi, the intermediary. First, the Court simply states that Delfi's freedom of expression is interfered with. It does not conclude that Delfi is the "publisher" of the comments (noting a development from traditional print-media to internet-based media and the need to distinguish between them), but the result would have been the same if Delfi was actually marked as publisher. Secondly, it practically glosses over the issue of collateral censorship. The

---

[138] See the Dissenting Opinion in *Delfi* at § 17. In our definition of internet intermediary, we would see Delfi as an internet intermediary only in relation to the comments section it enables; in relation to the article, Delfi is not an intermediary but a publisher.

[139] D. VOORHOOF and E. LIEVENS, "Offensive online comments, Delfi confirmed but tempered", *Inforrm's Blog* 17 February 2016, *https://inforrm.org/2016/02/17/offensive-online-comments-delfi-confirmed-but-tempered-dirk-voorhoof-and-eva-lievens/* .

Court states: "*Having regard to the fact that there are ample opportunities for anyone to make his or her voice heard on the Internet, the Court considers that a large news portal's obligation to take effective measures to limit the dissemination of hate speech and speech inciting violence – the issue in the present case – can by no means be equated to 'private censorship'.*"[140]

132. Then what is it? It seems to us that this is exactly what private censorship is: the moderation of speech of one private party by another private party. That this power can lead to collateral censorship is not even recognized by the majority opinion – though thankfully dissenting judges Sajó and Tsotsoria make this the crux of their dissent. "*This is an invitation to self-censorship at its worst"* is how they finish their opening paragraph, showing an understanding of what is really at stake here.[141]

133. *Delfi* proved to be a controversial decision, and the European Court had an opportunity to evaluate its case-law in *MTE and Index.hu Zrt v. Hungary*.[142] The case deals with the liability of an internet news portal (Index.hu) and of a self-regulatory body of internet content providers (MTE) for comments written by users under an article discussing the commercial practices of two real-estate websites. Much like Delfi, these platforms had rules in its terms and conditions of what types of speech were prohibited, had some moderators working for them and had a notice-and-take-down procedure in place. The difference here was that the comments could not be characterized as hate speech or incitement to violence, but were simply defamatory. The Hungarian courts held MTE and Index.hu liable on the ground of an objective liability applying to such entities.

134. The European Court considered that here art. 10 ECHR was violated. *Delfi* is still good law, but since the comments *in casu* did not amount to hate speech or incitement to violence, a different approach was required. The Hungarian courts violated art. 10 by holding the internet portals objectively liable and by failing to balance the right of reputation of the real-estate websites against the right to freedom of expression of the internet portals.

135. As we have seen, in *Delfi* the liability imposed was as good as an objective liability, seeing that the news portal could be held liable for hate speech and incitement to violence regardless of its terms and conditions, its notice-and-take-down procedure and other measures it had taken. In this case however, such measures *were* relevant: "*The domestic courts held that, by allowing unfiltered comments, the applicants should have expected that some of those might be in breach*

[140] § 157.
[141] Dissenting Opinion § 17.
[142] ECtHR, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, 2 February 2016, no. 22947/13.

of the law. For the Court, this amounts to requiring excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet."[143] It considered that a notice-and-take-down procedure can in many cases (excluding hate speech and incitement to violence) be an appropriate tool to balance the rights and interests of all involved.[144]

136. Crucially, the Court starts recognizing the negative effects intermediary liability may have on individual internet users. "*Such liability may have foreseeable negative consequences on the comment environment of an Internet portal, for example by impelling it to close the commenting space altogether. For the Court, these consequences may have, directly or indirectly, a chilling effect on the freedom of expression on the Internet*."[145] "*… the Hungarian courts paid no heed to what was at stake for the applicants as protagonists of the free electronic media. They did not embark on any assessment of how the application of civil-law liability to a news portal operator will affect freedom of expression on the Internet*."[146]

137. To summarize, the European Court offers internet intermediaries no protection from liability when it comes to internet users generating "clearly unlawful content", such as hate speech and incitement to violence, on their platforms (TYPE 1 scenario). When it comes to other kinds of unlawful speech (TYPE 2 scenario), the intermediaries can only be held liable after balancing the rights and interests of all involved, taking into consideration *inter alia* the measures taken by the intermediary and the chilling effect intermediary liability can have on free speech on the internet.[147]

138. The Court is thus moving in the right direction, but has still not faced the issue of collateral censorship head-on. These cases are still decided under the heading of the intermediary's right to freedom of expression, not that of the individual internet user, which confuses the problem. In a TYPE 1 scenario, collateral censorship still has free rein. The distinction between the treatment of clearly unlawful speech and other types of unlawful speech is furthermore awkward and unconvincing: it is certainly not always evident when something is "clearly unlawful"; but even more acute is the fact that an intermediary will not be able to enjoy the protection offered under a TYPE 2 scenario, because it will always have to proactively check *all* posts for "clearly

[143] § 82.
[144] § 91.
[145] § 86.
[146] § 88.
[147] This summary has been confirmed by a more recent case, *Pihl v. Sweden*, which did not change this case-law: ECtHR, *Rolf Anders Daniel Pihl v. Sweden,* 9 March 2017, no. 74742/14.

unlawful" content anyway.[148] The costs for the intermediary will therefore be largely the same. It can even have the unfortunate effect of making the intermediary aware of TYPE 2 unlawful content, thereby making it much easier to hold the intermediary liable since it has actual knowledge of that content. Obligations under TYPE 1 could therefore annihilate the protection under TYPE 2, and with it bring down the check on collateral censorship.

SECTION III. INTERNET USERS VERSUS INTERNET INTERMEDIARIES

139. We now turn to issues more directly related to the individual internet user. Before we look for answers to the concerns analyzed in the previous chapter, we'll have a look at some more general points the Court has made.

§1. Access to the internet

140. The European Court has made some general statements on the medium of the internet, and the established case-law formula says that "*in the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general*."[149] In *Cengiz and Others v. Turkey*, it stated that "*the Internet has now become one of the principal means by which individuals exercise their right to freedom to receive and impart information and ideas, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest*" and that "*[u]ser-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression ...*"[150]

141. The Court in principle protects a right of access to the internet, as can be extrapolated from cases where it found an art. 10 violation for restricting access to certain websites.[151] At the same time, the Court is also mindful of the dangers of the internet to other fundamental rights, in particular the right to respect for private life.[152]

---

[148] D. VOORHOOF and E. LIEVENS, "Offensive online comments, Delfi confirmed but tempered", 17 February 2016, *https://inforrm.org/2016/02/17/offensive-online-comments-delfi-confirmed-but-tempered-dirk-voorhoof-and-eva-lievens/*

[149] ECtHR, *Ahmet Yıldırım v. Turkey*, 18 December 2012, no. 3111/10, § 48; ECtHR, *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*, 10 March 2009, nos. 3002/03 and 23676/03, § 27.

[150] ECtHR, *Cengiz and Others v. Turkey,* 1 December 2015, nos. 48226/10 and 14027/11, §§ 49 and 52.

[151] See ECtHR, *Ahmet Yıldırım v. Turkey*, 18 December 2012, no. 3111/10; ECtHR, *Cengiz and Others v. Turkey,* 1 December 2015, nos. 48226/10 and 14027/11.

[152] see ECtHR, *Editorial Board of* Pravoye Delo *and Shtekel v. Ukraine*, 5 May 2011, no. 33014/05, § 63; ECtHR, *Delfi AS v. Estland*, 16 June 2015, no. 64669/09, § 133.

§2. Protection against private censorship?

142. One of the concerns in the triadic model is that an internet user faces too much censorship online, not emanating from the state but from the private internet intermediaries. Has the European Court offered a solution to this problem?

143. The first important case is *Appleby v. U.K.*.[153] In Washington, U.K., a new town center had been built by a government body and had subsequently been sold to a private company, Postel. The center included a shopping mall, a car park and some walkways. The applicants in the case had tried campaigning and collecting signatures on these premises to further a local cause, but Postel refused them permission to do so. The applicants claimed their right to freedom of expression had been breached. Although this is arguably a case against Postel, only Contracting States can be sued before the European Court. Therefore, the question before the Court was whether the U.K. had a positive obligation to offer protection of freedom of speech on private properties.

144. The Court starts by saying that in its examination of positive obligations, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual.[154] Regard must be had not only to the right to freedom of expression, but also to the property rights of the owner of the shopping center, protected under art. 1 Prot. No. 1 (right to property).[155] It follows that freedom of expression does not automatically bestow freedom of forum for the exercise of that right: "*While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the Court is not persuaded that this requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property*".[156]

145. However, there are circumstances where the freedom of expression takes the upper hand: "*Where [...] the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of the Convention rights by regulating property rights. A corporate town where the entire municipality is controlled by a private body might be an example*."[157]

---

[153] ECtHR, *Appleby and others v. United Kingdom*, 6 May 2003, no. 44306/98.
[154] § 40.
[155] § 43.
[156] § 47.
[157] § 47.

146. The question thus becomes whether the effective exercise of the right has been prevented or the essence of the right destroyed. *In casu* this was not the case. The applicants had to their disposal and actually used a number of alternative methods to reach their audience: they could set up stands on the public walkways or in individual shops, they could go door-to-door, and they could employ local press, radio and television. In the end, 3200 people submitted letters in support to them. It could not be said that the essence of their right to free speech had been destroyed.

147. Turning to our problems, the question is whether this solves the private censorship internet users face in their relationship with internet intermediaries. It would seem that in most cases it does not. When Facebook decides to remove a post, it will most likely have a range of arguments to show that the essence of the user's right of free speech has not been destroyed. In the first place, it can argue that, while it might have deleted one post, it nonetheless opened up a huge social media network to the user (for free!), making the balance always tip in favour of free expression. It can also argue that it can take reasonable measures to create an environment which reflects their values and the community they want to engage. And it will point to the contract the user made with it, granting the intermediary the power to moderate content on the platform. Clearly, an internet user's free speech rights have not been destroyed.

148. Some cases can be imagined where this would be the case. For example, where an ISP has a monopoly and refuses to provide internet to a person, *Appleby* would probably offer that person protection.

149. A second case which involves conflicting rights of private parties is *Khurshid Mustafa v. Sweden*.[158] Mr. Mustafa and his wife were Swedish nationals of Iraqi origin. They and their three children lived in a flat, at the exterior of which they installed a satellite dish to receive broadcasting from abroad. The landlord started proceedings against them, claiming they had breached the tenancy agreement, and in the end the Swedish courts agreed, leading to the eviction of the family from the apartment.

150. Again, this is a case between two private individuals, but since only states can be sued before the European Court, it has to find a way around this. It does so by claiming that the responsibility of the Swedish state is involved, seeing that it was the domestic courts which in the end enforced the contract. The question thus turns again to whether the state had a positive obligation to protect the freedom of expression of the private party.

[158] ECtHR, *Khurshid Mustafa and Tarzibachi v. Sweden,* 16 December 2008, no. 23883/06.

151. Strangely, in its decision the Court does not mention the competing rights of private parties, does not mention the property rights of the landlord and has no recourse to the *Appleby* criterion. Instead, it focuses on the decision of the domestic judge and carries out a classic proportionality test. By treating the case in this way, the Court indirectly treats the landlord as if he were a public authority. Once it is decided to treat the case like this, the outcome was of course easy, and a violation of art. 10 ECHR was found. That is not to say that the interests of the landlord were not discussed (the Court discusses for example the alleged safety concerns and aesthetic damage to the building), and the Court also comes close to *Appleby* when it discusses whether the tenants had alternative methods of reaching the foreign broadcasting, but all this was discussed in a classic framework of proportionality assessment against the state.

152. Why did the Court do this? There is no clear answer. Maybe the circumstances of the case, especially the eviction of a family with three children, moved the court to intervene in this manner. Treating the case like that also removed the problem of the tenancy contract, which was interpreted by the domestic courts as prohibiting the satellite dish. The Court does not even take this agreement into consideration in its proportionality analysis.

