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Platforms and Professional Performers: Legal Aspects of Pornography.

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Introduction

Every second, nearly thirty million people ("unique Internet users") are viewing porn online, globally. Every hour, porn platforms like Pornhub, Xvideos, and YouPorn register over 1.5 million views worldwide[1]. The average time spent on a porn site is between fifteen and twenty minutes, while the average time spent on a non-porn site is roughly five minutes. While most websites are predominantly text and images, porn sites offer streaming video. Loading a typical website requires roughly two megabytes, totalling roughly ten megabytes over five minutes. Streaming a video for fifteen minutes requires roughly ninety megabytes. Platforms like Pornhub, Xvideos, and Youporn have roughly 350 million monthly visitors each, transferring fifty gigabytes per second (about 25.000 more than any home internet connection could take)[2]. All in all, porn makes up 30% of all the data transferred across the web, which is estimated to host over forty million porn websites. Pornography fuels the need for high-speed internet connections as well as ever more refined video streaming technology (and, increasingly, Virtual Reality). The revenue generated by pornography platforms is often used by their mother tech companies to develop new and innovative technologies.

Regulating online pornography means regulating a third of the Internet and at least some factors and elements in its future evolution. In addition, it means regulating a most controversial human practice, which has long predated the Internet, and whose regulation has long been fraught with intense controversy and taken very different paths in different times and places. Today, some countries ban pornography outright, while most others allow it more or less liberally; some countries emphasize regulation of pornography consumption, others of its production, others yet of its distribution. The very task of attempting pornography regulation inevitably mobilizes deep value layers, social norms, and conceptual frameworks governing some of the most sensitive dimensions of human life, including sexuality, gender and gender relations, individual liberty, moral tolerability, and their complex interrelations. These are among the very lines along which cultures divide and distinguish themselves one from the other. Global

[1] GOBRY, SAINT (2011).
[2] ANTHONY (2012).

harmonization of online pornography regulation appears virtually impossible even as the web entangles all countries in shared flows of representations and data.

Any difficulties that ever existed with regulating the production, distribution, and consumption of pornographic representations before the advent of the Internet have been vertiginously magnified since, with a great acceleration occurring after 2007, the year in which smartphones took the world by storm. That was also the year in which Pornhub launched. According to Pornhub's 10-year celebration data release in 2017, a mere one per cent of viewers tuned in on a mobile device in 2007[3]. In 2017 that number had soared to 75 per cent. To such wider accessibility has corresponded a surge in availability. In 2007, 134 hours of video were uploaded to Pornhub, compared to nearly 477.000 hours uploaded in 2016. In total, Pornhub has now more than 1.5 million hours of video available to stream[4]. Roughly the same is true of its main competitors. All such content is available on mobile devices at any time.

Even if one restricts the question "what does the law say about pornography?" to exclusively Western contexts – those contexts in which pornography is typically allowed rather than prohibited - one can only respond with fairly general pointers about the side constraints that the law has established through the years. The legal landscape currently prevailing in western countries is one of general permissiveness towards production, distribution, and consumption of pornography, constrained by prohibitions over representations that involve children[5] and non-consensual violence. Around this core legal posture are fuzzy boundaries, subject to contention in reference to what are typically called, following terminology from US jurisprudence, "contemporary community standards"[6]. Yet in contemporary society standards change quickly (partly due to accelerating rates of technological developments) and communities are not isolated and localized but globally connected

[3] Pornhub.com/Insights2017.
[4] FUSTICH (2017).
[5] But see Judgement of the Supreme Court of the United States, 16th April 2002, *Ashcroft v. Free Speech Coalition*, protecting simulated child pornography. This accounts for the legality of the so- called barely legal pornography, a subgenre of porn that toys with the idea that its porn actresses are teenagers.
[6] Judgement of the U.S. Supreme Court, 21st June 1973, *Miller v. California* and Judgment of the Supreme Court of the United States, 24th June 1957, *Samuel Roth v. United States.*

and shifting. And the Internet Service Providers (ISPs) that connect communities across continents are in many respects legal novelties, whose processes and operations are technically complex and ever-evolving.

