

ONLINE RULERS AS HYBRID BODIES: THE CASE OF INFRINGING CONTENT MONITORING

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ABSTRACT

The digital information environment functions today as the backbone of democracies. This environment is operated by online intermediaries that control the flow of information and monitor content running through their “pipelines.” Thus far, content monitoring has been conducted with almost no regulation and according to the intermediaries’ own (commercial) policies. In that respect, online intermediaries have become, in fact, the online rulers. Therefore, the issue of online content monitoring stands at the heart of contemporary social and legal discourse, since it challenges other public, individual, or commercial entities’ constitutional rights and freedoms, such as freedom of speech, or more broadly, other “digital human rights.”

Online rulers are facing a new legal and social challenge, since they are the ones expected to strike the appropriate constitutional balance, although they are private-commercial entities. This reality can be demonstrated through different practices concerning content monitoring in cases of alleged copyright infringement, such as the legal schemes of “notice and takedown” or “blocking orders.” Online rulers are expected to act as gatekeepers for the sake of public interest—but without any legal infrastructure.

Against this backdrop, the article aims to explore whether and how some of the basic public law standards, such as accountability, transparency, equality, and reasoning, could be imposed on relevant online rulers. European countries, in contrast to the U.S., are more willing to accept the introduction of public law standards into the private law sphere. According to an accepted doctrine, in some cases private entities may be perceived as a hybrid private/public body, and as a result the door opens for the direct imposition of some public law standards on such private entities. This article proposes that in relevant cases major online rulers should be acknowledged as hybrid bodies, in order to promote a balanced and fair digital information environment. There are many advantages in using this doctrine, which allows a gradual and dynamic application of public law principles, and on a global scale. The challenge for such potential legal move in the U.S. is greater, considering the current interpretation of the “state action doctrine,” which hinders the application of constitutional rights in the private sphere. Nevertheless, this current judicial restrictive approach could be relaxed by further future judicial elaborations. The significance of this article, therefore, lies in its potential to assist in shaping better policies and practices in the future that can and should be initiated by the U.S. judiciary.

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TABLE OF CONTENTS

INTRODUCTION.....	353
I. ONLINE RULERS AND DIGITAL HUMAN RIGHTS.....	357
<i>A. The Role of Online Rulers in the Digital Age</i>	357
<i>B. Digital Human Rights</i>	360
II. ONLINE RULERS AND CONTENT MONITORING	364
<i>A. General Background</i>	364
<i>B. American and European Schemes for Infringing Content Monitoring</i>	366
<i>C. A Broader Perspective on Content Monitoring and “Digital Human Rights”</i>	373
<i>D. The Public/Private Divide Barrier</i>	378
III. THE PERCOLATION OF HUMAN RIGHTS STANDARDS INTO THE PRIVATE SPHERE	380
<i>A. General Background</i>	380
<i>B. The U.S. State Action Doctrine</i>	381
<i>C. Dynamic Perceptions of the Public/Private Legal Spheres</i>	385
<i>D. The Doctrine of Hybrid Bodies</i>	391
IV. ONLINE RULERS AS HYBRID BODIES.....	394
<i>A. Application of the Hybrid Bodies Doctrine to Online Rulers</i> ...	394
<i>B. The Infringing Content Monitoring Case Study</i>	399
<i>C. Alternative Measures: Antitrust Laws</i>	403
CONCLUSIONS	406

INTRODUCTION

Today the state is not the sole source of sovereignty, since its rule is shared not just with supra-state authorities but also with powerful private entities.¹ This is particularly evident in the current digital environment, which is operated and governed by a few super-corporations, such as the Big Five technology firms.² This article explores the questions of whether some public law norms, which bind the state, should be imposed on these private entities governing the digital sphere, and moreover, how such legal moves can be achieved.

The digital sphere is operated by a pyramid of “in-between” actors, known as Internet or online intermediaries. These intermediaries include the physical network access providers (ISPs) and various online services providers, such as search engines, content platforms, and social media networks.³ The structure of the digital environment has changed the way information is produced, used, and disseminated: All layers are involved with the traffic of information, whereas the platforms at the upper layer are also engaged in curation of the content.⁴ Therefore, while the various online intermediaries may be different in regard to the degree of their involvement in the dissemination and curation of information (*i.e.* some would be regarded more passive and others more active), all intermediaries nevertheless play a

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- 1 DAN JERKER B. SVANTESSON, INTERNET & JURISDICTION GLOBAL STATUS REPORT 2019, INTERNET & JURISDICTION POL'Y NETWORK (2019), at 49, available at https://www.internetjurisdiction.net/uploads/pdfs/GSR2019/InternetJurisdiction-Global-Status-Report-2019_web.pdf (citing E. Weitzenboeck, *Hybrid Net: The Regulatory Framework of ICANN and the DNS*, 22 INT'L J. L. INFO. TECH. 49, 68 (2014) (“[T]he state ceases to be the sole source of sovereignty. . .”).
 - 2 The Big Five multinational technology companies in terms of market capital are Apple, Amazon, Alphabet (holding company for Google), Microsoft, and Facebook. Katie Jones, *The Big Five: Largest Acquisitions by Tech Company*, VISUAL CAPITALIST (Oct. 11, 2019), <https://www.visualcapitalist.com/the-big-five-largest-acquisitions-by-tech-company/>. See also Rory Van Loo, *Rise of the Digital Regulator*, 66 DUKE L.J. 1267, 1269 (2017) (arguing that digital intermediaries, in the context of commercial markets, regulate “by influencing behavior in ways similar to public actors”); *How 5 Tech Giants Have Become More Like Governments Than Companies*, NATIONAL PUBLIC RADIO (Oct. 26, 2017), <https://www.npr.org/2017/10/26/560136311/how-5-tech-giants-have-become-more-like-governments-than-companies?t=1558819996409> (reflecting “*New York Times* tech columnist Farhad Manjoo warn[ing] that the ‘frightful five’—Amazon, Google, Apple, Microsoft and Facebook—are collectively more powerful than many governments”).
 - 3 See STEFAN KULK, INTERNET INTERMEDIARIES AND COPYRIGHT LAW: EU AND US PERSPECTIVES, 10–11 (2019) (discussing “in-between” actors).
 - 4 See *id.* at 17–21 (discussing the history of the internet and copyright law).

significant role in the operation of the current digital environment. The intermediaries are involved in the flow of information at all layers of the digital sphere's pyramid, and thus they function as the "valves" that control the traffic of content in their respective "pipelines." In that respect, these online intermediaries are in fact *online rulers*.

In the 1990s, digital technological and social development was celebrated as a facilitator for a utopian democracy.⁵ Two decades later, the fear in democratic states of the ill-consequences of centralized control of online rulers over the digital sphere has taken over.⁶ Online rulers, being commercial entities, are free to monitor the information flow in their pipelines; they are free to remove content as they deem fit; they may block access to content or sites at their own will. Thus far, legal attempts to claim that these online rulers are subject to some "must-carry" obligations, *i.e.* they cannot remove content or block access at their own will, considering their major role in the digital speech environment, has failed.⁷ Moreover, since the digital speech environment has replaced the press and other traditional media as well as traditional fora such as parks, market squares, and shopping malls, the basic questions of freedom of speech are still valid: Should we as a society tolerate any digital speech? Should the digital dissemination of harmful content be banned and in what manner? Should uninvolved third parties be held liable for not banning the flow of illegal digital speech and infringing content or, by the same token, be held liable for banning such flow? Clearly, one of the most urgent legal challenges that democratic states currently face is designing the appropriate legal governance that should be applied to online rulers.⁸

5 See Hannah Bloch-Wehba, *Global Platform Governance: Private Power in the Shadow of the State*, 72 SMU L. REV. 27, 33-38 (2019) (reviewing the early utopian trend in scholarly writing regarding the internet).

6 See DAPHNE KELLER, HOOVER INST., WHO DO YOU SUE? STATE AND PLATFORM HYBRID POWER OVER ONLINE SPEECH (Aegis Series Paper No. 1902) (2019) (detailing the broad discretion of online platforms and their ability to remove speech from their platforms).

7 *Id.* at 11-13.

8 Online platforms' liability for hate speech or encouragement of violence stood at the heart of a massive public debate in May-June 2020, when Twitter labeled President Trump's online messages as potentially 'false' or as 'glorifying violence.' President Trump perceived this move as an 'editorial decision,' which hinders freedom of speech. Maggie Haberman & Kate Conger, *Trump Signs Executive Order on Social Media, Claiming to Protect 'Free Speech'*, N.Y. TIMES (last updated June 2, 2020), <https://www.nytimes.com/2020/05/28/us/politics/trump-order-social-media.html>. Following these events, in June 2020, massive public pressure was put on Facebook to follow Twitter's move and to adopt a new proactive policy monitoring speech which encourages violence.

This article argues that since all online rulers serve as potential gatekeepers for access and participation in the global digital fora, a set of public law norms, such as quasi-administrative legal obligations, should be imposed on them in order to guarantee the protection of Digital Human Rights. In order to explain this stance, first the notion of Digital Human Rights will be presented. This discussion serves as the basis for the proposition that public law norms should be stretched into the private sphere, as it describes both the acknowledgment of these new (or nuanced) human rights and the risk to their fulfillment caused by content monitoring practices conducted by major online rulers. There are different content monitoring practices in the U.S. and Europe; however, both present a challenge to Digital Human Rights. Then, the article will turn to discuss the major legal obstacle to such a move, at least in the U.S., which stems from the fact that online rulers are private corporations. While European legal tradition is more sympathetic to the introduction of human rights standards into the private sector by horizontal application, the American counterpart is generally hostile to such legal moves. Therefore, the imposition of human rights standards on private entities should overcome the legal obstacle of the private/public law divide. For this aim, the doctrine of “hybrid private/public bodies” will be presented. According to this accepted doctrine, in some cases private entities, such as commercial companies that serve a social function in nature, may be perceived as hybrid private/public bodies.⁹ The legal consequence stemming from such perception is that the door opens for the direct imposition of public law standards on the relevant private entity. We will propose that in relevant cases major online rulers should be acknowledged as hybrid bodies, in order to promote a balanced and fair digital information environment.

The advantage of applying the hybrid bodies doctrine to online rulers lies exactly in its dynamic nature. The acknowledgment of an online ruler as a hybrid body is only the starting point for the substantial discussion as to which quasi-administrative principles should be applied and to what extent. It

Rachel Lerman & Craig Timberg, *Bowing to Pressure, Facebook Will Start Labeling Violating Posts from Politicians. But Critics Say It's Not Enough*, WASH. POST (June 27, 2020), <https://www.washingtonpost.com/technology/2020/06/26/facebook-hate-speech-policies>. These events, and the public outcry, demonstrate the importance of imposing the appropriate legal governance on online rulers.

9 See, e.g., Human Rights Act 1998, c.42 § 6(1) (UK); Aharon Barak, *Constitutional Human Rights and Private Law*, 3 REV. CONST. STUD. 218, (1996).

certainly does not imply a “must-carry” obligation but rather a set of norms that should govern *the process of decision making*, such as: transparency, giving reason, equality, and any kind of judicial review. These major factors would make the online ruler accountable to its operation, on a procedural level. The creation of legal governance over the decision-making process of online rulers may generate the needed guarantees for adequate protection of Digital Human Rights and at the same time preserve the online rulers’ adequate freedoms in conducting their own business,¹⁰ thus preserving some core net-neutrality.¹¹ The development of governance principles for online rulers should be made cautiously, since it should balance complex interests and accommodate rapidly changing technologies and social reality. The hybrid bodies doctrine allows such gradual development, since it does not rule on the outcome (remove/don’t remove content) but only moves, in part, the procedural parts of the operation of the digital environment into the public law sphere.

The potential role of the hybrid bodies doctrine will be demonstrated with respect to the issue of allegedly copyright infringing content that the various Internet operators are requested to remove or block. While such a request may be justified by the copyright holders’ wish to prevent economic injury, when such removal or block eventually takes down legal content it harms users – and in fact the public at large. In other words, content monitoring may injure the public’s Digital Human Rights. Therefore, in order to properly protect both sides’ legitimate interests, a quasi-administrative legal framework may ease the tension, where the online ruler cannot be an indifferent intermediary, and where it should operate in accordance to some basic public law principles that would ensure that there are no biased, capricious, or unreasonable decisions made.

10 See Eugene Volokh & Donald M. Falk, *Google First Amendment Protection for Search Engine Search Results*, 8 J.L. ECON. & POL’Y 883, 886 (2012) (reflecting that, in the U.S., the online platforms should enjoy basic freedoms as well, such as freedom of speech). Similarly, the European Court of Justice (EUCJ) has acknowledged a basic right to conduct a business freely. Case C-70/10 *Scarlet Extended SA v. Société Belge des Auteurs, Compositeurs et Éditeurs SCRL (SABAM)*, 2011 (Scarlet Extended case); Case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM) v. Netlog NV*, 2012 (the SABAM cases).

11 For a critical description of the net-neutrality approach, see Kristen E. Eichensehr, *Digital Switzerland*, 167 U. PA. L. REV. 665 (2019) (describing the U.S. technology companies as “digital Switzerland” because they are not completely regulated by their host nation and are “neutral”).

This article will proceed as follows: Part II will shortly describe the centrality of online rulers in current society and explore the notion of Digital Human Rights. Part III will delve into the issue of content monitoring, by describing current practices in the U.S. and in Europe, explaining the problems stemming from such practices to Digital Human Rights, and identifying the legal divide between the public and private spheres as a barrier to the adoption of a legal mechanism that may ease the conflict created by content monitoring. Part IV will focus on the public/private divide by describing the American state action doctrine, which preserves a dichotomic perception, and by describing other contemporary approaches that claim that the divide is blurred, and public law norms have long percolated into the private sphere. Then, the doctrine of hybrid bodies, which allows the imposition of public law obligation on private entities, will be presented. Part V ties up both ends: It presents the stance that major online rulers should be perceived in relevant cases as hybrid bodies, and it demonstrates this view with respect to allegedly copyright infringing content monitoring mechanisms.

I. ONLINE RULERS AND DIGITAL HUMAN RIGHTS

A. *The Role of Online Rulers in the Digital Age*

The digital environment has generated what is known in scholarly writing as the age of “information society.”¹² The dissemination of information, thereby of knowledge and ideas, through digital technologies has created a major societal leap and a paradigm shift, in Kuhnian terms.¹³ The emergence of the Internet and its early days were accompanied by a utopian sentiment concerning a free and purely democratic sphere that would allow for uncontrolled speech and social engagement.¹⁴ In recent years, however, there has been a growing understanding that the digital environment faces crucial

12 See YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 1-6, 27 (2006) (detailing the changes in technology, economy, and society).

13 THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970); see also BENKLER, *supra* note 13 (reflecting further on the societal changes brought on by digital technologies).

14 Bloch-Wehba, *supra* note 5, at 27, 33-38.

obstacles that prevent the accomplishment of such ideals.¹⁵ The obstacles vary with respect to various online actors in the different layers of the digital sphere's pyramid; however, there is one basic shared problem stemming from the fact that all online rulers are privately owned commercial corporations.

If we inspect the uppermost layer of the digital sphere's pyramid, containing online platforms, speech in this digital layer has indeed "created a global democratic culture."¹⁶ Various social media platforms, such as Facebook, YouTube, and WhatsApp, are examples of major online platforms. These major online platforms function as the current market square, yet on a global scale.¹⁷ Online platforms provide essential public needs, such as the "place" in which individuals may access information, express themselves, and thereby enjoy access to and engage with the social and cultural life of their communities.¹⁸ Yet, although the services online platforms provide became a backbone of the public civil experience, they are nevertheless operated by privately owned commercial corporations. Moreover, the market of online platforms is currently centralized, held by a few mega corporations that are highly dominant in the relevant market segment.¹⁹ Thereby, the global democratic market square is run by a few private holders.²⁰

15 See Bloch-Wehba, *supra* note 5, at 35 (describing the various realistic responses to the early utopian approach); Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CALIF. L. REV. 395, 403 (2000) (arguing that regulating the cybersphere will become inevitable in order to maintain basic liberal democratic norms).

16 Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1664 (2018); see also Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 34-35 (2004) (stressing the important role of digital speech for the participation of people in a democratic culture).

17 See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (citation omitted) (reflecting that these platforms "allow a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox'"). This case is further discussed below in Part II.B.

18 See Evelyn Mary Aswad, *The Future of Freedom of Expression Online*, 17 DUKE L. & TECH. REV. 26, 31 (2018) (detailing the view of the United States Supreme Court that social media and cyberspace is "one of the most important places to exchange views").

19 See Katie Jones, *The Big Five: Largest Acquisitions by Tech Company*, VISUAL CAPITALIST (Oct. 11, 2019), <https://www.visualcapitalist.com/the-big-five-largest-acquisitions-by-tech-company/> (outlining the dominance of the Big Five tech companies, Microsoft, Apple, Amazon, Alphabet (Google), and Facebook).

20 See Aswad, *supra* note 18, at 30 (suggesting that this reality may fit the coined notion of a "neo-medieval" social structure, in which non-state actors, such as feudal owner of properties, govern).