153. A similar method has been used in cases concerning relations between employers and employees. In *Fuentes Bobo v. Spain,* the Court held that a positive obligation exists to protect the employee's freedom of expression.[159] An employee had been dismissed after he criticized his employer in harsh terms in a radio interview. Again, there is no balancing of conflicting private rights, but a classic proportionality test. Although the employer might not be able to base himself on a fundamental right protected by the ECHR (as the other party could in *Appleby*), the right to enforcement of a contract is still one of the basic principles of private law. The right to a reputation of the employer is also not positioned as a right to be balanced against that of the employee, but only seen as the "legitimate aim" requirement necessary for an interference in the employee's right of free speech.

154. One thing is certain: *Appleby* would have been decided differently by the *Khurshid Mustafa* court. Turning to our problems, *Khurshid Mustafa* would require much more from internet intermediaries than *Appleby* would. In the example where Facebook deletes a post, a national court would be required to do a proportionality test much as if Facebook were a state authority. In any case, there is confusion in the case-law, and the Court is missing a clear vision on conflicts

[159] ECtHR, *Fuentes Bobo v. Spain*, 29 February 2009, no. 39293/98.

between private parties involving the freedom of expression. Should there be a balancing of rights, or should the party interfering with free speech be treated as a state entity?

155. *Appleby* is in fact not a bad decision. It recognizes the problem between the rights of private parties, and understands that the answer cannot be clear-cut. The criterion of the "essence of the right" or the "effective exercise" seems reasonable, but misses some clear guidance, just as the balancing of conflicting rights of private parties always leaves a lot of discretion in the judge's hands. In the next chapter, we will offer a different (but in some ways very similar) criterion, which shows a clear understanding of the problem (namely one of freedom versus power in the market for speech) and which can rely on the extensive jurisprudence of competition law.

156. In the cases discussed, the protection of the freedom of speech requires a detour via state liability, while it is really a private matter. In the next chapter, we will also propose that this right can be directly enforced against the other private party.

§3. Transparency and due process?

157. In the previous chapter, we expressed concerns over the opacity of internet intermediaries' policies and over the lack of due process when encountering censorship by these private governors. On the European Court's handling of these issues we can be short, because it has not handled them. Although these are concerns flowing from an analysis of the current triadic speech system, the question is whether these issues can be brought under the right to freedom of expression. The next chapter argues that they can.

§4. Lack of equality/democracy?

158. On the topic of a perceived lack of equality and democracy in cyberspace we can be equally short. Though one might think that at least equality corresponds to a fundamental right (the prohibition of discrimination), we are not considering discrimination by a public entity but by a private party. Even more difficult, it is not so much about discriminatory policies of the internet intermediaries as it is about the unequal enforcement of them. It is safe to say that these concerns have not yet found protection in the case-law of the European Court. The question again becomes whether they can find a place in a 21st-century conception of the right to freedom of expression. It might sound strange to bring these issues under such a heading – wouldn't the right to equal treatment be a much better option to deal with them? – but we have seen that they are concerns existing in the internet speech landscape. The next chapter will show how a revised conception of the freedom of expression in the internet age can help solve these problems.

SECTION IV. CONCLUSION

159. The freedom of expression is failing. Not one of the concerns surrounding the triadic model has been dealt with adequately by the European Court of Human Rights. Its case-law on intermediary liability is shaky. Its decisions on private censorship confusing. Its rulings on due process and transparency, equality and participation non-existent.

160. What seems to be missing is a clear conception of the realities of the internet age, and how the freedom of expression has to evolve in this new world. Not only the European Court struggles with these issues: It is safe to say that generally such a conception is missing in the courts.

161. When it comes to intermediary liability (or new-school speech regulation), we can see the courts struggling with it in a way we could have expected. They see that it is sometimes necessary to target the internet intermediary, yet are also mindful of the consequences to free speech. What is missing is a basic starting point on how to deal with the issue.

162. Turning to private censorship online, the struggle is possibly even greater. Three things stand in the way of free speech protection: private party; property; and contract. First, internet intermediaries are not public authorities, but private parties. This is a first hurdle to the freedom of expression, which originated as protection against state censorship. Secondly, the protection of private property is one of the basic principles of western democracies and the foundation of our economies. Internet intermediaries are the owners of their channels; it follows that they can use them, commercialise them and make them open to the public in the way they see fit. Thirdly, contract law protects the agreements these intermediaries and internet users enter into. A lot of intermediaries will reserve themselves the right to curate content on their infrastructure.

163. Again, a clear conception of the right to free speech in the internet age is missing to provide a thoughtful answer to these obstacles. These arguments are valid, but on the other hand free speech protection cannot be given up completely.

164. Due process rights, transparency obligations, equality before the intermediary and participation have all not yet found protection under the freedom of expression. Nevertheless, they concern us from a free speech perspective. We will take all these concerns into account when offering a new framework for the freedom of expression in the internet age.

CHAPTER V. FREEDOM OF EXPRESSION IN THE INTERNET AGE

SECTION I. SAVING THE FUNDAMENTAL RIGHT OF FREE SPEECH

165. We have recognized the shortcomings of fundamental free speech protection online. In answer to these difficulties, scholars have stated that free speech protection will no longer result so much from fundamental rights, but from regulation by the legislator.[160] This reverses the old paradigm of conflicting interests between speaker and government. It would seem that government intervention is not always contrary to free speech, but actually helpful and necessary to secure it.[161]

166. The best example of this is the U.S. Communications Decency Act §230. It has been hailed as "the most important law protecting internet speech"[162], and compared to the First Amendment protection the Supreme Court granted newspapers in its landmark case *New York Times v. Sullivan.*[163] Indeed, lawyers working at the headquarters of the biggest tech companies rely more on this statute than on the First Amendment.[164] It states: "*No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider*".[165] It removes potential liability of internet intermediaries for hosting or publishing speech of third parties.[166][167] Without this protection, Facebook, with its more than 2.38 billion monthly users[168], would be embroiled in legal suits without end. Top lawyers at the top tech companies state that §230 has been essential to the creation of user-generated content platforms, and that it allows for modern internet to exist.[169]

---

[160] J.M. BALKIN, "Digital speech and democratic culture: A theory of freedom of expression for the information society", *N.Y.U. L. Rev.* 2004, (1) 6; C.M. EVERETT, "Free speech on privately-owned fora: a discussion on speech freedoms and policy for social media", *Kan. J.L. & Pub. Pol'y* 2018, (113) 130; T. WU, "Is the First Amendment obsolete?", *Mich. L. Rev.* 2018, (547) 568-578.

[161] M. AMMORI, "The New New York Times: Free speech lawyering in the age of Google and Twitter", *Harv. L. Rev.* 2014, (2259) 2286.

[162] C. BUNI and S. CHEMALY, "The secret rules of the internet: The murky history of moderation, and how it's shaping the future of free speech", The Verge 13 April 2016, *https://www.theverge.com/2016/4/13/11387934/internet-moderator-history-youtube-facebook-reddit-censorship-free-speech;* EFF, "CDA 230: The most important law protecting internet speech", *https://www.eff.org/issues/cda230.*

[163] U.S. Supreme Court, *The New York Times Co. v. Sullivan*, 9 March 1964, 376 U.S. 254.

[164] M. AMMORI, "The New New York Times: Free speech lawyering in the age of Google and Twitter", *Harv. L. Rev.* 2014, (2259) 2284-90.

[165] 47 U.S.C. §230.

[166] T. G. ASH, *Free Speech: Ten Principles for a Connected World,* London, Atlantic Books, 2016, 23.

[167] The E.U. equivalent is the Electronic Commerce Directive, though there are differences; for a comparison, see M. PEGUERA, "The DMCA safe harbors and their European counterparts: A comparative analysis of some common problems", *Colum. J. L. & Arts* 2009, 481-512.

[168] As of march 2019, D. NOYES, "The top 20 valuable Facebook statistics – updated April 2019", *Zephoria* April 2019, *https://zephoria.com/top-15-valuable-facebook-statistics/.*

[169] M. AMMORI, "The New New York Times: Free speech lawyering in the age of Google and Twitter", *Harv. L. Rev.* 2014, (2259) 2287.

167. Emphasizing the need for regulation to promote free speech is a logical consequence of the seemingly inadequate protection afforded by the freedom of expression as interpreted today. Nonetheless, it is entirely reasonable to be worried about the loss of protection on a more fundamental level. There is a reason the right to free speech has been enshrined in countless constitutions and international treaties. A clear understanding in the past of the necessity of free expression put this right beyond the whims of legislators and governments. We cannot be certain that freedom of speech will be the primary concern of legislators going forwards. In fact, there are some indications that public authorities are shifting gears and are increasingly emphasizing the "responsibility" of intermediaries, pressuring them to govern their infrastructures more carefully. Especially hate speech and fake news seem like major concerns today.

168. On the other hand, authorities have not gone so far as to really regulate these intermediaries. They seem to be happy to let the intermediaries do the dirty work for them. As long as there is no legislation, there will be no judicial review over it and no finger-pointing to the authorities when the legislation is deemed excessive or inefficient. It is possible that the authorities don't even really know how to best handle the situation, being happy to shift focus to the intermediaries' own actions.

169. Clearly, a right to freedom of expression 2.0 is required. Not only should it aim to bring fundamental protection of speech back to the individual internet user. It should also be able to give a framework to legislators on how they can handle speech on the internet. In working out these aims we should take into consideration the internet context, wherefore the above analysis of the characterization of internet intermediaries will be a helpful guide.

170. Freedom of expression 2.0 will have to take two steps. The first step is overcoming the reluctance of applying the right to freedom of expression against internet intermediaries. The second step is defining the content of this evolved right, both in relation to the state and to the internet intermediaries. Indeed, it is not because internet intermediaries are subject to free speech restraints that they should be treated equivalent to the state. These players have different roles in the triadic model, which need to be taken into account.

SECTION II. ENFORCING FREE SPEECH RIGHTS AGAINST INTERNET INTERMEDIARIES

171. The internet age has to recognize the importance of internet intermediaries to our practical, day-to-day ability to speak. As we have seen, internet intermediaries can have a lot of control over

internet users' speech. They have accordingly been recognized in the triadic model as private governors of speech, taking in one of the three main anchor points of our free speech system.

172. The question becomes what is to be done with the right to freedom of expression. It originated in a dyadic speech system, where it served as protection against state censorship. However, reality has changed. The question is thus not whether the freedom of expression *should* evolve, but *how* it has to evolve in order to adapt itself to the new reality of the triadic model. The first question following in that regard is how to treat the "newcomer", the internet intermediaries. Should the freedom of expression simply ignore the odd man out, since he does not fit in with the dyadic model and the comfortable doctrines built up around it?

173. Ignoring the odd man out is obviously what we are trying to avoid. So how should the freedom of expression relate to the internet intermediaries? Because the old doctrines will be of little use, it is best to look at the freedom of expression in a functional way. What is the function of the right to freedom of expression, what is it trying to achieve?

174. Over the centuries, a lot of people have given their opinion on what they think the freedom of expression protects. Some think it protects the quest for truth; others argue it serves as the protection of the democratic political system, or of a democratic culture; and even more conceptions of the right exist, among which the protection of a marketplace of ideas, of personal autonomy, of self-expression…[170]

175. We are not trying to sever the knot here of who was right. Aims like these are also not exactly what we are looking for with our functional approach. The function of the freedom of expression is not something to be determined by ideological discussions over the ultimate aim of the right. It is much more basic than any of these ideological discussions. It is really asking how the right is working in society, a descriptive claim, something all ideologists could agree on. What is the most basic function of the right to freedom of expression?

