

Carril, Beatriz Barreiro , Andrzej Jakubowski , and Lucas Lixinski , ed. 15 Years of the UNESCO Diversity of Cultural Expressions Convention: Actors, Processes and Impact. Oxford: Hart Publishing, 2023. Bloomsbury Collections. Web. 12 May 2024. <<http://dx.doi.org/10.5040/9781509961474>>.

Accessed from: www.bloomsburycollections.com

Accessed on: Sun May 12 2024 22:57:43 Central European Summer Time

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monopolies, culturalinternational sports associationsInternational Covenant on Economic, Social and Cultural Rights (ICESCR)cultural monopolies andsports associationscultural monopoliesThis chapter reflects part of my research project on cultural monopolies that I was able to conduct as a Fellow of the Käte-Hamburger-Centre for Advanced Studies 'Law as Culture', Bonn, during the summer of 2020. I thank Werner Gephart and his outstanding team at the Centre for their support and hospitality under the challenging circumstances of the COVID-19 pandemic.

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Cultural Monopolies: The Cases of International Sports Associations and Internet Platforms

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I. Introduction

This chapter highlights the structural affinities between Internet platforms (section II) and international sports associations (section III) with a view to their status as cultural monopolists. It suggests a portability of arguments relating to instruments to control these monopolies (section IV). The potential of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (hereinafter the UNESCO Convention or the Convention)² and the International Covenant on Economic, Social and Cultural Rights³ to be used as such instruments will be investigated.

II. Internet Platform Providers and their Monopolies

Accounts of big Internet platforms and their abuse of power have become abundant, and it would be impossible to take a survey of even the better-known cases in such a short chapter. This is not to say that it would not be an important task to undertake. As a consequence, the selected examples may seem arbitrarily chosen. The reasons for their inclusion are that they are widely discussed and timely

¹ This chapter reflects part of my research project on cultural monopolies that I was able to conduct as a Fellow of the Käte-Hamburger-Centre for Advanced Studies 'Law as Culture', Bonn, during the summer of 2020. I thank Werner Gephart and his outstanding team at the Centre for their support and hospitality under the challenging circumstances of the COVID-19 pandemic.

² (adopted 20 October 2005, entered into force 18 March 2007) 2440 UNTS 311.

³ (signed 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

(Trump v Twitter) or that they seem to constitute a paradigm shift for the (potentially un-)democratic handling of digital power (Cambridge Analytica). This kind of democratic deficit is an inherent element of international sports federations, which is why they are offered as a model for comparison.

A. Trump v Twitter

Donald Trump, 45th President of the United States of America between 2017 and 2020, was a prominent user of Twitter, an online platform for shorter communications. At the time of the permanent closure of his account by the company on 8 January 2021,⁴ Trump had more than 88 million followers on the platform. Until May 2020, many of his tweets were criticised outside Twitter for being divisive or inaccurate, or both. When Trump claimed on Twitter that postal ballots to be used for the presidential elections later in the year would be fraudulent, his message was marked as inaccurate by the platform.⁵ A few days later, under the impression of growing protests after the killing of George Floyd in Minneapolis, Trump announced that he might react by bringing in the armed forces to open fire on protesters. Twitter marked the tweet as glorifying violence, a violation of the platform's terms and conditions.⁶ During and after the 2020 US presidential elections, the public got used to tweets by Donald Trump being marked as inaccurate by Twitter, often with a warning that 'this claim about election fraud is disputed'.

These measures received great attention because they seemed to mark a policy change. They deserve our attention because they highlight a particular problem that involves the interaction between private but globally effective norms, such as the terms and conditions of an Internet platform, and legal norms. While Trump criticised Twitter and threatened to introduce legislation against Internet providers, Facebook was criticised (not by Trump, of course) because it did *not* mark postings from Trump and its administration as misleading. Facebook changed its policy after the Capitol riots of 6 January 2021, when it banned Trump for at least the remainder of his term.⁷

In May 2020, Trump quickly signed an executive order 'on preventing online censorship', just days after Twitter had marked his tweet as untrue.⁸ The executive

⁴ See Twitter, 'Permanent Suspension of @realDonaldTrump' (8 January 2021) blog.twitter.com/en_us/topics/company/2020/suspension.html. Internet sources quoted in this chapter are archived and accessible at archive.org if deleted from their original web space.

⁵ twitter.com/realDonaldTrump/status/1265255835124539392?s=20. Donald Trump's tweets are archived at www.thetrumparchive.com/.

⁶ twitter.com/realDonaldTrump/status/1266231100780744704.

⁷ Facebook post by Mark Zuckerberg, CEO of Facebook (8 January 2021) www.facebook.com/zuck/posts/10112681480907401. The ban runs out on 7 January 2023.

⁸ Executive Order on Preventing Online Censorship (28 May 2020) www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/.

order questions a distinction that has been vital for providers of communication platforms in the USA. Similar legislation is in place in other jurisdictions. In the USA, it is to be found in section 230 of the Communications Decency Act from 1996. The provision prevents people from suing providers of an ‘interactive computer service’ for libel if users post defamatory messages on their platforms. Within the European Union, Article 14 of the Electronic Commerce Directive of 2000 follows a similar model.⁹ The law does not treat intermediary website operators as publishers; in this model, the platforms provide an infrastructure but are not responsible for the content. On the other hand, the platforms are free to remove or restrict posts they deem ‘obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable, whether or not such material is constitutionally protected’. Trump’s executive order argues that if a platform acts in bad faith, it should no longer be treated as a provider for other peoples’ messages but as a publisher, and be accountable for the published content. It argues that ‘When large, powerful social media companies censor opinions with which they disagree, they exercise a dangerous power ... Twitter, Facebook, Instagram, and YouTube wield immense ... power to shape the interpretation of public events’.

B. Platform Censorship and the Arts

It complicates the analysis that this statement is basically correct – which is unexpected, coming from an administration that was notorious for its fact-bending capacities.¹⁰ Within the art world, Facebook’s censorship of nudity has caused an unceasing debate. To mention just two cases, Frédéric Durand, a French teacher, was banned from Facebook because he uploaded a picture of Gustave Courbet’s *L’Origine du Monde*. In the end, the case was settled out of court.¹¹ The photographer Spencer Tunick, who is famous for his mass scenes of ordinary people in the nude which he photographs in public places, joined a group of artists who expressed their criticism of Facebook’s censorship. In June 2019, he organised an event with 125 people who posed nude in front of the New York headquarters of Facebook (and Instagram), together with the National Coalition Against Censorship.¹² It is, of course, debatable in itself why artistic freedom has to be

⁹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1.

¹⁰ The *Washington Post* has compiled a database of Donald Trump’s more than 30,000 false or misleading claims during his presidency, www.washingtonpost.com/graphics/politics/trump-claims-database/?itid=lk_inline_manual_11.

¹¹ G Harris, ‘Long-Running Facebook Battle over Censored Courbet Painting Gets Happy Ending’ *The Art Newspaper* (6 August 2019) www.theartnewspaper.com/news/facebook-legal-battle-over-courbet-painting-winds-down.