If we inspect the lower layer of the digital sphere's pyramid, we may reach similar conclusions. The access to the digital sphere is operated by digital infrastructure bodies, i.e. the ISPs, a term which refers to a wide range of access facilitators.²¹ These bodies function as the "pipelines" of the democratic digital environment, and as such they also operate its "valves." Therefore, in fact, ISPs control both the flow of information and the access to the information environment. Yet, ISPs are private corporations as well, therefore the "pipelines" of democracy are run by the private sector.

One may say that this is not a new phenomenon, since in the pre-digital era the press and traditional broadcasting media could have been described as the backbone of democracy as well, and most of these vehicles are also privately owned.²² Thus, to a certain extent, it could be argued that the issue of the role of online platforms and ISPs is nothing more than "old wine in new bottles." However, the old speech vehicles were mainly *local*, with much less exposure and thereby dominance in comparison to current online platforms.²³ The online platforms have created not only a global, supra-state, democratic fora, but in some communities their services are assimilated to the "Internet" itself.²⁴ Indeed, it is a matter of degree. In other words, online platforms' global reach and dominance presents a new legal challenge. The extreme size and power of some online platforms should play a major role in designing new

21 The ISPs' function includes the basic physical network providers (such as cable companies) and Internet access providers, which may be carried by cable companies or mobile companies. See Kulk, *supra* note 3, at 10-11 (discussing internet intermediaries).

22 For the press and media power and ownership in the pre-digital era, see Daniel L. Brenner, *Ownership and Content Regulation in Merging and Emerging Media*, 45 DEPAUL L. REV. 1009 (1996) (describing the private ownership of various press and media in the U.S. and discussing the negative and positive consequences stemming from mergers that would create mega media corporations); C. Edwin Baker, *Media Concentration: Giving up on Democracy*, 54 FLA. L. REV. 839, 902-19 (2002) (describing the private and concentrated ownership of major media in the U.S. and the potential harm to free speech); L. P. Hitchens, *Media Ownership and Control: A European Approach*, 57 MOD. L. REV. 585 (1994) (describing the British and European private ownership structure of mass media).

23 Brenner, *supra* note 22, at 1011 ("The old electronic marketplace of fifteen years ago, dominated by the three television networks and their affiliated stations, is a substantial but not dominant portion of the electronic landscape. Programmers and distributors view the market as worldwide, not domestic.").

24 See Leo Mirani, *Millions of Facebook Users Have No Idea They're Using the Internet*, QUARTZ (Feb. 9, 2015), <https://qz.com/333313/millions-of-facebook-users-have-no-idea-theyre-using-the-internet/>. According to this non-academic research, a very high percentage of people, especially in developing countries, such as Nigeria and Indonesia, use Facebook and believe that Facebook *is* the Internet. One of the proposed reasons for such reality is that in some of these countries Facebook is the major or even only free and accessible platform.

legal measures aimed at accommodating the new legal challenges. Furthermore, the online platforms enjoy new characteristics stemming from the technology, such as the unlimited capacity of curation of information, which generates new legal challenges. Moreover, the ISP's role cannot be compared with that of the traditional media, since their control is over the communication infrastructures. Therefore, ISPs should be resembled to the role of broadcasting signals, which are usually regulated by the state.²⁵

In many cases, some basic needs are covered by the private sector; however, the fact that the private sector is not only the sole operator of the democratic digital environment but is also controlled by a handful of major, dominant corporations leads to a conflict with protected human rights.

B. Digital Human Rights

Freedom of speech, that is protected under the U.S. Constitution's First Amendment,²⁶ includes both active acts of expression and access to information, which are acknowledged as protected human rights.²⁷ On an International Law level, freedom of speech is proclaimed and guaranteed both under the Universal Declaration of Human rights and the International Covenant on Civil and Political Rights, safeguarding "the right to hold opinions without interference" and "the right to seek, receive, and impart information and ideas of all kinds, regardless of frontiers" and through any medium.²⁸

Access to cultural life is an acknowledged human right as well. Article 27 of the Universal Declaration of Human Rights proclaims that "everyone has

25 The Federal Communications Commission regulates communications by radio, television, wire, satellite, and cable in the U.S. *What We Do*, FED. COMM'NS COMM'N, <https://www.fcc.gov/about-fcc/what-we-do> (last visited Oct. 20, 2020); *see also* 47 C.F.R. §§ 1-1513 (2020) (setting forth the statutory regulations in the United States).

26 U.S. CONST. amend. I.

27 *See* FREDERICH SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 15-86 (1982) (explaining the multi-facet aspects of free speech); *see also* Roy Peled & Yoram Rabin, *The Constitutional Right to Information*, 42 COLUM. HUM. RTS. L. REV. 357, 360 (2011) ("[T]he right to information is a precondition for the exercise of procedural political rights, such as the freedom of expression.").

28 G.A. Res. 217 (III) A, art. 19, Universal Declaration of Human Rights (Dec. 10, 1948) ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."); G.A. Res. 2200 (XXI) art. 19(2), International Covenant on Civil and Political Rights (Mar. 29, 1967) ("Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.").

the right freely to participate in the cultural life of the community.”²⁹ This human right was further anchored in Article 15(1) of the International Covenant on Economic, Social, and Cultural Rights, which states that “the States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life.”³⁰ The U.S. is not a party to the Covenant; however, the Universal Declaration of Human Rights may represent customary international law norms,³¹ or at least a source of inspiration for accepted moral standards.³² Various international law instruments assist in clarifying the content and boundaries of this cultural human right.³³ A comprehensive clarification can be found in a U.N. Educational, Scientific, and Cultural Organization recommendation from 1986, according to which the right embraces two key elements: 1. *Access to Culture*, defined as “the concrete opportunities available to everyone, in particular through the creation of the appropriate socio-economic conditions, for freely obtaining information, training, knowledge, and understanding, and for enjoying cultural values and cultural property”; 2. *Participation in Cultural Life*, defined as “the concrete opportunities guaranteed for all—groups or individuals—to express themselves freely, to act, and engage in creative activities with a view to the full development of their personalities, a harmonious life, and the cultural progress of society.”³⁴ Clearly, the right to participate in cultural life is a nuanced subset of freedom of speech, encompassing both passive and active perspectives;³⁵ however, it focuses on the democratic cultural sphere. This

29 G.A. Res. 217, *supra* note 28, at 71 (Dec. 10, 1948)

30 G.A. Res. 2200, *supra* note 28, at 45, (Dec. 16, 1966).

31 See PAUL SEIGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* 14–19 (1983) (discussing the history and structure of modern international human rights laws); see also Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287, 298, 301, 304–07, 322–24 (1995) (positing that the Universal Declaration has become part of customary international law).

32 See HENRY J. STEINER, PHILIP ALSTON, & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS, TEXT AND MATERIALS* 138–39 (3d ed. 2000) (describing how the Universal Declaration is perceived as the prime document and constitution of the human rights movement, with a symbolic and ideological status).

33 See Orit Fischman-Afori, *Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 497 (2004) (analyzing these legal instruments).

34 UNESCO, Rep. of Programme Commiss’n II, annex, Recommendation on Participation by the People at Large in Cultural Life and Their Contribution to It, 19th Sess., I.2, 31 (Nov. 26, 1976).

35 Fischman-Afori, *supra* note 33, at 514.

right is highly relevant in the current digital environment.³⁶ Particular attention has been given recently to the right to participate in cultural life in its current phase, *the right to participate in digital cultural life and digital discourse*, which in other words has evolved into Digital Human Rights. Digital Human Rights, therefore, include digital freedom of speech and its sub-branch of digital cultural rights. It should be noted that Digital Human Rights concern additional aspects, such as privacy; however, these fall outside the scope of this article.

In a gradual process, the U.N. has stressed the importance of this new phase of Digital Human Rights. Already in 1993, the United Nations Commission on Human Rights established the mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. The mandate was extended periodically, and special reports were submitted along the years.³⁷ One of its significant milestones, the Special Rapporteur report on the promotion and protection of the right to freedom of opinion and expression, submitted in 2011, has declared that Internet access, in general, should be perceived as a human right and as part of the freedom of speech.³⁸ The report included many concrete recommendations aimed to secure access to the Internet for all, which will be further explored in this article.³⁹ Thereafter, following reports elaborated various aspects of Digital Human Rights, including another significant report submitted in 2018 that focused on online content regulation.⁴⁰ Moreover, in 2016, the United Nations Human Rights Council released a nonbinding resolution condemning disruption of Internet access by governments, which

36 See Lea Shaver & Caterina Sganga, *The Right to Take Part in Cultural Life: On Copyright and Human Rights*, 27 WISC. INT'L L.J. 637, 638 (2009) (proposing to frame the movements for further freedom of speech on the Internet in terms of human rights); see also Kitsuron Sangsuvan, *Balancing Freedom of Speech on the Internet Under International Law*, 39 N.C.J. INT'L L. & COM. REG. 701, 703, 706 (2014) (discussing the importance of freedom of speech on the internet).

37 *Special Rapporteur on the Promotion and Protection of Freedom of Opinion and Expression*, OHCHR, <https://www.ohchr.org/en/issues/freedomofopinion/pages/opinionindex.aspx> (last visited Oct. 9, 2020).

38 Frank La Rue (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression) *Special Rep.*, ¶ 20, U.N. Doc. A/HRC/17/27, (May 16, 2011) (“[T]he Internet has become a key means by which individuals can exercise their right to freedom of opinion and expression.”).

39 *Id.* See also *infra* part II.C.

40 Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, U.N. Doc. A/HRC/38/35 (July 6, 2018).

further anchored the right to Internet access as a basic human right.⁴¹ Following this path, in January 2020 the Indian Supreme Court ruled that the long Internet access ban in Jammu and Kashmir, which had been presented by the government as a needed measure to fight terror, violated the Indian constitutional right to freedom of speech and expression.⁴²

In the U.S., similar evolution took place when the importance of Digital (Human) Rights was stressed in a gradual process.⁴³ A highlight of this process was when, in 2017, the U.S. Supreme Court, in its decision in the case of *Packingham v. North Carolina*, acknowledged access to online social media (such as Facebook) as part of the right to freedom of speech.⁴⁴ Therefore, the Court struck down state legislation that prevented convicted criminals from accessing social media, as it violated constitutional First Amendments rights.⁴⁵ This seminal decision placed the issue of regulating online platforms at the heart of the Digital Human Rights discourse. In other words, one of the major arenas in which the doctrine of Digital Human Rights should operate is that of social and cultural activities taking place over online platforms, being the contemporary market square. Yet, as it will be further explored below, guaranteeing Digital Human Rights leads to a major problem: Human Rights impose obligations on states, while online platforms are commercial-private entities. The question, therefore, is whether some public law obligations may nevertheless be imposed on the private sector as well, and if yes, then how.

41 Human Rights Council A/HRC/32/L.20 (June 30, 2016).

42 See Writ Petition, Anuradha Bhasin v. Union of India and Ors. (civil) No. 1031 of 2019 ¶ 152(b)(c) (2020) (“[T]he freedom of speech and expression and the freedom to practice any profession or carry on any trade, business or occupation over the medium of internet enjoys constitutional protection under Article 19(1)(a) and Article 19 (1) (g). The restriction upon such fundamental rights should be in consonance with the mandate under Article 19 (2) and (6) of the Constitution, inclusive of the test of proportionality. An order suspending internet services indefinitely is impermissible under the Temporary Suspension of Telecom Services (Public Emergency or Public Service) Rules, 2017, Suspension can be utilized for temporary duration only.”).

43 For scholarly works describing and analyzing this process, see Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2298 (2016); Klonick, *supra* note 16, at 1613–15. For an early acknowledgment of Digital Human Rights, see Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 95–97, 99–103, 115–25 (2009).

44 *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

45 *Id.* (“[T]o foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. . . . Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives.”).

II. ONLINE RULERS AND CONTENT MONITORING

A. General Background

In contrast to the early utopian views of the digital environment as an unregulated arena accomplishing the democratic freedom of speech ideal,⁴⁶ the traffic of information and content, thereby of speech, is monitored by various Internet actors, i.e. both ISPs and online platforms. This is what Jack Balkin has described as the “new-school speech regulation,” which comprises “techniques that regulate speech through the control of digital networks.”⁴⁷ The various online intermediaries may monitor content and remove it in accordance with various legal schemes. Exploring these schemes allows us to better understand the challenges Digital Human Rights face.

The legal schemes for content removal could be classified into certain categories. One such classification differentiates between content removal due to violation of the online intermediary’s contractual terms, which is voluntary removal of content, and content removal conducted due to imposed regulation, which is nonvoluntary removal. The classification of content monitoring according to whether it was conducted voluntarily or nonvoluntarily is not sensitive enough to some further ramifications. Voluntary removal of content may also be classified according to the initial motivation: Some voluntary content removal is generated by commercial contractual terms originally set by the platform operator, whereas others may be initiated by public discourse and public activities that encouraged, or rather compelled, the platform to adopt a higher standard of content filtering.⁴⁸ Moreover, some of the seemingly voluntary policies adopted by online platforms are a result of a fear or a threat of upcoming legislation.⁴⁹ A common

46 See Benkler, *supra* note 12 and accompanying text (explaining how technology can lead to great societal change).

47 Balkin, *supra* note 43, at 2306.

48 See Klonick, *supra* note 16, at 1664 (concluding that “platforms are economically responsive to the expectations and norms of their users”); see also REBECCA MACKINNON, ANDI WILSON, & LIZ WOOLERY, OPEN TECH INST., INTERNET FREEDOM AT A CROSSROADS: RECOMMENDATIONS FOR THE 45TH PRESIDENT’S INTERNET FREEDOM AGENDA12 (2016) (describing how American corporations have responded to government pressure by amending their terms of service).

49 See Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035, 1047 (2018) (noting that even if EU lawmakers describe changes in private speech practices as “voluntary,” in fact they are generated by governmental intervention); Aswad, *supra* note 18, at 42–70 (discussing the adoption of codes of conduct against hate speech by

legal mechanism used to promote the adoption of further voluntary terms is a “code of conduct,” which is a self-regulation tool.⁵⁰ The most well-known example for such a code of conduct relates to the removal of illegal hate speech. The European Union Commission have crafted a recommended code of conduct, which was voluntarily adopted by major online platforms.⁵¹ This last example demonstrates the complexity of self-regulation measures, which are not made of the same cloth: Some may reflect a self-serving need, while others may reflect social regulation implemented by sophisticated bottom-up mechanisms.⁵² In other words, self-regulation, known also as “soft law,” may function as a useful substitute to traditional regulation imposing duties on private actors.⁵³

Nonvoluntary content removal, in contrast, may be generated by coercive legislation or by a court order, based on either criminal law grounds,⁵⁴ or on civil law grounds, such as the one aimed at preventing the dissemination of copyright infringing content.⁵⁵ This last court order, known as a “blocking order,” and the American and European regulated schemes for allegedly copyright infringing content monitoring, will be further described in part III B below.

major online corporations to meet the standards proposed by the UN); *see also* Bloch-Wehba, *supra* note 5, at 46–47 (discussing how arrangements between governments and social media companies have become increasingly less voluntary over time).

50 For the function of “codes of conduct” or “codes of best practices” as a self-regulation tool, see Julia Black, *Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a ‘Post-Regulatory’ World*, 54 CURRENT LEGAL PROBS. 103 (2001). In recent scholarly works, there is a growing inspection of various types of self-ordering and their social function. *See, e.g.*, Ira P. Robbins, *Best Practices on Best Practices: Legal Education and Beyond*, 16 CLINICAL L. REV. 269, 289 (2009); Saule T. Omarova, *Wall Street as Community of Fate: Toward Financial Industry Self-Regulation*, 159 U. PA. L. REV. 411, 423 (2011).

51 *See* VERA JOUROVÁ, EUR. COMM’N, CODE OF CONDUCT ON COUNTERING ILLEGAL HATE SPEECH ONLINE: FIRST RESULTS ON IMPLEMENTATION (2016) (describing the adoption of the code).

52 *See* Black, *supra* note 50, at 115 (explaining that for some, self-regulation denotes a kind of regulation that is “responsive, flexible, informed, targeted, which prompts greater compliance, and which at once stimulates and draws on the internal morality of the sector or organization being regulated,” while for others, it denotes “self-serving” or “self-interested” regulation).

53 *See* Keller, *supra* 6, at 6 (criticizing the voluntary hate speech code of conduct).

54 *See* Directives, Article 5, 88/6 Official J. of the European Union 9 (2017) (recognizing content removal as an effective measure against terrorism).

55 *See, e.g.*, UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH [2014] C-314/12 (approving an Austrian Court site-blocking order).

Clearly, voluntary removal aims to serve commercial needs in its broadest meaning.⁵⁶ Even voluntary content removal initiated by public discourse, such as those crafted by codes of conduct, still serves the platforms' commercial needs, since the voluntary compliance with soft social norms fosters the online intermediary's social legitimacy. Yet, in cases of both voluntary and nonvoluntary monitoring activities that are initiated by public interest, a commercial and private entity is fulfilling societal needs.⁵⁷ In that sense, the private entity is engaged in acts that normally would be conducted by public agencies.⁵⁸ This mixture of functions conducted by private entities brings into the heart of the legal discourse the question of the *legal nature* of various online rulers.