176. It is the protection of speech against power. If there were no power, speech would not need protection. It is in the power of one party over another to censor speech that the true function of the freedom of speech can be found. Similarly, reasoning further in such manner, when asking what types of speech should be protected, a lot of people would again have their own opinion,

[170] See generally, and the references there: J.M. BALKIN, "Digital speech and democratic culture: A theory of freedom of expression for the information society", *N.Y.U. L. Rev.* 2004, (1) 28-49; S.M. BENJAMIN, "Transmitting, editing, and communicating: determining what the freedom of speech encompasses", *Duke L.J.* 2011, (1673) 1692-93; T. WU, "Machine speech", *U. Pa. L. Rev.* 2013, (1495) 1506-08.

deriving it from their position on the ideological aim (e.g. only political speech, or all types of speech except purely offensive speech, or…).[171] But again, everyone would agree on one thing, namely that "speech" is more than speech with which everyone agrees. Because if the only protected speech was speech which everyone agreed with, the freedom of expression would be an empty box. In that case, "speech" would not need protection in the first place.

177. But that already leads us too far. The basic function of the freedom of speech is protection of speech against power. Now it becomes easy to see how the freedom of expression should evolve. In times where the dyadic model was the appropriate framework, the freedom of expression protected speakers and publishers against the power of the state. Today in the triadic model, one only has to look where the power to censor speech lies. The state is still a powerful player. But it has been joined by the internet intermediaries, the private governors, who have a lot of power over the speech of individuals today. Lawrence Lessig recognized early on that private parties would have a major role to play in the internet age, asking: "*How do we protect liberty when the architectures of control are managed as much by the government as by the private sector?"*[172]

178. Indeed, the practices of these private superpowers may be more influential than those of lawmakers and regulators.[173] Governments are the dogs, intermediaries are the cats, and we are the mice. The biggest cats have more power than only the very biggest dogs, and their ability to limit free speech surpasses that of most states.[174] Professor Jeffrey Rosen even said that Facebook has "*more power in determining who can speak and who can be heard around the globe than any Supreme Court justice, any king or any president*".[175] Buni and Chemaly put it this way: "*As seen with* Black Lives Matter *or the* Arab Spring*, whether online content stays or goes has the power to shape movements and revolutions, as well as the sweeping policy reforms and cultural shifts they spawn.*"[176] Some have even analogized the power relationships online with medieval

---

[171] S.M. BENJAMIN, "Transmitting, editing, and communicating: determining what the freedom of speech encompasses", *Duke L.J.* 2011, (1673) 1675-1676.
[172] L. LESSIG, *Code and other laws of cyberspace,* New York, Basic Books, 1999, x-xi.
[173] T. G. ASH, *Free Speech: Ten Principles for a Connected World,* London, Atlantic Books, 2016, 26; C.M. EVERETT, "Free speech on privately-owned fora: a discussion on speech freedoms and policy for social media", *Kan. J.L. & Pub. Pol'y* 2018, (113) 119.
[174] T. G. ASH, *Free Speech: Ten Principles for a Connected World,* London, Atlantic Books, 2016, 26, 48; M. AMMORI, "The New New York Times: Free speech lawyering in the age of Google and Twitter", *Harv. L. Rev.* 2014, (2259) 2261, 2263-78; C.M. EVERETT, "Free speech on privately-owned fora: a discussion on speech freedoms and policy for social media", *Kan. J.L. & Pub. Pol'y* 2018, (113) 120; M. HEINS, "The brave new world of social media censorship", *Harv. L. Rev.* 2013-14, (325) 325.
[175] M. HELFT, "Facebook wrestles with free speech and civility", The New York Times 12 December 2010, *https://www.nytimes.com/2010/12/13/technology/13facebook.html?_r=0.*
[176] C. BUNI and S. CHEMALY, "The secret rules of the internet: The murky history of moderation, and how it's shaping the future of free speech", The Verge 13 April 2016, *https://www.theverge.com/2016/4/13/11387934/internet-moderator-history-youtube-facebook-reddit-censorship-free-speech.*

feudalism.[177] Speech on the internet is only made possible with the help of internet intermediaries, and each one can potentially silence speech.[178] Furthermore, since the popularization of the internet, speech has become cheap, while listener attention has become scarce.[179] The main internet platforms have consequentially a major role in the construction of the speech landscape.[180]

179. Therefore, the freedom of expression should not only serve as protection against the power of the state, but also as protection against the power of the intermediary. In procedural terms, an individual should be able to enforce his right to freedom of expression directly against the internet intermediaries. What the contents of that right are will be discussed in the following sections. To clarify, this does not entail a denial of the free speech right of intermediaries themselves against the state. However, their right of freedom of expression, which is hotly debated, is not the subject of this paper. In any case, even if these intermediaries had free speech rights themselves, they would not come into conflict with a user's freedom of expression right against the intermediaries, as will become clear when we define the content of that last right in the next section.[181]

180. In our analysis of the function of freedom of expression and of reality today, we have resulted in a scheme many scholars might call "*drittwirkung*" of fundamental rights. It is the doctrine that fundamental rights should not only be enforced against the state, but also horizontally between private parties. However, it is incorrect to state that we therefore support this doctrine. In our opinion, the doctrine is a clunky attempt to broaden the field of human rights to all layers of society, without considering the different realities for the different rights. One can come to the conclusion that a fundamental right might in some way need to be enforced against a private party by considering the function and aim of that right in an ever-changing reality. However, if it is simply an exercise in trying to widen fundamental rights to the private sphere "because that would be good for society", it is an illegitimate attempt by judges, lawyers and academics to enforce new rules without any democratic legitimacy. It would also be a badly thought-out attempt, because simply "privatizing" a fundamental right still gives no clue on how to enforce it, seeing that it was developed as protection against state power.

---

[177] F. PASQUALE, *The Black Box Society: The secret algorithms that control money and information*, London, Harvard University Press, 2015, 98.
[178] F.T. WU, "Collateral censorship and the limits of intermediary immunity", *Notre Dame L.Rev.* 2011, (293) 299.
[179] T. WU, "Is the First Amendment obsolete?", *Mich. L. Rev.* 2018, (547) 554-555.
[180] T. WU, "Is the First Amendment obsolete?", *Mich. L. Rev.* 2018, (547) 555.
[181] For a discussion of the free speech rights of internet intermediaries, see F. PASQUALE, "Platform neutrality: Enhancing freedom of expression in spheres of private power", *Theoretical Inq. L.* 2016, 487-513.

181. Others have tried enforcing the right of freedom of expression against the intermediaries by equating them to public authorities.[182] However, we do not think this is the right approach. We have defined internet intermediaries as *private* governors. In the following section, we will explain more thoroughly why they are fundamentally different from public authorities.

182. Simply privatizing a right is not enough. Now that internet intermediaries are also subject to free speech scrutiny, it must still be seen how this new structure will play out, and what the contents of the new rights should be.

SECTION III. FREEDOM OF EXPRESSION 2.0

§1. A market for rules

183. The aim of the freedom of expression 2.0 is to restore the fundamental protection of individuals' speech and to set up a framework in which the public authorities can operate. These aims must be considered in the context of a global internet environment.

184. We have seen that the internet has been hailed as a beacon for freedom of speech, regardless of the many underlying threats. It comes down to preserving what is good and improving on what is lacking; to preserve the basic structure of the internet and to ensure individuals an efficient protection (and control) of their right to free speech.

185. The solution lies in protecting the internet's "market for rules" and to strengthen it where it is lacking today. What made the internet great was the freedom users experienced. Not only were the possibilities of speech and of reaching an audience vastly enhanced, but there was also a possibility of setting up self-governing communities, of associating with like-minded individuals on a global scale.[183] A market for rules was born. Internet users could choose their own communities and set their own rules, including rules limiting types of speech. It is this basic structure which is essential for free expression on the internet, and which therefore must be protected under the right to freedom of expression. Scholars have argued before that the structure or institutional design of our information industries is a key determinant of our effective freedom of speech.[184] Freedom of expression 2.0 should be the right to have access to the internet – the internet structured as a market for rules.

---

[182] E.g. C.M. EVERETT, "Free speech on privately-owned fora: a discussion on speech freedoms and policy for social media", *Kan. J.L. & Pub. Pol'y* 2018, (113) 126-130.
[183] D. JOHNSON and D. POST, "Law and borders – The rise of law in Cyberspace", *Stan. L. Rev.* 1996, (1367) 1395-97.
[184] J.M. BALKIN, "Digital speech and democratic culture: A theory of freedom of expression for the information society", *N.Y.U. L. Rev.* 2004, (1) 52-54; J.A. BARRON, "Access to the press – A new First Amendment right", *Harv. L. Rev.*

186. The term "market for rules" was first used by professor David Post in a 1995 essay on who would make and control the rules in cyberspace.[185] He used the term in a descriptive sense, predicting that the future of the internet would see the birth of a market for rules. Because each individual network connected to the internet could set its own rules, while at the same time internet users could select the network they are "on", competition between the individual networks and their rule-sets would materialize.[186] We recognize his insight, but will now moreover use the term in a normative sense: it is not only how the internet works, but it should also be protected and strengthened. Indeed, professor Post already approved of the idea, saying that it is "*surely an attractive prospect, to the extent that what emerges represents the rules that people have voluntarily chosen*".[187]

187. The potential for this market for rules is in fact instilled in the design of the original internet architecture. The internet was designed as a decentralized, general-purpose network, allowing thousands of heterogeneous networks to interoperate – this as opposed to previous communication systems, which were based on the operator's capability to define the network's purpose.[188] The internet was conceived as an "agnostic platform", being neutral to whatever content was being conveyed through its pipes ("dumb pipes").[189] End-users were therefore empowered to utilize the internet as they saw fit. Not the operator, but the end-users were placed in control of their internet experience.[190] Of course, over the years it has become clear that network operators can in fact also act as chokepoints, but that was not the original intent of the internet's design.[191]

188. An interesting connection can be seen between the market for rules and the concept of the "marketplace of ideas", one of the founding and most accepted justifications for the U.S. First

---

1967, 1641-1678; R. TUSHNET, "Power without responsibility: Intermediaries and the First Amendment", *Geo. Wash. L. Rev.* 2008, (986) 1000.

[185] D.G. POST, "Anarchy, state, and the internet: an essay on law-making in cyberspace", *J. Online L.* 1995, art. 3.

[186] D.G. POST, "Anarchy, state, and the internet: an essay on law-making in cyberspace", *J. Online L.* 1995, art. 3, para. 42. See also D. JOHNSON and D. POST, "Law and borders – The rise of law in Cyberspace", *Stan. L. Rev.* 1996, (1367) 1387-91. 1395-98.

[187] D.G. POST, "Anarchy, state, and the internet: an essay on law-making in cyberspace", *J. Online L.* 1995, art. 3, para. 43.

[188] L. BELLI, "End-to-end, net neutrality, and human rights", in L. BELLI and P. DE FILIPPI (eds.), *Net neutrality compendium: Human rights, free competition, and the future*, Springer, 2016, (13) 13-14.

[189] T. G. ASH, *Free Speech: Ten Principles for a Connected World,* London, Atlantic Books, 2016, 357; L. BELLI, "End-to-end, net neutrality, and human rights", in L. BELLI and P. DE FILIPPI (eds.), *Net neutrality compendium: Human rights, free competition, and the future*, Springer, 2016, (13) 14; L. LESSIG, *Code and other laws of cyberspace,* New York, Basic Books, 1999, 32-33.

[190] L. BELLI, "End-to-end, net neutrality, and human rights", in L. BELLI and P. DE FILIPPI (eds.), *Net neutrality compendium: Human rights, free competition, and the future*, Springer, 2016, (13) 16.

[191] L. BELLI, "End-to-end, net neutrality, and human rights", in L. BELLI and P. DE FILIPPI (eds.), *Net neutrality compendium: Human rights, free competition, and the future*, Springer, 2016, (13) 16.

