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A contract law approach to private censorship of art on social media platforms

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Abstract

The censorship of artists on social media impacts their freedom of expression and their ability to monetize and engage with their audiences. Furthermore, this fosters a process of cultural standardization. Several legal arguments have been raised against art censorship in social media platforms, mainly based on public law, however, they are not effective in all jurisdictions, as demonstrated by U.S. case law. The purpose of this paper is to shift the spotlight and provide solutions from a private law perspective, specifically from contract law. The main argument here is that courts should abandon their traditional bilateral/vertical approach and embrace a more nuanced one that better reflects the complexity of the relationships taking place in social media. This would give those affected access to concrete contractual remedies and allow for greater control over the content moderation process.

Keywords

algorithmic censorship; content moderation; contract law; contractual networks

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Un enfoque de derecho contractual para la censura privada del arte en plataformas de redes sociales

Resumen

La censura a los artistas en las redes sociales afecta a su libertad de expresión y a su capacidad para monetizar e interactuar con su público. Además, esto fomenta un proceso de estandarización cultural. Se han planteado varios argumentos legales contra la censura artística en plataformas de redes sociales, principalmente basados el derecho público; sin embargo, no son eficaces en todas las jurisdicciones, como demuestra la jurisprudencia estadounidense. El objetivo de este artículo es cambiar el foco de atención y aportar soluciones desde una perspectiva del derecho privado, concretamente desde el derecho de contratos. El principal argumento aquí es que los tribunales deberían abandonar su enfoque bilateral/vertical tradicional y adoptar uno más matizado que refleje mejor la complejidad de las relaciones que tienen lugar en las redes sociales. Esto daría a los afectados acceso a recursos contractuales concretos y permitiría un mayor control sobre el proceso de moderación de contenidos.

Palabras clave

censura algorítmica; moderación de contenidos; derecho contractual; redes contractuales

1. Excessive self-censorship and limits to freedom of artistic expression: approaching the problem

Calls to regulate social media are generally based on concerns about their growing power and their overall influence on democratic society through information management. Taking down an image may seem minor in comparison to the much larger threats attributed to social media, such as jeopardizing democracy through automated disinformation, anti-Semitism or hate speech. Therefore, a significant part of studies focuses on the growing problem of such harmful content on the network (cyberterrorism, hate speech, extremist content, child pornography, disinformation, defamation, etc.). Meanwhile, issues that could be considered "less urgent" are perhaps not receiving as much attention, such as the impact of private digital censorship in the artistic field.

Occasional articles about the censorship of an image may appear in the press – such as the Pulitzer Prize-winning *Napalm Girl* in 2016 (Kleinman, 2016), the Danish *Little Mermaid* statue (Molloy, 2016), or even a 30,000-year-old palaeolithic Venus statuette (Breitenbach, 2018). Censorship scandals are often followed by apologies from the platform involved. Yet, these controversies may actually hide the ongoing routine censorship on social media platforms, making it seem like a rare occurrence rather than what it actually is: a pervasive, widespread phenomenon that has vast repercussions for visual culture and artistic freedom. It is plausible that society is not aware of the significance that "major technology companies such as Facebook, Google, and Twitter have been, in effect, deputized as censors" (Etzioni, 2019, p. 19). The extent of the problem was demonstrated, for instance, by Witt, Suzor and Huggins (2019), who found "that up to 22 per cent of images are potentially false positives – images that do not appear to violate Instagram's content policies and were removed". One such example was the banning of an innocent Christmas card with a bird illustration – a Robin Redbreast – which was interpreted by Facebook as an "adult item" (Bennett, 2017).

Platform terms and conditions and policies have traditionally been characterized by unclear language and vague and imprecise definitions.[1] This makes it difficult for users to know

1. "... such terms are generally long, dense and formulated in language that is hard to be understood by anyone who does not have legal training [...] people hardly ever read these contracts [...]. When they do, they find them difficult to understand". (Venturini *et al*. 2016, p. 24). Facebook Overside Board has overturned Meta's original decisions to remove two Instagram posts depicting transgender and non-binary people with bare chests (Gender identity and nudity 2022-009-IG-UA and 2022-010-IG-UA). It also recommends that Meta change its Adult Nudity and Sexual Activity Community Standard so that it is governed by clear criteria that respect international human rights standards.

what conduct is permitted or prohibited. Research repeatedly has demonstrated that these rules are applied arbitrarily and inconsistently (Faust, 2017; Gerrard & Thornham, 2020; Duguay, Burgess & Suzor, 2020; Riccio *et al*., 2022).