B. American and European Schemes for Infringing Content Monitoring

In the U.S., a significant legal framework allowing the practice of voluntary content monitoring conducted by the digital intermediaries is set by the Communications Decency Act (CDA).⁵⁹ Article 230 of the CDA provides the online intermediary with broad immunity from liability for user-generated content posted on their "premises," without prejudice to any other law. The underlying rationale of the "safe harbor" given to online intermediaries is both to encourage them to voluntarily, on a "Good Samaritan" basis, take an active role in removing offensive content,⁶⁰ and also to avoid free speech problems of "collateral censorship."⁶¹ Yet, this legal framework leaves online actors with vast discretion on the matter, and in fact gives no concrete guidelines. Therefore, voluntary content monitoring remains, to a large extent, a "black

56 See Klonick, *supra* note 16, at 1627 (noting economic reasons as the primary motive behind content removal).

57 See Keller, *supra* 6, at 3-7 (describing various mechanisms by which governments stimulate private entities to moderate digital speech in order to promote social goals).

58 *Id.*

59 47 U.S.C. § 230 (2012).

60 *Id.* § 230(b).

61 See Balkin, *supra* note 43, at 2309 ("Collateral censorship occurs when the state holds one private party A liable for the speech of another private party B, and A has the power to block, censor, or otherwise control access to B's speech."); Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293, 347-49 (2011) (detailing differences between defamation and intellectual property claims with respect to immunity for intermediaries); Klonick, *supra* note 16, at 1602 (discussing the rationale behind granting immunity to online intermediaries for "user-generated content posted to their sites").

box.”⁶² Moreover, since Article 230 to the CDA does not offer immunity based on intellectual property infringement, a special clause was enacted in the Digital Millennium Copyright Act of 1998 (DMCA).⁶³ Section 512 to the Copyright Act creates a safe harbor for some online intermediaries in case an infringing content passed traffic without their knowledge,⁶⁴ and it establishes the notice-and-takedown mechanism for all Internet intermediaries that governs the monitoring of copyrighted content.

An extensively described, discussed, and documented outcome of the notice-and-takedown regime, set by § 512 to the Copyright Act, is the allowance of mass and easy removal of allegedly infringing copyrighted content, ending up with a significant chilling effect to freedom of speech.⁶⁵ The various intermediaries, seeking the immunity, are incentivized to take down all requested content, despite the fact that the request could have been found unjustified had the case been decided by court.⁶⁶ In other words, the intermediaries have no incentive to invest time and effort in a profound legal assessment of the requests, being an uninvolved third party in the conflict, and

62 See Klonick, *supra* note 16, at 1630–47, 1663 (describing, in detail and based on interviews the “opaque” ways in which content is monitored voluntarily by the major online platforms).

63 17 U.S.C. § 512 (1988).

64 See *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 30 (2d Cir. 2012) (discussing what constitutes “knowledge” that would deprive immunity). For the ramifications of this case and its extensive litigation until it was settled by the parties outside the court, see John T. Williams & Craig W. Mandell, *Winning the Battle, but Losing the War: Why the Second Circuit’s Decision in Viacom Int'l, Inc. v. YouTube, Inc. is a Landmark Victory for Internet Service Providers*, 41 AIPLA Q. J. 235 (2013).

65 See Jerome H. Reichman, Graeme B. Dinwoodie, & Pamela Samuelson, *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works*, 22 BERKELEY TECH. L.J. 981 (2007) (calling for a reform that would allow the ban on the easy removal of content); Jennifer M. Urban, Joe Karaganis, & Brianna Schofield, *Notice and Takedown: Online Service Provider and Rightsholder Accounts of Everyday Practice*, 64 J. COPYRIGHT SOC’Y U.S.A. 371 (2017) (describing the practices of the notice-and-takedown mechanism); Daniel Etcovitch, *DMCA § 512 Pain Points: Music and Technology Industry Perspectives in Juxtaposition*, 30 HARV. J.L. & TECH. 547 (2017) (describing comments from both the music industry and the technology industry with respect to the DMCA and their call for reform); DAPHNE KELLER, INTERNET PLATFORMS: OBSERVATIONS ON SPEECH, DANGER, AND MONEY 18 (Hoover Institution, Aegis Series Paper No. 1807, 2018) (discussing laws surrounding liability for intermediaries); Niva Elkin-Koren & Maayan Perel, *Guarding the Guardians: Content Moderation by Online Intermediaries and the Rule of Law*, in OXFORD HANDBOOK OF ONLINE INTERMEDIARY LIABILITY (2020) (posing legal objections to content moderation and detailing “barriers to accountability in online content moderation by intermediaries”).

66 See Balkin, *supra* note 43, at 2314 (highlighting the duty of the intermediary to “promptly remove” content alleged to have infringed upon a party’s copyrights or risk liability).

the outcome is a massive and uncontrolled removal of content.⁶⁷ This outcome is amplified by the operation of such mechanisms by automated systems, since the indifferent position of the online intermediary is translated into the design of the algorithm by setting the defaults. Thus, in the current phase of online governance, the silencing mechanism is an algorithmic one.⁶⁸

Another popular legal path for content monitoring is by “blocking orders,” which are injunctions usually granted against ISPs, ordering them to block access to a certain website or specific source of content, or even directly ordering the removal of contents.⁶⁹ However, blocking orders usually aim to monitor infringing content at the infrastructural layer.⁷⁰ Blocking orders have been granted, occasionally and extensively, mainly in European countries, including Austria, Belgium, Denmark, Finland, France, Italy, Ireland, and the United Kingdom.⁷¹ The European Court of Justice has approved this practice, which is in line with the European Directives referring to the matter.⁷² Outside

67 See, e.g., Jeffrey Cobia, *The Digital Millennium Copyright Act Takedown Notice Procedure: Misuses, Abuses, and Shortcomings of the Process*, 10 MINN. J. SCI. & TECH. 387, 390–93 (2009) (noting abuses of current takedown practices, and particularly highlighting the fact that content is often taken down that does not pose a copyright infringement).

68 See Niva Elkin-Koren & Maayan Perel, *Separation of Functions for AI: Restraining Speech Regulation by Online Platforms*, SOC. SCI. RES. NETWORK (Feb. 14, 2020), <https://ssrn.com/abstract=3439261>.

69 See, e.g., UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH [2014] C-314/12 (approving an Austrian Court site-blocking order). It should be noted that injunctions ordering to take down contents in the context of defamation law and hate speech, which are not at the focus of this article, are also at the heart of the discourse concerning content monitoring. For example, in October 2019, the European Court of Justice (EUCJ) ruled in the case C-18/18 Eva Glawischnig-Piesczek v. Facebook Ireland Ltd., that the 2000/31/EC e-Commerce Directive does not preclude a Member State from ordering a hosting provider to remove or block content that has been declared unlawful. The Court also held that the Directive does not preclude Member states from ordering such removal worldwide, and therefore left it to the Member States to determine the geographic scope of the injunction. However, the Court left unconsidered the constitutional rights perspective. For a review and criticism of this decision, mainly due to the fear that such monitoring may take down legal speech, coined as “dolphins in the net,” see DAPHNE KELLER, DOLPHINS IN THE NET: INTERNET CONTENT FILTERS AND THE ADVOCATE GENERAL’S *GLAWISCHNIG-PIESCZEK V. FACEBOOK IRELAND* OPINION (2019) (identifying several problems and adverse consequences with the *Glawischnig-Piesczek* decision).

70 See MARTIN HUSOVEC, INJUNCTIONS AGAINST INTERMEDIARIES IN THE EUROPEAN UNION: ACCOUNTABLE BUT NOT LIABLE? 19, 90 (2017) (discussing the broad definition of “intermediary” and the responsibility of third parties and intermediaries in responding to blocking orders).

71 *Id.* at 184–210.

72 See, e.g., UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH [2014] C-314/12 (approving an Austrian Court site-blocking order). For a critical review of the English High Court and EUCJ approach to blocking orders, see Orit Fischman-Afori, *Proportionality – A New Mega Standard in European Copyright Law*, 45 INST. INNOVATION & COMPETITION 889, 890 (2014).

Europe, blocking orders are granted, for instance, in Australia⁷³ and in Israel,⁷⁴ and were recently approved by the Canadian Supreme Court in the case of *Google Inc. v. Equustek Solutions Inc.*, upholding an order according to which Google should index all websites that sell goods violating a Canadian company's trade secrets worldwide.⁷⁵ Arguably, blocking orders may be granted on a global scale.⁷⁶ Along with the § 512 safe harbors regime in the U.S., in a recent case decided by the Virginia District Court (*ACS v. Sci-Hub*),⁷⁷ the court surprisingly granted an order to block access to a website operated from outside the U.S. that provided access to unlicensed scientific materials. This decision, therefore, may signal a shift in the judiciary's attitude to blocking orders in the U.S. as well.⁷⁸

The blocking orders scheme, like the notice-and-takedown, raises concerns with respect to its impact on freedom of speech in the digital sphere. Although the order is granted by Court, and therefore is clearly subject to judicial oversight, it nevertheless generates controversy as to its underlying policy and to its compatibility with applicable measures relating to constitutional remedies, such as efficiency, necessity, and most importantly—proportionality.⁷⁹ The Courts are struggling with the question of whether blocking orders are a proportionate remedy under the circumstances,⁸⁰ and in

73 See Copyright Act 1968 § 115A (2019) (Austl.) (authorizing injunctions against intermediaries); see also David Lindsay, *Website Blocking Injunctions to Prevent Copyright Infringements: Proportionality and Effectiveness*, 40 U.N.S.W. L.J. 1507 (2017) (describing recent Australian court decisions granting site blocking orders).

74 Section 53A of the Israeli Copyright Act 2007 (Amendment No. 5 2019) authorizes injunctions against intermediaries.

75 *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, para. 1-5 (Can.).

76 See Case C-18/18, *Eva Glawischnig-Piesczek v. Facebook Ireland Limited*, 2019 Curia (approving injunctions on a global scale). For a critical view on “global injunctions,” see, for example, Michael Douglas, *Extraterritorial Injunctions Affecting the Internet*, 12 J. EQUITY 34 (2018) (considering the power of courts to issue extraterritorial injunctions).

77 *Am. Chem. Soc'y v. Sci-Hub*, Civil Action No. 1:17-cv-0726 (2017).

78 See Maayan Perel, *Digital Remedies*, 35 BERKELEY TECH. L.J. (forthcoming 2020) (discussing digital remedies).

79 See Fischman-Afori, *supra* note 72 (noting issues with blocking orders); see also, Althaf Marsoof, *The Blocking Injunction - A Critical Review of Its Implementation in the United Kingdom Within the Legal Framework of the European Union* (2015) (evaluating the blocking injunction in the United Kingdom); Matthias Leistner, *Intermediary Liability in a Global World*, in PLURALISM OR UNIVERSALISM IN INTERNATIONAL COPYRIGHT LAW 471 (2019).

80 See, e.g., *Twentieth Century Fox Film Corp. v. British Telecomms. PLC*, [2011] R.P.C. 28 (noting the various factors that should be considered in order to conclude that a blocking order, granted in accordance with specific authorization in the law, meets the proportionality requirement); Golden

at least one case the EU CJ overruled a national blocking order for being disproportionate.⁸¹ Yet, the dominant trend widely adopts this scheme.⁸²

The imposition of active obligations on online intermediaries to monitor content stood at the heart of the controversy relating to the European Union Directive on Copyright in the Digital Single Market, which was adopted in spring 2019 (Copyright Single Market Directive).⁸³ The underlying policy of the Copyright Single Market Directive is to strengthen the position of copyright owners *vis-a-vis* the various online platforms, considering what is coined as the “value gap”—the gap between the economic value generated by online platforms, and its fair share with content creators and copyright owners.⁸⁴ This development reflects the first legal move for applying mandatory *active* content monitoring obligations on online rulers. The strong opposition to the Copyright Digital Single Market Directive was based on fear it would hinder Digital Human Rights, yet despite a large public outcry⁸⁵ and resistance of several member states, it was finally approved.⁸⁶ Article 17 to the

Eye (Int'l) Ltd. v. Telefonica UK Ltd., [2012] EWHC 723 (UK) (weighing the rights of copyright owners and consumers); EMI Records Ltd. v. British Sky Broad. Ltd. [2013] EWHC 379 (UK) (granting a blocking order); Cartier Int'l v. British Sky Broad., [2014] EWHC 3794 (UK); Football Ass'n Premier League Ltd. v. British Telecomms. [2017] EWHC 480 (UK) (considering whether a blocking order is “appropriate and proportionate”).

81 See SABAM Cases, *supra* note 9 (discussing systems to filter information to prevent copyright infringement).

82 See Fischman-Afori, *supra* note 72 (discussing a “proportionality test as a remedy-based measure in the copyright” infringement context and the movement away from a bright-line decision of whether to generally grant or reject a blocking injunction); Marsoof, *supra* note 79 (noting issues with blocking injunctions).

83 Directive (EU) 2019/790, of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) [hereinafter Copyright Digital Single Market Directive].

84 See KULK, *supra* note 3, at 61–62 (discussing a proposed directive that would help to “strengthen the position of copyright owners”).

85 See, e.g., *EU copyright bill: Protests across Europe highlight rifts over plans*, DEUTSCHE WELLE (Mar. 23, 2019), <https://www.dw.com/en/eu-copyright-bill-protests-across-europe-highlight-rifts-over-reform-plans/a-48037133> (noting how “[c]ritics of EU internet copyright reforms have rallied across Europe ahead of a crucial vote in the European Parliament”); Cory Doctorow, *The Worst Possible Version of the EU Copyright Directive has Sparked a German Uprising*, ELEC. FRONTIER FOUND. (Feb. 18, 2019), <https://www EFF.org/deeplinks/2019/02/worst-possible-version-eu-copyright-directive-has-sparked-german-uprising> (noting how “with just two days of organizing, hundreds of Europeans marched on the streets of Cologne against Article 13”).

86 The final approval in spring 2019 was not unanimous: Three member states abstained and six voted against. In a joint statement, the opposing member states explained that the Directive may encroach on EU citizens’ rights, and therefore, they have voted against its adoption. See KULK, *supra* note 3,

Copyright Single Market Directive contains a line of obligations on “online content sharing service provider,” including an obligation to obtain an authorization from rightsholders with respect to any copyrighted work that is intended to be communicated by their services;⁸⁷ in the absence of such authorization the intermediary should demonstrate that best efforts were made to prevent the availability of specific works identified by rightsholders.⁸⁸ Upon notification by rightsholders, the intermediary should act expeditiously to remove these works,⁸⁹ and the intermediary should “provide rightsholders, at their request, with adequate information on the functioning of their practices with regard to the cooperation referred to” concerning removal of content.⁹⁰ Moreover, Article 17 (9) obliges the intermediaries to establish an effective and expeditious complaint and redress mechanism, in the service of users disputing over the removal of content, *e.g.* wishing to benefit from exceptions or limitations to copyright. The complaints should be “processed without undue delay” and decisions to remove content following such complaints will be “subject to human review.” This Article further stresses that “Member States shall also ensure that out-of-court redress mechanisms are available for the settlement of disputes[,]” that such mechanism shall enable disputes “to be settled impartially[,]” and that users shall not be deprived of the legal protection afforded by their national law and have “access to a court or another relevant judicial authority.”⁹¹

The first EU measure to address an Internet intermediary’s liability was the e-Commerce Directive adopted in 2000,⁹² which established immunity for the intermediaries on various legal grounds—albeit with no mandatory notice-and-takedown scheme, which could nevertheless be adopted voluntarily.⁹³ Article 17 to the Copyright Single Market Directive moves to a mandatory adoption of a nuanced notice-and-takedown scheme, but these schemes were

at 63 (explaining that these member states felt that the text of the approved directive would stifle innovation).

87 Copyright Digital Single Market Directive, *supra* note 83, at 119.

88 *Id.* at 120.

89 *Id.*

90 *Id.*

91 *Id.* at 120–21.

92 Directive 2000/31/EC of the European Parliament and of the Council of June 8, 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), 2000 O.J. (L 178) [hereinafter EU e-Commerce Directive].

93 Following the EU e-Commerce Directive, Finland is the only EU member state that has adopted a statutory notice-and-takedown mechanism. KULK, *supra* note 3, at 117.

in fact already adopted in a self-regulatory manner.⁹⁴ Therefore, it is very likely that the same extensively described, discussed, and documented chilling effect of the American notice-and-takedown scheme⁹⁵ already takes place in Europe as well. Yet, Article 17 contains additional, far-reaching active obligations for content monitoring, such as the obligation to make "best efforts", in fulfilling the duty to have rightholders' authorization for the use of their content, and also to make best efforts in accordance with "high industry standards of professional diligence" to ensure the unavailability of content the rightholder indicated.⁹⁶ These obligations are in fact referring to implementation of content recognition technologies, similar to the "content ID" systems applied voluntarily by YouTube.⁹⁷ The difference, however, is that in contrast to the notice-and-takedown scheme in which the online ruler is responsive to a conflict initiated by a third party, Article 17 shifts the liability to the online ruler to *proactively* initiate the process of obtaining authorization and thereby of content filtering and removal through content recognition technologies. Moreover, Article 17 includes a "staydown" active obligation, aimed at making sure that there is no reuploading of removed content.⁹⁸ Content ID systems likewise raised the concern of generating a chilling effect on digital speech, since, it may, for example, block the use of copyrighted content that could have been qualified as fair use and therefore non-infringing.⁹⁹ In other words,

94 See KULK, *supra* note 3, at 116-120 (discussing the notice-and-takedown scheme).

95 See *supra* note 65.

96 Copyright Digital Single Market Directive, *supra* note 83, at 120. See also Article 17(4)(b)-(c).

97 KULK, *supra* note 3, at 133 (noting the possibility of making "effective content recognition technologies" mandatory). For the operation of the YouTube content ID system, see YouTube Creators, *YouTube Content ID*, YOUTUBE (Sept. 28, 2010), <https://www.youtube.com/watch?v=9g2U12SsRns>.