Amendment protection.[192] Jerome Barron, in his influential article of 1967, argued that this marketplace was largely a romantic idea, and that in fact the mass media controlled the market, leading to a scarcity of unpopular ideas and unorthodox opinions. The First Amendment only protected speech which was already uttered, thereby protecting the status quo and the power of the media. What of the ideas too unacceptable to have access to the media?[193] Barron argued for a right of access to the press.[194] The internet, as we have seen, made "cheap speech" possible, and today everyone can easily reach an audience online, bypassing the old gatekeepers. It now comes down to protecting that basic structure, and to prevent the rise of new, too powerful, gatekeepers. Protecting the market for rules also means protecting the marketplace of ideas.

189. Political scientist Albert Hirschman defined three ways in which an individual can have an impact on the policy of a private power they are unsatisfied with: voice, loyalty and exit.[195] They can voice their concerns and try to change the policy; they can remain loyal and hope the situation improves; or they can exit. Protecting the market for rules comes down to protecting the possibility of individuals to vote with their feet, and to leave the intermediary for a different one. Furthermore, the market for rules is an advancement of individual liberty, and the power to define the rules for yourself. "*Sapere aude*" was how Immanuel Kant defined the Enlightenment.[196] Let us hope it will also be applied to the internet age.

190. From an individual internet user's perspective, the protection of the market for rules has to result in a protection of procedural rights against internet intermediaries which are lacking today. In order for a market to operate efficiently, it needs transparency. In a market for rules, the transparency requirement dictates a disclosure of the rules the internet intermediaries employ to

---

[192] See J.A. BARRON, "Access to the press – A new First Amendment right", *Harv. L. Rev.* 1967, (1641) 1642-43.

[193] J.A. BARRON, "Access to the press – A new First Amendment right", *Harv. L. Rev.* 1967, (1641) 1641, 1647-48. See also K. SULLIVAN, "First amendment intermediaries in the age of cyberspace", *UCLA L. Rev.* 1998, (1653) 1669-70. Lawrence Lessig makes a similar analysis when he states that not only the law determines whether you can speak, but also the forces of the market, social norms, and architecture; there is no speakers' corner in every city, and generally only professionals (journalists, academics, politicians, celebrities, …) get to address a wider audience on public matters; protection of controversial speech is therefore more narrow than the First Amendment would suggest: L. LESSIG, *Code and other laws of cyberspace,* New York, Basic Books, 1999, 166-167.

[194] J.A. BARRON, "Access to the press – A new First Amendment right", *Harv. L. Rev.* 1967, (1641) 1666-78. He stated earlier: "*Indeed, nongoverning minorities in control of the means of communication should perhaps be inhibited from restraining free speech (by the denial of access to their media) even more than governing majorities are restrained by the first amendment - minorities do not have the mandate which a legislative majority enjoys in a polity operating under a theory of representative government. What is required is an interpretation of the first amendment which focuses on the idea that restraining the hand of government is quite useless in assuring free speech if a restraint on access is effectively secured by private groups*", p. 1656.

[195] A.O. HIRSCHMAN, *Exit, voice, and loyalty: Responses to decline in firms, organizations, and states,* Cambridge (Mass.), Harvard university, 1970, x + 162 p.

[196] I. KANT, "An answer to the question: What is Enlightenment?", 30 September 1784, Königsberg, Prussia.

regulate speech. Furthermore, to function properly, a market not only needs transparency, but also rule of law to protect legitimate expectations. In the market for rules, an individual internet user should have procedural rights to protect him against arbitrary or illegitimate decisions by intermediaries to censor speech contrary to their own disclosed rule-sets. These procedural rights are safeguards for the individual's freedom to choose its own community and to live with its own rule-set.

191. From a broader perspective, in order to secure a market for rules, the internet intermediaries should in principle have immunity from liability for the speech of others using their infrastructure. A general imposition of liability on internet intermediaries would be subject to all the dangers of new school speech regulation and constitute a serious chill of free speech on the internet. Exceptions to this principle should be strict and precise and be supplemented with procedural guarantees. They should also take into account the global nature of the internet.

192. Once this market for rules is established, it must also be protected. Here we find ourselves on the cross-roads of fundamental rights law and competition law. Public authorities should have a positive obligation to defend the market for rules from anti-competitive practices. Cartel agreements, abuse of market power and mergers are threats to any market, and are in this market also a danger to the freedom of expression of internet users everywhere.

193. Before elaborating on all these elements, it is interesting to point out the character of the freedom of expression 2.0 with regard to the intermediaries: it is not substantive, but rather formal/procedural. None of the elements mentioned impose substantive limits on speech censorship. Only public authorities are subject to such constraints: freedom of expression 1.0 constraints. But because internet intermediaries have to work in a global internet context, any substantive limit on censorship would prove unsatisfactory. A substantive limit respecting the global nature of the internet would have to be interpreted in exactly the same way everywhere, which seems impossible. The freedom of expression 2.0 allows the global internet to exist, where an intermediary can work with one rule-set for all its users globally.

194. The freedom of expression 2.0 might sound strange in comparison with traditional free speech jurisprudence. Nevertheless, it is imperative to evolve the right to free speech in the manner described should we not want to give up fundamental protection of free speech in the twenty-first century.

§2. Procedural rights for internet users

195. Perfect information and rule of law are characteristics of a healthy competitive market system. Information or transparency of the market gives the market players the possibility of examining the market and finding the best choice for their needs. The rule of law should then make sure that the engagements entered into are enforced in the anticipated way.

196. This should be no different for the market of rules on the internet. Seeing that this market is the basis for free speech in the twenty-first century, the functioning of it deserves protection under the right to freedom of expression 2.0.

A. Transparency

197. In order to provide market players the necessary knowledge of the market, the first requirement is transparency. For an individual internet user to find the preferred rule-set on which regulation of speech will be based, he first of all needs to know that rule-set. As we have seen before, the policies of internet intermediaries can be murky at best, and as a consequence an internet user might not know why he gets to see certain content over other, or why a certain post is removed. Most of all, he might be in the dark about what he is *not* seeing (censored posts, demoted search results, blocked applications…): you do not know what you do not know. Internet intermediaries deciding to regulate speech on their infrastructure therefore have an obligation to disclose the rule-set to the public.

198. In order for it to be efficient, the disclosed rule-set should be complete. As we have seen, Facebook discloses one rule-set for the public, but internally uses a different, more detailed one. Individuals should have access to the rule-set the intermediary actually uses to censor speech.

199. What then is the complete rule-set? It is an account of all censorship rules, whether enforced *a priori* or *a posteriori*, proactive or reactive, manual or automatic. But it goes further than that. On the internet, not only the outright removal or blocking of content can hinder speech, but also simply the system some intermediaries use to rank content online. Search engines especially will rank the search results according to a certain rule-set. As Alejandro Diaz observed, search technologies encode certain values of what is important, relevant or authoritative. "Google goggles" are the result.[197] Internet users should have the right to know which political and ethical values underlie the search systems they use.

[197] A.M. DIAZ, "Through the Google Goggles: Sociopolitical bias in search engine design" in A. SPINK and M. ZIMMER (eds.), *Web Search,* Berlin, Springer, 2008, 11-34. See also T. G. ASH, *Free Speech: Ten Principles for a*

200. ISP's not bound by net neutrality might also rank content according to some criteria (probably commercial), giving some content faster flows through their channels (access-tiering). Again, which content gets priority when should be disclosed.

201. That is not to say that internet intermediaries should disclose the algorithms they utilize. These should remain protected by intellectual property rights. What should be disclosed are the principles, the ideas, at the basis of the algorithm.[198] They are human-made decisions concerning which content to allow and how to rank it. Even when the algorithm personalizes the experience for the individual user, an explanation is required of how that mechanism works, what it takes into consideration etc. Some authors have worried about the phenomenon of "filter bubbles", also called "The Daily Me"[199], where internet platforms offer their users a highly personalized experience, filtering information for them on the basis of earlier shown interests.[200] Though this paper does not deal with this issue, an obligation to disclose the ideas of the mechanism behind it is a first step in addressing it.

202. One more point on search engine transparency. Giving away too many details of their method could invite too much gaming of the system by search engine optimization firms and the like. A balance will need to be struck: users should get a thorough explanation of the method employed, while search engines should be able to protect their systems from abuse.[201] What matters most is that in the end the search engine will not be able to hide behind the algorithm when suddenly a website disappears or gets demoted in the ranking, especially when there are plausible reasons for the search engine to do so.

203. The obligation to disclose the rule-set is a positive obligation falling on the internet intermediaries. However, it is not a burdensome one. It will generally be very straightforward to disclose the rule-set, since it is simply a reveal of what internally is already being done.

Connected World, London, Atlantic Books, 2016, 168; see also E. GOLDMAN, "Search engine bias and the demise of search engine utopianism" in A. SPINK and M. ZIMMER (eds.), *Web Search,* Berlin, Springer, 2008, (121) 121-124; F. PASQUALE, "Platform neutrality: Enhancing freedom of expression in spheres of private power", *Theoretical Inq. L.* 2016, (487) 511-512.

[198] J.A. CHANDLER, "A right to reach an audience: An approach to intermediary bias on the internet", *Hofstra L. Rev.* 2007, (1095) 1115, 1117.

[199] C.R. SUNSTEIN, *#republic: Divided democracy in the age of social media*, Princeton, Princeton University Press, 2017, 1-3.

[200] T. G. ASH, *Free Speech: Ten Principles for a Connected World,* London, Atlantic Books, 2016, 51; C.R. SUNSTEIN, *#republic: Divided democracy in the age of social media*, Princeton, Princeton University Press, 2017, xi + 316 p.; T. WU, "Is the First Amendment obsolete?", *Mich. L. Rev.* 2018, (547) 555-556.

[201] J.A. CHANDLER, "A right to reach an audience: An approach to intermediary bias on the internet", *Hofstra L. Rev.* 2007, (1095) 1117.

204. This transparency obligation will be enforced through the right to freedom of expression of individual internet users. Of course, the reaction of most intermediaries will be to make public their rule-sets before they get sued. NGO's, consumer protection organisations and civil society can also play a role in this, pressuring intermediaries to comply with their obligations.

205. This transparency starts solving some concerns flowing from the triadic model as analyzed above. Obviously it resolves the lack of transparency. But it will furthermore help resolve a concern for lack of democratic input in the rule-making process. Because the rules are disclosed (and subsequent changes to it as well), watchdogs will be on the look-out. Especially NGO's and special interest groups will be monitoring these rules, voicing their concerns and suggesting improvements. But also individuals and public authorities might speak up. The external influences on the rules will therefore increase, reducing the possibility of completely undesired rules. And even if such instances of unacceptable rules occur, the market for rules makes it possible to leave the intermediary completely.

B. Due process

206. A second requirement for making the market for rules work efficiently is the rule of law. Legitimate expectations should be protected in any well-functioning market. It is one thing to disclose the rules, but another to enforce them correctly and in a non-discriminatory way. Therefore, procedural guarantees for the individual internet user should be guaranteed under the freedom of expression 2.0.

207. The first procedural guarantee must consist of a right to be heard. Before speech is removed or blocked by an internet intermediary, a user should have the right to be heard on the matter first, whether the censorship is *a priori* or *a posteriori*, proactive or reactive, manual or automatic. Today, as we have seen, the opposite is the norm: first the censorship happens, after which an internet user can possibly "appeal" the decision. This seems to us a bad starting point. Nonetheless, there might be cases where speech may be temporarily censored first, although definitively doing so can only be done after the user has had a chance to defend himself. Account will need to be taken of the degree of "unlawfulness" (is it clearly contrary to the rules?), the possible reach of the content, and the expectations of other users on the platform.