¹² *The Art Newspaper*, ‘Spencer Tunick’s Nip Slip’ (4 June 2019) www.theartnewspaper.com/blog/spencer-tunick-s-nip-slip.

identified with the public representation of (predominantly female) nudity as in these two cases. To put this traditional, white, male heterosexual aesthetic preference into a more diversified context, artists have formed an alliance to point out Instagram's handling of non-streamlined eroticised content, Artists Against Social Media Censorship. They debate body-shaming, queer and non-binary sexual identities, and in 2020 presented a line of cases in the form of an online exhibition. With a special interest in communities and their definition and normative role in mind, the artists' conclusion is intriguing. They formulate a 'government analogy'. It arises from a structural analysis, in which the platform is compared to a feudalistic state.¹³ This analysis denotes a lack of control and an imbalance of powers, as well as a perceived lack of participation in the areas of policy and decision making. From the perspective of the user or citizen, an organisation exercises power. There is, however, a fundamental difference between the norms: governments rely on laws, whereas Internet platforms rely on contracts and the large set of terms and conditions that comes with them. They are sometimes termed 'community standards' (Facebook)¹⁴ or 'Community Guidelines' (Instagram),¹⁵ implying that all the users are part of a single, global community. Such a claim is unconvincing. In his classic treatise, *Community and Civil Society*, originally published in 1887, Ferdinand Tönnies described the emotional component of communities, their 'sense of unity'.¹⁶ Tönnies anchored communities within biological, familial and anthropological frameworks, arguing that they contributed to achieving a degree of mutual protection and help.¹⁷ Besides family ('kinship') and neighbourhood, Tönnies pointed out friendship and comradeship as important kinds of community, based on 'similarity of work or opinion', for example 'artistic sympathy or creative purpose'.¹⁸ This category takes us back to the activities of the 42 Club and other artists' initiatives against the power of Internet platforms. It demonstrates that consumer status alone is not enough to form a community.

C. Collusion of State and Platform and the Case of Cambridge Analytica

Other Internet platforms emphasise their regionality and offer themselves as an alternative for a political or regional community. Parler is a service, modelled on Twitter, that has a large conservative to far-right user base in the USA. In the wake

¹³ See the website of the 42 Club, www.midnightsociety.org/ig-government.

¹⁴ Facebook Community Standards, facebook.com/communitystandards.

¹⁵ Instagram Community Guidelines, about.instagram.com/blog/announcements/instagram-community-guidelines-faqs.

¹⁶ F Tönnies, *Community and Civil Society* (J Harris ed, first published 1887, Cambridge, Cambridge University Press, 2001) 22; cf *ibid* 32: 'reciprocal binding sentiment'.

¹⁷ *ibid* 26.

¹⁸ *ibid* 29.

of the global COVID-19 crisis, Telegram has become a platform for conspiracy theorists. A prominent example of a regionally successful platform is the 'Russian Facebook', formerly known as V-Kontakte and now concisely branded vk.ru. The design of the website is an explicit echo of Facebook's. These regional alternatives to Facebook can be the leading platforms in their own areas. Another example is WeChat, a Chinese platform that combines the communicative functions of WhatsApp, Facebook and eBay. However, WeChat is tightly controlled by the Chinese government: communications are subject to pervasive content surveillance, and files deemed politically sensitive are used to invisibly train the artificial intelligence of China's political censorship system.¹⁹ As a consequence, not only can a digital platform in itself be powerful because of its monopoly-like position on the global or a regional market, it can also aggregate governmental power depending on the levels of civil rights, freedom and censorship.

While such congruence is plainly visible in the case of WeChat, it is widely expected in Western democracies that fundamental liberties should not be compromised by private platforms, that these platforms should be controlled under the rule of law and that governmental institutions or even political organisations must not make use of the power of digital platforms for uncontrolled, potentially undemocratic purposes. This expectation was thwarted by the Facebook–Cambridge Analytica data scandal, which was disclosed in 2018. Since 2014, personal data of near 87 million Facebook users had been acquired without their consent through apps using Facebook's user data by British consulting firm Cambridge Analytica. While Facebook claimed that this data transfer violated its terms and conditions, it also profited massively from the sales share of the app harvesting the data, called 'thisisyourdigitallife'. The haul included data on user identities, age, users' sexual, religious and political orientation, their interests and job affiliations. The data was aggregated to psychological profiles. These profiles were then used for political advertising servicing the Brexit and Trump campaigns of 2016. Some Facebook ads targeted potential voters for Hillary Clinton and the Remain campaign to demotivate them and discourage them from going to the polls; others camouflaged their partisanship and gave the impression they were an independent news source. The operation involved Steve Bannon, then one of Donald Trump's most important advisers, and the American software company specialising in big data analytics, Palantir.²⁰ The Cambridge Analytica case demonstrates the dominant position of

¹⁹ See the detailed report by J Knockel et al, 'We Chat, They Watch: How International Users Unwittingly Build up WeChat's Chinese Censorship Apparatus' (*The Citizen Lab*, 7 May 2020) citizenlab.ca/2020/05/we-chat-they-watch/.

²⁰ For a first sociological assessment of the Cambridge Analytica case, see F Maschewski and A-V Nosthoff, 'Der plattformökonomische Infrastrukturwandel der Öffentlichkeit: Facebook und Cambridge Analytica revisited' in M Seeliger and S Sevignani (eds), *Ein neuer Strukturwandel der Öffentlichkeit?*, Leviathan Sonderband 37 (Baden-Baden, Nomos, 2021) 320–41. In lieu of a comprehensive analysis of the scandal, the relevant Wikipedia entry offers a basic overview and understanding of the events with further references: see en.wikipedia.org/wiki/Facebook%E2%80%93Cambridge_Analytica_data_scandal. *The Guardian* has compiled 'The Cambridge Analytica Files' online, www.theguardian.com/news/series/cambridge-analytica-files.

globally active Internet platforms and the need for their control. This can easily be modelled onto the typical field concept as defined by Pierre Bourdieu.²¹ The field of digital cultural communication is deeply informed by the balance (or imbalance) of power. There is a clear deficit of participative options on the side of the users, with corresponding consequences for any social communities that do not fit into the terms and conditions of the digital platforms. The artists against censorship initiative can serve as an example. These structures have an immediate impact on digital communication and creative content.

D. Antitrust Laws, Digital Capitalism and the UNESCO Convention

This analysis is not new in itself, and similar concluding statements have been made in a growing number of publications. From the perspective of the cultural historian, the current platform economy triggers the arsenal of critique from the famous chapter on the cultural industries in Max Horkheimer and Theodor W Adorno's *Dialectic of Enlightenment* and recalls the scathing remarks on mass culture that becomes uniform under a monopoly.²² More than 20 years ago, a study by Dan Schiller explained how the prevalence of neoliberal thought in the 1980s and 1990s contributed to the uncontrolled expansion of powerful private platforms. He spoke of a 'new neoliberal paramountcy'.²³ The digital capitalism of Schiller's analysis is historically based in Web 1.0, and can be described as the takeover of digital infrastructure for pre-digital ends such as home entertainment, and the corresponding growth of companies investing in and selling this digital infrastructure. In 2015, Michael Betancourt concluded in his *Critique of Digital Capitalism* that platform providers such as Google and Facebook must violate the privacy of their customers in order to function.²⁴ He tellingly adapted the firms' terminology and used the word 'members' instead of 'customers', thereby involuntarily (?) subscribing to the pretension of a digital community. The common use of a shared infrastructure does not make for a community, which involves a minimal sense of communality. This kind of academic analysis has for a long time entered the area of journalism and become commonplace. John Herrman asked in the *New York Times* what increasingly powerful platform companies actually wanted.²⁵ Writing for *The Guardian*, Nick Srnicek argued that platforms are too big to serve

²¹ For an introduction, see P Bourdieu, *The Field of Cultural Production* (Cambridge, Polity Press, 1993).