98 See Copyright Digital Single Market Directive, *supra* note 83, at 120 (Article 17 (4) (c) stipulates that the service providers should make "best efforts to prevent their future uploads in accordance with point (b)"). See also Felipe Romero-Moreno, *Notice and Staydown and Social Media: Amending Article 13 of the Proposed Directive on Copyright*, 33 INT'L REV. L. COMPUTERS & TECH. 187, 203-04 (2019) (discussing "notice and staydown" duties, under which a regular takedown notification from a rightholder for a specific unlawful file would trigger a duty for the service provider to proactively identify and eliminate all instances of the allegedly infringing content and prevent future uploads").

99 See, e.g., Taylor B. Bartholomew, Note, *The Death of Fair Use in Cyberspace: YouTube and the Problem with Content ID*, 13 DUKE L. & TECH. REV. 66, 68 (2015) (emphasis omitted) ("[The Content ID system] has proven to be problematic in its application on YouTube by undermining the doctrine of fair use through indiscriminate flagging of legitimate uses of original content. Put simply, Content ID is blatantly hostile to users' interests because it shifts the neutral presumption of fair use against them."); Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright*

an automated system may produce “false positives” outcomes, which are inconsistent with freedom of speech as the default principle.¹⁰⁰ Moreover, the major obstacle with content recognition technologies is that they are run by private entities, which are not compelled to reveal the design of their algorithm; therefore these systems are operated with no safeguards in place for the protection of users and the public at large.¹⁰¹ As one commentator concluded, private entities such as Google and YouTube “have adopted a role for [themselves] that is similar to a collective management organization, but without there being any checks on its practices.”¹⁰² Users become dependent on the good intentions of online rulers to provide adequate protection to their rights and freedoms.

C. A Broader Perspective on Content Monitoring and “Digital Human Rights”

Online rulers are private corporations, motivated by profit. Yet, as presented above, some of their activities, such as content monitoring, raise profound questions concerning the protection of Digital Human Rights. Since content monitoring is governed by these private entities’ own voluntary policies or their own technology, even if they were obliged to implement such measures, these measures would lack basic elements embedded in public law guarantees of human rights, such as accountability, transparency, reasoning, and equality.¹⁰³ The fear is that these intermediaries would moderate digital

Enforcement, 19 STAN. TECH. L. REV. 473 (2016); Martin Senfleben, Christina Angelopoulos, Giancarlo Frosio, Valentina Moscon, Miquel Peguera, & Ole Andreas Rognstad, *The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform*, 40 EUR. INTELL. PROP. REV. 149, 187 (2018) (referring to European style exceptions that could be undermined by such monitoring systems).

100 See Toni Lester & Dessislava Pachamano, *The Dilemma of False Positives: Making Content ID Algorithms More Conducive to Fostering Innovative Fair Use in Music Creation*, 24 UCLA ENT. L. REV. 51, 53 (2017) (claiming that “these programs can produce ‘false positives,’ where legally allowable music associated with a reference file is inappropriately blocked”).

101 See, e.g., Senfleben et al., *supra* note 99, at 4 (pointing that “the decision over the scope and reach of filtering measures must not be left to agreements between industry representatives that are likely to focus on cost and efficiency considerations instead of seeking to avoid unnecessary content censorship.”)

102 See KULK, *supra* note 3, at 284.

103 These elements are regarded as the underlying principles of public and administrative law. See STEPHEN BREYER, *ADMINISTRATIVE LAW & REGULATORY POLICY* (3d ed. 1992); Cary Coglianese, *Administrative Law: The U.S. and Beyond*, in INTERNATIONAL ENCYCLOPEDIA OF

speech too heavily, or on a capricious or discriminatory basis, and they would thereby risk freedom of speech and all other nuanced Digital Human Rights.¹⁰⁴ As stressed above, while this fear was relevant in the pre-digital era with respect to traditional media and press as well,¹⁰⁵ the global reach and gigantic size of some online rulers not only amplifies the problem but in fact changes the democratic balance.

Jack Balkin described this new triangular social structure, in which a third angle is found in addition to public authorities and individuals—online intermediaries. Nowadays, the threat to human rights, and particularly to freedom of speech, is created not only by governmental authorities but to an even greater extent by private entities governing the online traffic of content.¹⁰⁶ A growing mass of scholarly works is turning the spotlight onto this new global challenge, in which Digital Human Rights are mainly threatened by private sector entities whose own policies are not governed by basic public law guarantees.¹⁰⁷ For example, the dominance of the online platforms in the democratic free speech environment was described as the “new governors,” namely the controllers of the free flow of expressions,¹⁰⁸ as a private law activity that stands at the “shadows” of the state;¹⁰⁹ or as “nonstate regulators” of the public sphere.¹¹⁰ Moreover, since such control is usually carried out by

SOCIAL & BEHAVIORAL SCIENCES, (James D. Wright, ed., 2d ed. 2015) (discussing the “salient political theory and legal issues fundamental to the U.S. administrative state but with relevance to the design and application of administrative law in any jurisdiction”); Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1946); *see also* Klonick, *supra* note 16, at 1609, 1665-69 (“There is very little transparency from these private platforms, making it hard to accurately assess the extent to which we should be concerned about speech regulation, censorship, and collateral censorship.”); Bloch-Wehba, *supra* note 5, at 61 (noting how some have argued that “speech governance by online platforms is inappropriate because the companies are not chosen through a democratic process”).

104 *See* Kyle Langvardt, *A New Deal for the Online Public Sphere*, 26 GEO. MASON L. REV. 341, 349 (2018) (discussing certain speech-related risks that these intermediaries raise).

105 *See supra* notes 22-25 and accompanying text.

106 *See* Jack M. Balkin, *Free Speech is a Triangle*, 118 COLUM. L. REV. 2011, 2011 (2018) (arguing that social media companies govern digital speech).

107 For one of the earliest scholarly writings on the matter, see Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to “Private” Regulation*, 71 U. COLO. L. REV. 1263, 1265-66 (2000) (discussing how web sites set their own terms and conditions which become the “law” of their pages).

108 *See* Klonick, *supra* note 16, at 1663 (describing private, online platforms as the new regulators free speech).

109 *See* Bloch-Wehba, *supra* note 5, at 33-34 (establishing their own legal structures that online platforms believed would work better than the physical world).

110 *See* Langvardt, *supra* note 104, at 342 (describing the regulations put in place by internet companies to shape speech on their platforms).

automated algorithms, these “new governors” and “nonstate regulators” may turn out to be machines operated via artificial intelligence, generating new legal challenges for both private and public laws.¹¹¹ Yet, both the research and legal structuring of this troubling phenomenon are still in their first steps.

The U.N. Human Rights Commission, as described above, gave special attention to freedom of expression in the digital environment, and particularly to its safeguards on social media platforms. The first Report of the Special Rapporteur on the matter, issued in 2011, reflected both a comprehensive acknowledgment of the important role online platforms served in contemporary social structure,¹¹² and of the necessity to set rules and legal boundaries to content monitoring carried out by these bodies. The Report opened by articulating the basic principle according to which:

*Censorship measures should never be delegated to private entities, and that intermediaries should not be held liable for refusing to take action that infringes individuals’ human rights. Any requests submitted to intermediaries to prevent access to certain content, or to disclose private information for strictly limited purposes such as administration of criminal justice, should be done through an order issued by a court or a competent body which is independent of any political, commercial or other unwarranted influences.*¹¹³

In other words, the Report stated that nonvoluntary specific content blocking should be carried out by a specific court order. Moreover, it stated that online platforms should serve as gatekeepers in protecting human rights.¹¹⁴ The Report further elaborated some concrete obligations stemming from the duty of online platforms to safeguard human rights in the context of content monitoring: Content monitoring should be transparent to both the relevant individuals and to the public; it should apply proportionate measures such as providing a forewarning if possible, and minimize the restriction strictly to the

111 See Sofia Grafanaki, *Platforms, the First Amendment and Online Speech: Regulating the Filters*, 39 PACE L. REV. 111, 122-23 (2018) (discussing the conundrum in trying to regulate fake news); Langvardt, *supra* note 104, at 349-50 (referring to platforms’ ability to silo users or curate their information); Keller, *supra* note 6 (describing the fear that general content monitoring, especially when conducted by algorithms, would silence legal speech).

112 See Report of the Special Rapporteur 2011, *supra* note 34 (stating the importance of a generally free and open internet).

113 *Id.* at 75.

114 This last principle was further stated upfront: “[W]hile States are the primary duty-bearers of human rights, the Special Rapporteur underscores that corporations also have a responsibility to respect human rights, which means that they should act with due diligence to avoid infringing the rights of individuals.” The Report of the Special Rapporteur 2011, *supra* note 38, at 76.

necessary content involved (i.e. the restriction should be proportionate).¹¹⁵ These statements marked the first step of an institutional-public discourse regarding the need to tilt the ‘human rights ship’ towards the private sector’s duties and obligations. And, keeping with the naval metaphor, the Report of the Special Rapporteur of the U.N. Human Rights Commission functions as a signal given by the central lighthouse on shore.

The second Report of the Special Rapporteur, issued on the matter in 2018, was based on a global survey seeking to sketch an actual and empirical picture with respect to voluntary and nonvoluntary content monitoring practices.¹¹⁶ The overall finding was that, on a global scale, freedom of speech is not protected adequately by the private sector. While many companies have adopted some measure of compliance with standards aimed at preventing state censorship (i.e. nonvoluntary content monitoring), the rest of voluntary content monitoring has not met appropriate standards of transparency and nondiscrimination.¹¹⁷ Moreover, another troubling finding in this survey was that content monitoring is often carried out by automated methods, namely algorithmic decision-making processes, which are unaccountable to any results affecting individuals’ human rights.¹¹⁸ It should be mentioned that the official U.S. response to this survey was somewhat laconic: It emphasized the limited volume of nonvoluntary content monitoring obligations in the U.S.,¹¹⁹ while with respect to voluntary content monitoring it simply mentioned that “internet companies, of their own volition, may and do remove online content that violates their terms of service.”¹²⁰ The final Report, therefore, concluded that

115 *Id.* at 76–77.

116 *See* Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression, Overview of submission received in preparation of the Report of the Special Rapporteur, 2–3 (A/HRC/38/35), A/HRC/38/35/Add.1. (June 6, 2018) (describing the compilation of submissions for the report).

117 The overview of submissions received in preparation of the Report of the Special Rapporteur also referred to a research conducted by The Danish Institute for Human Rights, that “shows that company commitments to human rights only extend to ‘protecting against external threats from governments.’” Danish Institute for Human Rights, Rikke Jørgensen, *Framing Human Rights: Exploring Storytelling Within Internet Companies* at 4; *see id.* at 42.

118 *See id.* at 40–49.

119 *See* Letter from Jason B. Mack, U.S. Deputy Permanent Representative to the U.N. Human Rights Council, to David Kaye, Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression U.S. Response to Request for Submissions on Social Media, Search, and Freedom of Expression (April 10, 2018), (“As a general matter, U.S. law does not impose an obligation on internet companies to remove, restrict, or otherwise regulate online content that is protected under the First Amendment.”)

120 *Id.*

“[d]espite taking steps to illuminate their rules and government interactions, the companies remain enigmatic regulators, establishing a kind of ‘platform law’ in which clarity, consistency, accountability and remedy are elusive.”¹²¹ The Report further elaborates some concrete recommendations as to the appropriate way to face these challenges. A special emphasis was given to the need to make the private sector’s companies subject to human rights obligations, and to turn civil compliance to basic human rights into the default standard.¹²² More specifically, according to the Report, “Companies should incorporate directly into their terms of service and ‘community standards’ relevant principles of human rights law that ensure content-related actions will be guided by the same standards of legality, necessity and legitimacy that bind State regulation of expression.”¹²³

Finally, the Special Rapporteur’s clear voice on the matter was heard once again with respect to then proposed provision of the Copyright Digital Single Market Directive, eventually adopted in Article 17 described above, which imposes far-reaching active obligations on major online rulers in order to strengthen rightsholders’ economic interests. In an open letter, the Special Rapporteur expressed his concerns that this (then-proposed) provision was incompatible with both Article 19 of the International Covenant on Civil and Political Rights (securing freedom of speech) and Article 15 of the International Covenant on Economic, Social, and Cultural Rights (securing the right to participate in cultural life).¹²⁴ He further expressed fear that this obligation could lead to “pressure on content sharing providers to err on the side of caution,” pointing at the known chilling effect that stems from the risk-averse behavior of a uninvolved third party.¹²⁵ The Special Rapporteur also referred to the lack of requirement of prior judicial review in the then-proposed provisions, currently adopted in Article 17, and subsequently stated that “intermediaries must not be required to restrict content unless an order has been issued by an independent and impartial judicial authority that has determined that the material at issue is unlawful,” in order to prevent censorship in the digital sphere.¹²⁶ As described above, the mechanism finally

121 Report of the Special Rapporteur 2018, *supra* note 37, at ¶ 1.

122 *See id.* at 44–48, 70–72 (setting out principles for responsible content monitoring).

123 *Id.* at 45.

124 David Kaye, Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, U.N. Doc. OL OTH 41/2018, 3–8 (June 13, 2018).

125 *Id.*

126 *Id.*

adopted in Article 17 does not follow this recommended path and it obliges online service providers to remove content upon rightsholders' request, with no prior judicial order.

D. The Public/Private Divide Barrier

The recommendation in the second Report of the Special Rapporteur raises the general issue of introducing public law principles into the private sector and the question of how such a legal move should be implemented *de-facto*. A few scholars have already stressed the need to accommodate online platforms' activities to human rights standards.¹²⁷ In line with this scholarly movement, Jack Balkin proposed that private law fiduciary duties should be applied to some Internet platforms.¹²⁸ However, the legal way for *imposing* such standards has not yet been profoundly explored. Voluntary acceptance of minimal public law standards, on a "Good Samaritan" basis, seems to be inadequate, considering the growing importance online rulers play in the societal democratic structure.¹²⁹ Imposition of public law duties may be carried out, therefore, either by legislation or by judicial doctrine.

An example of a legislative path was proposed by a few scholars, suggesting that *any* content monitoring and removal would be subject to either administrative, special advisory council, or judicial prior review and approval, to ensure that it complies with free speech principles.¹³⁰ The Special

127 See, e.g., Evelyn Mary Aswad, *The Future of Freedom of Expression Online*, 17 DUKE L. & TECH. REV. 26, 38–40 (2019) (proposing which terms should be inserted into the online platforms contracts in order to promote guarantees for freedom of speech that are in line with the international law standards); see also Noa Mor, *No Longer Private: On Human Rights and the Public Facet of Social Network Sites*, 47 HOFSTRA L. REV. 651, 654 (2018) (proposing to impose some public law principles upon private bodies operating social network sites such as Facebook, due to the impact on users' basic human rights); Langvardt, *supra* note 104, at 380–81 (proposing a new approach to the nonstate regulators, *i.e.* online platforms, according to which they would be perceived as state agencies).

128 See Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1205 (2016) (arguing that the government should regulate certain kinds of private information).

129 For a similar view, see Langvardt, *supra* note 104, at 348 (stating that social platforms are destroying users' abilities to hear conflicting views); Bloch-Wehba, *supra* note 5, at 63 (discussing the cooperation between public and private agencies in enforcing speech regulations). For the view that self-regulation is still the recommended way to tackle content monitoring, see Klonick, *supra* note 14, at 1666.

130 See Langvardt, *supra* note 104, at 355 (discussing the ways in which online content could be moderated); Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. MASON L. REV.

Rapporteur, in his open letter concerning the Copyright Single Market Directive described above, expressed a similar view.¹³¹ Concerns were raised as to whether such proposals are workable, due to the immense burden on the administrative agencies.¹³² Prior administrative or even judicial approval for *any* act is unrealistic. Moreover, any proposed legislation should be highly attentive to potential counter chilling effects on the freedom of speech and should be careful not to undermine altogether the online rulers' activities and digital free speech.¹³³

An example of a judicial doctrine, proposed as a potential vehicle for imposing public law obligations on online platforms, is perceiving the platforms as “newspaper editors” or “media broadcasters” who are thus willing collaborators with government censorship, acting as “arms of the state.”¹³⁴ Yet, this doctrine is rather limited, and it does not generate an overall legal framework with the guarantees needed for the adoption of human rights standards, such as accountability, transparency, reasoning, and equality in all cases of content monitoring.¹³⁵ This mechanism, at best, may be appropriate for extreme cases of state censorship, concerning issues such as national security or child pornography, and is not apt for every day content monitoring,

1353, 1357, 1376 (2018) (proposing that the policy for content monitoring would be approved by court or an administrative body in order for the platform to enjoy a safe-harbor clause that would be legislated on a Federal level). For a similar proposal, in the context of the “Right to be Forgotten,” see Edward Lee, *Recognizing Rights in Real Time: The Role of Google in the EU Right to Be Forgotten*, 49 U.C. DAVIS L. REV. 1017, 1035 (2016). Hannah Bloch-Wehba has proposed that non-governmental regulatory bodies, such as ICANN, which are in fact “meta-regulators,” should bridge the private/public gap and create standards that all can adhere to, *supra* note 5, at 71.