208. This doesn't mean that internet intermediaries should develop an independent judiciary comparable to the state judiciary. It should serve more as a safeguard against ill-considered, rash and obviously erroneous decisions taken by the intermediary. It is important to remember the

amount of power these intermediaries can have over someone's life.[202] YouTube might decide to delete the channel of a youtuber who gets his income from his videos and who has worked for years to amass his subscriber base. The amount of procedural guarantees a user has, might consequently also depend on the severity of the intended censorship (e.g. is a whole user profile being removed or only a comment?). Rights of appeal ("real" appeal) within the intermediary might in some cases be called for. How this due process requirement should be enforced more concretely is the subject of a whole new paper. In any case, the level of procedural rights required should probably further take into account the time and costs it would take to actually bring proceedings in court, as well as the type (social media platform, search engine, ISP…), size and means of the intermediary concerned.[203]

209. Indeed, these rights of due process are primarily useful against intermediaries such as social media, who censor the content of specific, individual users. Search engines' ranking methods and ISP's' promotion or degradation of certain content are less receptive to these types of rights, because they usually do not target one internet user specifically. Against those intermediaries, the transparency obligation and the obligation to notify users of updates to their rule-sets will be more important. Nonetheless, if they want to censor content of a specific user, the due process rights should apply to them in equal force.

210. When now this procedural guarantee before the intermediary fails, or when the internet user deems the decision incorrect, he will have the possibility to bring the case before the national courts. These courts will apply the rule-set as disclosed by the intermediary itself to the case. This is an important threat hanging over the decisions made by the intermediary. The final interpreter and applicator of the rules is not the intermediary itself, but an independent judge. This will incentivize the intermediary to make the correct decision.

211. It will also incentivize the intermediary to come up with a detailed set of rules if they don't want to give away too much of their power to regulate speech. First of all, if no rule-set was disclosed to the public, the intermediary would always lose on appeal (unless the intermediary is obliged by law to remove such content; the next section discusses the legitimacy of such laws). Due process obligations therefore reinforce the transparency requirement. Secondly, since a judge is

[202] E.g. R. TUSHNET, "Power without responsibility: Intermediaries and the First Amendment", *Geo. Wash. L. Rev.* 2008, (986) 998.
[203] Indeed, for most users the costs of bringing proceedings in court will simply not be worth it, C.M. EVERETT, "Free speech on privately-owned fora: a discussion on speech freedoms and policy for social media", *Kan. J.L. & Pub. Pol'y* 2018, (113) 120.

the final interpreter of the rules, vague standards such as a prohibition of "hate speech" or "bullying" will largely be filled in by the national judiciary. This also removes the possibility of opportunistic decisions on the part of intermediaries based on vague standards.

212. In fact, this comes down to enforcement of the contract the internet user has with the intermediary. However, in order for this due process to work, some opportunistic clauses from the side of the intermediary must be prohibited. First, a discretionary right to censor speech cannot be valid. This is contrary to the basic instinct of the rule of law we are trying to achieve. Secondly, modifications of the rule-set cannot be binding unless agreed upon by the individual internet user. Unilateral alterations are thus also prohibited.

213. Taken together, judges might clearly find some inspiration in consumer protection law. The difference is that here we are not so much trying to protect the consumer, but the market for rules guaranteeing free speech on the internet. That purpose is also the reason why similar requirements deserve fundamental protection here.

214. These procedural guarantees would solve some of the concerns encountered in the triadic model. Evidently, it resolves the lack of due process internet users experience today. Furthermore, it also resolves the lack of equality sometimes found in application of the rules to individual users. Donald Trump will no longer be exempt from the rules other social media users have to comply with – unless of course those rules make an exception for him (which would be very unlikely, seeing that such rules must be disclosed and thus subjected to external scrutiny). However, how would that work? Surely, Donald Trump will not sue Facebook for not removing his post? That may be true, but it is through pressure of other users that Facebook would be prompted to treat everyone according to its own rules. Users might not be able to force Facebook to censor content they think is not allowed, but they might be able to sue Facebook in damages for breach of contract when it does not apply its rules as promised.

215. Together, the procedural rights are a defence against dishonesty. Especially concerning search engines this may prove to be important. There are generally two opposed theories of what a search engine is: either a passive and neutral conduit, connecting users to websites; or an active and opinionated editor, using expert judgement to identify the important and interesting content.[204]

[204] J. GRIMMELMANN, "Speech engines", *Minn. L. Rev.* 2014, (868) 871 and see references there; Also: E. GOLDMAN, "Search engine bias and the demise of search engine utopianism" in A. SPINK and M. ZIMMER (eds.), *Web Search,* Berlin, Springer, 2008, (121) 125; F. PASQUALE, *The Black Box Society: The secret algorithms that control money and information*, London, Harvard University Press, 2015, 77-78. The authors also point to the opportunistic use search engines make of these opposing theories, claiming they are mere conduits in defamation or intellectual property

These opposing opinions consequently attribute a significantly different degree of protection under the freedom of expression to search results. However, they are both unsuccessful in capturing the internet user's experience of search engines. A search engine is not just a conduit, but also not really an editor; it is a trusted advisor.[205] It takes a user's query, performs research, and reports back with recommendations; It connects users to websites *and* uses discretion in doing so.[206] Therefore, loyalty of the search engine is the number one demand from internet users.[207] Search results may not be objectively wrong, but they can be dishonest, e.g. when the engine skews the results to favour its own services. Transparency obligations especially will put a check on such misleading behaviour.[208]

216. In sum, due process and transparency are all about foreseeability and protection of legitimate expectations. These are necessary requirements for every well-functioning market, no less so for the market for rules. It tackles the uncertainty, harmful to a speech environment, to be found online today.[209] It tackles the unequal treatment some internet users experience. But most of all, it tackles the absolute sovereignty some intermediaries assume over their realms. They might have a lot of power, but that does not mean they should exercise it in an arbitrary or unjust manner, waving their scepters this way or that. More and more, intermediaries are seen by internet users as governors of some kind, and indeed we have defined them as private governors. This goes hand in hand with an expectation of procedural fairness.[210] Like constitutional monarchs, they are to be constrained by the constitutions under which they rule. Though they dispense the rules, rule of law ensures they also bind themselves.

§3. Principle of immunity of internet intermediaries

217. To this point, we have talked about the individual internet user. However, in the triadic model we must also consider the relationship between the state and the internet intermediaries. We have

cases, while at other times claiming their search results deserve protection under the freedom of expression, usually when trying to avoid regulation. Pasquale also refers to this as "intermediaries' convenient identity crisis", see F. PASQUALE, "Platform neutrality: Enhancing freedom of expression in spheres of private power", *Theoretical Inq. L.* 2016, (487) 490-497.

[205] J. GRIMMELMANN, "Speech engines", *Minn. L. Rev.* 2014, (868) 873-874.

[206] J. GRIMMELMANN, "Speech engines", *Minn. L. Rev.* 2014, (868) 874.

[207] See J. GRIMMELMANN, "Speech engines", *Minn. L. Rev.* 2014, (868) 874-875, who mentions access to search and loyalty as the two basic requirements.

[208] E. GOLDMAN, "Search engine bias and the demise of search engine utopianism" in A. SPINK and M. ZIMMER (eds.), *Web Search,* Berlin, Springer, 2008, (121) 126.

[209] Jeffrey Rosen already said that "*Google's* [and we would say all intermediaries'] *'trust us' model may not be a stable way of protecting free speech in the twenty-first century*", J. ROSEN, "The deciders: The future of privacy and free speech in the age of Facebook and Google", *Fordham L. Rev.* 2012, (1525) 1537.

[210] J.M. BALKIN, "Free speech in the algorithmic society: Big data, private governance, and new school speech regulation", *U.C.D. L. Rev.* 2018, (1149) 1197.

seen that this is characterized by new-school speech regulation: the state targets the intermediary to carry out censorship. We have also seen that this led to the concerns of collateral censorship and the cooptation of intermediaries as state agents.

218. These can present a serious chilling effect on speech online, making the market for rules contract. A market which is too regulated might not really work as a market anymore, or would at least not run as efficiently. The market should be able to do its work. Furthermore, collateral censorship as a result of new-school speech regulation brings back uncertainty for internet users where we just tried to provide certainty with transparency and due process obligations.

219. The freedom of expression 2.0 must deal with two issues. First, it must prevent as much as possible these concerns to free speech. Secondly, it must give states a framework in which they can regulate speech to a certain extent. It would be untenable to deny states any right to regulate speech by targeting the internet intermediaries. The characteristics of the internet sometimes dictate they do so. But the manner in which states can do this must be delineated.

220. Immunity from liability of internet intermediaries for speech of others using their infrastructure should be the guiding principle. It is no wonder that §230 CDA has been hailed as the most important free speech law for the internet, no wonder that it has been compared to the most important First Amendment protections. Without this principle, entities like Facebook and Google would not exist as they do today. If intermediaries would be systematically held liable for the speech of internet users, online censorship would be rampant – a consequence of the collateral censorship such immunity tries to prevent.[211] Therefore, this principle deserves protection under the freedom of expression 2.0.

221. This is also the reason why there was such outcry over the *Delfi* case. The European Court of Human Rights clearly missed the mark here. Instead of tending to a principle of non-liability for intermediaries, it allowed for them to be strictly liable, practically ignoring the concerns to free speech of internet users.

222. Nevertheless, censorship by intermediaries might sometimes be called for. If states would only have the possibility of targeting the individual internet users, the aim of some legislation might never be reached. It comes down to finding the restrictions under which such a breach of the principle can be allowed.

[211] F.T. WU, "Collateral censorship and the limits of intermediary immunity", *Notre Dame L.Rev.* 2011, (293) 296.

223. The first condition should be that intermediaries can only be coopted by the state in specific, clearly defined circumstances. If intermediaries would be made liable for content on the ground of vague criteria, the dangers of collateral censorship and cooptation of intermediaries as state agents become too great. For example, requiring intermediaries to remove child pornography and making them liable if they refrain from doing so, is pretty straightforward. In most cases it will be clear when child pornography is present. On the other hand, requiring intermediaries to remove hate speech is too vague a criterion. The threat of overreach by "private judges" is then very real.

224. This is again a criticism of the *Delfi* judgement. The Court considered incitement to violence and hate speech to be so clearly unlawful that they deserved a strict liability regime for intermediaries. Why the Court thought so is a mystery, seeing that especially hate speech is one of the most contested concepts out there. The same criticism can be made for *NetzDG*.

225. Specific and clear criteria on what to censor also make the cooptation of intermediaries as state agents more acceptable. In that scenario, there is almost no discretion for the intermediaries' decision, thereby using them more as enforcement machines than as enforcement agents. Democratic accountability is accordingly a less pressing matter, because the decision will clearly carry the stamp of the state.

226. If the state wants to tackle hate speech online, it has different ways of going about it. The first is to provide more detailed rules than simply "hate speech" for intermediaries to censor. Secondly, the state itself could monitor the internet for hate speech. There might be some mechanism where the flagging of content as being hateful could be sent directly to public officials, who could then decide on the matter. In that way, the state itself remains responsible for the decision, while it also gets the benefit of fast notifications of presumed hate speech.

227. The second condition should be that the imposed censorship is supplemented by procedural guarantees. This is merely a repetition of the already discussed due process requirements. However, the state might as well make sure that its legislation foresees a right to be heard by the intermediary, maybe even a right of appeal, after which an appeal with the national courts is always possible.

228. The third condition is that the global nature of the internet must be respected. National legislation should only apply to the citizens of that state. Therefore, a state can only force an internet intermediary to censor content in relation to internet users in that state. The appropriate tool for this could be geo-blocking. For example, YouTube might censor a video only in relation to IP

addresses located in Germany. Germany cannot force YouTube to remove the video in other parts of the world.