The majority of censored artists will not be able to air their indignation in newspapers, nor will many know if and how they can challenge a platform's decision if their work is removed or their account suspended. This lack of recourses, coupled with the increased dependency of artists upon private platforms, ensures that artists are restricted in their artistic freedom and are pushed to produce compliant content:

- This can foster a climate of fear, where artists and other content creators begin censoring themselves preventively. Artists mention changing their technique and style, e.g. by adding shadows to genitalia or breasts, or even adapting their overall artistic approach to create more palatable imagery (Shapiro, 2022a). This has a negative impact on creativity and artistic innovation, a "chilling effect" (see Tofte – 1998 – for a historical example of this phenomenon).
- Censorship can negatively affect cultural diversity by restricting the representation of different perspectives and voices. By limiting certain types of artistic content, it may favour a dominant viewpoint and limit the visibility of marginalized or minority groups (Duffy & Meisner, 2023; Shapiro, 2022b; Iqbal, 2020).
- Platforms become cultural gatekeepers due to their increased impact on visual culture, teaching the next generation which images are right and which ones are subversive, shameful or dangerous. The criteria used by such platforms are at odds with democratic values that art should also be celebrated for being transgressive, or even shocking, rather than compliant and homogenous. Thus, platforms can enforce a retrograde aesthetic which is at odds with the place of art in an open society.
- For many artists, social media is a vital tool for sharing, promoting and selling their work, so censoring it can limit their ability to reach their followers and potential consumers. Lack of visibility not only affects their ability to generate income through art sales but also makes it difficult to build their online identity as artists and maintain a loyal fan base. This affects especially emerging or lesser-known artists. Social networks are bidirectional, so they also allow artists to interact directly with their audience, receive comments and feedback, and build meaningful relationships. Censorship can fragment and distort this interaction, decreasing engagement and leaving followers with a less enriching experience.
- Aside from the algorithmic processes that remove content outright, there is also the vaguer and possibly even more consequential mechanism of "shadow-banning" – a term developed by users of Instagram to describe the dramatic reduction in visibility of certain "vaguely inappropriate" content (Are, 2022). This mechanism can be even more pernicious than content removal because the user is not even notified. The artist eventually may notice that their content does not receive any feedback, which may prompt them to assume that their work is not "liked" by their audiences and that they need to adapt their style to be successful.

What tools could the law provide to artists and users to combat social media censorship? This is an issue that has been widely addressed from the perspective of public law (constitutional, human rights, procedural law). Whilst verdicts in Germany may yet provide some hope for artists, US case law basically allows unfettered censorship without any justification on the part of social media companies. The article will first outline landmark verdicts and precedents from Germany and the US, to present the widely diverging rights of users depending on the jurisdiction. Then, the paper will propose a potential new solution from the perspective of private law, more specifically contract law.

2. German and U.S. courts' approaches

Private censorship carried out by social media platforms is nothing more than the application of their terms and conditions via the content moderation process. The chances for affected parties to challenge the removal of specific content depend on the answers to the following questions: what is the extent of a platform's freedom to determine the modes of expressions of its users? And should platforms be obliged to guarantee the freedom of expression of their users? These questions, the arguments to force platforms to carry certain content (so-called "must carry" obligations), are addressed differently depending on the jurisdiction.

2.1. German approach

In Germany, Article 5 of the Basic Law (GG) states that "Every person shall have the right freely to express and

disseminate his opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources... There shall be no censorship." What remains to be determined, however, is whether this article also applies to private actors. In other words: can social networks be considered indirectly bound by Article 5? Does Article 5's protection extend to private legal relationships? This is what is known as "indirect third-party effect of fundamental rights" (*mittelbare Drittwirkung*). This legal doctrine has had a remarkable impact and theoretical development in Germany.

As reported by Kettemann and Tiedeke (2020) and Holznagel (2021), German courts have been hearing cases from users who argue that their content was not in violation of any standards and that even if it were, the terms of service or community standards of the platform were unfair, making them unenforceable. The cases referred by the aforementioned experts[2] generally conduct the following analysis: when users have their content removed, they can, in principle, claim for reinstatement if it does not infringe the national law or the platform's Community Standards. However, if the court finds that the content does, in fact, violate the Community Standards, it does not stop there, as the court then goes on to consider whether the Community Standards are valid, that is, to determine whether these Standards are not abusive or disproportionate. If the rules were to be found invalid, the court would annul them and the user could then claim the reinstatement of his content.