131 See Kaye, *supra* note 124, at 1, 9 (discussing the then European Commission’s proposed provision, currently adopted in Article 17 to the Copyright Digital Single Market Directive, which requires “online content sharing service providers” to monitor copyright-protected content).

132 See Bloch-Wehba, *supra* note 5, at 64–65 (discussing the concern in light of increasingly privatized government roles).

133 These fears have led to the legislation of the vast immunity found in § 230 of the CDA. See Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 404 (2017) (discussing the overbroad interpretation of the legislation). However, it was further argued that some adjustments to § 230 should be crafted in order to prevent illegal activities. See *id.* at 404 (“[W]ith modest adjustments to § 230, either through judicial interpretation or legislation, we can have a robust culture of free speech online without shielding from liability platforms designed to host illegality or that deliberately host illegal content.”); Klonick, *supra* note 16, at 1666 (arguing any proposed legislation must align with the existing self-regulatory structure in order to be effective).

134 See Klonick, *supra* note 14, at 1609; Bloch-Wehba, *supra* note 5, at 61.

135 Bloch-Wehba, *supra* note 5, at 61.

concerning issues such as copyright infringement.¹³⁶ Moreover, the massive amount of content flow and the need for fast responsiveness on digital platforms make these legal tools ineffective and therefore obsolete.¹³⁷

These examples feed into the feeling of legal helplessness in recent scholarly writing and public discourse, created by the gap between the acknowledgement of the urgent need to introduce basic human rights standards to the operation of online platforms and the seeming lack of ability to initiate such legal move.¹³⁸ Nevertheless, in the following parts we will examine a comprehensive legal doctrine that may serve as a vehicle or underlying force for the needed legal move of imposing human rights standards on private online intermediaries.

III. THE PERCOLATION OF HUMAN RIGHTS STANDARDS INTO THE PRIVATE SPHERE

A. General Background

The scholarship pertaining to the currently described threat to free speech in the digital environment hits a major stumbling block: Although it acknowledges the necessity to apply human rights standards to online actors,

136 An indicative example of a refusal of online platforms to remove content, despite government requests, is described by Kate Klonick, based on interviews with officials in the online platforms' companies. These interviews reveal that when it comes to high profile issues, such as "Wikileaks," then special attention is given to the balance of the various interests at stake. See Klonick, *supra* note 16, at 1622-25 (discussing the recognition such companies get for their pushback to government). However, it is unreasonable to expect that day-to-day requests for content removal would be treated similarly, though should be subject to a structured fair process as well.

137 See Langvardt, *supra* note 104, at 354 ("Facebook alone today employs several thousand content moderators who reportedly evaluate about one piece of content every ten seconds.").

138 See, e.g., Bloch-Wehba, *supra* note 5, at 80 (concluding that "platforms must take on these tasks themselves rather than waiting for government to act, because to wait is to allow the structures of private ordering to be coopted by state censors."); Klonick, *supra* note 16, at 1602 (explaining that "scholars have moved between optimistic and pessimistic views of platforms and have long debated how — or whether — to constrain them"); Langvardt, *supra* note 104, at 349 (concluding that though there is an extensive literature around the risk to freedom of speech by the platforms, and various proposals to regulate them, there are nevertheless "few policy proposals that contain any detail about how to implement this kind of regulation, and thus far no one in any government has shown any interest in them"); see also Thomas E. Kadri & Kate Klonick, *Facebook v. Sullivan: Public Figures and Newsworthiness in Online Speech*, 93 S. CAL. L. REV. 37, 38 (2019) (describing the current voluntary solution Facebook adopts, by creating an "Oversight Board that will hopefully provide due process to users on the platform's speech decisions and transparency about how content-moderation policy is made . . .").

the imposition of such principles becomes complicated since these actors are private entities.¹³⁹ This is the result of a dichotomic perception, according to which either a certain body is a state actor governed by public law, or else it is a private entity completely free from public law principles. The controversial American state action doctrine, adhering to this dichotomic perception, will be further described in following Part III.B.

Modern law perceptions encompass a much more complex social structure, perceiving the public/private law divide as a continuous spectrum of contingencies, according to the extent of applicable public law principles. While with respect to state actors, such as the government and state administration bodies, public law principles should be applied in full, there are further along the curve in-between situations of non-state actors that nevertheless would be subject to some public law principles. The extent of applicability of public law principles may vary according to the strength of the potential conflict with human rights. The understanding that the application of public law principles is not binary but rather a dynamic range of situations, with varied impositions of human rights standards, is the outcome of a gradual process in which public law principles have percolated into the private law sphere. These new, dynamic perceptions will be further described in Part IIIV.C.

A prominent doctrine primarily adopted in European countries, dubbed “hybrid bodies,” applies a dynamic perception of the public/private divide. This doctrine will be explored in Part III.D. Then, finally, in Chapter IV, loose ends will be tied up, and the possible application of the hybrid bodies doctrine to online rulers will be explored.

B. The U.S. State Action Doctrine

The “state action” doctrine refers to a constitutional principle developed by the U.S. Supreme Court, according to which the U.S. Constitution and its individual proclaimed rights apply only to state action and not to private action.¹⁴⁰ State action refers to all government actions, including those carried

139 See Klonick, *supra* note 16, at 1659 (arguing it is unlikely online platforms could be considered state actors).

140 See *Civil Rights Cases*, 109 U.S. 3, 18 (1883) (holding that Congress lacked the power to enact legislation regulating private racial discrimination under the Fourteenth Amendment); *Developments in the Law: State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1250 (2010)

out by the executive, legislature, and judiciary at both state and federal levels. In contrast, private action refers to all nongovernmental actions.¹⁴¹ Therefore, for instance, private discrimination is not actionable under the 14th Amendment of the U.S. Constitution, which proclaims the state's nondiscriminatory principle, in the absence of federal and state statutory law to the contrary.¹⁴² The state action doctrine applies to the constitutional safeguard of free speech as well.¹⁴³

The state action doctrine raises many questions, some controversial, as to its limits, boundaries, and justification.¹⁴⁴ One of the doctrine's greatest conundrums is drawing a clear line between a state actor and a non-state actor.¹⁴⁵ Many court decisions found creative ways to impute state action in

(“In the *Civil Rights Cases*, the Supreme Court laid down the bright-line rule of state action”); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 504 (1985) (“State action doctrines remain the dividing line between the public sector, which is controlled by the Constitution, and the private sector, which is not.”).

141 See *Developments in the Law: State Action and the Public/Private Distinction*, *supra* note 140, at 1256-61 (describing the early developments of this conceptual divide).

142 The Fourteenth Amendment of the U.S. Constitution proclaims: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 178-179 (1972) (holding that a private restaurant or bar may discriminate its clientele); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357-358 (1974) (holding that mere approval by a state utility commission of a business practice does not constitute state action).

143 See *Hudgens v. NLRB*, 424 U.S. 507, 520-21 (1976) (rejecting a free speech claim against a private mall). For a review of similar cases, see Jennifer Niles Coffin, *The United Mall of America: Free Speech, State Constitutions, and the Growing Fortress of Private Property*, 33 U. MICH. J.L. REFORM 615, 622-30 (2000) (discussing a line of cases that hold mall owners cannot suppress free speech on their premises); *Developments in the Law: State Action and the Public/Private Distinction*, *supra* note 140, at 1311-12.

144 See Chemerinsky, *supra* note 140, at 506 (advocating for the abolition of the state action doctrine); Michael J. Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 ST. LOUIS U. L.J. 683, 683 (1984) (describing the incoherent application of the doctrine); Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779, 789 (2004) (calling for the doctrine's abolishment); *Developments in the Law: State Action and the Public/Private Distinction*, *supra* note 140, at 1313 (“[T]he continuing debate is further evidence that in an era in which public use and private ownership collide increasingly often, a court's theory of state action on private property can have serious implications.”).

145 See *Shelley v. Kraemer*, 334 U.S. 1, 13, 22-23 (1948) (holding that if a private individual or entity merely enters into a discriminatory contract it is not state action, but judicial enforcement of such a contractual right would be qualified as a state action).

cases involving racism operated by private actors,¹⁴⁶ yet these decisions amplified the stance that the concept of state action is both easily manipulated and inherently incoherent.¹⁴⁷ Whether limited or not, the state action doctrine reflects the basic American legal core principle that constitutional rights are to protect individuals from the power of the state and not to regulate relations between individuals, which is left to private law. Moreover, the state action doctrine adheres to the underlying U.S. constitutional rationale that preserves an area of individual freedom, out of reach of the state.¹⁴⁸

Within attempts to avoid the ill-consequences of the state action doctrine, certain decisions crafted exemptions that stretched the concept of state actor. For instance, in the seminal case of *Marsh v. Alabama*, the Supreme Court indicated that discriminatory action conducted by a private actor may be imputed as state action if it involved an exercise of a “public function.”¹⁴⁹ In emulating a private property to a public sphere area, the Supreme Court held that “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.”¹⁵⁰ This ruling was further expanded to shopping malls, being private properties serving public utility.¹⁵¹ Yet, this route was eventually overruled by subsequent decisions.¹⁵² Another known attempt to elaborate an exemption to the state action doctrine was in the landmark case of *New York Times Co. v. Sullivan*, in which the Supreme Court ruled that a state court decision enforcing common law rules regarding defamation (discussing a state official’s claims against a privately

146 See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 726 (1961) (holding that a private restaurant’s policy of racial discrimination qualified as state action because the restaurant leased space from a government agency).

147 See Phillips, *supra* note 144, at 697 (discussing how *Burton* advanced the Court’s “doctrinal diffusion”).

148 *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936–37 (1982). See also Berman, *supra* note 107, at 1268 (arguing that although the critique concerning the incoherence of the public/private divide is correct, nevertheless “most Americans are likely to resist, on an intuitive level, scholarly attempts to erode the distinction between public and private. Most of us like to believe that there are spheres of privacy in which we exist, untouched by the state”).

149 See *Marsh v. Alabama*, 326 U.S. 501, 506 (1946) (holding that a privately-owned mining town was nevertheless perceived as a “quasi-municipality” for anti-discrimination purposes).

150 *Id.*

151 See *Amalgamated Food Emps. Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 325 (1968) (holding the mall was the functional equivalent of a “business block” and should be treated as such for First Amendment purposes).

152 See *Hudgens v. NLRB*, 424 U.S. 507, 518 (1976) (stating that “the rationale of *Logan Valley* did not survive the Court’s decisions in [*Lloyd Corp. v. Tanner*]”).

owned newspaper) had an impact upon free speech and press rights and therefore created a state action that had triggered the application of constitutional rules of free speech.¹⁵³ Nevertheless, despite these and other exemptions, most court decisions tend to tighten the standard against a finding of “state action.” The common assertion is that it is not enough that a private party has acted under some nexus to the state, such as acting under state regulation or license, and it is necessary to establish that the actions were attributable to the state.¹⁵⁴ In line of this rigid trend, the Supreme Court held in June 2019 in the case of *Manhattan Community Access Corp. v. Halleck* that, once again, a private company running a television network is not a “state actor,” even if it operates under a contract with the City of New York, and therefore it is not bound to freedom of speech.¹⁵⁵

The current Supreme Court’s approach has been described as a return to the early formalistic approach.¹⁵⁶ Some scholars perceive this trend as foreclosing any potential application of U.S. constitutional rights in the private sector.¹⁵⁷ And more specifically, the *Manhattan Community Access Corp. v. Halleck* ruling could be perceived as a clear sign of the Supreme Court’s refusal to impose public law standards, headed by freedom of speech, on online social media private services,¹⁵⁸ despite the acknowledgment of social media networks as the digital public market square in the *Packingham v. North Carolina* case.¹⁵⁹

Considering the current formalistic approach of the U.S. Supreme Court to the state action doctrine, which seems to foreclose the path for a direct application of freedom of speech on private entities, various proposals have been made seeking to solve the problem of control over free speech by major

153 *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

154 *Flagg Bros. v. Brooks*, 436 U.S. 149, 156 (1978).

155 139 S. Ct. 1921, 1931 (2019) (reaching the holding by a 5-4 decision). *But see id.* at 1934 (Sotomayor, J., dissenting) (arguing that the private company stepped into the City’s shoes and thus should have been qualified as a “state actor,” who is then subject to the First Amendment).

156 For a review of the evolution of the state action doctrine until its current restrictive phase, see Jonathan Peters, *The “Sovereigns of Cyberspace” and State Action: The First Amendment’s Application—Or Lack Thereof—To Third-Party Platforms*, 32 BERKELEY TECH. L.J. 989, 996-99 (2017) (arguing that the Supreme Court ruling in *United States v. Morrison*, 529 U.S. 598 (2000), reflects the current formalistic trend).

157 See Peters, *supra* note 156, at 998 (discussing the boundaries between the private sector and constitutional rights).

158 See Keller, *supra* note 6, at 21-22 (arguing *Halleck* will unlikely “affect internet platforms directly”).

159 See *Packingham*, 137 S. Ct. at 1735 (describing the Internet and social media in particular as the most important place for the exchange of ideas).

online rulers. Many scholars have stressed the need to entirely abolish the state action doctrine.¹⁶⁰ Whereas chances for such a legal move are low, Jonathan Peters proposed to look for a solution through state legislation in contrast to federal constitutional law: For instance, in California, the principle of freedom of speech is anchored as a right of every person to free speech and not as an obligation of the state to refrain from limiting free speech. Therefore, such a difference allows in California a broader application of freedom of speech on private properties as well—an application which was approved by the Supreme Court.¹⁶¹ Since many of the major online rulers are based in California, this was the proposed path for imposing free speech standards on the private sector.¹⁶² Alternatively, many expressed the need to ease the state action doctrine following the flexible interpretation given to the private/public divide in *Marsh v. Alabama*.¹⁶³ Klonick, in contrast, reached the conclusion that imposition of free speech standards are not realistic in light of American public law principles. Therefore, she argues that a better path would be the voluntary one, facilitated by complex social structures and market needs.¹⁶⁴

Following these scholarly attempts to turn free speech standards into an obligatory principle in the private sector, albeit on solid grounds and on a more global scale, the general percolation of human rights into the private sphere will be further described in following Part III.C.

C. Dynamic Perceptions of the Public/Private Legal Spheres

The traditional divide between public and private legal spheres has been challenged for decades, and there have been prominent legal developments

160 See Peller and Tushnet, *supra* note 144, at 789 (“The state action doctrine is analytically incoherent because, as Hohfeld and Hale demonstrated, state regulation of so-called private conduct is always present, as a matter of analytic necessity, within a legal order. There is no region of social life that even conceptually can be marked off as ‘private’ and free from governmental regulation.”); Chemerinsky, *supra* note 140, at 506 (“The conclusion which emerges is that limiting the Constitution’s protections of individual rights to state action is anachronistic, harmful to the most important personal liberties, completely unnecessary, and even detrimental to the very goals that it originally intended to accomplish.”).

161 Peters, *supra* note 156, at 1001–04.

162 *Id.* at 1001–02.

163 See Peters, *supra* note 156, at 1022–23 (discussing *Marsh*); Langvardt, *supra* note 130, at 1366–67 (same).

164 See Klonick, *supra* note 16, at 1659 (noting the challenges of categorizing social media platforms as state actors).

promoting the weakening of the dichotomic approach.¹⁶⁵ The growth of powerful for-profit corporations in the 1950s and onwards has generated the legal discourse that questions whether some public law constraints should be imposed on corporate behavior.¹⁶⁶ The process of privatization, in which public services are transferred into private entities' hands, has further amplified this discourse, since it further blurred the dividing line between public and private spheres.¹⁶⁷ Privatization, in fact, was supposed to be perceived as "publicization," since public law norms such as accountability, due process, equality, and rationality might extend to private actors through budgeting, regulation, and contracts.¹⁶⁸ As explained above, the U.S. state action doctrine could easily be triggered in clear-cut cases of state involvement, thereby introducing the entire set of public law standards into private sphere activity.¹⁶⁹ The hard cases, where private activity has great public impact but no direct state "footprints," are the controversial ones. These hard cases

165 See Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982) (chronicling the history of the public/private distinction); Aharon Barak, *Constitutional Human Rights and Private Law*, 3 REV. CONST. STUD. 218, 220, 225, 228 (1996) (describing Israeli law and other models for imposing public law obligations upon private parties); Sabino Cassese, *New Paths for Administrative Law: A Manifesto*, 10 INT'L J. CONST. L. 603, 607 (2012) (commenting on the public versus private conceptions in administrative law).

