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Back up: Can Users Sue Platforms to Reinstate Deleted Content?

A Comparative Study of US and German Jurisprudence on 'Must Carry'

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Abstract: A private order of public communication has emerged. As social network services fulfil important communicative functions in political communication processes, the question of public interest and public law-based limits to their private power has to be carefully considered. A lot has been written about the failings of companies in deleting problematic content. This paper flips the question and asks under which conditions users can sue to reinstate content and under which circumstances courts have recognized 'must carry' obligations for social network services. We will analyze this question looking at a selection of US and German court cases on the question of reinstatement of accounts and republication of deleted posts, videos and tweets. We will draw out the differences in constitutional and statutory law and explain the divergence. Our analysis will also point to a larger issue of systemic relevance, namely the differences in treatment of states and private companies as threats to and/or guarantors of fundamental rights in the jurisdictions under comparison. Finally, we will show why it is important to not *think about private ordering of communication as separate (or even separable) from the public interest.*

Keywords: platforms, intermediaries, private spaces, courts, Drittwirkung, indirect application of human rights

1. Introduction

In Germany, the Facebook account of a right-wing party is suspended three weeks before the European parliamentary election. The starting point for the ban was a Facebook post from January 2019 about a 'Winter aid' booth in Zwickau. It said, among other things, about the Neuplanitz district: 'While more and more asylum seekers from other cultures and backgrounds were accommodated in flats in the prefabricated buildings there, sometimes expressing their gratitude with violence and crime, quite a few Germans in the neighbourhood have hardly any prospects'.[1]

Also in Germany, a Facbook user was suspended for thirty days for commenting, at least 100 times since 2014, 'Refugees: detain them until they voluntarily leave the country!'[2] Facebook deleted the post and blocked the account of the user for thirty days.

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[1] BVerfG, 1 BvQ 42/19, decision of 22 May 2019.
[2] Higher Regional Court Karlsruhe (OLG Karlsruhe), decision of 25 June 2018 - Az. 15 W 86/18.

In Norway, the journalist Tom Egeland had posted seven photos on Facebook in the context of an article exploring the role of images in warfare. These included the 1972 Pulitzer Prize-winning photo by Nick Út of a Vietnamese girl, Phan Thị Kim Phúc, running naked from a Napalm attack by US troops by press photographer Nick Ut, which is found in history books around the world and has become a symbol of the atrocities during the Vietnam War. Facebook deleted the post because of the nudity of the girl.[3]

These cases serve to illustrate the potential impact of platforms and their terms of services on freedom of expression and communication. Since a quickly growing percentage of communication takes place online, platforms that are privately owned communication spaces have become systematically important for public discourse, in itself a key element of a free and democratic society.[4] The evolution of the Internet has become determinative for our communicative relations.[5] As the European Court of Human Rights noted in 2015, the Internet is 'one of the principal means by which individuals exercise their right to freedom to receive and impart information and ideas, providing [...] essential tools for participation in activities and discussions concerning political issues and issues of general interest.'[6] It plays 'a particularly important role with respect to the right to freedom of expression.'[7] Due to technological innovation these platforms are now able to regulate speech in real time at any time. The platforms do not only set the rules for communication and judge on their application but also moderate, curate and edit content according to their rules. Speaking from a constitutional perspective, they combine the tasks of all three separate powers of states – law-making, judication and execution, plus the role of the press.[8]

This private power is unprecedented and sits uneasily with the primary responsibility and ultimate obligation of states to protect human rights and fundamental freedoms in the digital environment. But states do not only have the negative obligation to refrain from violating the right to freedom of expression and other human rights in the digital environment but also the positive obligation to protect human rights. The present paper asks whether and in what way this duty extends to platforms, especially social networks, and to the reinstatement of user comments that may have been wrongfully deleted. Put concisely: Under what circumstances do (and should) platforms incur 'must carry' obligations as a question of law and policy?

We will analyze this question looking at a selection of US and German court cases on the question of reinstatement of accounts and republication of deleted posts, videos and

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[3] BBC, Fury over Facebook 'Napalm girl' censorship, 9 September 2016, https://www.bbc.com/news/technology-37318031.

[4] See *Hölig*, Sascha / *Hasebrink*, Uwe, Reuters News Study 2019, pp. 5-8; https://www.hans-bredow-institut.de/uploads/media/default/cms/media/os943xm_AP47_RDNR19_Deutschland.pdf.

[5] Cf. for this section, *Kettemann*, Matthias C., Network Enforcement Act, Deliberative Briefing Materials for the Internet Governance Forum Germany, 2018.

[6] ECtHR, Cengiz and Others v. Turkey, judgment of 1 December 2015, § 49.

[7] Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries, 7 March 2018, PP 2.

[8] *Kadri*, Thomas and *Klonick*, Kate in 'Facebook v. Sullivan: Public Figures and Newsworthiness in Online Speech at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3332530, 1.

tweets. We will draw out the differences in constitutional and statutory law and show why they explain some of the divergence. We will also point to a larger issue of systemic relevance, namely the differences in treatment of states and private companies as threats to and/or guarantors of fundamental rights between the jurisdiction under review.

Some research on this issue of 'whom to sue?', when content is deleted and the challenges that are involved in the US, has already been conducted.[9] These analyses, however, seem to accept and appreciate the dual systems of remedy.[10] In fact, they consider a culture on platforms that would oblige platforms to carry all legal speech, a potential threat to free speech and to the economic interests of the platforms.[11]

We will show that the key to understanding 'must carry' is to overcome the public/private distinction in law. We will also show that 'must carry' obligations need to be understood in the context of the impact of platforms as gatekeepers of discourse platforms where a growing number of societally relevant debates are (also) taking place. Recognizing this, platforms, we submit, have to implement a transparent and consistent process of balancing the interests at stake.

In comparative case studies of US and German courts we will address the following questions: Can users sue platforms to have deleted posts and videos reinstated? Do they have a right to a Facebook or Twitter account? Do platforms have corresponding duties to treat users equally in furnishing these services as long as users do not violate the terms of service or as long as users do not violate local law?

After a brief analysis of the challenges of regulating online speech between state duties and private obligations (2), the jurisprudence of US (3) and German (4) courts will be presented. On this basis we proceed with a critical assessment of the horizontal effects of (especially) human rights on private contracts (5) and draw conclusions (6).[12]

2. Private and public freedom of expression governance

In times of digitality, online communicative spaces have enriched public offline spaces, e.g. town squares or district assemblies. This is a challenge for states that continue to have the primary responsibility and ultimate obligation to protect human rights and

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[9] *Keller*, Daphne 'Who do you sue? State and platform Hybrid power over online speech' a Hoover Institution Essay, National Security, Technology and Law Aegis Series Paper No. 1902 (2019), https://www.hoover.org/sites/default/files/research/docs/who-do-you-sue-state-and-platform-hybrid-power-over-online-speech_0.pdf.