229. The fourth condition considers the nature of the liability. In principle, such liability has to be based on actual knowledge of the unlawful content. In practice this means that liability will generally only exist after the intermediary has been notified of the content through a notice-and-take-down procedure. Strict liability, based on constructive knowledge, should only be allowed where automatic filters exist which can block content *a priori* without a high risk of false positives. Such liability should also take into account the size of an intermediary and the means it has to install such filters. An example is again child pornography, which is relatively easy to censor *a priori*. A counter-example is the protection of intellectual property rights: Because of the many exceptions (basically "fair use") to those rights, such as parody, critique, education, etc., it is highly doubtful whether an *a priori* filter will be able to avoid a high number of false positives.[212]

230. The final condition is not a matter under examination here: compliance with the freedom of expression 1.0. A state can never force an internet intermediary to censor content which it would not have been allowed to censor itself.

231. At first sight the immunity principle concerns the intermediaries, but in fact it concerns the free speech of individual internet users. Therefore, this principle is not a consequence of the right to freedom of expression of the intermediary, but of the right of internet users. They can enforce their right to freedom of expression 2.0 against the state in order for the state to comply with the above conditions.

232. To clarify, the immunity for intermediaries discussed here only applies to the content it carries for the users of its infrastructure. Obviously such immunity should not apply when the intermediary itself is the original speaker. In that case, collateral censorship is not a threat, seeing that the intermediary itself has the incentives of an original speaker.[213]

[212] J. ZITTRAIN, *The future of the internet – and how to stop it*, New Haven, Yale university press, 2008, 115.
[213] F.T. WU, "Collateral censorship and the limits of intermediary immunity", *Notre Dame L.Rev.* 2011, (293) 297.

§4. Protecting the market for rules: freedom of speech as competition law

A. Countering anti-competitive / anti-speech practices

233. The contours of the market for rules are now clear. There is however one big danger to this market (a danger common to all types of markets): anticompetitive practices. The idea of the market for rules is that every internet user can choose the rule-set with which he feels comfortable. This presumes that the user can make a number of different choices. Indeed, because the internet is such a vast and open space, one could imagine an endless amount of possibilities to choose from. Other alternatives are only a few clicks away.

234. However, that is not what we are seeing today. The internet has not been immune from market concentration.[214] A few firms now have an enormous user base and vast influence over the development of the internet: think of Alphabet (Google), Facebook, Apple, Amazon... Especially for social media and similar platforms, network effects can play a significant role to their success.

235. Anticompetitive practices can be classified in three main categories: anticompetitive agreements; abuse of market power; and mergers. An in-depth analysis of each would require another paper. We will here provide the starting points.

236. The first way in which the market for rules can be disturbed, is by internet intermediaries making agreements on the regulation of speech. If they decide to follow the same rule-set, competition between them is effectively shut down. It would avoid displeased users switching from one intermediary to another. Especially when these intermediaries together have considerable market power, the effect on the possibility to choose can be considerable.

237. A significant example is the recent collective action by a few of the biggest internet firms to remove Alex Jones from their platforms. From one day to another, Apple removed his show Infowars from iTunes, Spotify did the same, and Facebook and YouTube deleted his pages and channel. Alex Jones is a controversial figure in the U.S., hosting a popular show often filled with fake news, conspiracy theories, and hateful speech. The big internet firms were under quite some pressure to do something about him. However, if on its own one decided to remove Jones from its platform, the backlash could be considerable. Therefore, it seems that the biggest intermediaries coordinated their censorship (though all said they were simply enforcing their

[214] As recognized in Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries, adopted on 7 March 2018, Preamble (7).

policies). Jones replied that he was being censored by the "San Francisco tech elite".[215] Those who criticized this action by the internet platforms were right.[216] Most might disapprove of what Alex Jones says, but, in the spirit of Voltaire[217], all should defend his right to say it.

238. The state should have a positive obligation under the freedom of expression 2.0 to prevent such arrangements.

239. A second way in which the market can be disturbed, is by firms exercising their market power abusively. While this is less obvious than anticompetitive agreements, one might imagine some ways in which an intermediary might do so. For example, Facebook might refuse to deal, i.e. refuse an internet user access to its platform, because that user has an account on another social media platform. Because it can be important for people to have a Facebook profile, they might give up their other engagements.

240. Again, the state should have a positive obligation to prevent this. Not only would it protect the market for rules, but it might also resolve issues of discrimination that might exist online. Intermediaries with a lot of market power might be forced to offer their services in a non-discriminatory manner, in order to avoid abuse of market power. A silly example might be Facebook trying to exclude all homosexuals from its platform. On the other hand, intermediaries with little to no market power, trying to be a community for a certain group, might legitimately discriminate on such basis. If someone wanted to start a social media platform for all Europeans of Asian descent, he could do so.

241. A more realistic example could be ISP's not acting in conformity with net neutrality. In principle, net neutrality is not obligatory under the freedom of expression 2.0. In a well-functioning market for rules, internet users will know (thanks to transparency) which content these ISP's prioritize or block. The internet user can choose the ISP he likes best. However, because the market for rules must be defended, some intermediaries could be prohibited from promoting or blocking certain

---

[215] J. KANTER, "Apple, Facebook, Spotify, and YouTube shut down Infowars' Alex Jones", *Business Insider* 6 august 2018, *https://www.businessinsider.nl/apple-shuts-down-most-of-alex-jones-infowars-podcasts-2018-8/?international=true&r=US.*

[216] See J. COASTON, "YouTube, Facebook, and Apple's ban on Alex Jones, explained", *Vox* 6 august 2018, *https://www.vox.com/2018/8/6/17655658/alex-jones-facebook-youtube-conspiracy-theories.*

[217] The quote "*I disapprove of what you say, but I will defend to the death your right to say it*" is often attributed to the French thinker, but it was actually made by Evelyn Beatrice Hall, his later biographer, in order to illustrate Voltaire's beliefs; See QUOTE INVESTIGATOR, *https://quoteinvestigator.com/2015/06/01/defend-say/.*

content because it would be an abuse of market power.[218] If the market is concentrated and the ISP has a significant amount of market power, the user might not have a real choice. In that case, it can be abusive for the ISP to discriminate between data packets, since it would undermine the freedom of speech (including the freedom to receive information) of content providers and internet users. In practice, this could be the case for a lot of ISP's.

242. Is there in that last scenario no room for internet traffic management at all? What if, for example, the "pipes" are congested with data packets, but the internet user wants to watch video streaming, which is sensitive to such delays? Or what about the blocking of malware? Clearly, not all internet traffic management techniques are illegitimate *per se*.[219] The courts will have to examine whether such actions are then in the interest of all internet users' freedom of expression, or whether they only serve the interests of the ISP. There is a clear difference between the blocking of malware and the blocking of competitors. Luca Belli proposes that the operator should only be allowed to manage internet traffic when necessary and proportionate to the achievement of a legitimate aim.[220]

243. Especially in market abuse cases, due consideration should also be given to network effects. The bigger the network, the harder it is to leave, the more difficult it is for new entrants in the market to grow. Though network effects are sometimes mentioned to discard a market theory like ours, or something in the same vein[221], we think they should not be given that much weight to discard the whole idea. Over the years, internet platforms have come and gone, so it is not impossible for new platforms to make it.

244. A third type of practices which can be anticompetitive are mergers and takeovers. In the beginning, the internet was a space of possibility. Anyone could make it and grow big. Over the years, the character of the internet changed. Concentration happened, resulting in a few gigantic internet firms ruling cyber-space. Today, the hope of internet entrepreneurs is not so much to become the next big thing, but rather to be bought by one of the existing giants.

---

[218] Jennifer Chandler also noticed that a transparency obligation will not be enough in the event there is no choice between different intermediaries (though she does not connect it to a competition law perspective), see J.A. CHANDLER, "A right to reach an audience: An approach to intermediary bias on the internet", *Hofstra L. Rev.* 2007, (1095) 1124.
[219] L. BELLI, "End-to-end, net neutrality, and human rights", in L. BELLI and P. DE FILIPPI (eds.), *Net neutrality compendium: Human rights, free competition, and the future*, Springer, 2016, (13) 16-17.
[220] L. BELLI, "End-to-end, net neutrality, and human rights", in L. BELLI and P. DE FILIPPI (eds.), *Net neutrality compendium: Human rights, free competition, and the future*, Springer, 2016, (13) 23.
[221] E.g. J.M. BALKIN, "Free speech in the algorithmic society: Big data, private governance, and new school speech regulation", *U.C.D. L. Rev.* 2018, (1149) 1199.

245. This is an obvious problem to the market for rules. If internet infrastructure is in the hands of a few powerful firms, the possibility of choice diminishes. States should take action to prevent too much concentration in the hands of some happy few.

246. In all three cases, we have defined positive obligations for the state under the freedom of expression 2.0, at the risk of state liability. Could the obligation also be enforced directly against the internet intermediary by the internet user? In some instances, mostly where an individual user is directly affected by the actions of the intermediary, this seems self-evident. For example, when a cartel agreement singles out a specific person, such as Alex Jones, that person should be able to hold the intermediaries accountable under the freedom of expression 2.0. However, when users are not directly affected, as in merger cases, an individual's case against the intermediary not only seems impracticable, but also undesirable, since the outcome of the case will affect internet users generally. What if judge A decides to uphold the merger, but judge B rules against it? The freedom of expression 2.0 should not lead to such incongruities. In that case, a direct right of enforcement against the intermediary seems out of bounds.

247. In any case, inspiration can and should be taken from the huge amount of existing doctrine and cases on competition law. The wheel does not have to be reinvented. Only the market for rules has to be recognized.

B. Intermediaries as state actors: incompatible with the market for rules and the triadic model

248. The free speech/competition law approach is the solution to the concern that there is too much censorship online. Nonetheless, some argue that intermediaries such as social media should be regarded *as if they were the state* in matters of free speech. Such a doctrine could be the consequence of a doctrine of *Drittwirkung* of fundamental rights, where a general horizontal applicability of human rights is defended without thinking about the consequences of the application of these rights in the private sphere. However, it can also be the consequence of a more concrete approach: social media are the public fora of the twenty-first century, and therefore, the argument goes, they are restrained in matters of censorship as the state is.[222]

[222] See C.M. EVERETT, "Free speech on privately-owned fora: a discussion on speech freedoms and policy for social media", *Kan. J.L. & Pub. Pol'y* 2018, 113- 145; K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1609-11; C.R. SUNSTEIN, *#republic: Divided democracy in the age of social media*, Princeton, Princeton University Press, 2017, 36. More generally on the public nature of the intermediaries, see J.M. BALKIN, "Digital speech and democratic culture: A theory of freedom of expression for the information society", *N.Y.U. L. Rev.* 2004, (1) 23.

249. This argument got some traction in the United States, where they can rely on the "state action" doctrine developed by the Supreme Court in *Marsh v. Alabama*.[223] A Jehovah's witness tried handing out leaflets on the street of a company town in Alabama. This town was owned by the Gulf Shipbuilding Corporation, streets included. The woman refused to leave the grounds when asked by the private policeman, and was subsequently charged for trespassing. The Supreme Court found that she had a right to exercise her First Amendment rights on the streets of the company town.

250. Justice Hugo Black, writing for the majority, stated: "*Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it*." Because the company was performing an essentially public function, it had to respect the First Amendment rights of other individuals in its town.

251. Subsequent cases have mainly centered around shopping centers. In *Amalgamated Food Employees*, the shopping center was compared to a business district. Picketers therefore had a right to protest in the center.[224] However, in *Hudgens*, this decision was overturned.[225] Merely being open to the public did not necessarily imply the exercise of a public function.