Pornography is a morally charged and often strongly ideologized topic. Once platforms became the medium for pornography, traditional concerns about the regulation of pornography were compounded by new challenges in the regulation of platforms. The pervasive diffusion of platform pornography is a phenomenon of great societal impact that surely calls for sophisticated legal regulation: yet platform pornography (like most of what goes on cyberspace) is also a new, complex, multifarious, evolving and still only partially understood phenomenon. In addition, the list of platform pornography stakeholders is distinctively long: it includes actors in the app economy, including powerful social media; actors in the data economy, including miners, processers, strategists, and intermediaries; tech investors; phone and web service providers; credit card and cryptocurrency circuits; cybersecurity agencies; media and advertisement companies; sex toys manufacturing and underwear industries; event planners; the location and real estate business; closed-circle broadcasting services for the hospitality industry; production studios, performers agencies, law firms, and more. Search engines like Google, which offer access to porn platforms, and social media like Facebook, Twitter, and Snapchat, where platforms and performers have an account, have a huge stake in online pornography as well.

All these factors significantly complicate efforts at legal regulation. With many people, I believe that existing regulation is in various ways and respects unfit to the task of tackling the overwhelming phenomenon that platform pornography is. In this dissertation, I consider legislation relevant to pornography regulation (in Western contexts, particularly the US and Europe) developed before and after the advent of the Internet, and discuss the ways in which such legislation has shaped today's regulation of platform pornography (the pornography distributed through platform websites such as Pornhub). For reasons of space, I consistently restrict my investigation to professional porn, setting aside all issues related to amateur pornography (whose diffusion

has, expectably, had an even greater boost from the advent of the Internet than that of its professional counterpart[7]).

§1 Research Question and Central Claims

My research question is: What is conspicuously missing from the regulation of platform pornography that would be likely to address, at least to some significant extent, important worries that are typically attached to the operations of the adult industry, particularly now that its deliverances are distributed online?

My central claim is that what is missing is a robust performer-centered legislation binding the long supply and delegation chain that leads from a porn set to a website thumbnail. Such chain is today ultimately in the hands of tech giants like MindGeek, the owner of Pornhub, Youporn (and Redtube and many others), and I suggest it is these companies that should bear the burden of ensuring respect of performer-centered legislation all along the chain of supply and delegation.

A tech company like MindGeek, which owns the Pornhub platform as well as the Brazzers Studios producing the videos that are available (also) on Pornhub, should bear the legal obligation of protecting performers' rights and promote their interests, drafting dedicated requirements applying to every step of the chain of sub-contracting services. Performer-centered legislation, I believe, should be informed not only by a concern for performers' consent but also by an equally weighty concern for performers' dignity and integrity, as defined by performers themselves.

On this view, performers' consent is a necessary but not sufficient condition for the regulation of porn production, and because the latter is ultimately in the hands of its online distributors, of online pornography more generally. A further principle should be given equal weight, which aims at protecting consenting performers from physically, psychologically, and socially intolerable premises and implications of porn production.

[7] See RUBERG (2016) for wide ranging discussion on amatory pornography.

What constitutes the "intolerable" should not only be determined on a case-by-case contractual basis by individual performers and individual producers, but also respond to an independent set of overarching "dignity/integrity-protectors" systematized by law and inspired by performers' indications as a group[8]. That performers should have such direct say in defining platform pornography's regulation is justified by considerations relating to their rights as workers[9] and as humans[10], and it is urged by the high level of vulnerability to integrity violations that performers (as a group) are exposed to along the extended supply and delegation chain that leads from a set to a thumbnail in times of platform pornography.

I believe this approach, besides leading to a fairer distribution of rights and burdens among performers and platforms, has also the attractive feature of cutting through a number of objections to pornography as a

[8]The Charter of Fundamental Rights of the European Union (2012) states in Title I, Art.1: "Human dignity is inviolable. It must be respected and protected". And refers to *Right to Integrity of the person*, in Title I, Art.3 (1): "Everyone has the right to respect for his or her physical and mental integrity". It is also worth noticing Art.3 (2c): "the prohibition on making the human body and its parts as such a source of financial gain". In addition, The Universal Declaration of Human Rights (1948), Art.22, recognizes that: Everyone, [...], has the right to social security and is entitled to realization, [...], of the economic, social and cultural rights indispensable for his *dignity* and the free development of his personality" (emphasis added).