²² M Horkheimer and TW Adorno, *Dialectic of Enlightenment: Philosophical Fragments* (Stanford, Stanford University Press, 2002) 95.

²³ D Schiller, *Digital Capitalism: Networking the Global Market System* (Cambridge, MA, MIT Press, 1999) 203.

²⁴ M Betancourt, *The Critique of Digital Capitalism* (Brooklyn, NY, Punctum Books, 2015) 76.

²⁵ J Herrman, 'Platform Companies Are Becoming More Powerful – but What Exactly Do They Want?' *New York Times Sunday Magazine* (26 March 2017) 16.

the public interest and demanded the nationalisation of Amazon, Facebook and Google.²⁶ Srnicek expanded his critique of digital platforms in a 2017 book that defines them as ‘digital infrastructures that enable two or more groups to interact ... intermediaries that bring together different users.’²⁷ In his 2019 study on digital capitalism, Philipp Staab takes a similar analytical perspective.²⁸ Staab describes the system of a genuinely digital capitalism, which is based on what he defines as ‘proprietary markets’. They become operational as digital infrastructures or platforms, which allow groups and individuals to interact, thereby resembling markets.²⁹ On these ‘quasi-markets’, information, access, price and power are subject to the control of the platform operators. The corresponding problems become more urgent once the platform rises to a monopolistic position,³⁰ powered by network effects.³¹ Staab concludes that a proprietary market is only perfect when it commands an effective monopoly.³² Ulrich Dolata distinguishes two main regulatory problems of concern for the global digital platforms: the organisation and regulation of markets for products and services, and the curation of content and communication.³³ This distinction is crucial for the understanding of the anti-trust laws’ failure to regulate fair communication on digital platforms. They are not designed for the purpose.

Antitrust laws regulate the conduct and organisation of business corporations, generally to promote competition for the benefit of consumers. Their main mechanism, however, is to control companies in their relationships with each other, not in their relationship with consumers. In the antitrust perspective, a monopoly is foremost a problem for the competitors, and the regulative powers are mainly operative on the level of companies and businesses. For example, Facebook is draining away advertising revenue from smaller and often more reliable news sources.³⁴ In the economic framework of relations between competing companies, antitrust laws protect consumers indirectly by way of focusing on low prices as an outcome of presumptively free competition. However, digital capitalism does not work around a price as an outcome of demand and supply. As a consequence, antitrust authorities have often ignored the digital market, because seemingly free services fell outside

²⁶ N Srnicek, ‘We Need to Nationalise Google, Facebook and Amazon. Here’s Why’, *The Guardian* (30 August 2017) www.theguardian.com/commentisfree/2017/aug/30/nationalise-google-facebook-amazon-data-monopoly-platform-public-interest.

²⁷ N Srnicek, *Platform Capitalism* (Cambridge, Polity Press, 2017) 43.

²⁸ P Staab, *Digitaler Kapitalismus* (Berlin, Suhrkamp, 2019).

²⁹ Alluding to Jürgen Habermas, Maschewski and Nosthoff (‘Der plattformökonomische Infrastrukturwandel’ (2021)) speak of an (‘Infra-)Strukturwandel der Öffentlichkeit’, the (Infra-)structural transformation of the public sphere.

³⁰ P Staab, *Digitaler Kapitalismus* (Frankfurt/Main, Suhrkamp, 2019) 170–76.

³¹ Srnicek, *Platform Capitalism* (2017) 45: more users mean that the platform becomes more valuable.

³² *ibid* 178.

³³ U Dolata, ‘Plattform-Regulierung. Koordination von Märkten und Kuratierung von Sozialität im Internet’ (2019) 29 *Berliner Journal für Soziologie* 179, 184.

³⁴ S Vaidhyanathan, *Antisocial Media: How Facebook Disconnects Us and Undermines Democracy* (Oxford, Oxford University Press, 2018) 8.

the traditional definition of a market. In contrast, in a digital economy, information values, data and communicative freedoms inform a market effectively regulated by its largest players. At present, several new definitions of markets and monopolies are discussed. A specifically legal perspective is offered by Maximilian Volmar in his analysis of digital market power. He argues for an expanded legal understanding of market power that would encompass the typical platform monopolies, suggesting the application of the instrumental concept of the 'competitive bottleneck'.³⁵ Volmar also observes a growing number of cases that are considered by the antitrust authorities, more often in Europe than in the USA.³⁶

In this context, an interesting approach has emerged under German antitrust law, where § 19 (2) No 2 GWB (Act against Restraints of Competition) defines an abuse case if a dominant undertaking, as a supplier or purchaser of a certain type of goods or commercial services, demands payment or other business terms which differ from those which would very likely arise if effective competition existed. Here, the digital remuneration of personal data can be interpreted as a potential case of abusive business terms; indeed, it plays a crucial role for the applicability of antitrust measures.³⁷ Consequentially, on 6 February 2019, the German Bundeskartellamt (Federal Cartel Office, FCO) decided that Facebook abused its dominant position on the German market for social networks by imposing unfair terms and conditions with regard to data generated by third-party websites and an ensuing lack of data protection.³⁸ After the Federal Court of Justice (Bundesgerichtshof) confirmed the FCO's decision in preliminary proceedings,³⁹ the Higher Regional Court (Oberlandesgericht) of Düsseldorf filed a request for preliminary ruling at the European Court of Justice (ECJ).⁴⁰ The FCO had prepared its decision extensively. Under German antitrust law, any legal principle protecting a contract party can be applied to determine whether the terms are exploitative. In the Facebook case, data protection principles provide the relevant test.⁴¹ The

³⁵ M Volmar, *Digitale Marktmacht* (Baden-Baden, Nomos, 2019) 455; on the competitive bottleneck, cf M Armstrong and J Wright, 'Two-Sided Markets, Competitive Bottlenecks and Exclusive Contracts' (2007) 32 *Economic Theory* 353.

³⁶ Volmar, *Digitale Marktmacht* (2019) 445–48.

³⁷ J Barth, *Datenschutzrechtsverstöße als kartellrechtlicher Konditionenmissbrauch* (Baden-Baden, Nomos, 2020) 237; cf BGH, 24 January 2017, KZR 47/14 (2017) *Neue Zeitschrift für Kartellrecht* 242, where the court had established the possible abuse of a dominant position through unfair terms and conditions; T Körber, 'Die Facebook-Entscheidung des Bundeskartellamtes – Machtmissbrauch durch Verletzung des Datenschutzrechts?' [2019] *Neue Zeitschrift für Kartellrecht* 187, 189.

³⁸ B6-22/16 [bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=8](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=8). The FCO had investigated the case since 2016; see also Körber, 'Die Facebook-Entscheidung' (2019) 187–88.

³⁹ BGH, 23 June 2020, KVR 69/19 (2021) *Gewerblicher Rechtsschutz und Urheberrecht International* 603.

⁴⁰ OLG Düsseldorf, 24 March 2021, VI-Kart 2/19 (V) (2021) *Gewerblicher Rechtsschutz und Urheberrecht* 874; Case C-252/21 *Facebook Inc and others v Bundeskartellamt*, [2021] OJ C320/16.