[10] *Kadri*, Thomas and *Klonick*, Kate in 'Facebook v. Sullivan: Public Figures and Newsworthiness in Online Speech' at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3332530&download=yes, 1.

[11] *Keller* (2019).

[12] Research for this paper has been conducted within the framework of Research Program 2: *Regulatory Structures and the Emergence of Rules in Online Spaces* (headed by Matthias C. Kettemann and Jan-Hinrik Schmidt) and the leading project *Doing Internet Governance: Constructing Normative Structures Inside and Outside Intermediary Organisations* (headed by Wolfgang Schulz and Matthias C. Kettemann) at the Leibniz Institute for Media Research | Hans-Bredow-Institut (HBI), Hamburg.

fundamental freedoms, online just as offline. All regulatory frameworks they introduce, including self- or co-regulatory approaches, have to include effective oversight mechanisms over the companies *de jure* and *de facto* controlling the private communication spaces and be accompanied by appropriate redress opportunities. However, the normativity inherent in the primary responsibility of states to protect human rights is at odds with the facticity of online communicative practices that are primarily regulated by the rules of intermediaries.

The private sector assumes a distinct role that reveals the specificity of the Internet: the vast majority of communicative spaces on the Internet are privately held and owned. These intermediaries, including social media companies, today have become important normative actors.[13] Network effects and mergers have led to the domination of the market by a relatively small number of key intermediaries.

Social media companies set the rules for the private *public* online spaces they control. Some do it via Community Standards,[14] others via their terms of service. While in some jurisdictions[15] judges have applied the concept of indirect third-party effect of fundamental rights (*Drittwirkung*) to online spaces. Social media companies remain – for the foreseeable future – the norm-setters regarding online communicative spaces. Understanding the theory and practice of the private norm-setting process is thus essential. Intermediaries set the rules for communication and thereby define what they understand as 'desirable communication'. Eliminating 'unproductive' information and communication translates into more productivity, acceleration and growth in today's immaterial production environment.[16] The commodity at stake in online platforms is not just the user, but rather it is the content created and engaged with by user culture.[17] This user culture is shaped by the specific rules of the platform. But there is no market of rules. As Balkin puts it: 'There is no competition between social media platforms themselves, because they are complementary, not substitute, goods.'[18] However, private companies have an overriding interest in creating a hospitable communication environment that fosters and attracts advertisement and business activity.[19]

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[13] Globally, by the end of 2017, Facebook had reached two billion active monthly users, YouTube 1.5 billion, WhatsApp 1.2 billion, WeChat 889 million, Instagram 700 million and Twitter 330 million. See *Zakon*, Robert; Hobbes' Internet Timeline 10.2.

[14] E.g. Facebook, Community Standards, https://m.facebook.com/communitystandards.

[15] E.g. Germany – BVerfG, Beschluss der 2. Kammer des Ersten Senats vom 22.5.2019 , 1 BvQ 42/19, http://www.bverfg.de/e/qk20190522_1bvq004219.html; LG Berlin, Beschluss vom 23.3. 2018 - Az. 31 O 21/18; LG Offenburg, Urt. v. 26.9.2018 - 2 O 310/18; OLG München, Beschl. v. 27.8.2018 - 18 W 1294/18; AG Tübingen Urt. v. 05.10.2018 - 3 C 26/18; LG Bamberg, Urt. v. 18.10.2018 - 2 O 248/18

[16] *Han*, Byung-Chul; „Krise der Freiheit' in Psychopolitik – Neoliberalismus und die neuen Machttechniken, 2014, S. Fischer Verlag Wissenschaft, Frankfurt am Main at page 19.

[17] *Balkin*, Jack M.,; Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society, 79 N.Y.U. L. Rev. 1 (2004) at page 4-6.

[18] *Pasquale*, Frank 'Privacy, Antitrust, and Power,' 20 G. MASON L. REV. (2013), at page 1009 (1014). https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2347&context=fac_pubs

[19] *Klonick*, Kate; 'The New Governors: The People, Rules, and Processes Governing Online Speech, 2018, 131 Harv. L. Rev. at page 1590 (1615).

The business model of platforms is fundamentally dependent on communication. To put it with the words of Noah Feldman: 'No voice, no Facebook'.[20] In the end, it will remain a business decision to do anything to protect voice, meaning 'desirable communication' in the view of the social network services. By favouring this kind of communication, they have changed the social condition of regulating quasi-public speech.[21] In that way the motivation to safeguard the right of free speech differs significantly from the persuasion shared by liberal democratic societies. The clash of opinions is 'absolutely constitutive for a liberal democratic state order, for it makes possible only the constant intellectual confrontation, the clash of opinions, which is its vital element (...)'. In a certain sense it is the basis of all freedom at all, 'the matrix, the indispensable condition of nearly every other form of freedom' (Cardozo)'.[22] Clashing opinions by definition include *negative* communication.

In an environment that promotes and protects only to that degree that speech is still good for business, clash oesf opinions will not always be desired and protected. It could rather be considered a hinderance. But in line with the UN Guiding Principles on Business and Human Rights and the 'Protect, Respect and Remedy' Framework ('Ruggie Principles')[23], intermediaries should respect the human rights of their users and affected parties in all their actions (including the formulation and application of terms of service) in order to address and remedy negative human rights impacts directly linked to the operations and committed through business relationships. The Ruggie Principles are part of a Human rights-based approach to content moderation but are not formally binding. [24]

In light of the persuasive power of the Ruggie approach, however, intermediaries have committed to human rights-inspired values and principles that have certain self-constitutionalizing functions. Facebook's Oversight Board, for example, has been given substantial leeway in framing selected norms that apply to online speech on Facebook's platform.[25] Facebook has undertaken to implement the Board's decision 'to the extent that requests are technically and operationally feasible and consistent with a reasonable allocation of Facebook's resources.'[26] Next to authenticity, safety, privacy and dignity, Facebook favours thus voice as the paramount value and states:

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[20] Noah Feldman in Conversation with Mark Zuckerberg and Jenny Martinez, 27 June 2019: https://newsroom.fb.com/news/2019/06/mark-challenge-jenny-martinez-noah-feldman/
[21] *Balkin*, J.M.; 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society' (2004) 79:1 New York University Law Review, at page 2.
[22] BVerfGE 7, 198 (208) citing U.S. Supreme Court Justice Benjamin N. Cardozo in *Palko v. Connecticut*, 302 U.S. 319 (1937), translation by the author.
[23] *See* 'Ruggie Principles': Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN Doc. A/HRC/17/31 of 21 March 2011.
[24] Forthcoming: *Sander,* Barrie: 'The Freedom of Expression in the Age of Online Platforms: Operationalizing a Human Rights based approach to content moderation' at page 19 et seq.
[25] Facebook, Oversight Boards, Structure, https://newsroom.fb.com/news/2019/09/oversight-board-structure.
[26] Ibid.