These rulings are relevant because, in addition to the traditional constitutional law arguments, they also incorporate elements of contract law. In fact, the court ruled ineffective a portion of the ToS under Article 307(1)(1) of the *Bürgerliches Gesetzbuch* (German Civil Code): "Provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user. An unreasonable disadvantage may also arise from the provision not being clear and comprehensible". The court also recognized that in this type of legal relationship, a disadvantage also arises from the fact that the user does not have the power or opportunity to negotiate the contract.[3]

Presently, German courts allow online platforms to define the rules that govern the activity within their online space and such rules can be stricter than what is prohibited by law. However, this right to self-regulate is not limitless. The limit responds to a matter of reasonableness that is analysed case by case; the clause must be objective and transparent (Holznagel, 2021).

To evaluate whether a clause is unenforceable within the meaning of Article 307(1)(1) BGB, the German court undertook an assessment and weighing of conflicting interests. "Facebook has rights, but its users do, too. Facebook's rights, so the FCJ has ruled, have to be weighed against the rights of its users" (Kettemann & Klausa, 2021). Therefore, the Supreme Court focused on the following rights:

- On the social network's side, the right to conduct business (Art. 12 Para. 1 Sentence 1 GG) which would include the creation of an attractive environment for the exchange and sale of advertising space. To this end, certain Community Rules are developed and applied to avoid alienating users and advertising partners. The second right is Facebook's own freedom of expression (Kettemann & Klausa, 2021). These rights are what would justify the implementation of a content moderation system.
- On the users' side, freedom of expression (Art. 5 Para. 1 Sentence 1 GG).

Then, a proper balance of these rights would represent for a Platform the following obligations: clarity and objectivity in the drafting and implementation of terms and conditions; informing the user of any removal of content, blocking of their account, as well as the reason for such actions and offering them the opportunity to make a counterstatement before a definitive decision is made. Given that a significant part of the public discourse takes place on social media platforms, and such companies wield a lot of (censorship) power, emulating in some ways state prerogatives, then, like any state, they must follow minimal rules of due process. "The FCJ calls this 'procedural protection of fundamental rights' (*Grundrechtsschutz durch Verfahren*)" and considers it "an effort that is a necessary part of the company's business

2. Here we will focus specifically on two cases: Federal Court of Justice, decision of July 29, 2021 - III ZR 179/20 and III ZR 192/20.
3. "Terms of Service are standardized contracts, defined unilaterally and offered indiscriminately on equal terms to any user. Since users do not have the choice to negotiate, but only accept or reject these terms, Terms of Service are part of the legal category of adhesion agreements. In fact, these agreements establish a kind of 'take it or leave it' relationship, replacing the traditional concept of bargained clauses among contracting parties" (Venturini *et al*., 2016, p. 23).

model... Facebook is not bound directly by fundamental rights like a state, but they still apply to a degree and the company has the responsibility to meaningfully uphold them" (Kettemann & Klausa, 2021). This "indirect horizontal effect" implies that there is indeed a *duty of respect* that private entities owe regarding fundamental rights. The level of this duty may vary depending on certain factors. For private entities offering platforms for information communication and social interaction, for example, the degree of their market dominance is relevant, as well as the extent to which users rely on them as channels for effective social participation. These factors would determine the extent of their fundamental rights obligations (Theil, 2022; Barth, 2023).

This argumentative logic developed by the German Supreme Court seems accurate. Private companies are generally free to set and implement their own terms of service and policies.[4] However, this freedom should be limited by other fundamental rights and societal interests. Therefore, an absolute interpretation of the freedom of contract, business, or speech to allow unlimited content moderation would be an improper approach. The rights of users must also be considered and balanced, especially if we are dealing with an agent that, although private, performs an important public function that requires certain minimum guarantees and safeguards.

2.2. U.S. case law

Content moderation in the United States cannot be understood without mentioning Section 230 of the Communications Decency Act of 1996. In brief, Section 230(c)(1) protects online service providers from liability for hosting user-generated content while Section 230(c)(2) precludes them from being held liable when they act "in good faith" to restrict or remove content that they may find objectionable. In other words, service providers cannot be subject to liability for exercising control of objectionable content. Based on this provision, the big platforms have felt free to moderate the content they host at their discretion.