166 For example, already in 1957 Friedmann published his scholarly piece, questioning whether public law obligations should not be imposed on powerful corporations. See Wolfgang G. Friedmann, *Corporate Power, Government by Private Groups, and the Law*, 57 COLUM. L. REV. 155, 165 (1957) ("[T]he question must be raised in all seriousness whether the 'overmighty subjects' of our time—the giant corporations, both of a commercial and non-commercial character, . . . have taken over the substance of sovereignty."); see also Chemerinsky, *supra* note 133, at 510–511 ("[T]he concentration of wealth and power in private hands, for example, in large corporations, makes the effect of private actions in certain cases virtually indistinguishable from the impact of governmental conduct."). This discourse should not be mixed with more radical views, from a political science perspective, perceiving any corporate being an artificial entity created by law, as an entity that should be subject to some public law norms. See, e.g., David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POL. SCI. REV. 139, 156 (2013) (stating corporations are "neither wholly private nor wholly public," but exhibit properties of both).

167 Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169 (1995); Cheryl L. Wade, *For-Profit Corporations That Perform Public Functions: Politics, Profit, and Poverty*, 51 RUTGERS L. REV. 323 (1999); Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813 (2000); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003); Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029 (2005).

168 See Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1285 (2003) (suggesting privatization "can be a means of publicization"); see also Jack M. Beerbaum, *Administrative-Law-Like Obligations on Private [Ized] Entities*, 49 UCLA L. REV. 1717, 1731–34 (2002) (discussing antidiscrimination law in the private sector).

169 Barak-Erez, *supra* note 160, at 1172.

concern, for instance, a public function utility, i.e. an activity that is public in nature (such as the one discussed in *Marsh v. Alabama*),¹⁷⁰ or a private activity with an indirect state nexus, i.e. a “close” cooperation between the private entity and a state agent.¹⁷¹ Privatization, for instance, might fall into any of these two options.¹⁷²

From a broader perspective, public law, including its two sub-branches of administrative and constitutional law, is facing a gradual and consistent process in which it is percolating into private law. Vast scholarly writing covers this phenomenon. Jody Freeman’s work, as well as that of other scholars, for instance, has unveiled both myths and the reality around the public/private dichotomy.¹⁷³ After inspecting these two legal fields, following the Critical Legal Studies tradition, Freeman has concluded that there is a complex mechanism of constant “negotiation” between private and public actors, which ends up with intertwined legal outcomes. The challenge of the traditional public/private divide is addressed from various perspectives, including the way public norms are crafted and enforced.¹⁷⁴ She further argues that “There is no purely private realm and no purely public one” therefore scholarly attention should be focused on the . . .—“set of negotiated relationships between the public and the private.”¹⁷⁵ Moreover, a non-dichotomic perception of the public/private realm led to the understanding that the application of public law standards may be a matter of degree, according to the relational public nature of the activity, the strength of cooperation with state actor, and according to contractual obligations.¹⁷⁶

The European legal legacy and international law trends are more willing to accept the introduction of public law norms into the private sphere. Such

170 See *supra* notes 142-140 and accompanying text.

171 See Barak-Erez, *supra* note 160, at 1178 (explaining the nexus theory of state activity).

172 This is the stance offered by an extensive scholarly movement. See *id.*

173 See Jody Freeman, *The Private Role in the Public Governance*, 75 N.Y.U. L. REV. 543, 548 (2000) (proposing a more realistic conception of the public/private distinction); Freeman, *supra* note 167. For similar conclusions, see Vandenbergh, *supra* note 167, at 2037-41 (discussing the important role of private actors in government functions).

174 See Freeman, *supra* note 173, at 636 (discussing the role of government associated with regulation). In that respect, the “nondelegation” doctrine is challenged as well. *Id.* at 580-586 (analyzing the nondelegation doctrine). For further criticism concerning the myth and reality with respect to the “nondelegation” doctrine, see Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003).

175 Freeman, *supra* note 173, at 548.

176 See *id.* at 580 (commenting on this “essential dichotomy” between public and private).

acceptance is addressed by scholarly writings and could be seen in judicial decisions as well. In the pre-digital era, during the 1980s and 1990s and along with the development of European Union Law, a growing body of scholarly writings was devoted to theoretical analysis concerning the application of human rights. For instance, Andrew Clapham opened his 1993 book with the overall stance that:

[It] challenges the presumption that the fundamental rights and freedoms contained in the European Convention on Human Rights are irrelevant for cases which concern the sphere of relations between individuals. . . . It is the application of human rights law to the action of private bodies which I label “human rights in the private sphere” or “the privatization of human rights.”¹⁷⁷

Following this path, in 2011 the U.N. published its Guiding Principles on Business and Human Rights, calling for the compliance of all private entities with human rights.¹⁷⁸ German law, in particular, is a prominent example of the application of human rights standards in the private sphere, since every provision of private law must be compatible with the system of values of German Basic Law (i.e. Constitutional Law), and every such provision must be interpreted in its spirit.¹⁷⁹ In the seminal case of *Lüth*, discussing freedom of expression, the German Federal Constitutional Court held that basic rights are primarily to protect the citizen against the state, but as enacted in the German Constitution, they also incorporate an *objective scale of values* which applies, as a matter of constitutional law, throughout the entire legal system.¹⁸⁰ In this case, a film producer filed a lawsuit against Erich Lüth, who called to boycott his film due to the former’s anti-Semitic background. The Court held that the introduction of human right standards into the relation of two individuals is a matter of degree, namely it is an *indirect* application in contrast to full and direct application as the case is with a state actor, yet in the specific

177 ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE 1 (1993).

178 See U.N. Human Rights, Office of the High Comm’r, *Guiding Principles on Business and Human Rights* (Apr. 2011), https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

179 See DONALD P. KOMMERS & RUSSEL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 444 (3d ed. 2012) (“Every provision of private law must be compatible with this system of values, and every such provision must be interpreted in its spirit.”).

180 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, 1958, 7 Entscheidungen des Bundesverfassungsgerichts [BVERFGE] 198. See also Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 Md. L. R. 247 (1989) (reviewing the *Lüth* case and its impact on the full introduction of human rights into German private law).

case freedom of speech prevails.¹⁸¹ This seminal case marked the opening of the European balancing era, namely an era of judicial balancing of competing constitutional rights, in private civil cases.¹⁸² The German Constitutional Court has further developed the horizontal application of constitutional rights in the private sphere in more recent cases. Moreover, this contemporary application could arguably be perceived as *direct*. For instance, in a case discussing the scope of freedom of expression in the premises of the Frankfurt Airport (“Fraport”), held in 2011, the German Constitutional Court ruled that since the State held seventy percent of the shares of the company that owned the airport’s premises (with the remaining thirty percent held by a private entity), the airport is bound to allow freedom of speech in the commercial parts of its premises. The Court further stressed that as long as the privately owned spaces are intended for public use, freedom of expression applies in these public-use areas, which essentially constitute a “public forum.”¹⁸³ Following this case, further decisions developing the horizontal application of constitutional rights were handed down;¹⁸⁴ and in May 2019 the Court granted an interim order against Facebook, obliging the restoration (“put back”) of a far-right-wing political activist’s article that Facebook had blocked and monitored as “hate speech,” on the basis of horizontal application of freedom of expression as a constitutional right.¹⁸⁵ The horizontal application of various

181 BVerfGE, *supra* note 180, at 204; Quint, *supra* note 180, at 260–261. For the indirect application of constitutional rights in cases involving a private actor in German law, see Livia Fenger & Helena Lindemann, *The FRAPORT Case of the First Senate of the German Federal Constitutional Court and Its Public Forum Doctrine: Case Note*, 15 Ger. L.J. 1105 (2014) (discussing the German court decision in the FRAPORT case).

182 See Jacco Bomhoff, *Luth’s 50th Anniversary: Some Comparative Observations on the German Foundations of Judicial Balancing*, 9 GER. L.J. 121, 124 (2008).

183 BVerfG, Judgement of the First Senate of February 22, 2011–1 BVR699/06, English translation available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2011/02/rs20110222_1bvr069906en.html.

184 See BVerfG, Judgement of the First Senate of July 18, 2015–1 BvQ 25/15, no English translation, available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/07/qk20150718_1bvq002515.html; BVerfG, Order of the First Senate of April 11, 2018–1 BvR 3080/09 (ruling that “under specific circumstances, however, equality requirement relating to relationships between private actors may derive from Article 3(1) of the Basic Law. Article 3(1) of the Basic Law does have horizontal effects, inter alia, where private actors exercise their rights to enforce house rules under private law.”), English translation available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2018/04/rs20180411_1bvr308009en.html.

185 See BVerfG, Order of the Second Senate of May 22, 2019–1 BvQ 42/19, English abstract available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2019/05/qk20190522_1bvq004219en.html.

human rights in the private sphere on the EU level is also an expanding terrain.¹⁸⁶

Another legal path, accepting the introduction of public law norms into the private sphere, address the legal governing rules of various international bodies, which were established to monitor or coordinate global behavior.¹⁸⁷ Such bodies, being nongovernmental and usually not-for-profit organizations, are in fact private entities who nevertheless subordinate themselves to administrative law standards, at least to a certain extent. These international organizations, therefore, have led to the gradual development of the notion of Global Administrative Law, which adheres the application of basic public law standards by non-state actors.¹⁸⁸ Thereby, these bodies were categorized as special, hybrid public/private bodies.¹⁸⁹ The development of Global Administrative Law has attracted much legal attention. Within this legal discourse, the notion of accountability was developed as a standard that should be applied on a global scale and outside the traditional and narrow state-individuals scope.¹⁹⁰ The notion of accountability in itself denotes a line of basic administrative law standards, including transparency, reasoned decisions, and independent review.¹⁹¹ The development of a special Global Administrative Law for non-state global hybrid bodies raises the general issue of hybrid bodies that will be further explored in Part III.D.

186 For a review of various EU cases applying human rights in the private sphere, see Eleni Frantziou, *The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality*, 21 EUR. L.J. 657 (2015).

187 Such as the World Trade Organization (WTO), the Anti-Doping Agency (ADA) or the Internet Corporation for Assigned Names and Numbers (ICANN). For a taxonomy of these bodies, see Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 20-23 (2005).

188 *Id.* at 22-23; see also Sebastian Lopez Escarcena, *Contextualizing Global Administrative Law*, 21 GONZ. J. INT'L L. 57 (2018); Christoph Möllers, *Ten Years of Global Administrative Law*, 13 INT'L J. CONST. L. 469 (2015); Susan Marks, *Naming Global Administrative Law*, 37 N.Y.U. J. INT'L L. & POL'Y. 995 (2005); Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law*, 68 L. & CONTEMP. PROBS. 63 (2005).

189 See Kingsbury, *supra* note 187, at 16-17, 20.

190 See *id.* at 17. See also Danielle Hanna Rached, *Doomed Aspiration of Pure Instrumentality: Global Administrative Law and Accountability*, 3 GLOBAL CONST. 338 (2014); David Dyzenhaus, *Accountability and the Concept of (Global) Administrative Law*, 2009 ACTA JURIDICA, 3 (2009); Simon Chesterman, *Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law*, 14 GLOBAL GOVERNANCE 39 (2008).

191 See Kingsbury, *supra* note 187, at 37-40 (discussing how global administrative law has provided transparency, reasoned decisions, and right of review).

D. The Doctrine of Hybrid Bodies

The discussion above stressed the profound gaps between the accepting European approach to human rights standards in the private sphere in contrast to the seemingly negative U.S. approach on the matter. However, legal reality is a lot more complex. For example, while the German approach allows only *indirect* application of human right standards in all potential civil law cases, the American approach only scantily allowed such application as an interpretive extension of the state-action doctrine—but when it did allow such an interpretive move, the application of human rights standards in the private sphere was *direct*.¹⁹² The different paths taken by the two legal systems has generated different legal developments. One of such developments is the notion of a hybrid public/private body, which since it encompasses a mix of characteristics, it allows European countries to directly impose certain human rights standards. Namely, concerning the general indirect imposition of human rights in the private sphere, the doctrine further evolved to locate specific “islands” in the private sphere in which some *direct* obligations could nevertheless be imposed. Therefore, the doctrine of hybrid bodies may create an appropriate bridge between the two legal approaches if the American state-action doctrine would be interpretively stretched to cover at least robust cases of hybrid bodies. In such case, both European and U.S. laws would allow a concrete, direct application of public law norms in the private sphere and thus create a coherent global norm for global hybrid bodies.

The doctrine of hybrid bodies is extensively discussed in the United Kingdom. Article 6 to the Human Rights Act 1998 (the Human Rights Act) stipulates that the obligations of public authorities apply to any person or body performing “functions of a public nature.”¹⁹³ Namely, the Human Rights Act explicitly acknowledges the potential application of human rights standards on private bodies, and the question is *when* such application is appropriate

192 Compare the German holding in the Lüth Case BVerfG, *supra* note 180 (applying human rights indirectly), with the U.S. holding in the case of Marsh v. Alabama, 326 U.S. 501 (1946) (using human rights as a limitation of the law). See also Quint, *supra* note 180, at 273 (explaining how U.S. law differs from German law in disputers between individuals).

193 See Human Rights Act 1998, c.42 § 6(1) (UK) (proclaiming that “it is unlawful for a public authority to act in a way which is incompatible with a Convention right”); see also *id.* § 6(3) (proclaiming “In this section ‘public authority’ includes— (a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature.”)

according to domestic court decisions.¹⁹⁴ The hybrid bodies doctrine, i.e. imposition of human rights standards on private bodies, was applied in cases of privately run prisons or in similar cases of private psychiatric hospitals exercising compulsory detention.¹⁹⁵ The doctrine was also applied in the pre-Human Rights Act era, in a seminal case held in 1987 concerning the Panel on Takeovers and Mergers, a regulatory body operated on a municipal level with enforcing powers. The Court held that since the powers exercised by the Panel were essentially in the domain of public law, it should be subject to judicial review.¹⁹⁶ Since the Human Rights Act's term "functions of a public nature" is very vague, the application of the hybrid bodies doctrine is an interpretive matter subject to policy considerations.¹⁹⁷ Naturally, therefore, the question of whether the hybrid bodies doctrine should be further extended to other "grey areas" is controversial.¹⁹⁸

An outstanding example of the controversy is demonstrated in the case of *Birmingham City Council* (BCC) held by the House of Lords in 2007, discussing whether a care home, providing accommodation and care to residents pursuant to arrangements made with a local authority, is subject to direct public law standards despite it being a privately owned and run company.¹⁹⁹ Lord Bingham adhered to a flexible measure, according to which "there is no single test of universal application to determine whether a function is of a public nature,"²⁰⁰ and there are many factors that should be considered

194 See *Aston Cantlow v. Wallbank* [2003] 3 All. ENG. REP. 1213, at ¶ 6 (HL) ("The broad purpose sought to be achieved by [section] 6(1) is not in doubt. The purpose is that those bodies for whose acts the state is answerable before the European Court of Human Rights shall in future be subject to a domestic law obligation not to act incompatibly with convention rights. If they act in breach of this legal obligation victims may henceforth obtain redress from the courts of this country. In future victims should not need to travel to Strasbourg."). See also *YL v. Birmingham City Council* (2007) 3 All ENG. REP. 957 (HL) at ¶¶ 4, 20, 55, 86–87 [hereinafter the BCC case].

195 See *R v. Partnerships in Care Ltd* [2002] 1 WLR 2610, 2619.

196 *R v. Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815.

197 See *Aston Cantlow*, 3 All. ENG. REP. at ¶ 12 ("What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.").

The BCC case, *supra* note 191, at ¶ 128.

198 See H.W.R. WADE & C.F. FORSYTH, *ADMINISTRATIVE LAW* 538 (11th ed. 2014).

199 See the BCC case, *supra* note 191, at ¶ 1 (Bingham, L.J., dissenting).

200 *Id.* ¶ 5 (Bingham, L.J., dissenting).

on a case-by-case basis, such as the nature of the service, the degree of state involvement (whether by payment, regulation, or by any other means), and the extent of the risk that the function at stake might violate an individual's human right.²⁰¹ Baroness Hale joined, adding another important factor, which is the public interest in having that task undertaken.²⁰² Yet, the majority of the three other Lords (Scott, Mance, and Neuberger) dismissed the appeal on the basis of policy considerations. The majority's opinion stressed that this case should be distinguished from former decisions, since it did not meet a core delegation of public authority, as the specific arrangement focused on residents that fell outside the public scheme, and the care home served simply as a contractor or a supplier of a public authority.²⁰³ Nevertheless, Lord Mance further stressed that the refusal to apply the entire public law standard at stake does not mean that no standards should apply at all. To the contrary: "Apart from any contractual arrangements, the care home should view and treat all such residents with equality."²⁰⁴ In other words, the application of public law standards is always a matter of degree.

In other states, such as Israel, the doctrine of hybrid bodies is highly popular, and it can be applied in a wide range of cases. Under Israeli common law, private entities that control public resources, supply a basic social need, or fulfil a public function in nature, or whose function may promote social values under necessity may altogether be imposed upon by Court to apply certain administrative law standards, being acknowledged as hybrid bodies.²⁰⁵ This court-made rule raises the question of whether in other Anglo-American legal systems, common law could serve as a legal basis for the adoption of the hybrid bodies doctrine as well. At least one commentator raised such a question with respect to U.S. common law, even if considering the current formalistic approach of the U.S. Supreme Court as to the state action doctrine.²⁰⁶ Moreover, it was suggested that the imposition of public law

201 *See id.* ¶ 5-11 (Bingham, L.J., dissenting).