> *'The goal of our Community Standards is to create a place for expression and give people voice. Building community and bringing the world closer together depends on people's ability to share diverse views, experiences, ideas and information. We want people to be able to talk openly about the issues that matter to them, even if some may disagree or find them objectionable. In some cases, we allow content which would otherwise go against our Community Standards – if it is newsworthy and in the public interest. We do this only after weighing the public interest value against the risk of harm, and we look to international human rights standards to make these judgments.'*[27]

This reliance on 'newsworthiness' or 'public interest' as criteria to allow content that would otherwise be deleted echoes similar policies at Twitter, which redefined the importance of public interest for its network:[28]

> *Serving the public conversation includes providing the ability for anyone to talk about what matters to them; this can be especially important when engaging with government officials and political figures. By nature of their positions these leaders have outsized influence and sometimes say things that could be considered controversial or invite debate and discussion. A critical function of our service is providing a place where people can openly and publicly respond to their leaders and hold them accountable.*
>
> *With this in mind, there are certain cases where it may be in the public's interest to have access to certain Tweets, even if they would otherwise be in violation of our rules. (...). We'll also take steps to make sure the Tweet is not algorithmically elevated on our service, to strike the right balance between enabling free expression, fostering accountability, and reducing the potential harm caused by these Tweets.*

These statements matter. They show that social networking services begin to see that just evaluating content on the basis of their terms of service (and deleting content, if it falls foul of a private norm) might lead to unjustified (or unjustifiable) decisions. Taking up one of the examples with which we opened the paper: Clearly *a* picture of an unclothed child is a violation of Facebook's Community Standards. But, the picture of *this* unclothed child, of Phan Thị Kim Phúc, has a special place in history. Deleting it, carries a different *message*. Even though, this set of values and the Commitment to the Ruggies principles as a 'social licence to operate'[29] show a general willingness of private actors to comply with core constitutional and human rights principles. However, 'content' remains the essence of the platforms. Especially in light of potential liability risks, substantiated e.g. by the fines companies can incur under the German Network Enforcement Act (NetzDG), they will promote 'desirable communication' on the platform

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[27] Monika Bickert, Vice President, Global Policy Management, 12 September 2019: https://newsroom.fb.com/news/2019/09/updating-the-values-that-inform-our-community-standards/
28 Twitter, Defining Public Interest on Twitter, 27 June 2019, https://blog.twitter.com/en_us/topics/company/2019/publicinterest.html
[29] Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights', A/HRC/8/5, 7 April 2008, at para. 54.

and moderate content accordingly. To minimize the risk of being held liable for (potentially) illegal content is a strong driver for platforms in regard to the question how they draft their rules. In this regard, the ruling of European Court of Justice (CJEU) *Glawischnig-Piesczek v Facebook Ireland Limited* is relevant. Since the CJEU chose to follow Advocate General Szpunar's Advisory Opinion,[30] negative implications for free speech are not unlikely: caught like 'dolphins in the [tuna] net',[31] legal speech might be overblocked. The CJEU ruled that EU law does not preclude national courts ordering social network services to seek, identify and delete comments identical to illegal comments and equivalent comments from the same user - globally. [32]

There is some content that companies want (good voice), some content that companies put up with (neutral voice) and some content they a) wish to (unwanted voice) or b) legally have to delete (illegal voice). The question now arises how – in the US and the German jurisdictions – courts have dealt with arguments that unwanted voice should be reinstated as long as it is not illegal. Through the lens of the 'must carry' approach we will now take a closer look at the situation in the United States and Germany and show how 'must carry' is sometimes the only way to guarantee effective protection of speech online.

3. Private spaces under private rules: the US approach

In the US, courts have regularly sided with social networks that have blocked user accounts or deleted tweets.[33] In the 2018 *Twitter v. San Francisco* case, for instance, the California Court of Appeal confirmed that a service provider's decision 'to restrict or make available certain material – is expressly covered by section 230' Communications Decency Act (CDA), the clause shielding internet service providers from liability.[34] The court presupposes the existence of 'must carry' claims[35] but shield platforms from them because Sec. 230 CDA [36] and the Digital Millennium Copyright Act (DMCA)[37] intend to

[30] CJEU, Advocate General's Opinion in Case C-18/18 Eva Glawischnig-Piesczek v Facebook Ireland Limited.
[31] In depth analysis: Daphne Keller, White Paper: Dolphins in the Net: Internet Content Filters and the Advocate General's Glawischnig-Piesczek v. Facebook Ireland Opinion https://cyberlaw.stanford.edu/files/Dolphins-in-the-Net-AG-Analysis.pdf
[32] CJEU, decision of 3 October 2019, Case C-18/18 - Eva Glawischnig-Piesczek v Facebook Ireland Limited at para 55.
[33] See Mezey v. Twitter Inc., Florida Southern District Court, 1:18-CV-21069; Cox v. Twitter, Inc., 2:18-2573-DCN-BM (D.S.C.). Magistrate R&R dated Feb. 8, 2019; Kimbrell v. Twitter Inc., Northern California District Court, 18-cv-04144-PJH.
[34] Twitter Inc. v. The Superior Court for the City and County of San Francisco, California Court of Appeal, A154973.
[35] *Keller*, Daphne 'Who do you sue? State and platform Hybrid power over online speech' a Hoover Institution Essay, National Security, Technology and Law Aegis Series Paper No. 1902 at page 11.
[36] 47 USC 230(c)(2)(immunity from 'must carry' claims based on good-faith efforts to exclude objectionable content); 17 USC 512(g)(immunity from 'must carry' claims for platforms that carry out counternotice process).
[37] DCMA Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998), https://www.copyright.gov/legislation/dmca.pdf.

limit the take-down of legal speech. [38] The purpose of this grant of immunity was both to encourage platforms to be 'Good Samaritans' and take an active role in removing offensive content, and also to avoid free speech problems of collateral censorship.[39] The courts rejected the claims with reference to Sec. 230 CDA in the majority of cases, e.g. in *Mezey v. Twitter Inc.* [40], *Twitter Inc. v. The Superior Court ex rel Taylor*,[41] *Williby v. Zuckerberg*, [42] *Fyk v. Facebook Inc.* [43], *Murphy v. Twitter, Inc.* [44] and *Brittain v. Twitter Inc.* .[45] Besides these two regimes, any other arguments were also rejected in court. Up until today, in the US there was no successful 'must-carry' claim for put-back in court.[46]