"To section 230 we must also add the First Amendment. Courts cannot prohibit a private party from removing comments from its platform as this would be considered a limitation on the platform's own freedom of expression. An option to overcome this argument would be to demonstrate that this private entity is performing a public function (public function test)[5] but American judicial practice has been reluctant to recognize that private social media, in general, fulfil such a function" (see *Prager Univ. v. Google LLC*,[6] *Wilson v. Twitter*,[7] *Fed. Agency of News LLC v. Facebook, Inc.*,[8] *Manhattan Community Access Corp. v. Halleck*).[9] In *United States Telecom Association v. FCC*,[10] Judge Kavanaugh determined: "... the government may not regulate the editorial decisions of Facebook and Google". Thus, "... speakers in the United States have few or no legal rights when platforms take down their posts... American law does not, and perhaps constitutionally could not, restrict this choice..." (Keller, 2019, pp. 2 and 10). There are numerous court decisions in the United States that support this point of view: *Hudgens v. NLRB*,[11] *E-Ventures-*

4. Granted in European Charter of Fundamental Rights: article 16's freedom to conduct a business and article 17's right to property.
5. Under the public function test, "[p]rivate activity becomes a 'public function' only if that action has been 'traditionally the exclusive prerogative of the State." In Rendell-Baker v. Kohn, 457 U.S. 830, § 842 (1982).
6. Case No. 17-CV-06064-LHK (N.D. Cal. Mar. 26, 2018). "private entities who creat[e] their own ... social media website and make decisions about whether and how to regulate content... have not engaged in public functions that were traditionally exclusively reserved to the State... private property does not 'lose its private character merely because the public is generally invited to use it for designated purposes' [and] YouTube may be a paradigmatic public square on the Internet, but it is 'not transformed' into a state actor solely by 'provid[ing] a forum for speech'."
7. Case No. 3:20-cv-00495 (S.D.W. Va. Sep. 17, 2020). "That private social media companies now host platforms which imitate the functions of public forums... does not mean that the entities are state-actors for the purposes of the First Amendment [cite to Prager U.].... notwithstanding that it has created a forum for hosting speech, Twitter is a private entity and is not subject to the state-action doctrine."
8. 18-CV-07041-LHK (N.D. Cal. Jan. 13, 2020), para. 20. "By operating its social media website, Facebook has not engaged in any functions exclusively reserved for the government. Therefore, Facebook does not operate as a public forum, so Facebook's actions do not amount to state action under the public function test".
9. 587 U.S. ___ (2019). "when a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor. The private entity may thus exercise editorial discretion over the speech and speakers in the forum".
10. 855 F.3d 381, § 433-434 (DC Cir. 2017).
11. 424 U.S. 507, § 520-521 (1976). "[T]he constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state."

Worldwide, LLC v. Google,[12] *Inc, Green v. Am. Online (AOL)* [13] or *Langdon v. Google, Inc*.[14]

As the previous cases indicate, US users cannot rely on the same arguments used in Germany. A doctrine of horizontal application of fundamental rights has not taken root in American jurisprudence. Private social media companies are, in essence, unfettered in restricting the activity of their users, and this general tendency has fundamental repercussions for artistic content, which can be banned or removed at will. This makes it necessary to look for another approach for artists and users to fight against arbitrariness or excessively restrictive private censorship on social media.

3. A potential argument: "network contracts" theory

Most of the literature on content moderation is based on arguments of moral philosophy or public law. Analyses from private law are scarce, however, we argue this area could shed some light on the discussion, specifically the field of contract law. This argument may be useful, especially in jurisdictions such as the United States[15] where constitutional law arguments have always resulted in shielding platforms from claims.

The content moderation process has the platform's terms and conditions as its base. The Terms and Conditions are nothing more than a contract[16] in which the owner clarifies the conditions of use of its service. The platform agrees to provide certain services and access to its platform while users offer their attention, data and (creative) content as payment.[17] Users remain powerless in the face of these terms of service (ToS) and policies. This is because ToS are based on "contracts of adhesion" that leave no room for negotiation between the parties.