⁴¹ C Carugati, 'The 2017 Facebook Saga: A Competition, Consumer and Data Protection Story' (2018) 2 *European Competition & Regulatory Law Review* 4, 6; WPJ Wils, 'The Obligation for the Competition Authorities of the EU Member States to Apply EU Antitrust Law and the Facebook Decision of the Bundeskartellamt' (2019) *Concurrences* 58, 61.

expected decision by the ECJ will help to disentangle the complex relationships between antitrust law and data protection law. Possibly, further legal areas can in the future be considered within the antitrust framework, and the conclusions of the FCO might inform European antitrust standards.⁴²

Does the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions provide an alternative or additional instrument in the context of platform control? On the one hand, the Convention has often been criticised as a fuzzy piece of soft law that does not command concrete consequences.⁴³ Kristina Irion and Peggy Valcke have pointed out the EU's awareness of the connection between cultural diversity and broadcasting regulations, but they assess the regulatory impact as marginal.⁴⁴ On the other hand, the Convention's scope is extremely broad, as Jan Wouters and Bart De Meester clarify: it is applicable as soon as there is an effect on any aspect of cultural expression if it relates to cultural diversity.⁴⁵

Historically, cultural diversity has been considered an exception to free trade, which, however, has not been integrated in the list provided by Article XX of the General Agreement on Tariffs and Trade 1994.⁴⁶ The UNESCO Convention pairs cultural diversity and national sovereignty – the latter is evoked to defend of diversity in a global framework. This is an immediate consequence of the Convention being directed at signatory states but assumes that the nations bound by the Convention act as trustees of their minorities. This is not a trivial precondition, as diversity is not a concept exclusive to national states, and trusteeship of domestic diversity can highlight strong tensions. Catalonia in Spain and Scotland in the UK are prominent Western European examples of such tensions. Furthermore, Beatriz Barreiro Carril points out that the principle of territorial sovereignty, a cornerstone of the Convention, does not apply to the Internet.⁴⁷

While the global scope of Internet platforms goes further than (and in fact challenges) national sovereignty, the dichotomy between trade and cultural

⁴² cf Barth, *Datenschutzrechtsverstöße* (2020) 245–46; Wils, 'The Obligation' (2019) 63–64; a more critical assessment is voiced by Körber, 'Die Facebook-Entscheidung' (2019) 193–95.

⁴³ See M Burri, 'The UNESCO Convention on Cultural Diversity: An Appraisal Five Years after Its Entry into Force' (2013) 20 *International Journal of Cultural Property* 357; cf J Wouters and B De Meester, 'UNESCO's Convention on Cultural Diversity and WTO Law: Complementary or Contradictory?' in B Demarsin et al (eds), *Art & Law* (Bruges, die Keure, 2008) 342, 348: 'the phrasing ... is not very pressing.'

⁴⁴ K Irion and P Valcke, 'Cultural Diversity in the Digital Age: EU Competences, Policies and Regulations for Diverse Audiovisual and Online Content' in E Psychogiopoulou (ed), *Cultural Governance and the European Union: Protecting and Promoting Cultural Diversity in Europe* (Basingstoke, Palgrave Macmillan, 2015) 75, 87.

⁴⁵ Wouters and De Meester, 'UNESCO's Convention' (2008) 345.

⁴⁶ For a historical analysis in the perspective of GATT and the TRIPS agreement, see B Barreiro Carril, *La diversidad cultural en el derecho internacional: la Convención de la UNESCO* (Madrid, Iustel, 2011) 55–95.

⁴⁷ B Barreiro Carril, 'How Can China Influence the Transatlantic Governance of Cultural Products in the Digital Age' (2018) 19 *The Journal of World Investment & Trade* 444, 445.

diversity is repeated in the conflicts between platforms and their users. Specifically in this area, the Convention has evolved and deepened its scope with the approval of the ‘Guidelines on the Implementation of the Convention in the Digital Environment’.⁴⁸ While these guidelines ‘primarily address public authorities’, they also encourage ‘Non-governmental organizations, cultural and creative industries from the public and private sectors, including global digital platforms, Internet service providers (ISP) and other actors in the digital environment ... to follow them’ (section 7). The guidelines put the principles of the Convention, notably Article 7(I), into more concrete terms. They confirm important values and a continuity of essential freedoms between the physical and digital spheres: ‘The distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning does not change in the digital environment’ (section 2). A ‘Human Rights-based open Internet’ is envisioned (section 3), with a practical call for privacy and freedom of expression (section 8.9). The technological changes, including social networks, ‘provide new challenges and opportunities to promote the diversity of cultural expressions’ (section 5). This discernment is important, as it takes into account the double position of Internet platforms as enablers and regulators of cultural activities. Related to this double bind is the dual nature of cultural products, which are both economic and cultural, a fact recognised in the Preamble of the Convention and taken up in the Convention’s ‘Principle of the complementarity of economic and cultural aspects of development’. This concept echoes the classical analysis by Horkheimer and Adorno, who remarked that culture is a paradoxical commodity.⁴⁹ However, there is no global consensus on this dual nature, exemplified by the insistence of the USA to refer to ‘cultural products’ as ‘entertainment products’.⁵⁰ Indeed, this blurred line has been the concern of the then UN Special Rapporteur in the field of cultural rights, Farida Shaheed, who in 2014 demanded better protection from undue advertising and marketing and the reinforcement of data protection rights.⁵¹ In an article from 2015, Ulrich Dolata is very clear about a connection whose importance can hardly be overestimated: the platform ‘ecosystems’ are not just technical infrastructures, they are also – and perhaps more importantly so – social spaces.⁵²

A preliminary conclusion is permissible here: while the potential of antitrust laws to regulate cultural diversity on Internet platforms needs further evolution, the UNESCO Convention can offer an additional framework for regulatory measures that can specify its principles.⁵³ An application to the platform constellation,

⁴⁸ UNESCO (2017) unesdoc.unesco.org/ark:/48223/pf0000370521.page=92.

⁴⁹ Horkheimer and Adorno, *Dialectic of Enlightenment* (2002) 131.

⁵⁰ Barreiro Carril, ‘How Can China’ (2018) 448.

⁵¹ UN General Assembly, ‘Report of the Special Rapporteur in the Field of Cultural Rights’ (8 August 2014) UN Doc A/69/286, 15, 24.

⁵² U Dolata, ‘Volatile Monopole. Konzentration, Konkurrenz und Innovationsstrategien der Internetkonzerne’ (2015) 24 *Berliner Journal für Soziologie* 505, 511.

⁵³ cf Barreiro Carril, *La diversidad* (2011) 327.

as outlined here, does not fall outside the scope of the Convention. The international bodies are aware of the double nature of cultural activities in digital environments, as these are by default clad in the shape of a service.

III. The Established Monopolies of Sports Associations

This double nature returns in a distinct but related field. It does not come as a surprise that in 2009, the Committee on Economic, Social and Cultural Rights of the United Nations Economic and Social Council (CESCR) included sports in its General Comment No 21, which focuses on the ‘Right of everyone to take part in cultural life’ (Article 15, paragraph 1(a) ICESCR).⁵⁴ The Comment establishes a broad and inclusive definition of ‘culture’ in Article 13, encompassing

inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives. Culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities.