[9] The International Covenant on Economic, Social and Cultural Rights (1976), Part III, Art.6 (1) recognizes: the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts. And Part III, Art.8(1a) recognizes to every worker: "[...] to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others". A Further important document for the rights of workers is in the Freedom of Association and Protection of the Right to Organise Convention (1948) in the International Labour Organization Convention.

[10] The Charter of Fundamental Rights of the European Union protects both human and workers' rights, as in Part II, Art.12 and Art.15 protect respectively: Freedom of assembly and association, and Freedom to choose an occupation and right to engage in work. And in Art. 31 (1) on Fair and just working conditions, it states: "Every worker has the right to working conditions which respect his or her health, safety and dignity". In addition, the International Covenant on Civil and Political Rights (1976), Art. 14 states that: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

practice, which have often polarized public debate in a sweeping and divisive ‘pro or anti porn’ disagreement.

My approach takes pornography regulation to be about regulating the pornography industry rather than pornographic imagery. The latter approach is favored by anti-pornography groups that dwell on the corrosive effects that pornographic imagery has on individual welfare and traditional morality. The former approach is traditionally favored by feminist thinkers or activists that dwell on the status of women within or as represented by the porn industry. I take issue with conservative anti-porn positions. I agree with feminist focus on regulating the industry but take issues with any construal of such task that contemplates or promotes abolishing pornography. I believe criminalization of the porn industry is, at least in Western context, legally unjustifiable. I also believe, however, that the regulation of the industry’s operations is legally justified, particularly now that most of its operations are online, and are online the way they are. From these starting points, I suggest that making a concern for performers’ dignity/integrity pivotal to platform pornography regulation would be the best way to balance respect for the rights of personal autonomy, sexual citizenship and privacy that justify doing porn, with the rights to personal dignity and integrity that forbid being done or asked to do certain things in and outside porn.

§2 Structure of the Work

The dissertation is structured as follows. Ch. 1 discusses pornography, by sketching the contours of traditional debates regarding its legal status. After a first general overview, I adopt a “residualist” strategy whereby I let a working definition of legal, mainstream pornography emerge as what is left after some legally relevant distinctions, boundaries, and constraints have been brought to bear on the practice of depicting sexually arousing material for wide distribution. I thus zero-in on my main subject matter by rehearsing some legal landmarks and central parameters in pornography regulation (as developed in the US, Canada, UK and the EU), which have in time sharpened a core understanding of what pornographic material is legal (that whose production, distribution and consumption is protected by right). This is

material that represents, to consenting adults, sexual activities among consenting adults that are not deemed obscene and extreme.

Chapter 2 discusses some legal basics of digital platforms regulation, and the challenges such regulation must face even when unconcerned with pornography. Part of the difficulty is due to the relative inability of States to monitor and apply appropriate regulation to globalized content production and distribution in cyberspace. The mostly extra-legal (or maybe pre-legal) framework in which the online platform economy has evolved favors a set of circumstances whereby the protection of users' and platform workers' rights is mostly left to platforms themselves. These problems are inevitably replicated in the case of platform pornography.

The latter is discussed in Chapter 3, which describes the basics of platform pornography architecture, business operations, and legal regulation. I then present my case study, the platform Pornhub, owned (along with many others) by Canadian tech behemoth MindGeek, by far the most important (if largely under-investigated) player in the adult industry today. I look at MindGeek's intricate corporate structure and Pornhub's opaque business operations, along with some of its most recent travails.

Chapter 4 presents and discusses legal issues related to professional performers' rights, as these come under pressure in a platform pornography world dominated by monopolistic tech giants along extended and convoluted supply and delegation chains. It is here that I advance my suggestion in favor of a performer-centered (or at least an increasingly performer-centered) regulation of platform pornography. Most explicit or implicit requests for a legal ban on porn, in most countries and at different times, have sourced supporting arguments in a cluster of concerns about the violence, degradation and exploitation that performers, and particularly female performers, risk being subjected to during production, and more generally by operating within the industry. Yet, somewhat paradoxically, few proposals have come for a more performer-centred regulation of the industry, and little support has traditionally been given to the ever more insistent requests by performers that their voice be heard. I suggest this should change. In particular, I suggest that when it comes to platform pornography the legal requirement that performers consent to engage in pornographic