But US jurisprudence has insight to offer into the relationship of private property and public communication goals. Back in the days, it was booksellers, broadcasters or editors that would put limits to content or speech. According to the Supreme Court strict liability on their part would lead booksellers 'to restrict the public's access to forms of the printed word, which the State could not constitutionally suppress directly.'[47] Therefore, also this argument was rejected to protect free speech. In *Johnson v. Twitter Inc.*, the California Superior Court refused to consider Twitter akin to a 'private shopping mall'[48] that was 'obligated to tolerate protesters'. [49] In *Prager University v. Google LLC*, the Northern California District Court (2018)[50] refused to see YouTube as a state actor in accordance with the 'public function'-test, arguing that providing a video sharing platform fulfils neither an exclusive nor a traditional function of the state. The court also did not see YouTube as a 'company town'.[51] A claim relaying on the 'company town' rule, which was established in 1946 *Marsh v. Alabama*, today would only succeed if a claim was brought against a private entity that owns all the

[38] For a detailed analysis: *Keller*, Daphne, 'Who do you sue? State and platform Hybrid power over online speech'; a Hoover Institution Essay, National Security, Technology and Law Aegis Series Paper No. 1902 at page 4.
[39] *Zeran v. Am. Online, Inc.,* 129 F.3 d 327, 330 (4 th Cir. 1997) (noting that the purposes of intermediary immunity in § 230 were not only to incentivize platforms to remove indecent content but also to protect the free speech of platform users).
[40] *Mezey v. Twitter Inc.,* Florida Southern District Court 1:18-CV-21069.
[41] *Twitter Inc. v. The Superior Court ex re Taylor* - A154973 (Cal. App. Ct. Aug. 17, 2018) https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2795&context=historical (white supremacist content)
[42] *Williby v. Zuckerberg*, Northern California District Court, 18-cv-06295-JD, https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2975&context=historical
[43] *Fyk v. Facebook Inc.,* Northern California District Court, No. C 18-05159 JSW, https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2972&context=historical
[44] *Murphy v. Twitter Inc.*, San Francisco Superior Court, CGC-19-573712, https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2968&context=historical
[45] Brittain v. Twitter Inc., Northern California District Court, 2019 WL 2423375, https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2883&context=historical
[46] *Keller*, Daphne; 'Who do you sue? State and platform Hybrid power over online speech' a Hoover Institution Essay, National Security, Technology and Law Aegis Series Paper No. 1902 at page 2.
[47] *Smith v. California,* 361 U.S. 147 (1959); *Keller,* Daphne, Internet Platforms observations on speech, danger, and money, A Hoover institution essay Aegis series paper no. 1807 at pages 16-20 (discussing bookseller precedent).
[48] *Pruneyard Shopping Center v. Robins,* 9.6.1980, 447 U.S. 74.
[49] *Johnson v. Twitter Inc.,* California Superior Court, 18CECG00078.
[50] *Prager University v. Google, LLC,* Northern California District Court, 2018 WL 1471939, https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2688&context=historical.
[51] *Marsh v. Alabama*, 7.1.1946, 326 U.S. 501.

property and controls all the functions of an entire (virtual) town. [52]

Economic dominance — or dominance in the 'attention marketplace' — was not considered to be enough to justify must-carry obligations and override the platforms' own speech rights [53], because the courts did not consider major platforms, comparable to the cable companies in *Turner*, to control 'critical pathway[s] of communication.'[54]

In *Manhattan Community Access Corporation v. Halleck*, [55] the Supreme Court just recently had the chance to weigh in again on the tension between cable operators' and cable programmers' First Amendment rights - and, by implication, on the viability of must-carry claims for internet platforms. However, in June 2019 the court only ruled on the status of MNN (non-state actor) rather than whether the actions directly affect free speech. Only the dissenting opinion of Justice Sotomayor[56] argued that MNN 'stepped into the City's shoes and thus qualifies as a state actor, subject to the First Amendment like any other.' Justice Sotomayor also argued that since New York City laws require that public-access channels be open to all, MNN also took responsibility for this law with the public-access channels. It did not matter whether the City or a private company runs this public forum since the City mandated that the channels be open to all.

PruneYard v. Robins[57] remains an exception. In that case the Court affirmed plaintiffs' rights under the California constitution to enter a Silicon Valley shopping mall to distribute leaflets. Plaintiffs suing today's platforms argue that the platforms fulfill the public-forum function at least as much as shopping malls ever did, and in consequence must tolerate unwanted speech. The court held 'that a shopping mall owner's own 'autonomy' and communication power were not undermined by leafleters' presence on its premises and that must-carry will not 'force cable operators to alter their own messages' [58] This is the closest a US case has come to respect third party effect of fundamental rights.

4. Public law in private spaces: German jurisprudence

The situation in Germany is different. Since 2018 German civil courts have decided a number of put-back cases arising from deletions by social media companies (especially

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[52] *Prager University v. Google, LLC*, Northern California District Court, 2018 WL 1471939 at para 11, https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2688&context=historical.
[53] First Amendment: 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.'
[54] *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 629 (1994) ('Turner I') at 657.
[55] *Manhattan Community Access Corporation v. Halleck*, No. 17-702, reviewing 882 F.3d 300 (2d Cir. 2018), Kavanaugh, delivered the opinion of the Court, in which Roberts, Thomas and Gorusch joined.
[56] https://supreme.justia.com/cases/federal/us/587/17-1702/case.pdf, Sotomayor, filed a Dissenting Opinion in which Ginsburg, Breyer, and Kagan, joined.
[57] *PruneYard Shopping Center v. Robins*, 447 US 74 (1980), 87–8.
[58] *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), 578–80, referring to . PruneYard .

Facebook) in favour of the plaintiff.

The judgments of the civil courts are taken against the background of a specific understanding of the public sphere that was shaped by the German Federal Constitutional Court (BVerfG). Before continuing with a more detailed analysis of the decisions, we will first take a closer look at the BVerfG's past decisions on private gatekeepers.

In one of its landmark decisions, *Fraport*[59], in 2011 the BVerfG considered that 'depending on the 'guaranteed scope [of the fundamental right] (Gewährleistungsinhalt) and the case', the 'indirect fundamental rights obligation of private parties (...) can come close or even be close to a fundamental rights obligation of the state' if the private actor has 'already taken over the provision of the framework conditions of public communication themselves ...' . This is in nuance the doctrinal concept of indirect third-party effect (mittelbare Drittwirkung).[60] It has left open to what extent this applies to private individuals who 'create places of general communication. '[61] In its *Bierdosen-Flashmob (Beer can flashmob)* decision 2015, the BVerfG confirmed this reasoning. [62]

In the *Stadionverbot* (*Stadion ban)*[63] decision of 2018 the BVerfG applied the doctrine of indirect third-party effect (mittelbare Drittwirkung) and found that according to the principle of equal treatment[64] a ban for (suspected) hooligans and other potentially violent soccer fans must

> *'not [be] imposed arbitrarily but must be based on an objective reason (...) [and] is associated with procedural requirements. In particular, stadium operators must make reasonable efforts to clarify the facts of the case. In principle, this includes the prior hearing of the parties concerned. The decision shall also be justified on request in order to enable the persons concerned to enforce their rights.'*

From this, the BVerfG concludes that persons should not be excluded 'without objective reason' and not without compliance with procedural requirements.