Not only does this concept connect sports, the arts and freedom of expression, which is part of the Article’s logical basis, it also points out the effect on communities. Today, an outlook is needed that takes the ‘social’ in ‘social media’ more seriously and, by extension, the place of the community in digital communicative environments. Evolving from the CESCR’s understanding of culture as a multidimensional, transversal concept, it is suggested here that the typical imbalance in communicative freedoms imposed by digital monopolies is not a new phenomenon but reveals a structure that is inherent to a number of established social constellations. As a proof of concept, a focus on the parallel economy of a professional sport, namely football, is offered. There exists a line of scholarship on ‘sports capitalism’ that comes to conclusions that strongly resemble the interrogations of digital capitalism. This is no coincidence. Sports associations act as a kind of entertainment provider, in many ways similar to Facebook or YouTube. As organisers of their respective global sports events, the International Olympic Committee (IOC)

⁵⁴ Committee on Economic, Social and Cultural Rights, ‘General Comment No 21: Right of Everyone to Take Part in Cultural Life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)’ (21 December 2009) UN Doc E/C.12/GC/21. See Barreiro Carril, *La diversidad* (2011) 252–54.

and the Fédération Internationale de Football Association (FIFA) are monopolists, and ‘any fundamental change would have to affect the monopoly power that the IOC and FIFA wield’.⁵⁵

Despite its monopolistic power, FIFA remains classified as a non-profit organisation.⁵⁶ In fact, sports associations’ monopolies are even more solid than those of digital platforms, in that international sports competitions are organised around the principle that every association exclusively represents their discipline. There is only one global football association, only one global athletics organisation, only one global skiing association, etc, which is why the principle can be called the Highlander Principle, after the motto: ‘There can be only one!’ In sports where such a monopoly is not in place, such as boxing or wrestling, the value of international championships is compromised, because there can be multiple athletes simultaneously holding world titles.

The FIFA World Cup generated \$1.6 billion in sponsorship revenue between 2007 and 2010. To maximise these profits, FIFA attempts to influence national legislation to secure its marketing monopoly. It also implements surveillance measures such as ‘Commercial Restriction Areas’, which limit the marketing opportunities of non-sponsors that could arise from their physical presence at event venues and official sites.⁵⁷

An anecdote serves to highlight the power of FIFA. In the wake of the World Cup of 2014, as is now the rule before such events, the city of Rio de Janeiro underwent an intensive phase of restructuring, demolition and building. Both World Cups and Olympic Games offer attractive financial opportunities for producers of merchandise, for real estate investors and for venture capitalists. The urban environments around the Maracanã stadium in Rio de Janeiro were transformed accordingly, and plans were made to demolish some of the buildings surrounding the stadium to ease access. Then the old building of the Museu do Índio became a potential victim of the redevelopment. Until 1977, the building, erected in 1862, had housed the museum for indigenous cultures; since 2006, it had served as a meeting place for a settlement of about 20 indigenous people. In 2013, the city council acquired the property and announced plans to demolish it to make room for a parking garage.⁵⁸ The indigenous inhabitants were removed from the estate by military police.⁵⁹ While the local government claimed that FIFA had demanded the demolition of the former museum for the World Cup, FIFA had never explicitly

⁵⁵ A Zimbalist, *Circus Maximus: The Economic Gamble behind Hosting the Olympics and the World Cup*, 2nd edn (Washington, DC, Brookings Institution, 2016) 139.

⁵⁶ HA Solberg and C Gratton, ‘Broadcasting the World Cup’ in S Frawley and D Adair (eds), *Managing the Football World Cup* (Basingstoke, Palgrave Macmillan, 2014) 47, 60.

⁵⁷ S Chadwick, R Liu and D Thwaites, ‘Ambush Marketing and the Football World Cup’ in Frawley and Adair, *Managing the Football World Cup* (2014) 63, 71–72.

⁵⁸ Zimbalist, *Circus Maximus* (2016) 101.

⁵⁹ S Romero and T Barnes, ‘Police Storm Squatters at Rio Stadium Site’ *New York Times* (22 March 2013) 5.

demanded any such move.⁶⁰ It is noteworthy that the authorities could easily operate on the assumption that hardly anybody would question a demand by FIFA for the demolition of the old buildings. The narrative was plausible because of FIFA's position – it could indeed have demanded such a move, but in the course of events FIFA needed to distance itself from the decision. The events contributed to a partial sense of estrangement from the global football party. As Gabriel Kuhn notes, instead of football concealing social contradictions, it was now highlighting them.⁶¹

FIFA demands a closely controlled, protected commercial environment for its events and for its sponsors. This includes massive infrastructure projects and other measures. Local merchants are forced to close their shops within a designated area near the sports venues or if they do not sell the sponsors' products. Even spectators are affected: they are not allowed to wear t-shirts with political messages and detailed terms and conditions apply to their tickets, which, for example, may not be sold on. FIFA also insisted on the sale of beer in the stadium, something that was at odds with Brazilian laws at the time, which banned alcohol at football matches.⁶²

International sports associations act globally, they are in an exceptionally powerful position, they manage a monopoly and they are highly conscious of their position. The architecture of their headquarters does not leave any open questions in this regard. The architecture betrays the common language of corporate power, which was also noted by Horkheimer and Adorno⁶³ and further elaborated by Fredric Jameson in his study on postmodernism (1991):

Of all the arts, architecture is the closest constitutively to the economic, with which ... it has a virtually unmediated relationship. It will therefore not be surprising to find the extraordinary flowering of the new postmodern architecture grounded in the patronage of multinational business.⁶⁴

Hal Foster notes the sleek surfaces of metal and glass typically offered by the architectural studio of Norman Foster, and how the elegant façades offer media-friendly backdrops for public relations and space for logos. It is a kind of architecture with

⁶⁰ I Mello, 'Fifa desmente Cabral e afirma que não pediu demolição do Museu do Índio' *Jornal do Brasil* (18 October 2012) www.jb.com.br/rio/noticias/2012/10/18/fifa-desmente-cabral-e-afirma-que-nao-pediu-demolicao-do-museu-do-indio.html.

⁶¹ G Kuhn, *Soccer vs the State: Tackling Football and Radical Politics*, 2nd edn (Oakland, PM Press, 2016) 250.

⁶² 'Brazil World Cup Beer Law Signed by President Rousseff' (*BBC News*, 6 June 2012) www.bbc.com/news/world-latin-america-18348012. Similar policies are implemented by UEFA at European tournaments; for example, for Euro 2008 in Switzerland and Austria, see Kuhn, *Soccer* (2016) 68.

⁶³ Horkheimer and Adorno, *Dialectic of Enlightenment* (2002) 132 mention 'the imposing buildings of the big companies'.

⁶⁴ F Jameson, *Postmodernism, or, the Cultural Logic of Late Capitalism* (Durham, NC, Duke University Press, 1991) 5.

brand-like qualities.⁶⁵ A recent study considers the connection between corporate identities and their representation in architectural terms and concludes that

another period is starting, that of the great twenty-first-century IT corporations, those established powers of neoliberal capitalism, building their own vast corporate campuses for their core creative staff: the 'shining ring' headquarters planned by Apple (designed by [Lord Norman] Foster), the 'futuristic greenhouse' planned by Google (designed by Heatherwick Studio), and Facebook's 'Facebook West' (designed by [Frank O] Gehry) ... These new campuses, we might argue, demonstrate a renewed 'dialectic of distinction' between prestigious architects and powerful clients, a desire to project corporate identity, and a need to promote the integration of a corporate community (understood as domination): in this way constituting another reification of social life under capitalism, in which 'everything must change so that everything can remain the same.'⁶⁶

The observation could easily be extended to the headquarters of FIFA (designed by Tilla Theus) and the recently completed Olympic House for IOC (designed by 3XN Architects). In conclusion, the common corporate architecture of global sports associations and platform providers demonstrates their shared understanding of communities as dominated collectives, and a self-understanding as a dominant singularity.