Policies and guidelines such as Facebook's Community Standards or YouTube Community Guidelines are usually attached by reference to the Terms and Conditions. Such policies and guidelines stipulate that violation of such policies also constitutes a violation of the ToS, that is, a breach of the contract's provisions.[18] In these documents, most of the major platforms repeatedly emphasize their commitment towards promoting users' freedom of expression. Instagram in its Community Guidelines expressly declares that: "We want Instagram to continue to be an authentic and safe place for inspiration and expression", while Facebook's Community Standards state that "... The goal... is to create a place for expression and give people a voice. Meta wants people to be able to talk openly about the issues that matter to them". Therefore, these platforms are contractually committing themselves to promote freedom of expression through these statements.

It could perhaps be argued that such representations are too general and lack binding power. We could then focus on a specific category of content, indeed one of the artistic categories most affected in the content moderation process: nudity and erotic art. According to the content policies of Meta, the company that owns massive platforms such as Instagram and Facebook:

> "We understand that nudity can be shared for a variety of reasons, including as a form of protest, to raise awareness about a cause, or for educational or medical reasons... Where such intent is clear, we make allowances for the

12. 2:14-cv-646-FtM-29CM. "The First Amendment protects these decisions, whether they are fair or unfair, or motivated by profit or altruism".
13. 318 F.3d 465, § 472 (3d Cir. 2003).
14. 474 F. Supp. 2d 622, § 631 (D. Del. 2007).
15. This is not to say that the argument we argue in this section cannot be employed in other jurisdictions, for example, in Germany, to complement their approach.
16. "... the legal relationship that arises between the user and the company that manages the social network could be qualified as a service contract... Most of these companies distinguish between what they call 'Services', in reference to the services they are obliged to provide in compliance with the contract, and what is called 'Content', in reference to the information and material that the user publishes when using the services..." (Cano & Matute, 2021, p. 1141) (our translation).
17. Remuneration should not be understood strictly as a monetary payment but should be interpreted broadly to include other concepts that represent economic value. See C/9-12, Corman-Collins SA vs. La Maison du Whisky SA, 19 December 2013 [ECLI:EU:C: 2013:860] and DIRECTIVE (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services (recital 24 and art. 3(1)).
18. See Facebook Terms of Service in sections 3.2 and 4.2.

> content... we allow other images, including those depicting acts of protest, women actively engaged in breast-feeding and photos of post-mastectomy scarring... We also allow photographs of paintings, sculptures, and other art that depicts nude figures".[19]

Why, then, are the platforms not respecting these conditions? Why do so many people have their art, which is theoretically permitted by the ToS, removed from these platforms? What legal argument can content creators and their followers employ against these decisions? First, we consider that statements of this nature create certain expectations among users (counterparts).[20] It would be entirely reasonable for users to expect Meta, in good contractual faith, to comply with the obligations it undertook (*pacta sunt servanda*) through the terms of service and policies they themselves drafted.[21] If the contractual conditions stipulate that nakedness is permitted, it may not be removed indiscriminately. Even though it could be considered a general statement, if the platform's terms of service state that its goal is to create a space that upholds and fosters freedom of speech, then it could be argued that the platform has a contractual obligation to take reasonable steps to create that.

3.1. Network contracts

This approach, based on traditional contractual breach theory, should, in principle, be valid. However, it has not been successful in the US courts as evidenced, for example, by the case *Doe v. Google LLC*.[22] Therefore, we agree with Elkin-Koren, De Gregorio and Perel (2021, p. 1012) who propose changing the lens through which the contractual relationship between platform and users is analysed. They suggest that users of social media platforms have had difficulty in making contractual claims against these platforms due to the narrow perspective of courts. Courts, it seems, are not considering the full complexity of the contractual relationships that exist between social media users and platforms.[23] To this end, they developed this interesting hypothesis:

> "... this problem could be corrected if courts adopt a broader view and consider the different horizontal relationships underlying the operation of social media platforms, as suggested by contractual network theory... A network perspective could give rise to claims by users that a platform's actions... compromise the shared goal of the network." (Elkin-Koren, De Gregorio & Perel, 2021, pp. 1011 and 1041)

Professor Gunther Teubner developed the notion of "contractual networks" to describe a new market trend characterized by networks that depart from traditional corporate structures – but whose transactions could not be considered as entirely independent[24] neither (Teubner, 2011, pp. 129-130). Our assumption is that social media platforms like Instagram or Facebook fall into this catego-