Of course, these cases did not specifically concern the public sphere in a digital environment or in platforms. Against this background and because of the attention the issue got from the introduction of the *Act to Improve Enforcement of the Law in Social*

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[59] BVerfG, judgment of 22 February 2011 – 1 BvR 699/06 - Prohibition of an assembly on airport premises by the operator of the airport.
[60] Developed in BVerfG 7, 189 (205 et seq.) – *Lüth* and confirmed since then in e.g. BVerfGE 42, 143 (148) – *Deutschland Magazin*; BVerfGE 89, 214 (229) – *Bürgschaftsverträge*; BVerfGE 103, 89 (100) – *Unterhaltsverzichtsvertrag*; BVerfGE 137, 273 (313) – *Katholischer Chefarzt*.
[61] BVerfG, , judgment of 22 February 2011 – 1 BvR 699/06 at 59.
[62] BVerfG, decision of 18 July 2015 – 1 BvQ 25/15 at 6 -Prohibition of an assembly on a square open to the public by private owners
[63] BVerfG, decision of 11 April 2018 - 1 BvR 3080/09: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2018/04/rs20180411_1bvr308009.html
[64] Art. 3 Basic Law (GG).

Networks (Network Enforcement Act (NetzDG)),[65] since 2018 we have seen the first cases that were decided by civil courts regarding put-back claims. Most of the cases in 2018 and 2019 concerned statements which constituted or where deemed to constitute hate speech, according to the definition of the platforms.[66] What becomes clear from the analysis of the present cases is that only in rare cases the solution is clear cut. Only if the statement clearly violates the law, e.g. § 130 German Criminal Coder (StGB),[67] a put-back claim would clearly fail.

This is not the case where the statements that have been taken down do not violate any laws but rather go against the terms of services or Community Standards of the platform but might be protected under Article 5 (1) (1) Basic Law (GG).[68] Article (5) (1) (1) Basic Law (GG) protects the right of every person to freely express and disseminate their opinions without hindrance. 'There shall be no censorship', the GG confirms. Limits to freedom of expression exist. Under Article 5 (2) Basic Law (GG)[69] freedom of expression finds its limit in the provisions of general laws, in provisions for the protection of young persons and in the right to personal honor'.

In these cases, there are different ways to argue and the courts – in the end – have the obligation to balance constitutional values.

With reference to Article 5 (1) (1) Basic Law (GG) and the function of Facebook as a 'public marketplace', some courts decided that Facebook and YouTube [70] would generally[71] not be allowed to remove 'admissible expressions of opinion' and that the

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[65] *Schulz*, Wolfgang on the NetzDG, see Regulating Intermediaries to Protect Privacy Online – the Case of the German NetzDG, HIIG Discussion Paper Series 2018-01, https://www.hiig.de/wp-content/uploads/2018/07/SSRN-id3216572.pdf; *Matthias C. Kettemann*, The Future of the NetzDG: Balanced Briefing Materials on the German Network Enforcement Act, Deliberative Polling, Briefing Materials for Multistakeholder Discussion, developed for Stanford University, Center on Deliberative Democracy, October 2018; Amélie Pia Heldt, Reading between the lines and the numbers: an analysis of the first NetzDG reports, Internet Policy Review, 8 (2019) 2, https://policyreview.info/articles/analysis/reading-between-lines-and-numbers-analysis-first-netzdg-reports; *Kettemann*, Matthias C., Follow-up to the Comparative Study on Blocking Filtering and Take-down of Illegal Internet Content (Country Report for Germany 2016-2019) (Strasbourg: Europarat, 2019), https://rm.coe.int/dgi-2019-update-chapter-germany-study-on-blocking-and-filtering/168097ac51, May 2019; *Matthias C. Kettemann*, Stellungnahme als Sachverständiger für die öffentliche Anhörung zum Netzwerkdurchsetzungsgesetz auf Einladung des Ausschusses für Recht und Verbraucherschutz des Deutschen Bundestags, 15.5.2019.

[66] E.g. Facebook: 'We define hate speech as a direct attack on people based on what we call protected characteristics — race, ethnicity, national origin, religious affiliation, sexual orientation, caste, sex, gender, gender identity, and serious disease or disability. We also provide some protections for immigration status. We define attack as violent or dehumanizing speech, statements of inferiority, or calls for exclusion or segregation (...), https://www.facebook.com/communitystandards/objectionable_content; Twitter: https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy.

[67] Higher Regional Court Stuttgart (OLG Stuttgart), decision of 6 September 2018 - 4 W 63/18; Higher Regional Court Dresden (OLG Dresden), judgment of 9 April 2018 - 1 OLG 21 Ss 772/17 – 'Drecksvolk'.

[68] Maunz/Dürig/Grabenwarter, Commentary to German Basic Law (GG) 87th ed., March 2019.

[69] Ibid.

[70] Higher Regional Court Berlin (KG Berlin), decision of 22 March 2019 – 10 W 172/18 at 17.

[71] Higher Regional Court Munich (OLG München), decision of 28 December 2018 – 18 W 1955/18 at 19 et seq.- possible exception for subforums.

community standards would not be allowed to exclude such content. [72] Such restrictions for the terms of services, however, could only be explained by a direct and state-like duty to guarantee Article 5 (1) Basic Law (GG), which many courts of instance have rejected so far. [73] This argument is convincing, because the indirectly binding nature of fundamental rights of private individuals is not about minimizing interference restricting freedom, but about balancing fundamental rights.[74] That is, balancing the legitimate interests of the intermediary in setting their own communication standards – and ruling over their own private space – as well as the interests (and concomitant communication rights) of the affected user and other users and their right of information. [75]

This offers the opportunity to weigh Facebook's role and influence and to e.g. arrive at a 'substantial indirect meaningful duty'[76] to protect the rights under Article 5 (1) (1) Basic Law (GG). In August 2018 the Higher Regional Court (OLG) Munich[77] decided that a contract between a user and Facebook is a contract 'sui generis' and that Facebook's Declaration of Rights and Duties forms part of the terms of service (Allgemeine Geschäftsbedingungen, AGBs). These were considered to be (partially) invalid, insofar as they substantially disadvantage the user contrary to good faith (§ 307 German Civil Code (BGB). The court found that provision on deletion in the terms of services could not survive the 'disadvantage test', since the provision restricted the reviewability of any decision to delete. The court reasoned that in taking decisions on deleting content, Facebook has to take into account the right to freedom of expression (Article 5 (1) (1) GG). Allowing only Facebook to choose whether or not to delete content violates § 241 (2) BGB enshrining 'mutual respect for the rights and interests of both parties.'[78] As the court considered Facebook to be a 'public market place' for information and

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[72] Higher Regional Court Munich (OLG München), decision of 17 July 2018 – 18 W 858/18 at 30, ; decision of 12 December 2018 – 18 W 1873/18 at 21; decision of 17 September 2018 – 18 W 1383/18 at 20 et seq.; decision of 24 August 2018 – 18 W 1294/18 at 28; Regional Court Karlsruhe (LG Karlsruhe), decision of 12 June 2018 – 11 O 54/18 at 12; Regional Court Frankfurt/Main (LG Frankfurt/M.), decision of 14 May 2018 2-03 O 182/18 at 16; Regional Court Bamberg (LG Bamberg), judgment of 18 October 2018 – 2 O 248/18 at 86.