202 *See id.* ¶ 67 (Hale, B., dissenting).

203 *See id.* at par. 115-17 (explaining that the specific service at stake was tailored for "self-funders" residency, and therefore had a more commercial nature than public service); *id.* ¶ 141 (explaining that contractors and suppliers of the government should not be regarded as hybrid bodies).

204 *See id.* ¶ 119.

205 *See* Barak, *supra* note 162, at 220-21.

206 *See* Henry H. Perritt, *Towards a Hybrid Regulatory Scheme for the Internet*, 2001 U. CHI. LEGAL F. 215, 268 (2001) (stating that "the regular courts did a good job of working out touchstones for internet jurisdiction. They can do the same with respect to touchstones for accountable private

standards on online rulers could be done in jurisdictions outside the U.S., or by international organizations, which would inevitably generate an impact on these entities' conduct in the U.S. domestic arena as well.²⁰⁷

IV. ONLINE RULERS AS HYBRID BODIES

A. Application of the Hybrid Bodies Doctrine to Online Rulers

Considering the central role of online rulers in the current digital societal structure and the rising importance of Digital Human Rights, the question is whether time is ripe for imposing some public law standards on relevant online actors. The scholarly voice adhering such legal move is growing stronger.²⁰⁸ Already during the dawn of the Internet, it was apparent that despite the wish for it to be an entire free zone of conduct, some regulation would be inevitably imposed.²⁰⁹ After almost two decades, scholars have proposed to perceive online rulers as “public utilities,” namely essential services for public function²¹⁰

regulation of the Internet”). See also Berman, *supra* note 107, at 1270, 1289–93 (challenging the ill-consequences of the state action doctrine by adoption of constitutional principles in the civil society as common and shared values, on a cultural level).

207 See Perritt, *supra* note 206, at 268. See also Laurence R. Helfer & Graeme B. Dinwoodie, *Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy*, 43 WM. & MARY L. REV. 141, 241 (2001) (stressing that international organizations could potentially insert public law norms into the operation of national private entities: “Admittedly, ISPs are nominally applying United States copyright law to these disputes, not non-national or international law. However, the rules applicable to notice and take down disputes may well evolve away from purely national roots toward contract enshrined norms and practices not tied to any particular prescriptive authority”).

208 See, e.g., Balkin, *supra* note 128; Aswad, *supra* note 124; Bloch-Wehba, *supra* note 5; Keller, *Who Do You Sue?*, *supra* note 6. See also Derek E. Bambauer, *Cybersieves*, 59 DUKE L.J. 377, 379, 393–401 (2009) (proposing the global democratic procedural principles of accountability and transparency for the operation of the “cyberspace,” without any pre value-based assumptions); JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* 224 (2012) (proposing more operational transparency by online intermediaries); Ira Steven Nathenson, *Super-Intermediaries, Code, Human Rights*, 8 INTERCULTURAL HUM. RTS. L. REV. 19, 149–168 (2013) (proposing the application of “Digital Due Process” to online intermediaries, including three major parameters: accuracy, transparency, and participation).

209 See Perritt, *supra* note 206, at 266.

210 See K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1668–70 (2018) (arguing that Internet platforms take on the characteristics of infrastructure and ought to be regulated as public utilities); see also *supra* note 131.

or as entities which govern the backbone of democracy,²¹¹ which therefore should be subject to some basic public law principles. The legal consequence for imposing public law standards would be varied and may include obligations for setting clear and transparent rules of operation, for securing equality between all users, for giving reasoned decisions, and a right to file an appeal with respect to such decisions to an objective quasi-judicial body. In other words, these online rulers should serve as gatekeepers for digital human rights who therefore would be subject to some administrative law standards, akin to the Global Administrative Law trend.

The next question is what the legal mechanism for promoting such legal move should be, and whether the doctrine of hybrid bodies is apt for such a task. With respect to mass media, already in 1997, in the pre-Human Rights Act era, the British Court left open the issue of whether a private radio station should be subject to judicial review, while stressing the important public function of radio services.²¹² One could expect that twenty years later, in light of the emergence of the digital environment described above, and considering the important role of Digital Human Rights and freedom of speech, some of the major online rulers would be perceived as serving at least some public function and therefore should apply at least some public law standards. However, in the British case of *Richardson v. Facebook*, held in 2015, the High Court of Justice refused to hold Facebook and Google as hybrid bodies under British domestic law.²¹³ In rejecting such legal interpretation, the Court referred to the BCC holding, and specifically to Baroness Hale's reasoning, according to which in order for a private body to be regarded hybrid under the Human Rights Act, it needs to carry out a function *on behalf of the public* and be initially assumed responsible by the state, for example by the state's willingness to pay for such activity.²¹⁴

211 See Eyal Benvenisti, *Upholding Democracy Amid the Challenges of New Technology: What Role for Global Governance?*, 29 EUR. J. INT'L L. 9, 55-56, 71 (2018) ("The private social media providers and other ICT companies shape the contemporary governance sphere due to their possession of two major resources: their control of our channels of communication and, from this, their ability to accumulate vast amounts of data that is necessary for commercial and governance purposes.").

212 See *R. v. British Broadcasting Corp., ex parte Referendum Party*, [1997] EMLR 605 (discussing the criteria for time allocation of parties' political campaign before elections).

213 See *Richardson v. Facebook & Richardson v. Google*, [2015] EWHC 3154, at par. 63 (QB) (holding that "Facebook does not act 'in the public interest' in the relevant sense, nor can it conceivably be described as performing 'functions of a public nature'").

214 See *id.*

The British Court in the *Richardson v. Facebook* case preferred a very narrow interpretation to the hybrid bodies doctrine, even if it leaned on the BCC holding. The very short reasoning in this case is not self-explanatory, and it does not present any underlying policy considerations. What parameters would determine which function is conducted on behalf of the public? Is the test asking whether the state would initially be willing to pay for such a service is a relevant one today? The court ignored the centrality of Internet intermediaries in the current societal structure, and it did not take into consideration the function of online platforms as the public digital market square. Moreover, this decision ignores the current reality, in which the private sector initiates cutting-edge functions, based on mass public use, that no state could initially pay for. As the public sphere is evolving, the term “public function” should be a dynamic one as well.

There are several advantages in using the hybrid bodies doctrine for imposing obligations on major online rulers. First, the mere acknowledgment of an entity as a hybrid body is only the opening declarative step that should be followed by an in-depth analysis of the concrete public law standards applicable at stake, which should be made on a case-by-case basis. Truly, once a set of standards is tailored in a certain case, it would reasonably apply to future similar cases. However, in contrast to pure state obligations, the application of public law standards on hybrid bodies could be partial or gradual in terms of time and place.²¹⁵ As hybrid bodies are located in between the private and public spheres, the correlative obligations are a matter of degree that should be designed in accordance to the “weight” of the core nature of the service at stake as a “public function.” In that sense, the hybrid bodies doctrine is a dynamic one.²¹⁶ The inherent flexibilities of the hybrid bodies doctrine are of great importance to the case of online rulers, since they involve a complex set of competing interests, including various clashing Digital Human Rights: those of the platforms versus those of the users.²¹⁷ The dynamic and gradual model allows all stakeholders a deliberative adaption of

215 See Perritt, *supra* note 206, at 266 (observing, already in 2001, that some policy with respect to the Internet governance should be developed, stating that “they need some rough, practical benchmarks to decide where private regulation should stop and public regulation begin. They need to be able to define the boundaries, at least rough boundaries, between the public and private spheres.”).

216 See the BCC case, *supra* note 194.

217 See Van Loo, *supra* note 2, at 1327 (arguing that regulators must take an interdisciplinary approach in order to create integrated rules).

their acts and behavior, and in that regard, to a degree it emulates soft regulation mechanisms, such as codes of conduct.²¹⁸

Second, a major advantage of the hybrid bodies doctrine in the context of online rulers is its global reach. The doctrine implies the use of basic administrative law standards, which are common in all democracies. Moreover, as explained above, in the past few decades, Global Administrative Law has been a developing legal branch of public law, where supra-state authorities operate in accordance with certain shared core administrative standards of accountability.²¹⁹ It would be perfectly in line to further stretch its reach to global, multinational, online corporations.²²⁰ Internet governance could not be left up to domestic rules for long,²²¹ and there are growing signs of cross-border regulation (except for the EU level).²²²

Finally, the adoption of the hybrid bodies doctrine could be done via various legal paths that would fit diverse legal traditions. It may be adopted by a Court ruling, following the British tradition that allows direct application of the doctrine via the Human Rights Act.²²³ It may follow the German tradition, which allows indirect application of human rights standards in all areas of law.²²⁴ It may also be adopted by a concrete piece of legislation, as it was done in several European countries, such as the new German legislation imposing certain obligations on a major social network, such as transparent decision-making concerning the removal of hate speech.²²⁵ Although this legislation is

218 See Perritt, *supra* note 206, at 301–05 (discussing a wide range of duties and standards that could be imposed on online private entities, such as: accountability, independent self-regulatory bodies, inclusion of public representatives in such bodies, application of the measure of proportionality, rationality, fair process); see also *supra* notes 47–49 and accompanying text.

219 See *supra* notes 181–81 and accompanying text.

220 See Benvenisti, *supra* note 211, at 71, 79–81 (arguing, in the context of access to big data, which is generated by major online corporations, that the imposition of some global administrative principles over these private entities is justified).

221 See MacKinnon et al., *supra* note 48, at 22–25.

222 See Andrew Keane Woods, *Litigating Data Sovereignty*, 128 YALE L.J. 328 (2018) (exploring case law challenging national sovereignty against large internet firms); see also *Google Inc. v. Equustek Solutions Inc.* [2017] 1 S.C.R. 824 (granting a (controversial) “global injunction”).

223 See *supra* notes 186–87 and accompanying text (describing how the notion of a hybrid public/private body allows the United Kingdom to directly impose certain human rights standards).

224 See *supra* notes 172–71 and accompanying text (discussing German law’s application of human rights standards in the private and public spheres).

225 *Netzwerkdurchsetzungsgesetz [NetzDG] [Network Enforcement Act]*, Sept. 1, 2017, Bundesministerium der Justiz und für Verbraucherschutz [BMJV] at 3352 (Ger.); see Thomas Wischmeyer, ‘What is Illegal Offline is Also Illegal Online’—The German Network Enforcement

aimed at pushing online platforms to remove content, and some fear the ill-consequences of such removal on legal content and free speech,²²⁶ it nevertheless serves as an example for the upfront introduction of public law obligations on private bodies, keeping in mind democratic values.²²⁷ Yet, if a legislative measure is taken, it should reflect a balanced mechanism, protecting free speech as its underlying rationale.²²⁸ The question remains as to the doctrine's adaptability to U.S. law. Despite the rigid trend of the U.S. Supreme Court concerning the scope of state action doctrine, there is still room for the adoption of the hybrid bodies doctrine by U.S. courts, as both doctrines are basically interpretive legal tools. As it was suggested, the U.S. Supreme Court needs only to be convinced that the relevant question is how a "space" is used and not just who owns it when deciding if it is "public."²²⁹ Moreover, once the Court ruled that a private stakeholder at stake is nevertheless a "state actor" for that purpose, then it would take only one step further, in line with the state action doctrine, to conclude that in such a case a dynamic set of public law standards may apply.²³⁰ Although dissenting, in the

Act 2017, in FUNDAMENTAL RIGHTS PROTECTION ONLINE: THE FUTURE REGULATION OF INTERMEDIARIES 28-56 (Bilyana Petkova & Tuomas Ojanen eds., Elgar 2019) (providing a review and analysis of this new enactment and its social and political background).

- 226 See Mathias Hong, *The German Network Enforcement Act and The Presumption In Favour of Freedom of Speech*, VERFASSUNGSBLOG (Jan. 22, 2018), <https://verfassungsblog.de/the-german-network-enforcement-act-and-the-presumption-in-favour-of-freedom-of-speech/> (arguing that "the regulatory model of the NetzDG . . . amounts to a call for massive 'overblocking'").
- 227 See Heidi Tworek, *How Germany is Tackling Hate Speech*, FOREIGN AFFAIRS (May 16, 2017), <https://www.foreignaffairs.com/articles/germany/2017-05-16/how-germany-tackling-hate-speech> (describing Germany's long-held belief in limiting free speech to protect democracy). See also Wischmeyer, *supra* note 225, at 7 (claiming that "the NEA compels companies to consider in their assessment of what can be posted online also [German] fundamental rights. In this sense, the NEA can also be understood as part of the business and human rights movement").
- 228 See Hong, *supra* note 226 (claiming that: "[W]hen balancing freedoms of expression against other protected interests, there is a fundamental presumption in favour of freedom of speech. This presumption applies at least to speech on matters which substantially affect the public The presumption in favour of freedom of speech also [indirectly] binds private Internet companies such as Facebook, Google, and Twitter. Since *Lüth* it was [also] applied to the general so-called indirect third-party effect of freedom of expression in private relations.").
- 229 See *Developments in the Law: State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1310 (2010); Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295, 1306 (1998) (arguing that cyberspace changes the traditional notions of location in the context of sovereignty and regimes of law).
- 230 See Mor, *supra* note 127 (expressing a similar view on "applying public law norms" to social network sites); Nathenson, *supra* note 205, at 149-56 (proposing the application of "Digital Due Process" on online intermediaries).

very recent case of *Manhattan Community Access Corp. v. Halleck*, four Justices thought that a private cable TV operator is subject to freedom of speech obligations due to the fact that it operated under a state contract that supplied the physical infrastructure and nothing more.²³¹ It remains to be seen how the American courts would rule in the case of a mega-online ruler's conflict with a robust user's Digital Human Right.

B. The Infringing Content Monitoring Case Study

Allegedly copyright infringing content monitoring could serve as a case study. As described above, content monitoring creates a major hurdle to the accomplishment of Digital Human Rights, whether it is done by the American mechanism of notice-and-takedown or the European style of blocking orders.²³² Legal content and speech thus may be foreclosed. Can online rulers be indifferent to such results? Can they simply remove or block content upon an *ex-parte* request? Should there be any procedural safeguards for the non-represented users? Should there be any procedural safeguards for balancing Digital Human Rights?

Let's inspect more closely the path of blocking orders, which is seemingly applicable in the U.S. as well.²³³ In these cases, a major copyright stakeholder usually reaches out to an ISP or a platform, requesting to block a website that contains allegedly infringing materials. The ISP/platform is an uninvolved third party, caught between the applicant and the alleged infringer. As a private corporation, it wishes to diminish any legal risk and expenses, therefore the immediate default would be to block. Even if the ISP/platform enjoys immunity under a domestic scheme, it may still prefer to block the website, since the immunity's scope is national. The ISP/platform's indifference on the matter is deeply rooted in its basic motivation. Therefore, even if domestic law requires a mandatory judicial blocking order and prohibits voluntary blocking, the ISP/platform nevertheless would not voluntarily oppose such a request and would not voluntarily invest resources to challenge an order that is granted on an *ex-parte* basis.²³⁴ The problem is clear: The public's voice is not heard in these cases, and therefore the final decision may be one-sided.

231 *Supra* text accompanying note 148.

232 *Supra* part II.B.

233 *See supra* notes 77-71 (noting that blocking orders may be granted on a global scale).

234 *See* SECONDARY LIABILITY OF INTERNET SERVICE PROVIDERS (Graeme B. Dinwoodie ed., 2017) (offering a comparative survey of "secondary liability" imposed on online intermediaries).

The ISP/platform would act as an uninvolved private actor, even though it serves a public function in nature. The same pattern occurs with respect to the notice-and-take down schemes, in which the online intermediary's prime interest is to escape the conflict with minimum expenses and the least amount of harm.²³⁵ The outcome is lack of representation of the public interest and potential harm to users' Digital Human Rights.

By contrast, if the ISP/platform were to be acknowledged as a hybrid body, then there is room for discussing its obligations, stemming from its accountability to guarantee the public's Digital Human Rights. For instance, the ISP/platform may be expected to reveal all relevant information it holds relating to the blocking request at stake; it may be obliged to actively seek for the alleged infringer response; it may be obliged to apply for judicial review on the matter; and if the request is discussed in court, it may be obliged to actively express its reasoned opinion why it is justified or not justified to block the content in the specific case. In other words, the mere status of a hybrid body does not automatically entail the imposition of all state obligations, but rather stresses that the ISP/platform cannot behave indifferently to the case. The ISP/platform should perceive itself, to a certain extent, as a facilitator of the public interest, which he commercially serves. In other words, the ISP/platform is expected to perform certain gatekeeper duties.²³⁶

The Copyright Single Market Directive, described above,²³⁷ provided a significant move for imposing obligations on online rulers, yet it was criticized for imposing such obligations mainly in favor of copyright holders. Considering this result, the importance of applying the hybrid bodies doctrine on the very same entities becomes even more crucial and urgent, since it may provide the judiciary with adequate means to implement the complimentary obligations in favor of users and the public at large. Once the legislature has adopted an active obligation of online rulers to monitor content, there is no reason or justification not to allow the parallel *mandatory* mechanism for promoting a balanced digital speech environment. Whereas the first step was conducted by the legislature, the door was open to the adoption of the flip side

235 See *supra* notes 58–60 and accompanying text (describing online intermediaries' incentives under § 512 of the Copyright Act).