IV. The Role of Communities

The previous two sections of this chapter have offered the insight that Internet platforms and sports associations prove how culture under commercial conditions becomes subject to corporate normativity. For the global digital platform providers, network effects of contractual law, principally only binding partners of a contract, entail collective effects that are much further reaching. For the sports associations, legally non-profit associations or charities, the logic of sports competition evolves into long-lasting and resilient commercial monopolies. It has become a kind of engineered legal butterfly effect, as these providers of communication and culture also provide their own legal frameworks.

The all-permeating commercial logic behind sports events has started to wear off, and the effects have become even more visible during the ongoing COVID-19 pandemic. It has been noted that football has lost some of its unpredictability ('openness of outcome'), which is an essential part of its attraction.⁶⁷ This is

⁶⁵ H Foster, 'Designing a Second Modernity?' in N Lahiji (ed), *The Political Unconscious of Architecture: Re-Opening Jameson's Narrative* (Farnham, Ashgate, 2011) 97–98.

⁶⁶ R Kerr, SK Robinson and C Elliott, 'Modernism, Postmodernism, and Corporate Power: Historicizing the Architectural Typology of the Corporate Campus' (2016) 11 *Management & Organizational History* 123, 140.

⁶⁷ E Franck, 'The Other Side of League Organization – Efficiency-Aspects of Basic Organizational Structures in American Pro Team Sports' (2002) Working Paper Series of the Institute for Strategy and Business Economics, University of Zurich, 16: 'openness of outcome increases the economic value of the championship race.'

a side effect of the intense commercialisation of football, which is marketed as a cultural product by the monopolistic associations, for example in the shape of the Champions League. The old German phrase, ‘Money does not score goals’, commonly credited to Otto Rehhagel, then (1995) manager of Bayern München, has lost much of its truth since broadcasting revenues have become more important than ticket sales for the economy of the football clubs.⁶⁸ The confluence of commercial and sporting success has deepened. The (preliminarily stalled) efforts to instate a European Super League in 2021 confirm this development.⁶⁹ As a consequence, the successful clubs’ dependence on their fan base has weakened, with the side effect of (some) fans turning away from over-commercialised clubs.⁷⁰

The relation between clubs and their supporters was loosened further when, during the early days of the COVID-19 crisis, most football matches were called off. Once the professional leagues resumed their match plan in May and June 2020, no spectators were allowed to be present. In Germany, this format, which is known as ‘behind closed doors’ in English, is called ‘Geisterspiel’, a ghost game. In its June issue of 2020, the German magazine for football culture, *11 Freunde*,⁷¹ spoke out in large letters on its cover how much they were missing the fans in the empty stadiums: ‘Ihr fehlt!’ (‘Miss you!’), and the editors added the conclusion: ‘Football without fans is just a game.’ While this is true for amateur sports, it is not for the professional branch of football. Here, without the fans, it is but an investment. The games in empty stadiums were arranged as a measure to rescue the money from the clubs’ television broadcasting rights.

The same issue of the magazine contained an interview with fans of the Gelsenkirchen club Schalke 04, where supporters remembered the good old times and a promotion video that the club had produced after it had won the Euro League in 1997. ‘Suddenly I realised what I was missing,’ one of the interviewees is quoted, ‘The community, the team spirit. Thousand friends standing together.’ It is notable that these feelings were prompted by watching a promotion video. Obviously, there was a consensus between club and fans at the time; the emotions at play were

⁶⁸ See, eg S Parlasca and S Szymanski, ‘When the Whole Is Less than the Sum of the Parts: The Negative Effects of Central Marketing of Football Television Rights on Fans, Media Concentration and Small Clubs’ (2002) 4 *Zeitschrift für Betriebswirtschaft, Ergänzungsheft* 83.

⁶⁹ D Goldblatt, ‘The Greed of the European Super League Has Been Decades in the Making’ *The Guardian* (20 April 2021) www.theguardian.com/commentisfree/2021/apr/20/greed-european-super-league-football-billionaires. The original press release of the Super League founders, dated 18 April 2021, is archived at web.archive.org/web/20210419223112/https://thesuperleague.com/press.html. It lists AC Milan, Arsenal FC, Atlético de Madrid, Chelsea FC, FC Barcelona, FC Internazionale Milano, Juventus FC, Liverpool FC, Manchester City, Manchester United, Real Madrid CF and Tottenham Hotspur as founding clubs.

⁷⁰ C Sandvoss, *A Game of Two Halves: Football, Television and Globalization* (London, Routledge, 2003) 164: ‘As football clubs increasingly embody messages of rationalization and standardization, more and more fans are unable to appropriate these messages within their fandom.’

⁷¹ Literally ‘11 Friends’, after a quote that is commonly (but wrongly) credited to Sepp Herberger, the first (West) German national football team manager after World War II: ‘You must be 11 friends!’ The motto was in fact engraved on the first German football trophy that was used from 1903.

not over-commercialised but were presented in such a manner that they remained relatively unharmed and authentic. In contrast, the ‘ghost games’ were perceived as inauthentic, artificial performances. Hans Ulrich Gumbrecht observes an almost metaphysical effect of synchronicity between a football team and its supporters inside the stadium. Historically, he explains, team sports are a modern phenomenon, and the team offers a more natural point of emotional contact for a larger audience. The team effort also extends to the supporters; team and supporters see themselves as united. ‘You’ll never walk alone.’⁷² If the ties between clubs and their supporters are cut by blocking their common ground and meeting place, they might, however, move in different directions.

Football supporters are an example of the kind of communities that can resist the global platform providers. In the end, fan protests contributed significantly to the collapse of the plans to start a European Super League.⁷³ In fact, it is this power that contributes to the sport’s attractiveness to investors. Supporters are an asset, and it is complicated to protect the innocence of fandom in such an environment. In the context of fandom as an asset, it is also significant that Facebook operates with the term ‘fans’ for those accounts that follow another. The wording reveals the capitalisation of these community forces. Such a move should provoke resistance. Philipp Köster, editor-in-chief of *11 Freunde*, argued in the editorial for the August 2020 issue that supporters should organise themselves after the model of trade unions.⁷⁴ Legal instruments of collective labour law are suggested as a real option to empower supporters.

There are international precedents for such a self-empowerment of football supporters’ communities, for example, the foundation of the Independent Manchester United Supporters Association (IMUSA) in 1995. The English Wikipedia lists close to 20 different English football supporters’ associations.⁷⁵ Acts of self-organisation can go even further. In 2005, Manchester United supporters opposed American businessman Malcolm Glazer’s takeover of the Premier League club. While the opposition of the IMUSA ultimately failed in stopping this takeover, a series of meetings led to the founding by disaffected supporters of a new club, FC United of Manchester. In his analysis of the events, Adam Brown notes:

Within these discussions, various references were made to the notion of ‘community’. Supporters talked of the need to ‘keep the community together’ referring to groups of

⁷² HU Gumbrecht, *Crowds: The Stadium as a Ritual of Intensity* (Stanford, Stanford University Press, 2021) 104–05.