[73] Higher Regional Court Dresden (OLG Dresden), decision of 8 August 2018 – 4 W 577/18 at 19 et seq.; Higher Regional Court Karlsruhe (OLG Karlsruhe), decision of 28 February 2019 – 6 W 81/18 at 51 et seq.; Higher Regional Court Karlsruhe (OLG Karlsruhe), decision of 25 June 2018 – 15 W 86/18 at 21; Higher Regional Court Stuttgart (OLG Stuttgart), decision of 6 September 2018 – 4 W 63/18 at 71; Regional Court Offenburg (LG Offenburg), judgment of 20 March 2019 – 2 O 329/18 at 80; Regional Court Bremen (LG Bremen), judgment of 20 June 2019 - O 1618/18 at 59; Regional Court Heidelberg (LG Heidelberg), judgment of 28 August 2018 – 1 O 71/18 at 38.

[74] Higher Regional Court Karlsruhe (OLG Karlsruhe), decision of 28 February 2019 – 6 W 81/18 at 52 .

[75] *Spindler*, Gerald CR 2019, at page 238 (244 et seq.).

[76] Higher Regional Court Stuttgart (OLG Stuttgart), decision of 6 September 2018 – 4 W 63/18 at 73, '*(...) einer erheblichen mittelbaren Grundrechtsbindung, welche bei der Kontrolle ihrer Allgemeinen Geschäftsbedingungen zu berücksichtigen ist.*'

[77] Higher Regional Court of Munich (OLG München), decision of 24 August 2018 (Beschluss vom 24.8.2018 – 18 W 1294/18 (LG München II), MMR 2018, 753, BeckRS 2018, 20659, NJW 2018, 3115, LSK 2018, 20659 (Ls.), MDR 2918, 1362).

[78] *See* also Regional Court Frankfurt/Main (LG Frankfurt/M.), decision of 14 May 2018, (Beschluss vom 14.5.2018 – 2-03 O 182/18 [= MMR 2018, 545]) and Regional Court Frankfurt/Main (LG Frankfurt/M.), decision 10 September 2018 2-03 O 310/18

opinion-sharing,[79] it had to ensure – via the construct of the 'mittelbare Drittwirkung der Grundrechte' (the doctrine of indirect third-party effect) – that 'zulässige Meinungsäußerungen' (admissible opinions = legal opinions) are not deleted.[80]

Applying the same approach to a more problematic statement, the Higher Regional Court of Dresden (OLG Dresden), in a decision of 8 August 2018,[81] concluded that social networks can prohibit hate speech that does not yet amount to a criminally punishable content pursuant to § 1 (3) NetzDG, but only as long as deletion is not performed arbitrarily and users are not barred from the service without recourse. Facebook had developed a 'quasi-monopoly', the court argued, it is a private company offering a private space to share, thus making it a 'public communicative space'. A private company, the court continued, that 'takes over from the state to such a degree the framework of public communication' must also have the 'concomitant duties the state as a provider of essential services used to have' ('Aufgaben der Daseinsvorsorge'). The court held that the prohibition of 'hate speech' on a platform would not constitute a surprising clause (forbidden with limited exceptions under § 305a BGB) and therefore considered this part of the terms of service as valid. The court also explained that opinions that are protected under Article 5 GG enjoy a higher level of protection (from deletion by a private actor) than other forms of expression. The court also considered that no social network must incur the danger of liability for user comments under the NetzDG or as a *Störer* (§§ 823 (1), (2), § 1004 BGB) and may take measures to stop the presence of hate speech even if it is not criminally punishable speech.[82] Intermediaries have a right to police their platforms ('virtuelles Hausrecht'[83]) and must have the right to delete uploaded content in order to avoid liability.[84]

What we can draw from this decision is that even though a statement might be considered hate speech according to the definition of hate speech of the platforms, this does not mean that the individual speaker is not protected. The generic terms in the BGB allow for and demand an interpretation that ensures that constitutional guarantees are being observed in contractual relations and by private actors. Thus, the violation of the terms of service does not always suffice to justify a deletion of a statement if it is protected under Article 5 (1) (1) Basic Law (GG), thus restricting the

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[79] Higher Regional Court Frankfurt/Main (OLG Frankfurt/M.), judgment of 10 August 2017 (Ur. v. 10.8.2017 – 16 U 255/16 [= MMR 2018, 474]), at 28.

[80] Similarly, Higher Regional Court Munich (OLG München), decision of 17 July 2018 (Beschluss vom 17.7.2018 – 18 W 858/18 (LG München I)), BeckRS 2018, 17447, GRUR-Prax 2018, 477 (comments by Paetrick Sakowski), LSK 2018, 17447 (Ls.), MDR 2018, 1302.

[81] Higher Regional Court Dresden (OLG Dresden), decision of 8 August 2018 (Beschluss vom 8.8.2018 – 4 W 577/18 (LG Görlitz), MMR 2018, 756 BeckRS 2018, 18249, NJW 2018, 427; NJW 2018, 3111, LSK 2018, 18249 (Ls.), CR 2018, 590, WRP 2018, 1209).

[82] Similarly, Regional Court Frankfurt/Main (LG Frankfurt/M.), decision of 10 September 2018 (Beschluss vom 10.9.2018 – 2-03 O 310/18, MMR 2018, 770, BeckRS 2018, 21919, GRUR-Prax 2018, 478).

[83] Regional Court Bonn (LG Bonn), judgment of 16 November 1999 (U. v. 16.11.1999 – 10 O 457/99 [= MMR 2000, 109]).