scenes is too thin a protection for performers, and that it should be complemented by regulations that oblige monopolistic entities like MindGeek to protect the dignity and integrity (physical and mental) of performers along the whole chain of production, taking responsibility for ensuring that all outsourced services be bound by those principles. I also suggest that a performer-oriented regulation of platform pornography, with combines the principle of performer autonomy (consent) with one of integrity (mental and physical), can be a pivotal stepping-stone towards a better (effective, nuanced, fair) regulation of platform pornography more generally. I articulate these claims while discussing two performer-initiated legal cases against MindGeek. In both cases consent was given but performers claimed their integrity was violated. The chapter closes by presenting the closest real-life example of what performer-centred pornography would look like, namely a family of production and distribution methods that identifies itself under the umbrella term of "Ethical Porn".

CHAPTER 1

Pornography

Pornography is literally 'the representation of fornication/prostitution' (from the Greek *porneia* – fornication, prostitution - and *graphia* - representation). The etymology reveals the basics of a pornographer's practice: representing fornication for profit. A pornographer may be a performer whose profits are the acting fees paid by the production, or a producer whose profits are the revenues from sales of the pornographic product. Ultimately, the profits of all pornographers are predicated on their ability to sexually arouse pornography consumers.

Because the practice of pornography meddles with some of the most viscous and sensitive regions of human sexuality, a first difficulty for legal reflection on pornography is to determine the extent to which moral judgment on such morally controversial practice should be allowed to inform its legal definition, as opposed to a morally more neutral definition that would focus on representational content and function alone.

A second, related issue arises with regards to the source of the legal contentiousness of pornography. Is pornography (or should it be) a matter of interest for the law because it has an inherent tendency to corrupt individual character and/or have detrimental effects on social *mores*, or only insofar as it causes physical harm to those involved in its production, or offence to unwilling observers? Both these issues point to a larger controversy on whether the law should be used to discourage immorality ever and at all, a controversy that according to some is at the very heart of liberal legal thought[11]. Another way to put such question is whether the importance of rights protecting individual autonomy, such as the right to free speech and the right to privacy, is such as to rule out legislating against pornography that (broadly speaking) respects the Harm Principle[12].

[11] For classic explorations of such topics are in: HART (1963), DWORKIN (1977), RAWLS (1993/2005). For a more recent discussion see: QUONG (2010).
[12] MILL (1860). See also: FEINBERG (1984).

The modern concept of pornography did not exist until the Victorian Era. The first original English "prose pornography" was the 1748 text *Fanny Hill* a.k.a. *Memories of a Woman of Pleasure*, one of the most prosecuted and banned books in history[13]. Victorians implanted gender, race, and class biases in pornography early on, believed that pornography was only for a select few. While wealthy white men could look at porn safely, other groups of people—including women, minorities, and the working class—were seen as being highly vulnerable to corruption. The word 'pornography' first appeared in the Oxford English Dictionary in 1857[14]. In that same year the English Obscene Publications Act became the world's first law criminalizing pornography. The American equivalent was the Comstock Act of 1873 (the term "obscene" was, however, left undefined in both documents).

The discourse on pornography both within and outside the law has perennially been moralized. Most religious groups oppose pornography as sinful, and most conservative social and political groups oppose it as corruptive of individual character and collective morals, or tradition. In the United States, socially conservative and religious cycles have traditionally manifested their anti-porn sentiment to local and federal governing bodies very strongly. As recently as February 2016, the State of Utah introduced the resolution SCR 9[15], declaring pornography a "public health crisis". The resolution was sponsored by a politician historically dedicated to the fight against the adult entertainment industry, Republican Senator Todd Weiler. The following year, the Senator sponsored a bill that aimed at making pornography producers and distributors liable for civil damages if a minor is physically or psychologically affected by pornographic contents, SB 185, which reached the signature of the governor[16].

At the centre of the American fight against pornography is the National Center on Sexual Exploitation (NCOSE). While resolution SCR 9 was being passed in Utah, the NCOSE released a general model resolution

[13] For discussion see: BAIRD, ROSENBAUM (1991).
[14] JONES (2000).
[15] Resolution on the Public Health Crisis, Utah Resolution sponsored by Senator Todd Weiler, February 2016, Written by the National Center on Sexual Exploitation, S.C.R. 009.
[16] General Session, Chief sponsor Todd Weiler, 2017, Cause of Action for Minors Injured by Pornography, S.B. 185.

on the same topic[17]. Their action was supported by the American Legislative Exchange Council (ALEC), an organization of conservative state legislators and corporate lobbyists that are also known for their attacks on the provision of climate science education in schools and for promoting anti-environmental legislation[18]. This anti-pornography group is reinforced by the Family Research Council, a known anti-LGBT, pro-life lobby group that upholds and promotes so-called "family values"[19]. Much of the funding for these organizations comes from socially conservative philanthropist and foundations.