⁷³ See T Lewis, ‘The Week English Football Fans Bit Back against the Billionaire Owners’ *The Observer* (25 April 2021) www.theguardian.com/football/2021/apr/24/the-week-english-football-fans-bit-back-against-super-league-the-billionaire-owners. However, F Röckenhaus, ‘Schulden und Schuldige’ *Süddeutsche Zeitung* (23 April 2021) 25, points out that strong political interests from Russia and Saudi Arabia also worked against the Super League.

⁷⁴ P Köster, ‘Organisiert euch!’ *11 Freunde* (August issue, 2020) 14.

⁷⁵ Wikipedia, ‘Category: English Football Supporters’ Associations’, en.wikipedia.org/wiki/Category:English_football_supporters%27_associations. See S Hamil et al (eds), *The Changing Face of the Football Business: Supporters Direct* (Oxon, Frank Cass Publishers, 2001) for an early academic assessment of football supporters’ initiatives.

fans who had followed the club home and away over the preceding years, essentially match day communities.⁷⁶

The motto printed on t-shirts to help fundraising for the new club, 'Our Club, Our Rules', highlights the normative self-empowerment of the supporters' community, autonomy in its literal sense. FC United of Manchester established itself as a non-profit organisation with a one-member, one-vote governance structure.⁷⁷ It is currently the second-largest fan-owned football club in the UK by number of members after Exeter City FC.⁷⁸

The club seems to have been the model for supporters of the Hamburger Sportverein (HSV), who left their club in 2014 to start the Hamburger Fußball-Club Falke. The move was a reaction against the transformation of the professional football division of the HSV into a public limited company. Similar to FC United, HFC Falke offered its members a sense of belonging and established an active community.⁷⁹

Perhaps the most successful example of fans taking over their clubs is AFC Wimbledon. The club was founded in 2002 by (then former) supporters of Wimbledon FC, after the club had made public its plans to relocate to Milton Keynes. Supporters felt that the new club, which soon changed its name to Milton Keynes Dons, no longer represented their local community. Whereas the traditional meaning of the acronym AFC is 'Athletic Football Club', it stands for 'A Fans Club' and the philosophy of the new club, 'By the fans, for the fans'.⁸⁰ Starting in the ninth tier of the English league system, the club has been promoted six times (and relegated once) and is currently playing in the fourth tier, or League Two, having previously reached the same league that Milton Keynes Dons are playing in.

These examples demonstrate that communities are not helpless. The decisive step is indeed to organise the community into a potentially legal entity; to turn culture into law. The football clubs in Manchester, Hamburg and Wimbledon have proven the possibility. Communities such as artists against censorship on Instagram are moving in the same direction. Nick Srnicek suggests that 'Rather

⁷⁶ A Brown, "'Our Club, Our Rules': Fan Communities at FC United of Manchester' (2008) 9 *Soccer & Society* 346, 347.

⁷⁷ *ibid* 353; D Torchia, 'An Alternative Football Club in a Liquid Modernity: FC United of Manchester' (2016) 22 *Culture and Organization* 203, 209–10.

⁷⁸ FC United of Manchester is currently (2021/22) playing in the seventh tier of English professional football, the Northern Premier League.

⁷⁹ See C Brandt, "'Eine neue emotionale Heimat": der Hamburger Fußballclub Falke' (2019) 3 *Forum Wohnen und Stadtentwicklung* 141.

⁸⁰ D Cook and C Anagnostopoulos, 'MK Dons FC and AFC Wimbledon: Moving the Goalposts and Rising From the Ashes' in S Chadwick, D Arthur and J Beech (eds), *International Cases in the Business of Sport*, 2nd edn (London, Routledge, 2017) 138, 140. For an assessment of the emotional effects of the relocation on supporters groups, see D Potter, 'From Merton to Milton Keynes: Wimbledon Football Club Fans and the Impact of Post Team Relocation Ten Years after the End of the Crazy Gang' in S Dun, M Kalaji and M Stell (eds), *It's How You Play the Game: International Perspectives on the Study of Sport* (Oxford, Inter-Disciplinary Press, 2013).

than just regulating corporate platforms, efforts could be made to create public platforms – platforms owned and controlled by the people.⁸¹ This is the basic idea behind initiatives such as fan-run clubs. Translated into the environment of digital communication platforms, it might mean accommodating particular communities with tools suited specifically to their needs, to build networks for specific purposes. Indeed, on a technical level, software solutions are already offered to implement such networks. Interestingly, whereas the big global platforms present themselves as communities of fans by using the pertinent terminology, smaller competitors try to reappropriate the term, for example, advertising that users can find their perfect community.

Twenty years ago, Valérie Fournier argued that self-governance and small self-reliant communes are ‘the material conditions under which we can start to open up alternative possibilities to neoliberalism and its devastation’;⁸² indeed, it is a goal shared by artists on Instagram, football supporters and other communities. Virtual communities in a digital environment may be more individualistic than offline communities, but should not be confused with pseudo-individual customisation of consumer demand. Online communities are as capable of sharing common values, ideas and traditions as offline communities, and it would be a mistake to ignore these values. Gerard Delanty argues that we should abandon the distinction between real and imaginary communities.⁸³

However, the frameworks of sports and digital communication are only similar, not identical. Fundamental differences between online and offline communities cannot be ignored.⁸⁴ The organisational structure of football allows for dissent to a certain degree – communities can split and form new communities. A new club such as FC United or AFC Wimbledon is still part of the same regulatory framework as Manchester United and Milton Keynes Dons. The case is different for digital platforms, which offer communication services that are being used almost universally. The option to terminate the contract and cease using the platform is not always desirable when a platform appears to be the only sensible option for a particular type of communication, or when most or all of your social contacts are based on one particular platform. The exodus from such a platform brings with it the feeling of being expelled. Furthermore, it contributes to the echo chambers of community-driven communication. Virtual communities strengthen existing ones, and rarely create new networks. Deviant communities are marginalised. Delanty sees this as a problem, a missed opportunity to create democratic possibilities to bring together people who are different,⁸⁵ an ambition that is part of

⁸¹ Srnicek, *Platform Capitalism* (2017) 128.

⁸² V Fournier, ‘Utopianism and the Cultivation of Possibilities: Grassroots Movements of Hope’ (2002) 50 *The Sociological Review* 189, 206.

⁸³ G Delanty, *Community*, 2nd edn (London, Routledge, 2010) 137.

⁸⁴ M Castells, *The Rise of the Network Society*, 2nd edn (Wiley-Blackwell, Chichester, 2010) 389 struggles with the reality of digital communities, while Delanty, *Community* (2010) 134 emphasises their innovative character.

⁸⁵ Delanty, *Community* (2010) 146.

the underlying principles of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which include interculturality and dialogue among cultures.