252. In recent years there has been quite some debate whether social media platforms could be brought under the *Marsh* doctrine.[226] The Supreme Court in *Packingham* gave extra ammunition to the supporters of this thesis.[227] The case centered around a North Carolina law barring sex offenders from social media. The Court decided that this was a violation of the First Amendment, essentially guaranteeing a right of access to social media. Justice Kennedy, writing the opinion of the Court, stated that "*[w]hile in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace— the 'vast democratic forums of the Internet' in general, ... and social media in particular.*"

253. Social media today are yesterday's public square. Some even go further and speak of Facebook as a country, "Facebookistan".[228] Therefore, the free speech rights of individuals constrain

---

[223] U.S. Supreme Court, *Marsh v. Alabama,* 7 January 1946, 326 U.S. 501.
[224] U.S. Supreme Court, *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.,* 19 May 1968, 391 U.S. 308.
[225] U.S. Supreme Court, *Hudgens v. NLRB,* 3 March 1976, 424 U.S. 507.
[226] K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1609-1611.
[227] U.S. Supreme Court, *Packingham v. North Carolina*, 19 June 2017, 137 S. Ct. 1730.
[228] A. CHANDER, "Facebookistan", *N.C. L. Rev.* 2012, (1807) 1809.

platforms as they do state authorities.[229] Paired with the power these social media giants have garnered over the years, some might adapt this doctrine enthusiastically to fight back. But while a sense of justice for the powerless user may be attractive, so is being right. Can a social media platform really be considered a state actor?

254. It is true that the public relies on social media to express themselves. In that sense, they do resemble a public square. But the problem is in the plural. If there was only one social media platform, the conclusion of state actor might be reached more quickly.[230] People cannot choose the state they are born in. But as it stands, multiple social media platforms contend for users worldwide. One day Myspace, the next day Facebook. Or you might prefer Twitter. How can a company be a state actor when multiple private parties with similar services are only one click away?

255. This is exactly the point of the market for rules as we have analyzed it. Internet users can choose their preferred rule-set. Other alternatives are only a click away. Therefore, the freedom of expression 2.0 comes down to protecting the market for rules.[231] Trying to fit internet intermediaries in a freedom of expression 1.0 mould is unsatisfactory, because it tries to fit a new reality into old categories.[232] We have recognized the applicability of the freedom of expression to internet intermediaries. However, we do not draw the conclusion that they should be subject to the same restrictions as the state when it comes to censorship. As befits the triadic model, internet intermediaries, the private governors, deserve their own treatment separate from the state in order to do justice to the realities of the internet age. It follows that internet intermediaries can censor more speech than the state would be allowed to. In fact, they can censor as much as they like – as long as they do not act in an anti-competitive way.

256. Internet users themselves want some of the platforms they use (Facebook, YouTube…) to regulate speech in a more restrictive manner than the state would be allowed to, otherwise they might not like the platform. Indeed, it does not do to only dwell on the negative aspects of the filtering, ranking, moderating, curating or censoring of content intermediaries undertake. Their

---

[229] C.M. EVERETT, "Free speech on privately-owned fora: a discussion on speech freedoms and policy for social media", *Kan. J.L. & Pub. Pol'y* 2018, (113) 126-129.

[230] K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev.* 2018, (1598) 1659.

[231] For the argument that competition law can be important for the freedom of expression (though not in the context of a market for rules), see F. PASQUALE, "Platform neutrality: Enhancing freedom of expression in spheres of private power", *Theoretical Inq. L.* 2016, (487) 503-508.

[232] J.M. BALKIN, "Free speech in the algorithmic society: Big data, private governance, and new school speech regulation", *U.C.D. L. Rev.* 2018, (1149) 1194.

intermediation can also be beneficial and even necessary. They help users filter out bad content and identify good content.[233] The multiplicity of speakers and the scarcity of audience attention in the internet age highlights the importance of filtering.[234] Unwanted content such as spam, malware, pornography and viruses can be blocked.[235] On the other hand, services like search engines help users find the desired content.[236]

257. Treating intermediaries as state actors for free speech purposes is therefore not only inaccurate, but also undesirable.[237] It confirms our qualification of them as *private* governors. In the classic speech system, the state was the adversary of speakers and publishers, and every intervention would limit freedom of speech. That is not the case for internet intermediaries. From the start, intermediaries have been a double-edged sword: necessary to divide the good from the bad, but be careful before it cuts you too.

258. Our solution is not far off from the solution provided by the European Court of Human Rights in *Appleby*.[238] In this case, it renounced a state action doctrine as put forward in *Marsh*. However, a private party could be forced to respect free speech rights of other private parties when the effective exercise of those rights would be prevented or the essence of the right destroyed. We would rephrase this as a question of market failure: are there reasonable alternatives for speech available, or have anticompetitive practices led to a scarcity of choice?

259. An example of the market for rules in action was the decision by Tumblr in 2018 to ban pornographic content from its platform. A few months later, Tumblr reported it had lost almost thirty percent of its web traffic, or 151 million page views.[239] At the time of the decision, CEO D'Onofrio stated that users had other options, saying that "there are no shortage of sites on the internet that feature adult content". Obviously, users followed his advice, and the unpopular action was met with users leaving the platform for alternatives.[240]

---

[233] C. S. YOO, "Free speech and the myth of the Internet as an unintermediated experience", *Wash. L. Rev*. 2010, (697) 703.
[234] J.M. BALKIN, "Digital speech and democratic culture: A theory of freedom of expression for the information society", *N.Y.U. L. Rev*. 2004, (1) 7.
[235] C. S. YOO, "Free speech and the myth of the Internet as an unintermediated experience", *Wash. L. Rev*. 2010, (697) 703-704
[236] C. S. YOO, "Free speech and the myth of the Internet as an unintermediated experience", *Wash. L. Rev*. 2010, (697) 707-708.
[237] K. KLONICK, "The new governors: The people, rules, and processes governing online speech", *Harv. L. Rev*. 2018, (1598) 1658-59.
[238] See *supra* para. 143.
[239] M. SUNG, "Tumblr loses almost a third of its users after banning porn", Mashable 14 march 2019, *https://mashable.com/article/tumblr-lost-a-third-of-its-users-after-porn-ban/?europe=true#RUDA18Zapaq3*
[240] S. LIAO, "After the porn ban, Tumblr users have ditched the platform as promised", The Verge 14 march 2019, *https://www.theverge.com/2019/3/14/18266013/tumblr-porn-ban-lost-users-down-traffic*

260. We have seen that the basic function of the freedom of speech is the protection of speech against power. The dyadic model dealt with the power of the state by subjecting it to restrictions on which speech it could censor when. In our development of the freedom of expression 2.0, we have now found how to deal with the power of internet intermediaries, our private governors: subjecting them to the market for rules.

C. Free speech as an objective of competition law?

261. To end, a note on the application of competition law for free speech purposes. There has always been a lot of discussion, mostly in the E.U., of what the goals of competition law should be. The goals are important because they define what should be taken into consideration when examining a case. The European Commission, together with a lot of scholars and lawyers, thinks consumer welfare should be that goal – following the U.S. example. This basically means that only the economic consequences for the consumer are taken into account: the price, the possibility of choice, the quality of the product… However, some disagree with this view. They maintain that the goals of competition law should be broader. The text of the E.U. treaty (art. 101 et seq. TFEU) does not mention consumer welfare. On the contrary, the treaty starts by summing up a host of values (human rights, environment etc.) which are overarching policy goals of the E.U., so logically also for competition law. The CJEU has also never taken a clear stance on what the goals of E.U. competition law are.

262. It would seem that our analysis should put us in the second box: freedom of speech should be one of the goals of competition law. Yet this does not have to be true. What we are defending here is not that freedom of speech should be taken into consideration in all competition law cases. We are defending the online market for rules. This just happens to be a market which is conducive to the freedom of speech when functioning properly. Therefore, the "economic" interests of the consumer (here: internet user), primarily the possibility of choice, coincide with the advancement of free speech. Hence if a market for rules is recognized, the consumer welfare approach and the broader approach might be equally valid. Consumer welfare and freedom of speech work in the same direction in the market for rules.

CONCLUSION

263. Is the freedom of expression obsolete? We should not let it be so. This paper started with the frustration that there seemed to be a vacuum online when it came to speech protection. This vacuum existed not without reason: the arrival of the internet, and the power of the internet intermediaries, has taken time to digest. Internet intermediaries are private parties, but they are also more: they are private governors, capable of governing the speech of internet users relying on their infrastructure. A new triadic model of speech governance is now in operation: the state, the individual and the internet intermediary each take up different positions.

264. This brought with it new concerns that were not apparent in the traditional dyadic model of speech governance. Internet users now faced private parties capable of governing speech, but without the procedural guarantees expected from such powerful entities. A concern for opportunistic or arbitrary decisions on the part of the intermediaries inflated the concern that the intermediaries were governors without checks or accountability. Furthermore, the amount of speech intermediaries could censor was seemingly endless. A Magna Carta for the internet was missing.

265. The freedom of expression can provide this Magna Carta. As seen in our analysis of the case-law of the European Court of Human Rights, the freedom of expression is not playing that role today. The interpretation governing the freedom of expression is still largely devoid of a clear vision of the realities of the internet, and how the freedom of expression should evolve with it. We have tried offering that new vision here.

266. The first step consisted in allowing the right to freedom of expression be enforced against internet intermediaries. However, we have avoided the pitfall of equating internet intermediaries with state actors for that purpose. In the second step, we therefore proposed a "freedom of expression 2.0": a protection of the online market for rules. It tries to rein in the unchecked power of our private governors, while also allowing the internet to remain a free and open space consisting of self-regulating entities.

267. In order for this market to function efficiently, internet intermediaries should in the first place be allowed to set their own rules. State-imposed liability for the speech of their users should therefore be contained into strict boundaries, because the threat of collateral censorship makes every rule-set unreliable. Secondly, the rule-sets of these intermediaries should be transparent, and internet users deserve procedural guarantees when faced with censorship by the intermediaries. Only in

that way is the market for rules clear and predictable, and is the power of the intermediaries in check.

268. The market for rules should also be protected against anti-competitive (or anti-speech) practices, if it is to allow everyone to find their desired rule-set online. The keystone of the freedom of expression 2.0 consequently lies in its cross-roads with competition law. The market for rules must be defended against entities trying to contract it, manipulate it, or abuse their market power on it. In that way, the concern that there is too much censorship online can be dealt with.

269. For all its technicalities, this paper is in the end a call to action to judges. Our main hope is that the courts will see that the freedom of expression as applied today is inadequate for the internet age. Two pitfalls are to be avoided: to treat intermediaries as free private parties, or to treat intermediaries as state actors. We have tried to offer a way for the freedom of expression to move forward.

BIBLIOGRAPHY

LEGISLATION

Council of Europe:

European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, *European Treaty Series* no. 005: art. 7, 10

Protocol no. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, *European Treaty Series* no. 009: art. 1

Recommendation CM/Rec(2018)2 to member States on the roles and responsibilities of internet intermediaries of the Committee of Ministers of the Council of Europe (7 March 2018), *https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680790e14*

European Union:

Treaty on the Functioning of the European Union (consolidated version), 13 December 2007, *OJ* C 326, 26 October 2012: art 101 et seq.