Some socially progressive groups oppose pornography for different reasons. Some (by no means all) feminists oppose it as an inherently exploitative practice. Feminist thinkers Andrea Dworkin and Catharine MacKinnon, Diana Russel[20], and Gail Dines[21] for example, famously proposed that pornography be defined as 'the graphic, sexually explicit subordination of women whether in pictures or in words', including in their elaboration of the definition specifics about the representation of such subordination, with women presented as sexual objects or commodities, or as whores by nature, or as experiencing sexual pleasure in being raped[22].

It is statistically true that the production of pornography harbors a huge amount of sexist exploitation (as recently as 2013, the Committee on Women's Rights and Gender Equality advanced a proposal to the European Parliament that aimed at eliminating all forms of direct or indirect gender discrimination and stereotypes, and which contemplated an across-the-board ban to all pornography on internet platforms[23]). Nonetheless, understood as a general definition, Dworkin's and MacKinnon's gender-alert characterization of pornography is controversial. For one thing, it is clearly too narrow. It

[17] Resolution from the National Center on Sexual Exploitation (NCOSE), February 2016, on *Recognizing Public Health Crisis of Pornography*.
[18] Greenpeace partnered with the Center for Media and Democracy (CMD) and several other organizations to publish ALECClimateChangeDenial.org, after ALEC executives attempted to distance themselves from ALEC's ongoing practice of obstructing climate and clean energy policies.
[19] As they state on their website.
[20] For wide ranging discussion see: RUSSELL (1993).
[21] For wide ranging discussion see: DINES (2010).
[22] Contains a statement of the Model Ordinance governing pornography presented to the State of Minneapolis by DWORKIN, MACKINNON (1988).
[23] Resolution of the European Parliament,12 March 2013, 2012/2116, *on eliminating gender stereotypes in the European Union*.

focuses on male-female heterosexual porn when in fact pornography comes in a wide variety of versions (gay, lesbian, bisexual, pansexual). For another, it is clearly overdetermined: it is not in the definition of pornography that male-female relations be graphically represented as involving exploitation, and it is also not inherent to the practice that producing pornography involve male exploitation of women.

A more neutral definition of pornography may refer to the degree of sexual explicitness of the representation and its point. A good example here is the 1979 Report of the Committee on Obscenity and Film Censorship in England and Wales, known as The Williams Report, which appeals to John Stuart Mill's Harm Principle in its recommendations for changes to the laws governing obscenity and film censorship[24]. The report proposes that "a pornographic representation is one that combines two features: it has a certain function or intention, to arouse its audience sexually, and also a certain content, explicit representations of sexual material (organs, postures, activity etc.)"[25].

The Williams Report is equally skeptical that the notion that pornographic material is morally damaging to the individuals who consume it, to particular groups involved in its production, or to society in general. The Williams Report deems pornography to be wrong in a legally relevant sense only insofar as its production involves the infliction of physical harm, or if it causes offence to unwitting and unwilling observers. This reflects the practice of most liberal countries today, where pornography's (alleged) intrinsic moral wrongness is not typically part of the legal case against it.

Those who believe that pornography may be legally restricted because it is morally damaging are often accused of paternalism: the attempt to impose on free and equal citizens a particular, favored understanding of the best way to live. Liberalism rather valorizes individual autonomy, and if people can best become autonomous when they are able to develop their own views and opinions, then people should have access to a wide range of opinions and beliefs from which to choose. That, in turn, requires that freedom of speech be guaranteed - and (non-harmful)

[24] WILLIAMS (1979).
[25] Ibid.

pornography is, by liberal lights, an exercise in freedom of speech[26]. In response, it may be suggested that pornography is akin to racist speech, and that just as racist speech may undermine the self-respect of minority groups, so pornography undermines the self-respect of women and makes it difficult for them to develop autonomy[27].