19. "Adult Nudity and Sexual Activity" policies, retrieved on 22/8/2023 from https://transparency.fb.com/policies/community-standards/adult-nudity-sexual-activity/
20. According to article 8(1)(b) of DIRECTIVE (UE) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services, to be in conformity with the contract, the digital content or services shall: "... possess the qualities and performance features, including in relation to functionality, compatibility, accessibility, continuity and security, normal for digital content or digital services of the same type and *which the consumer may reasonably expect*, given the nature of the digital content or digital service and *taking into account any public statement made by or on behalf of the trader*, or other persons in previous links of the chain of transactions, particularly in advertising or on labelling". In other words, the statements made by the parties create expectations and may be crucial to assess the conformity of the contract from an objective point of view. The problem is that Schulze and Staudenmayer (2020, p. 151) consider that these "reasonable consumer expectations", a figure derived from British law, is too abstract a term to determine the conformity of the product/service. As this is a relatively new branch of commerce, what it is reasonable for a user to expect is not yet fully defined. It would become clearer over time.
21. Obviously, these duties would only be required of the services that make these kinds of representations. If a platform categorically rejects all types of nudity, regardless of its nature, then this argument would become weak.
22. No. 20-cv-07502-BLF, 2020 WL 6460548 (N.D Cal. Nov. 3, 2020) (The plaintiffs filed a lawsuit claiming that the defendants infringed upon their contractual and First Amendment rights by unfairly removing them and their political opinions from the YouTube platform without prior notice, shortly before the 2020 presidential election).
23. Courts are focusing more on the vertical platform-creator relationship and are overlooking the horizontal relationships that are also established among the other participants in the network.
24. "The individual network member thus not only acts in his own name and his own interest, but is also implicitly acting as an agent for and in the interest of other members of the network." (Teubner, 2011, p. 141).

ry. Firstly, in contrast to cooperation models that typically result in the formation of a new legal entity integrating the economic interests and liabilities of participants, the dynamics of social media maintain the autonomy of both platforms and users as independent agents. Secondly, transactions in social networks are not independent. Since the advent of Web 2.0, users have been contributing to the success of the network through their participation and interaction. The interaction between users plays a pivotal role in generating data and boosting platform revenues. This signifies that the platform's functionality relies on the connections formed through interaction. The platform economy thrives on the interdependence between users and platforms, as well as among users themselves. In other words, it is through engagement and exchange that the platform operates. The fact that the network does not create a new entity is quite evident, but the interdependence of the members of the network is the key element that the courts seem to be overlooking.

According to Cafaggi (2011, p. 74), a contractual network is based on the following premises: "(1) a strong collective interest to pursue (2) a common objective, and (3) a high level of interdependence among the contracts and the activities performed through contracts".[25] In a contractual network, a shared objective unites all contracts, while preserving the independence of each participant. Whilst the network serves to streamline complexity and achieve a collective goal over time, each member upholds their own interests.

If the pursuit of a common goal constitutes the underlying motivation behind these contracts, this means that the Platform's commercial interests must not override it. In the case of social media platforms such as Facebook or Instagram, this common goal is not other than the one stated in the terms and conditions to which all parties committed to: the creation of connected communities able to share expressions and opinions on a global scale. As long as no basic rules of the community are violated, the platform should refrain from actions that jeopardize this common goal.

How would this work in a real case applied to artists unfairly sanctioned on social networks? The network perspective suggests interpreting contracts based on the shared network goal, which guides the contractual relationship in such network. When assessing whether a platform has breached its contract, courts should examine whether platform actions (such as content removal decisions) conflict with the network's common objectives. Let us say the platform opts, despite committing to the contrary, to eliminate some content to increase engagement among some users. Courts should, therefore, consider whether the platform's actions compromise the shared objective of the network when determining if a breach of contract occurred. This implies that whereas users and platforms maintain independent agency, the bilateral contracts they enter into may create a mutual obligation to uphold the shared goal of the network.[26] This not only allows members of the network to claim damages but also functions as a mechanism to control platforms. The contractual network approach also proposes a duty for platforms to prevent arbitrary changes to their terms of use and to give users adequate advance notice regarding potential changes.