[84] *Kettemann*, Matthias C. ; Follow-up to the Comparative Study on Blocking Filtering and Take-down of Illegal Internet Content (Country Report for Germany 2016-2019) (Strasbourg: Europarat, 2019), https://rm.coe.int/dgi-2019-update-chapter-germany-study-on-blocking-and-filtering/168097ac51, Mai 2019, at page 257.

rights of Facebook under Articles 2, 12, 14 Basic Law (GG).[85]

On 22 May 2019, Germany's highest court regarding constitutional questions, including the protection of fundamental rights, the Federal Constitutional Court (BVerfG), was concerned with a put-back claim for the first time. In a preliminary injunction decision, the BVerfG ordered Facebook to allow a right-wing party to access its Facebook page and resume posting.[86] Even though the BVerfG did order Facebook to only temporarily re-grant the right-wing party 'Der III. Weg' access to its Facebook page and resume posting, for it considered the outcome of the main proceedings to be open, we can draw some insight from its decision. The BVerfG argued that, by excluding the use of its Facebook base, the right-wing party was 'denied an essential opportunity to disseminate its political messages and actively engage in discourse with users of the social network,' which would 'significantly impede' its visibility, especially during the run-up to the European elections.[87]

The BVerfG argued *inter alia* that Facebook has 'significant market power' within Germany and that fundamental rights can be effective in disputes between private parties by means of the doctrine of indirect third-party effect. Therefore, Article 3 (1) Basic Law (GG)[88] ('All persons shall be equal before the law'.) may have to be interpreted in 'specific cases' to force powerful private actors to respect equality of treatment provisions with regard to private contracts.[89] There is a lot that speaks for the transferability of the strict requirements of equality law in the sense of the *Stadion ban* decision on the exclusion of users and content by large social networks, some of which are described as to act 'equal to the state'.[90]

The fact that in *Der III. Weg* decision the BVerfG argued that Facebook will have to adhere to the principle of equal treatment with regard to its interaction with its users in the same way as the state has to adhere to this principle, does not mean that this holds true in regard to Article 5 (1) (1) Basic Law (GG). As the BVerfG clarified in its *Fraport* decision, the scope of the indirect third-party effect (mittelbare Grundrechtsbindung) always depends on the 'guaranteed scope [of the fundamental right] and the circumstances of the case.'[91] This suggests that not only Art. 5 Basic Law (GG) but all relevant fundamental rights in question need to be considered and balanced in order to determine if Community Standards can justify the deletion of a specific statement, even though it would be protected under Article 5 Basic Law (GG).

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[85] Maunz/Dürig/Grabenwarter, Commentary to German Basic Law (GG) 87th ed., March 2019.
[86] BVerfG, decision of 22 May 2019, 1 BvQ 42/19: http://www.bverfg.de/e/qk20190522_1bvq004219.html (ECLI:DE:BVerfG:2019:qk20190522.1bvq004219).
[87] Ibid.
[88] Maunz/Dürig/Grabenwarter, Commentary to German Basic Law (GG) 87th ed., March 2019.
[89] BVerfG, decision of 22 May 2019, 1 BvQ 42/19 – at 15: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2019/05/qk20190522_1bvq004219.html
[90] *Michl*, Fabian in JZ 2018, 910 on BVerfG, decision of 11 April 2018 - 1 BvR 3080/09.
[91] BVerfG, judgment of 22 February 2011 – BVR 699/06 at 59.

5. Integrating public values into private contracts

So, do social network services incur 'must carry' obligations? It depends on the jurisdiction. In both US and Germany, intermediaries – here: social network services – may restrict content on their platform via terms of service. However, and depending on the importance of a communication made (user-side) and the 'significant market power' (intermediary-side), social network services in Germany face restrictions in limiting access to the platform by suspending users or cancelling profile access contracts via the concept of indirect third-party effect of fundamental rights.

This may include restrictions regarding the design of terms of service (§§ 307, 305c BGB), with regard to the interpretation of the terms of services in light of the Basic Law and the obligations for companies to take into account §§ 241 (2) and 242 BGB (good faith). There might even be grounds to argue for an exclusion of the ordinary right of termination and an obligation to contract for particularly important networks[92], due to the adverse effects of the exclusion from the platform on fundamental rights of individual users and considering the self-perception of the platform.[93] Whether the indirect third-party effect that has been accepted for Art. 3 Basic Law (GG) is transferrable to Art. 5 (1) (1) Basic Law (GG) is not clear yet.

The German line of cases following the adoption of the Network Enforcement Act confirms that certain intermediaries – those with a key role for public communication – have duties towards private users under fundamental rights law, namely a duty to respect the equality principle.

On the other hand, US law and jurisprudence does not recognize fundamental right-based duties for intermediaries as forums of free speech. In offline contexts, such as in *PruneYard v. Robins*, the US Supreme Court, which has traditionally been very reluctant to apply fundamental rights obligations to private actors, acknowledged that under certain circumstances and if a private entity fulfils a public-forum function, it must tolerate unwanted speech.[94] This jurisprudence has not impacted intermediaries and 'must carry' cases yet. This is also because US law is very sensitive to interferences with free speech by the government. This becomes clear when looking at the First Amendment argument invoked by private companies against *must carry* claims. The freedom from interference of the government goes further and protects the private company from being forced to restore and put back speech that they do not want to host on their platforms (negative free speech). The understanding of speech is much

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[92] The platform may be barred from terminating a contract, if they would have the obligation to contract again under § 242 German Civil Code (BGB) – *Dolo agit, qui petit, quod statim redditurus est – meaning: that an action constitutes an inadmissible exercise of a right and may not succeed if the plaintiff would have to immediately return the performance claimed to the defendant because the defendant is entitled to a counterclaim.*

[93] E.g. Twitter: 'We believe in free expression and think every voice has the power to impact the world' (: https://about.twitter.com/en_us/values.html); Facebook: 'Give people the power to build community and bring the world closer together.' (https://www.facebook.com/pg/facebook/about).

[94] *PruneYard Shopping Center v. Robins,* 447 US 74 (1980), 87–88.

broader than what German jurisprudence would comfortably interpret as falling under Art. 5 (1) (1) Basic Law (GG). However, this leaves citizens less protected regarding interferences with their right to free speech by private actors. This is unfortunate as these have become important providers of online communicative spaces.

In order to meet the fundamental rights guarantees (applied horizontally), content-related standards need to be (and by now usually are) published, enshrined in terms of service that meet fundamental rights-standards, formulated as general rules that are applied non-arbitrarily and allow for effective recourse against deletions and suspensions, as foreseen, for example, by the Council of Europe Recommendation on Intermediaries.[95] With Facebook's introduction of revised values, and a charter for an Oversight Board, content governance is progressively 'constitutionalized'. We expect other platforms to follow. The step to implement values can be considered a reaction of Facebook to the demand of a number of scholars[96] for a 'constitution-building' within the platform.[97] What they are trying to do is to implement self-regulation first, before governments force them to implement regulation which might be difficult to enforce or bad for business. In that way, platforms' anticipatory normative action spares governments the need to enact actual laws - and at the same time makes it more difficult for affected users to challenge take-downs in courts,[98] especially in the US. This is why the horizontal application of fundamental rights is so important as a concept.