236 An analogy could be drawn from corporate law. See, e.g., Assaf Hamdani, *Gatekeeper Liability*, 77 S. CAL. L. REV. 53 (2003) (observing that the notion that a company and its executives serve as public interest gatekeepers is widely accepted in corporate law).

237 See *supra* notes 84–78, 94–93 and accompanying text.

of the coin through judicial discretion. For example, Article 17 to the Copyright Single Market Directive requires online service providers to provide rightsholders, at their request, with adequate information concerning the “functioning of their practices” with regard to the cooperation between the parties.²³⁸ Being a hybrid body, which thereby is obliged to standards of transparency and equality, this information should be provided to any stakeholder, such as users. In other words, this information should be open to the public.²³⁹ Moreover, it could also be argued that users are entitled to the very same complementary information concerning the functioning of the online service providers’ practices” taken for ensuring that *legal content is not removed*. This is particularly true in light of Article 17 explicit clarification that “The cooperation between online content-sharing service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright,” and especially if the use of the work is permitted by national exceptions and limitations.²⁴⁰ The measures employed should therefore be applied to serve both conflicting sides, *since a hybrid body could not favor or discriminate any party*.²⁴¹ In other words, though the Copyright Single Market Directive presents an asymmetric balance, the judicial doctrine may provide the adequate counterweight, which may lead to a final, symmetric constitutional application of obligations.²⁴² Article 17 (9) further establishes a mechanism akin to the American notice-and-takedown scheme, and emphasizes that out-of-court redress mechanisms for settling disputes “*impartially*” should be available for users.²⁴³ Being a hybrid body, the online service provider would

238 See *supra* note 90.

239 It should be noted that Article 17 (10) states that the Commission will organize stakeholder dialogues to discuss best practices for cooperation between the parties, and that “For the purpose of the stakeholder dialogues, users’ organisations shall have access to adequate information from online service providers on the functioning of their practices with regard to paragraph 4.” In other words, while the Copyright Single Market Directive acknowledges the users’ legitimate interest to have access to this information, it nevertheless does not acknowledge a fully-fledged entitlement of access to such information.

240 See Copyright Digital Single Market Directive, *supra* note 76, at 120 (Article 17 (7)).

241 For a similar view, see Romero-Moreno, *supra* note 98, at 201 (arguing that the then proposed Article 13—currently Article 17—is inconsistent with the fundamental principle of “equality of arms,” namely that “each party must be afforded a fair opportunity to argue their case under conditions which do not put them at a substantial disadvantage vis-a-vis their opponent,” since it fails to provide equal procedural safeguards to users).

242 For a similar view concerning the German Internet Enforcement Act (2017), see Hong, *supra* note 226.

243 See *supra* note 86; Copyright Digital Single Market Directive, *supra* note 82, at 121.

be obliged therefore not only to set up such mechanisms but to ensure that they are operated independently and to fully reveal the procedural work of the mechanisms' operating bodies to verify their impartiality. Otherwise, the requirement for an *impartial* out-of-courts dispute resolution mechanism will not be guaranteed. Moreover, these independent, though in-house, bodies should be obliged as hybrid bodies to give reasons for their decisions, and such decisions should be exposed to external judicial review.²⁴⁴

The common arguments against the introduction of administrative law standards into the operation of online rulers are that (a) it would prevent fast content monitoring operated by automated machines (algorithmic monitoring); (b) it stresses a default of non-removal, which then favors users over rightsholders; and (c) it would place a heavy burden on the judiciary due to the large amount of everyday conflicts.²⁴⁵ There are several answers to these arguments. Concerning the automated mode of operation, the argument is cyclic, since the question is indeed what the working assumptions of the algorithm would be. Even in the case of various kinds of artificial intelligence systems, the initial dataset is still designed according to human policy considerations.²⁴⁶ Therefore, administrative standards do not contradict the use of systems supported by artificial intelligence. There are some examples of cutting-edge artificial intelligence systems that are used in support of judicial decision-making processes;²⁴⁷ therefore a deliberative, transparent artificial intelligence system could be designed for the initial process of content monitoring as well. Concerning the question of what the default principle should be in cases of disagreement—removal or non-removal of content—the

244 For a similar view, see Bloch-Wehba, *supra* note 5, at 80; Langvardt, *supra* note 104, at 394; Kadri & Klonick, *supra* note 138. It should be noted that according to Article 17 (9), the dispute resolution mechanism should be “without prejudice to the rights of users to have recourse to efficient judicial remedies.” See Copyright Digital Single Market Directive, *supra* note 81, at 121. Therefore, the Copyright Digital Single Market Directive only implicitly acknowledge, if at all, that online service providers are obliged to hand reasoned decisions.

245 See Bloch-Wehba, *supra* note 5, at 78–79.

246 See Elkin-Koren & Perel, *supra* note 67, 8 (describing the uses of AI in the legal system).

247 For example, the COMPAS system assess potential recidivism risk. Its use for supporting sentencing decisions was approved by court in some states. See, e.g., *Criminal Law -- Sentencing Guidelines - Wisconsin Supreme Court Requires Warning Before Use of Algorithmic Risk Assessments in Sentencing*. -- State v. Loomis, 881 N.W.2d 749 (Wis. 2016), 130 HARV. L. REV. 1530, 1530–32 (2017) (describing a case involving this issue). See also, Michael Veale, *Algorithms in the Criminal Justice System*, THE LAW SOC'Y OF ENG. AND WALES (2019), <https://www.lawsociety.org.uk/support-services/research-trends/algorithm-use-in-the-criminal-justice-system-report/> (summarizing the potential and pitfalls of AI algorithms in criminal justice)

answer is that the algorithm could be designed with a “tree” of possibilities assessing the strength of the copyright infringement allegation, and the needed weight for an automatic decision of interim removal.²⁴⁸ The algorithm could also be designed in a way that transfers hard cases to human decision-making for the interim period until they are assessed by the independent in-house body for disputes.²⁴⁹ And most importantly, both the algorithm’s design and the manual policy for interim decisions should be transparent.²⁵⁰ Finally, concerning the fear of over-burdening the judiciary, if this is a consideration at all for excluding a body merited for judicial review, then the answer is twofold. First, such fears are often rebutted. Following the common law tradition, after a line of reasoned decision is handed down, more clarity and certainty would be created, thus fewer cases on the matter would be appealed on court. Second, the judicial review may be conducted by a professional administrative tribunal, which despite not cutting the public expenditure would nevertheless save precious judicial time.²⁵¹

C. Alternative Measures: Antitrust Laws

The fear that too much power in the digital realm is in the hands of few private companies clearly leads to the question of whether the problem can

248 For a similar view, concerning recommendations for improving content ID systems in a way that would reduce “false positive” outcomes, see Lester & Pachamanova, *supra* note 100, at 67–72.

249 In line with this stance, Article 17 (9) to the Copyright Digital Single Market Directive obliges decisions to remove content following complaints to be “subject to human review.” See Copyright Digital Single Market Directive, *supra* note 82, at 121. For the need to require a better oversight over content ID systems’ performances, see Lester and Pachamanova, *supra* note 100, at 72.

250 For the view that algorithms in public use should be transparent, see Benvenisti, *supra* note 211, at 60–61. See also, Joshua A. Kroll, Joanna Huey, Solon Barocas, Edward W. Felten, Joel R. Reidenberg, David G. Robinson, & Harlan Yu, *Accountable Algorithms*, 165 U. PA. L. REV. 633, 657–60 (2017) (claiming that transparency is often essential for accountability but that in many cases transparency is not enough).

251 In Italy and Spain, the ordering of website blocking was entrusted to a specialized administrative authority, which therefore is obliged to consider human rights’ implications. See Martin Husovec, *How Europe Wants to Redefine Global Online Copyright Enforcement*, in PLURALISM OR UNIVERSALISM IN INTERNATIONAL COPYRIGHT LAW 513, 522 (2019) (elaborating on the Italian model of regulation).

and should be treated by antitrust laws.²⁵² Under § 2 of the Sherman Act,²⁵³ as interpreted by courts, a monopoly that was acquired through prohibited conduct, such as exclusive dealing, price discrimination, product tying and predatory pricing, has committed an offense which is subject to judicial remedies.²⁵⁴ These remedies may include forcing large organizations to be broken up, be run subject to positive obligations, and massive penalties may be imposed.²⁵⁵ Therefore, the problem described above, of the dominance of the online rulers in the digital speech environment may be potentially treated by the alternative path of antitrust remedies: either by forcing the mega online rulers to break-up into smaller corporations or by setting positive obligations, such as the ones discussed above, concerning quasi-administrative virtues. The U.S. antitrust agencies, which are also mandated to protect consumers, have already taken measures against major online platforms in order to prevent conduct harmful to consumers, such as misrepresenting security or privacy practices.²⁵⁶ Yet, the issue of content monitoring and free speech concerns have not been regulated by these agencies thus far.

While there exists a potential alternative antitrust path, it is less realistic to tackle the specific problem of threat to freedom of speech. Antitrust law,

252 See Terrell McSweeney, *FTC 2.0: Keeping Pace with Online Platforms*, 32 BERKELEY TECH. L.J. 1027, 1028–30 (2017) (proposing antitrust enforcement under the FTC Act as a tool for treating the online platforms' over market power). See also Jack Nicas, Karen Weise & Mike Isaac, *How Each Big Tech Company May Be Targeted by Regulators*, N.Y. TIMES (Sept. 8, 2019), <https://www.nytimes.com/2019/09/08/technology/antitrust-amazon-apple-facebook-google.html> (outlining the scope of government investigations and potential action against large tech firms).

253 Sherman Act, 15 U.S.C. § 2 (2018).

254 See *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (citing *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 343). See also Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 ANTITRUST L.J. 713, 726–37 (2014) (describing the “rule of reason” that was developed by the Supreme Court, according to which only unreasonable restraints would be considered as violation of the Antitrust laws).

255 Federal Trade Commission Act, 15 U.S.C. § 45 (2018). For a description of the investigating and enforcing authorities of the Federal Trade Commission (“FTC”), which is one out of the two U.S. agencies enforcing antitrust laws, see FED. TRADE COMM'N, *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority* (Oct. 2019), <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority>. For an in-depth analysis of the enforcing tools of both the Antitrust Division of the Department of Justice (DOJ) and the FTC, see Jonathan B. Baker, Jonathan Sallet, & Fiona Scott Morton, *Unlocking Antitrust Enforcement*, 127 YALE L.J. 1916 (2018).

256 See McSweeney, *supra* note 252, at 1035–37 (“[T]he FTC has brought more than 500 cases protecting the privacy or security of consumer information.”).

generally speaking, is aimed at preventing constrains on trade.²⁵⁷ Therefore, antitrust laws are thus far focused on crafting prohibited commercial practices, which results in the accumulation of a monopolistic market power that at the end of the day may prevent free competition.²⁵⁸ Accordingly, the Big Five technology companies were initially under investigation concerning concrete commercial practices that traditionally fall under the auspices of antitrust law.²⁵⁹ For example, Facebook's practice of mass acquisition of companies, including major social platforms such as WhatsApp (the global messaging application used by more than a billion people) and Instagram, could possibly be viewed as a method of maintaining the company's dominance over social media networks, which violates antitrust laws. The prohibited act, then, would be the consolidation of social media.²⁶⁰ Yet, the byproduct of such practice concerning massive content monitoring and harm to the free digital speech is not a direct trade issue, and it does not directly concern free competition in the market. Antitrust laws would traditionally be concerned by the lack of ability of potential competitors to enter the social media market and the subsequent harm done to consumers in terms of price and quality of services. It is doubtful whether antitrust laws, including consumer protection, could challenge commercial practices that pose a problem to free speech without

257 The FTC explains the underlying rationale of antitrust laws as follows: "Yet for over 100 years, the antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up." FED. TRADE COMM'N, *The Antitrust Laws*, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws>.

258 The FTC perceives its mandate as follows: "The FTC will challenge anticompetitive mergers and business practices that could harm consumers by resulting in higher prices, lower quality, fewer choices, or reduced rates of innovation. We monitor business practices, review potential mergers, and challenge them when appropriate to ensure that the market works according to consumer preferences, not illegal practices." FED. TRADE COMM'N, *What We Do*, <https://www.ftc.gov/about-ftc/what-we-do>.

259 See Jack Nicas et al., *supra* note 252 (discussing the investigations of antitrust issues in technology companies). For a discussion concerning Google's allegedly product tying practices and comparing the E.U. and U.S. treatment of tying claims, see Travis Clark, *Google v. Commissioner: A Comparison of European Union and United States Antitrust Law*, 47 SETON HALL L. REV. 1021 (2017). For a more general discussion concerning online platforms commercial conduct as a consumer law problem, see Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 YALE L.J. 2142, 2143-45 (2018).

260 See Jack Nicas et al., *supra* note 252 ("In Washington, Brussels and beyond, regulators and lawmakers are investigating whether the four technology companies have used their size and wealth to quash competition and expand their dominance.").

any direct implications on trade constrains.²⁶¹ In other words, although the problem that this article is challenging stems from the dominance of online rulers in their respective markets, it is nevertheless not a traditional antitrust or a consumer protection question. The problem discussed in here is that these online rulers govern the *democratic discourse*. Therefore, as proposed above, since the problem is a public law question, it should be treated by public law measures.

Moreover, on a pragmatic level, the legal measure regarding hybrid bodies proposed to tackle the problem of content monitoring is easier and faster to implement. All it takes is a judicial decision acknowledging an online ruler as a hybrid body and setting the concrete obligation imposed. These measures could be calibrated on a case-by-case basis, as the imposition of quasi-administrative obligations would be determined by a concrete and specific judicial decision. In contrast, antitrust procedures may be very long and complicated,²⁶² could involve political players, and their final outcomes may be “overshooting,” such as the breakup of corporations and criminal procedures.²⁶³ Internet rulers’ activity should not be stopped but rather regulated.

CONCLUSIONS

The digital information environment is operated by a pyramid of “in-between” actors, known as online intermediaries. All these online actors are involved in the flow of information, and thus they may function as “valves” that control the traffic of content in their “pipelines.” Thus far, the control over the flow of information is handled by these actors with almost no regulation and according to their own policies driven by commercial considerations. Therefore, these online intermediaries have become, in fact, the *online rulers*. However, the issue of online content monitoring stands at

261 For a similar view, see McSweeney, *supra* note 252, at 1038–39 (stressing that the U.S. antitrust agencies are “optimized to stop practices inflicting concrete harms on consumers and competition, so the agency cannot address broader public interest concerns arising from the power of online platforms in our digital economy”).

262 See *id.* at 1034 (“[A]ntitrust cannot keep pace with rapidly evolving technology markets [A]ntitrust litigation can proceed slowly over the course of many years”).

263 For the view that the large size of media corporation has also many advantages, see Brenner, *supra* note 22, at 1027 (stressing that “[l]arger companies possess abilities that can produce greater diversity for society Second, large companies are often better positioned to combat government censorship and support First Amendment freedoms”).

the heart of contemporary social and legal discourse, since it challenges other public, individual, or commercial entities' constitutional rights and freedoms, such as freedom of speech, or, more broadly, other "digital human rights."

Online rules are facing a new legal and social challenge since they are expected to strike the appropriate human rights balance despite being private commercial entities. This phenomenon could be demonstrated through several examples concerning content monitoring in cases of allegedly copyright infringement, such as the legal schemes of "notice and takedown" or "blocking orders." The online rulers are expected to act as gatekeepers for the sake of public interest—but with no legal and social infrastructure.

Against this background, the proposed research aims to explore whether and how some of the basic public law standards, such as accountability, transparency, equality, and reasoning, could be imposed on relevant private entities that are currently engaged in online content monitoring. European countries, in contrast to the U.S., are more willing to accept the introduction of public law standards into the private law sphere. An accepted doctrine acknowledges that in some cases, private entities, such as commercial companies that serve a social function in nature, may be perceived as a *hybrid private/public body*. The legal consequence stemming from such perception is that the door opens for the direct imposition of public law standards on the relevant private entity. This article proposes that in relevant cases major online rulers should be acknowledged as hybrid bodies in order to promote a fair and balanced digital information environment. There are many advantages to using this doctrine, which allows a gradual and dynamic application of public law principles, and on a global scale. The challenge for such a potential legal move in the U.S. is greater, considering the current interpretation of the "state action doctrine," which hinders the imposition of constitutional rights and obligations on private entities. Nevertheless, this rigid approach stems from a judicial doctrine that could be relaxed by further judicial and legal elaborations. The significance of this proposed research, therefore, lies in its potential to assist in shaping better policies and practices for the future—policies that can and should be initiated by the U.S. judiciary.

In the past, the word "ruler" referred to the sovereign or the king or queen of a realm. In modern democracies, the term reflects the perception that *the*

*people's will rules.*²⁶⁴ *The digital environment has become the backbone of democracies. Therefore, the time is ripe for online rulers to move from perceptions of the past to democratic ones.*

264 See "Sovereign," OXFORD LEXICO UK DICTIONARY, <https://www.lexico.com/en/definition/sovereign> (defining the term as "[p]ossessing supreme or ultimate power" and providing the example sentence that "in modern democracies the people's will is in theory sovereign"). See also Cass Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 256 (1992) (discussing the nexus between modern sovereignty and freedom of speech).