3.2. Departing from the "party primacy norm"

In addition to the theory of network contracts, there are other arguments to protect the interests of users, or even third parties outside of the platform. Traditionally, contract law has gravitated around a central idea: facilitating the execution of the legitimate expectations of the contracting parties. However, in order to offer a potential solution to the situation that is the subject of this research, we must move away from the principle of "contractual relativity", the "party primacy norm" and make a case in favor of a more social interpretation. This idea makes sense, since when contracts are executed between parties, the public may also be affected by a variety of negative externalities. It is reasonable that these third parties outside the contract seek to keep such negative effects as low as possible. This increasingly frequent scenario has led several academics (Trakman, 2016; Hoffman & Hwang, 2021; Parella,

25. Meanwhile, Teubner (2011, p. 158) proposes the following features:
"(1) Mutual references within the bilateral contracts to one another, either within the explicit promises or within implicit contractual practice ('multi-dimensionality').
(2) A substantive relationship with the connected contracts' common project ('network purpose').
(3) A legally effective and close co-operative relationship between associated members ('economic unity')".

26. As Teubner (2011) explains, this type of contract is best illustrated by the franchises.

2021; Ben-Shahar, Hoffman & Hwang, 2022) to propose forms of liability that can protect third parties who are victims of negative contractual externalities.

A proposal of this nature seems to be reasonable since the law in almost all jurisdictions places restrictions on contractual autonomy in the form of default rules, interpretation practices, and remedies under the justification of protecting society as a whole.[27] Among these restrictions, there is one that could serve as a starting point for those who suffer negative externalities from the activity of the social networks to claim: what Ben-Shahar, Hoffman and Hwang (2022) have called "nonparty defaults".

The RESTATEMENT (SECOND) OF CONTRACTS, § 179(b)[28] § 236(f)[29] are clear evidence that the sole purpose of contract law is not to ensure that the will of the parties is honored.[30] Ben-Shahar, Hoffman and Hwang (2022) cite insurance contract law and contracts causing environmental damage as examples of contexts in which courts apply a specific principle: interpreting and constructing the contract in a way that favors interests beyond those of the parties ("including specific performance or compensatory measures tailored to reverse concrete social harms and secure in-kind completion or preservation of a socially valuable outcome") (Ben-Shahar, Hoffman & Hwang, 2022, p. 31). The authors also make an interesting point: if a provider warrants that a service has a particular social or ethical attribute (as some social networks do), then any breach of that warranty should result in compensation not only for the buyer's financial loss but also for the broader social interest at stake.[31]

Conclusion

Although classic contract law principles are theoretically valid, they focus too much on the bilateral/vertical relationship between users and private social media companies and ignore the complexity of the actual social networks this relationship yields. The "contractual network" advocated here is a reminder that private law, and specifically contract law, has elements that are rarely used, but which provide valid pathways to holding platforms accountable for erroneous content moderation decisions. They have made a commitment to users (and even third parties outside the contract) to accept specific content in particular and to promote freedom of expression in general. This should then be the primary objective of the network and the main element on which the courts should focus when assessing the legitimacy of any content moderation decision. Although this argument is developed primarily with the United States in mind, it is certainly a model that should be taken into account by courts elsewhere.

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27. That is why contracts that are illicit, go against morality and public order are usually declared void. Another example is anti-cartel laws. After all, these default rules are not designed to protect the parties but general and social interests, third party interests.
28. "Bases Of Public Policies Against Enforcement
A public policy against the enforcement of promises or other terms may be derived by the court from
(b) the need to protect some aspect of the public welfare, as is the case for the judicial policies against, for example...
(iii) interference with other protected interests (§§ 192-196, 356)."
29. "Where a public interest is affected an interpretation is preferred which favors the public."
30. "A close reading of past cases illustrates that when social hazards sharply increase after formation, courts have sometimes rejected, re-formed, and reinterpreted contracts so that parties who breach to reduce external harms are not left holding the bag. We describe these cases as a sort of contractual anticanon: where social, and not private, ends are the focus of contract judges." (Hoffman and Hwang, 2021, p. 979)
31. "Look around us: the products people purchase through private contracts increasingly seek to preserve social interests – 'green', 'fair trade', 'local', or other humanitarian or cosmopolitan values. If buyers are demanding such accountability, and if sellers are responding by claiming to offer it, contract law should retool and support these expectations." (Ben-Shahar, Hoffman & Hwang, 2022, p. 49). The same should apply to the referred representations made by the platforms.

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