Germany:

Gesetz 1 September 2017 zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken, BGBI. I S. 3352

United States:

Constitution: Amendment I (added by the Bill of Rights of 15 December 1791)

Communications Decency Act 1996, 47 U.S.C. 230

Soft law:

Manila Principles on Intermediary Liability, 2015, *https://www.manilaprinciples.org/principles*

CASES

CJEU, *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, 13 May 2014, C-131/12, ECLI:EU:C:2014:317

ECtHR, *Appleby and others v. United Kingdom*, 6 May 2003, no. 44306/98

ECtHR, *Khurshid Mustafa and Tarzibachi v. Sweden,* 16 December 2008, no. 23883/06

ECtHR, *Fuentes Bobo v. Spain*, 29 February 2009, no. 39293/98

ECtHR, *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*, 10 March 2009, nos. 3002/03 and 23676/03

ECtHR, *Editorial Board of* Pravoye Delo *and Shtekel v. Ukraine*, 5 May 2011, no. 33014/05

ECtHR, *Ahmet Yıldırım v. Turkey*, 18 December 2012, 3111/10

ECtHR, *Delfi AS v. Estland*, 16 June 2015, 64669/09

ECtHR, *Cengiz and Others v. Turkey,* 1 December 2015, nos. 48226/10 and 14027/11

ECtHR, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, 2 February 2016, 22947/13

ECtHR, *Rolf Anders Daniel Pihl v. Sweden,* 9 March 2017, no. 74742/14

U.S. Supreme Court, *Marsh v. Alabama,* 7 January 1946, 326 U.S. 501

U.S. Supreme Court, *Smith v. California*, 14 December 1959, 361 U.S. 147

U.S. Supreme Court, *The New York Times Co. v. Sullivan*, 9 March 1964, 376 U.S. 254

U.S. Supreme Court, *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.,* 19 May 1968, 391 U.S. 308

U.S. Supreme Court, *Hudgens v. NLRB,* 3 March 1976, 424 U.S. 507

U.S. Supreme Court, *Packingham v. North Carolina*, 19 June 2017, 137 S. Ct. 1730

U.S. 4th Circuit Court, *Zeran v. America Online, Inc.,* 12 November 1997, 129 F.3d 327

BOOKS & ARTICLES

AMMORI, M., "The New New York Times: Free speech lawyering in the age of Google and Twitter", *Harv. L. Rev.* 2014, 2259-2295

ASH, T.G., *Free Speech: Ten Principles for a Connected World,* London, Atlantic Books, 2016, 491 p.

BALKIN, J.M., "Digital speech and democratic culture: A theory of freedom of expression for the information society", *N.Y.U. L. Rev.* 2004, 1-58

BALKIN, J.M., "Old-school/new-school speech regulation", *Harv. L. Rev.* 2014, 2296-2342

BALKIN, J.M., "Free speech in the algorithmic society: Big data, private governance, and new school speech regulation", *U.C.D. L. Rev.* 2018, 1149-1210

BARLOW, J.P., "A Declaration of the Independence of Cyberspace", *EFF* 8 February 1996, *https://www.eff.org/cyberspace-independence*

BARRON, J.A., "Access to the press – A new First Amendment right", *Harv. L. Rev.* 1967, 1641-1678

BELLI, L., "End-to-end, net neutrality, and human rights", in L. BELLI and P. DE FILIPPI (eds.), *Net neutrality compendium: Human rights, free competition, and the future*, Springer, 2016, 13-30

BELLI, L., and DE FILIPPI, P., "General introduction: Towards a multistakeholder approach to network neutrality", in BELLI, L., and DE FILIPPI, P., (eds.), *Net neutrality compendium: Human rights, free competition, and the future*, Springer, 2016, 1-12

BENJAMIN, S.M., "Transmitting, editing, and communicating: determining what the freedom of speech encompasses", *Duke L.J.* 2011, 1673-1714.

BUNI, C., and CHEMALY, S., "The secret rules of the internet: The murky history of moderation, and how it's shaping the future of free speech", The Verge 13 April 2016, *https://www.theverge.com/2016/4/13/11387934/internet-moderator-history-youtube-facebook-reddit-censorship-free-speech*

CHANDER, A., "Facebookistan", *N.C. L. Rev.* 2012, 1807-1844

CHANDLER, J.A., "A right to reach an audience: An approach to intermediary bias on the internet", *Hofstra L. Rev.* 2007, (1095)

CHEN, A., "The labourers who keep dick pics and beheadings out of your Facebook feed", *Wired* 23 October 2014, *https://www.wired.com/2014/10/content-moderation/*

COASTON, J., "YouTube, Facebook, and Apple's ban on Alex Jones, explained", *Vox* 6 august 2018, *https://www.vox.com/2018/8/6/17655658/alex-jones-facebook-youtube-conspiracy-theories*

DIAZ, A.M., “Through the Google Goggles: Sociopolitical bias in search engine design” in A. SPINK and M. ZIMMER (eds.), *Web Search,* Berlin, Springer, 2008, 11-34

EVERETT, C.M., “Free speech on privately-owned fora: a discussion on speech freedoms and policy for social media”, *Kan. J.L. & Pub. Pol’y* 2018, 113-145

GOLDMAN, E., “Search engine bias and the demise of search engine utopianism” in SPINK, A., and ZIMMER, M., (eds.), *Web Search,* Berlin, Springer, 2008, 121-133

GRIMMELMANN, J., “Speech engines”, *Minn. L. Rev.* 2014, 868-952

HAMDANI, A., “Who’s liable for cyberwrongs?”, *Corn. L. Rev.* 2002, 901-957

HEINS, M., “The brave new world of social media censorship”, *Harv. L. Rev.* 2013-14, 325-330

HELFT, M., “Facebook wrestles with free speech and civility”, The New York Times 12 December 2010, *https://www.nytimes.com/2010/12/13/technology/13facebook.html?_r=0*

HIRSCHMAN, A.O., *Exit, voice, and loyalty: Responses to decline in firms, organizations, and states,* Cambridge (Mass.), Harvard university, 1970, x + 162 p.

JOHNSON, D., and POST, D., “Law and borders – The rise of law in Cyberspace”, *Stan. L. Rev.* 1996, 1367-1402

KANT, I., “An answer to the question: What is Enlightenment?”, 30 September 1784, Königsberg, Prussia

KANTER, J., “Apple, Facebook, Spotify, and YouTube shut down Infowars’ Alex Jones”, *Business Insider* 6 august 2018, *https://www.businessinsider.nl/apple-shuts-down-most-of-alex-jones-infowars-podcasts-2018-8/?international=true&r=US*

KLONICK, K., “The new governors: The people, rules, and processes governing online speech”, *Harv. L. Rev.* 2018, 1598-1670

LESSIG, L., *Code and other laws of cyberspace,* New York, Basic Books, 1999, xii + 297 p.

LEVIN, S., CARRIE, J., and HARDING, L., “Facebook backs down from ‘napalm girl’ censorship and reinstates photo”, *The Guardian* 9 September 2016, *https://www.theguardian.com/technology/2016/sep/09/facebook-reinstates-napalm-girl-photo*

LIAO, S., “After the porn ban, Tumblr users have ditched the platform as promised”, The Verge 14 March 2019, *https://www.theverge.com/2019/3/14/18266013/tumblr-porn-ban-lost-users-down-traffic*

MACKINNON, I., “YouTube ban after videos mock Thai king”, *The Guardian* 7 April 2007, *https://www.theguardian.com/technology/2007/apr/07/news.newmedia*

MILL, J.S., *On Liberty*, London, 1859

NOYES, D., "The top 20 valuable Facebook statistics – updated April 2019", *Zephoria* April 2019, *https://zephoria.com/top-15-valuable-facebook-statistics/*

OLTERMANN, P., "Tough new German law puts tech firms and free speech in spotlight", *The Guardian* 5 January 2018, *https://www.theguardian.com/world/2018/jan/05/tough-new-german-law-puts-tech-firms-and-free-speech-in-spotlight*

PASQUALE, F., *The Black Box Society: The secret algorithms that control money and information*, London, Harvard University Press, 2015, 311 p.

PASQUALE, F., "Platform neutrality: Enhancing freedom of expression in spheres of private power", *Theoretical Inq. L.* 2016, 487-513

PEGUERA, M., "The DMCA safe harbors and their European counterparts: A comparative analysis of some common problems", *Colum. J. L. & Arts* 2009, 481-512

POST, D.G., "Anarchy, state, and the internet: an essay on law-making in cyberspace", *J. Online L.* 1995, art. 3

RADSCH, C., "Proposed German legislation threatens broad internet censorship", *Committee to Protect Journalists* 20 April 2017, *https://cpj.org/blog/2017/04/proposed-german-legislation-threatens-broad-intern.php*

ROSEN, J., "The deciders: The future of privacy and free speech in the age of Facebook and Google", *Fordham L. Rev.* 2012, 1525-1538

SEETHARAMAN, D., "Facebook employees pushed to remove Trump's posts as hate speech", *The Wall Street Journal* 21 October 2016, *https://www.wsj.com/articles/facebook-employees-pushed-to-remove-trump-posts-as-hate-speech-1477075392*

SCOTT, M., and DELCKER, J., "Free speech vs. censorship in Germany", *Politico* 4 January 2018, *https://www.politico.eu/article/germany-hate-speech-netzdg-facebook-youtube-google-twitter-free-speech/*

SULLIVAN, K., "First amendment intermediaries in the age of cyberspace", *UCLA L. Rev.* 1998, 1653-1681

SUNG, M., "Tumblr loses almost a third of its users after banning porn", Mashable 14 March 2019, *https://mashable.com/article/tumblr-lost-a-third-of-its-users-after-porn-ban/?europe=true#RUDA18Zapaq3*

SUNSTEIN, C.R., *#republic: Divided democracy in the age of social media*, Princeton, Princeton University Press, 2017, xi + 316 p.

TUSHNET, R., "Power without responsibility: Intermediaries and the First Amendment", *Geo. Wash. L. Rev.* 2008, (986)

VOLOKH, E., "Cheap speech and what it will do", *Yale L.J.* 1995, 1805-1850

VOORHOOF, D. and LIEVENS, E., “Offensive online comments, Delfi confirmed but tempered”, *Inforrm’s Blog* 17 February 2016, *https://inforrm.org/2016/02/17/offensive-online-comments-delfi-confirmed-but-tempered-dirk-voorhoof-and-eva-lievens/*

WHITTAKER, Z., “A Swedish ISP has blocked Elsevier’s website in protest for forcing it to block Sci-Hub”, *Tech crunch* 5 November 2018, *https://techcrunch.com/2018/11/05/swedish-internet-provider-bahnhof-protest-injunction-elsevier-website/?guccounter=1&guce_referrer_us=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_cs=l6XBuxjtztUgQYxgIL73uA*

WU, F.T., “Collateral censorship and the limits of intermediary immunity”, *Notre Dame L.Rev.* 2011, 293-350

WU, T., “Machine speech”, *U. Pa. L. Rev.* 2013, 1495-1533

WU, T., “Is the First Amendment obsolete?”, *Mich. L. Rev.* 2018, 547-582

X, “Twitter bans 270,000 accounts for ‘promoting terrorism’”, *The Guardian* 5 April 2018, *https://www.theguardian.com/technology/2018/apr/05/twitter-bans-270000-accounts-to-counter-terrorism-advocacy*

X, “Facebook zet verwijderd profiel Dries Van Langenhove terug online”, *HLN* 15 February 2019, *https://www.hln.be/nieuws/binnenland/facebook-zet-verwijderd-profiel-dries-van-langenhove-terug-online~a17ebcb1/*

X, “Declaration on Freedom of Expression”, *https://deklaration-fuer-meinungsfreiheit.de/en/*

X, “CDA 230: The most important law protecting internet speech”, *EFF*, *https://www.eff.org/issues/cda230*

X, “Proposed German legislation threatens free expression around the world”, *Global Network Initiative, http://globalnetworkinitiative.org/proposed-german-legislation-threatens-free-expression-around-the-world/*

X, “How to appeal”, *Online Censorship*, *https://onlinecensorship.org/resources/how-to-appeal*

X, “I disapprove of what you say, but I will defend to the death your right to say it”, *Quote Investigator*, *https://quoteinvestigator.com/2015/06/01/defend-say/*

X, “The terror of war”, *TIME, http://100photos.time.com/photos/nick-ut-terror-war*

YOO, C.S., “Free speech and the myth of the Internet as an unintermediated experience”, *Wash. L. Rev*. 2010, 697-773

ZITTRAIN, J., *The future of the internet – and how to stop it*, New Haven, Yale university press, 2008, x + 342 p.