These issues remain, of course, philosophically open and the *loci* of important social struggles. However, it is possible to individuate a set trajectory in most Western, liberal legislation about pornography that has refused to criminalize it and has rather attempted to regulate it through some milestone legal pronouncements. I now turn to a description of such trajectory.

In what follows, I adopt a "residualist" strategy whereby I let a working definition of legal, mainstream pornography emerge as what is left after some legally relevant distinctions, boundaries, and constraints have been put in place around the general practice of depicting sexually arousing material for wide distribution. I zero-in on my main subject matter by rehearsing some legal landmarks and central parameters in pornography regulation (as developed in the US, Canada, UK and the EU), which have in time sharpened a core of pornographic material that is legal (whose production, distribution and consumption is protected by right) and represents, to consenting adults, sexual activities among consenting adults that are not deemed obscene or extreme.

While a general definition of what sexual representations generally count (or should count) as obscene or extreme needs an antecedent theory of what counts as sexual perversion – a theory that is hard to articulate[28] -, a legal definition (however fluid, fuzzy, and controversial) has emerged through the decades as legislators have struggled with the practice of pornography regulation.

I begin by distinguishing pornography from erotica, and then from prostitution. I go on to discuss the distinction between pornography that is obscene and pornography that is not - a distinction that has been at the centre of legal debate for more than sixty years, particularly in the

[26] ALTMAN, WATSON (2018: 12-3) and for wide ranging treatment of Pornography as an expression of freedom of speech, see: SUNSTEIN (1986).
[27] For wide ranging discussion, see: CARSE (1995).
[28] NAGEL (2001: 45-56).

United States. I then distinguish pornography from (filmed or printed) exercises of sexual domination, and extreme from (what may be called) mainstream pornography.

§1 Pornography and Erotica

Not all visual or printed material that contains explicit depictions of sexual activity and is intended to sexually arouse the viewer is considered pornographic. Some of it goes by the name of "erotica". While it may include explicit representations of sexual activities, such representations do not *exclusively* aim at the sexual arousal of the viewer but also express substantial artistic, political, and aesthetic values. With erotic material the viewer is invited to an experience whose topic or expressive medium is sexual activity, but which also involves reflection and imagination, and invites contemplation of the subtleties of the manner, form, and context of the sexual representation. The production of such representation typically does not require erotica actors and actresses to have sexual intercourse on set, but only to enact a simulation of it.

By contrast, pornography tends to be exclusively functional to provoking the viewer's sexual arousal and is valued instrumentally as such by both its producers and consumers. For the most part (though some notable counterexamples arguably exist, particularly in the case of large productions), pornography does not express any substantial ulterior artistic, political, and aesthetic values. In addition, the production of pornographic sexual representations always does require performers to have intercourse on set.

A further element of distinction between erotic and pornographic material, proposed by influential feminist G. Steinem in 1978, emphasizes the dimension of gender relations and their different representations in erotica and pornography. Steinem argued that while erotic material tends to depict sexual activity as a vector of mutual interest and often love between equals, in pornography "the subject is not mutual love, or love at all, but domination and violence against women"[29]. As seen in the Introduction, gender inequality and its affirmation and perpetuation through pornographic representations has

[29] STEINEM (1978:130).

been and still is a primary concern for most anti-pornography movements and initiatives; as we will see later in this chapter (§4), this concern has also informed Canadian legislation on porn.

§2 Pornography and Prostitution

While erotica and pornography are often (incorrectly) conflated because they both depict sexual activity, pornography is often conflated with prostitution because they both involve the selling of sexual services. Statutory definitions specify that prostitution requires sexual conduct in exchange for a fee, usually (but not exclusively) in the form of money[30]. Because pornography appears to do the same, some (particularly but not exclusively from feminist quarters) have argued "To distinguish pornography from prostitution [. . .] is to deny the obvious: when you make pornography of a woman, you make a prostitute of her"[31].

Several courts have deliberated on whether a person who engages in pornography commits the crime of prostitution. Applying the above definition of prostitution (sexual activity in exchange for a fee), *People v. Kovner* (1978) established that a defendant who had paid two actors to engage in sexual conduct with each other while being filmed, was guilty of inciting prostitution under New York law, and that the actors were indeed guilty of engaging in it[32].