Given that these platforms claim a universal status for their services,⁸⁶ they must be held accountable according to the Peter Parker Principle, ‘With great power comes great responsibility’.⁸⁷ In Western democracies, although no longer uniformly accepted, the exercise of power is controlled by several factors, such as a balance of powers, the rule of law, elections and other democratic instruments. The individual is not only subject to authority, but enjoys a number of fundamental freedoms and rights against this authority. Normative limitations of community interactions, implemented by private enterprises, should be legitimised by a balance of mutual respect and consideration, not by the unilateral commercial interests of the platform of communication. There is a growing consensus that there should be some kind of legal control. Platforms that acknowledge the diversity of their users and give them enough space to self-regulate their affairs fit better into democratic requirements than those simply treating their users foremost as customers. Where Reddit allows a multitude of ‘boards’ according to community interests, Facebook targets individuals as customers. To complicate matters further, diversity on less controlled platforms must have its controlled limits, too – Reddit and 4Chan have been the source, filter bubble and echo chamber of terrorist ideas turned into reality, a script board for actions that threaten societies and many communities alike. The far-right subreddit r/The_Donald, which was closed by Reddit in June 2020, is but one example of boards that should not benefit from a global communication platform. Communities that target other communities and deny their right to exist undermine a prosperous diversity. This is in line with the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which emphasises in Article 1b) that one of its aims is to ‘create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner’. Furthermore, in Article 19 of the CESCR’s aforementioned General Comment No 21, the need for certain limitations of cultural freedoms is acknowledged. Technically, the place for these limitations is the platform’s ‘community’ regulations. The CESCR stipulates that such limitations must

be proportionate, meaning that the least restrictive measures must be taken when several types of limitations may be imposed. The Committee also wishes to stress the

⁸⁶ On Facebook’s idea of ‘bringing the world closer together’, cf S Vaidhyathan, *Antisocial Media: How Facebook Disconnects Us and Undermines Democracy* (Oxford, Oxford University Press, 2018) 1.

⁸⁷ The principle has been popularised by Spider Man comics, where it first appeared in 1962, but expresses a fundamental value that has been articulated before, eg in 1793 at the French National Assembly; see *Collection générale des décrets rendus par la Convention Nationale. Mois de Mai 1793* (Paris, Baudouin, 1793) 72 [entry for 7 May 1793]: ‘Les Représentans du peuple ... doivent envisager qu’une grande responsabilité est la suite inséparable d’un grand pouvoir’. The principle has also been acknowledged by the US Supreme Court in *Kimble v Marvel Entertainment, LLC* 576 US 446 (2015).

need to take into consideration existing international human rights standards on limitations that can or cannot be legitimately imposed on rights that are intrinsically linked to the right to take part in cultural life, such as the rights to privacy, to freedom of thought, conscience and religion, to freedom of opinion and expression, to peaceful assembly and to freedom of association.

As a consequence, any cultural platform's rules have to stand the proportionality test. German courts have come to similar conclusions. In its preliminary Facebook decision, the Bundesgerichtshof has pointed out:

Facebook provides a communication platform that, at least for some consumers, crucially determines their participation in social life and is of major significance for public discourse in political, societal, cultural and economic matters. As a result, the firm has a special legal responsibility under the aspect of informational self-determination when designing the terms of use of the platform.⁸⁸

Significantly, the court here refers to a decision by the German Constitutional Court (Bundesverfassungsgericht) on a nationwide stadium ban issued by a football club in application of the German Football Association's rulebook.⁸⁹ The Constitutional Court had established that, under certain conditions, even private associations have to respect fundamental rights, such as the principle of equal treatment.⁹⁰ Furthermore, it explicitly referred to Article 15, paragraph 1(a) ICESCR and CESCR General Comment No 21.⁹¹

V. Conclusions

The comparison between the monopolistic structures of digital platforms and international sports associations has shown that the latter can be interpreted as platforms. Both groups share important characteristics. These non-governmental, global organisations accumulate so much power it requires democratically legitimised, normative control. Such a normative framework is, however, not yet effective. Antitrust laws do not regulate the relationship between monopolistic companies and their customers.

This common structure is not exclusive to digital platform providers and sports associations. The analysis could, for example, be extended to religious organisations, which often follow their own, autonomous legal systems. Recent

⁸⁸ BGH, 23 June 2020, KVR 69/19, 2021 *Gewerblicher Rechtsschutz und Urheberrecht International* 603, 614.

⁸⁹ cf K Wiedemann, 'A Matter of Choice: The German Federal Supreme Court's Interim Decision in the Abuse-of-Dominance Proceedings Bundeskartellamt v Facebook (Case KVR 69/19)' [2020] *International Review of Intellectual Property and Competition Law* 1168, 1179.

⁹⁰ BVerfG, 11 April 2018, 1 BvR 3080/09, 148 *BVerfGE* 267, 283.

⁹¹ *ibid* 284.

developments in biotechnology have led to the emergence of yet another candidate. Writing for the German weekly *Der Spiegel*, Sascha Lobo argues that the mRNA COVID-19 vaccines developed by Moderna and BioNTech are early examples of bio-platforms that are prone to replicating developments from the digital infosphere.⁹² To support his analysis, Lobo could have quoted an article from *Nature Reviews*, which presents an overview of mRNA vaccines and ‘considers future directions and challenges in advancing this promising vaccine platform.’⁹³

Finally, it is proposed that the relation of platform monopolies and the responsibility for diversity be considered a case of socio-legal proportionality: the greater the monopolistic character of a platform, the greater the responsibility to guarantee diversity on the platform. Fundamental democratic principles and the rule of law both legitimise legal control over the monopolistic platforms to enable diverse communities and limit the freedom of diversity. The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions reaffirms, in Article 1h), ‘the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory’. Measures to control global Internet platforms serve this purpose; they are mentioned in Article 6 of the Convention as ‘regulatory measures aimed at protecting and promoting diversity of cultural expressions’.

The UNESCO Convention does not provide legal control mechanisms, but it does offer a clear compass for lawmakers,⁹⁴ which is further developed into an appeal in section 11 of the Guidelines on the Implementation of the Convention in the Digital Environment (2017):⁹⁵ ‘Parties are invited to update their legislative and regulatory frameworks’. Manifestly, the Convention operates as a platform itself, a regulatory framework that needs the initiative of governments to start a social and legal transformation of existing monopoly structures: a counter-platform. The first steps in this direction are still exploratory. Adopted by the UN General Assembly on 10 December 2008, the Optional Protocol to the ICESCR⁹⁶ introduced complaint and inquiry mechanisms for individuals and groups. Once more states sign and implement the protocol, a much-needed road to stronger guarantees of cultural freedom can be paved. Legal counter-platforms provide an adequate regulatory instrument for monopolistic cultural platforms.

⁹²S Lobo, ‘Die neue Weltmacht der Bio-Plattformen’ (27 January 2021) [spiegel.de/netzwelt/netzpolitik/mrna-technologie-die-neue-weltmacht-der-bio-plattformen-a-c87fa211-1897-47cf-8a1b-cd9ded973e6f](https://www.spiegel.de/netzwelt/netzpolitik/mrna-technologie-die-neue-weltmacht-der-bio-plattformen-a-c87fa211-1897-47cf-8a1b-cd9ded973e6f).

⁹³N Pardi et al, ‘mRNA Vaccines – A New Era in Vaccinology’ (2018) 17 *Nature Reviews* 261.

⁹⁴*cf* Barreiro Carril, *La diversidad* (2011) 250–53.

⁹⁵Guidelines on the Implementation of the Convention in the Digital Environment, Approved by the Conference of Parties at its sixth session (2017) <https://unesdoc.unesco.org/ark:/48223/pf0000370521.page=92>.

⁹⁶(adopted 10 December 2008, entered into force 5 May 2013) 2922 UNTS 29.