We argue that insofar platforms serve as public forums for communications, this function for public discourse must influence the 'normative order' in which they operate. We submit that the German approach to this question offers elements worth considering. In Germany, reading the *Stadion ban* decision of the BVerfG in an internet-oriented way, 'must carry' is already implemented with regard to access to online content. It is very likely that the BVerfG will extend its reasoning of indirect third-party effect onto platforms in regard to the principle of equal treatment and it should also do so in regard to Article 5 (1) (1) Basic Law (GG). This is appropriate and will facilitate a transparent process of balancing in regard to the fundamental rights in conflict.

Drittwirkung by another name – the horizontal application of fundamental rights - is a common theme of CJEU jurisprudence as well.[99] Very recently, the highest European

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[95] Council of Europe, Recommendation CM/Rec (2018) 2 of the Committee of Ministers to member States on the roles and responsibilities of Internet intermediaries.
[96] Including *Kadri,* Thomas and *Klonick,* Kate in 'Facebook v. Sullivan: Public Figures and Newsworthiness in Online Speech' at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3332530&download=yes
[97] *Zittrain,* (Jonathan) forthcoming. See also, in relation to the normative role of non-state actors, Kettemann, Matthias, The Normative Order of the Internet (Oxford: OUP, 2020).
[98] *Keller,* Daphne 'Who do you sue? State and platform Hybrid power over online speech' a Hoover Institution Essay, National Security, Technology and Law Aegis Series Paper No. 1902 at page 2.
[99] The CJEU assumes such an indirect third-party effect on the merits by simply applying the fundamental rights in private law cases, in particular by interpreting the relevant provisions 'in the light' of the fundamental rights without talking about a third-party effect or 'must carry', e.g. CJEU, judgment of 18 July 2013 - C 426/11 - Alemo-Herron, at 29-30; CJEU judgment of 13 May 2014 C-131/12 - Google Spain, at 68 and 74 '(…) must necessarily be interpreted in the light of fundamental rights, which, according to settled case-law, form an integral part of the general principles of law whose observance the Court ensures and which are now set out in the Charter.' CJEU, judgment of 17 July 2014, C - 141/12 -

court confirmed the indirect third party obligation of fundamental rights when assessing how search engines have to balance fundamental rights in the context of de-referencing decisions:

> *(…) It is thus for the operator of a search engine to assess, (…) whether, in the light of all the circumstances of the case, such as, in particular, the nature and seriousness of the offence in question, the progress and the outcome of the proceedings, the time elapsed, the part played by the data subject in public life and his past conduct, the public's interest at the time of the request, the content and form of the publication and the consequences of publication for the data subject, he or she has a right to the information in question no longer, in the present state of things, being linked with his or her name by a list of results displayed following a search carried out on the basis of that name. [And] if (…) the inclusion of the link in question is strictly necessary for reconciling the data subject's rights to privacy and protection of personal data with the freedom of information of potentially interested internet users (…).*[100]

But even acknowledging that platforms have a 'must carry'-like obligation does not mean they 'have to carry' all content. As the CJEU confirms, they can still restrict content in specific cases after balancing the fundamental rights at stake.

6. Conclusion

In conclusion, let us compare the reaction, in Germany and in the US, to the cases described in the beginning. The claim brought before the Higher Regional Court of Karlsruhe (OLG Karlsruhe) was not successful, because

> *according to settled case-law, fundamental rights can take effect in disputes between private individuals by way of indirect third-party effect. Accordingly, the basic rights do not obligate the private ones in principle directly among themselves. However, they also have a radiating effect on the legal relationships under private law and must be enforced by the civil courts in the interpretation of civil law, in particular via general clauses under civil law and indefinite legal concepts (…). The (…) terms of use and community standards take due account of Article 5 (1) of the Basic Law. Also, the deletion of the objected statement and the temporary suspension of the account in the concrete case are neither*

Y.S., at 54.: 'must necessarily be interpreted in the light of fundamental rights, which, according to settled case-law of the Court, form an integral part of the general principles of law whose observance the Court ensures and which are now set out in the Charter.' However, third-party effects appear with the AG's Opinions; e.g. Opinion of Advocate General Poiares Maduro delivered on 23 May 2007, C-438/05, at 39 stating: 'the horizontal effect of constitutional rights, namely by deriving from those rights an obligation for the State to intervene in situations where one private party's constitutional rights are under threat from the actions of another; Opinion of Advocate General Trstenjak on 8 September 2011 C 282/10 at 83, arguing that 'Private individuals can therefore at best be bound indirectly by rules implementing the duty of protection.'

[100] CJEU, C-136/17 - GC and Others (Déréférencement de données sensibles), judgment of 24 September 2019, C-136/17 at para. 76 et seq. (our emphasis).

> *disproportionate nor arbitrary. There are no indications that the respondent misjudged the broadcasting effect of Article 5 (1) of the Basic Law in the concrete application and interpretation of its terms of use.*

In the case concerning the Vietnam picture, there were no judicial proceedings but rather a complaint letter issued by the editor in chief of the affected newspaper. Hours after the pushback, Facebook reinstated the photo across its site stating

> *An image of a naked child would normally be presumed to violate our community standards, and in some countries might even qualify as child pornography. In this case, we recognize the history and global importance of this image in documenting a particular moment in time.*

A court case asking Facebook to reinstate the picture in front of US courts would have been unlikely to succeed. This shows the difference between the US and the German approach.

We can thus answer the questions we posed in the beginning as follows: In Germany, users can sue platforms to have deleted posts and videos reinstated. Depending on the relevance of a platform, users may have a claim to a Facebook page and a Twitter account since they are providing essential infrastructure for speech to be voiced and heard. This might only be restricted by continuous severe violation of the terms of services that are a reflection of proportionate fundamental rights protection and balancing. The platform's decisions must be made transparent considering the doctrines of public figures, public interest and newsworthiness as well as other rights deriving from the constitution.

In Germany, platforms have corresponding duties to treat users equally in furnishing these services and provide equal access as long as they are essential for public communication pursuant to indirect third-party effect of the right to equal treatment, provided that users do not violate local law.

This holistic approach to the normative order of online speech is less concerned with public versus private ownership of the communicative space, but focuses on the function of online speech. We conclude that this approach makes much sense in times of divergence of online actors and redistribution of responsibilities for governing the public sphere. It is thus time to back up and consider the potential impact of the horizontal application of human rights on the normative order of private-public interaction on the Internet as a whole, including governance by algorithms and governance by affordance, which influences the way speech is communicated and received. 'Must carry' cases and put-back-attempts draw our attention – with much potential gain - to clashes between private and public orders, between public law and private law.