However, most other courts have taken a different approach, considering the fees being paid in pornography to be compensations for professional provisions not of sexual activity but of acting services. This distinguished porn performers from prostitutes and porn producers from pimps. What is being bought and sold on a pornographic set is the acting not the sexual service, and actors as well as producers are thus protected under the artistic expression protections of the First Amendment of the US Constitution.

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[30] DEFRANCO, STELLATO (2013: 555-56).
[31] MACKINNON (2005: 996–97).
[32] Judgment of the Supreme Court of New York County, 20th September 1978, *The People of the State of New York, v. Harold Kovner*.

This reasoning, which has marked much porn-related jurisprudence in the US and beyond, was made explicit in *People v. Freeman* (1988), where the California High Court relied on the First Amendment for the judgement[33]. On that occasion, the judges stated that prostitution requires that "money[...] be paid for the purpose of sexual arousal or gratification", and this requirement was not met where a producer paid actors to engage in pornographic acting and the payment were "acting fees" given "to the actors for performing in a non-obscene film" [34]. In pornography people are paid for acting out sexual acts rather than for providing them. This equated porn performers to non-porn performers in the visual industries.

The judges noted that to treat the filmed performances as acts of prostitution "would rather obviously place a substantial burden on the exercise of protected First Amendment rights, [...], therefore unconstitutionally infringe on First Amendment liberties"[35]. The Court ultimately held that California's definition of prostitution should not be read to encompass sex in films for money[36]. This has also worked to distinguish pornography as a legally protected industry from prostitution as a criminal racket. The ruling undoubtedly had a significant role also in enabling the Californian porn industry, which became by far the largest and boldest in the world in the 1980's and possibly still retains that primacy. And by turning pornography into a legitimate industry, the ruling also required producers to engage in record-keeping and age verification for all participants in pornographic productions; workers to sign contracts specifying right and duties to which they consented; distribution of pornographic materials to observe trade regulations; and everyone involved to pay taxes.

Conceptually, the ruling was fuzzy. An objection that can be moved to it is that ultimately fails to distinguish pornography from erotica as well as from prostitution. As noted above (§1), in pornographic productions actors are not acting in the same way in which they are in erotic productions. In the case of erotica there typically is no sexual intercourse on set, but only an enacted simulation of it: it is thus easy

[33] Opinion of the Supreme Court of California, 25th August 1988, *The People v. Harold Freeman.*
[34] Opinion of the Supreme Court of California, *The People v. Harold Freeman.*
[35] *The People v. Harold Freeman.*
[36] *The People v. Harold Freeman.*

to isolate the acting services from the sexual services. In the case of porn, however, distinguishing those is harder, given that the acting in question is at least in part characterized by the actor's consummation of intercourse. Unlike their erotica counterparts, porn actors or actresses are indeed *having* sex for money. Yet, indeed, they are surely *acting*. The sexual intercourse a porn performer has on set is technically very different from the sex he or she may have in her private life; and it is also likely to be psychologically very different from the sexual intercourse he or she may have (and want to have) in her private life. Sex on a porn set obviously is an acting performance for effect. But then, is all of the above also not true off set, of a prostitute's service – is that not also 'acting'?

It is possible to conjecture that at least four elements could have worked to progressively disentangle pornography from prostitution in the law and (though possibly to lesser extent) popular culture (at least in the US). First, the lobbying power of the nascent and later consolidated porn industry and its cultural influence[37]. Second, the lack of physical involvement of the consumer with the object consumed in pornography, which clearly has no analogue in the case of prostitution. Pornographic consumption is constructed on imaginative representation of the actual sexual encounter, and thus does not threaten the physical integrity of the consumer, since the actor cannot transmit any disease to the consumer; nor is the consumer physically implicated in any practice that might threaten the physical integrity of performers[38]. Third, from the point of view of performers, the practice is also different, involving for example (at least ideally) the use of services provided by agents rather than pimps (with the former bound by contract and exercising non-coercive powers over consensual performers, and the latter rather exercising forms of pressures on possibly non-consensual prostitutes). And fourth, pornography might be thought not to threaten the same moral corruption that prostitution might. To the extent that the use of pornography is understood as an imaginative or otherwise non-physical phenomenon, it may not be perceived as implicating the user's moral

[37] KAYE (2016: 277).
[38] *Ibid.* 287.

character to the same extent that patronizing a prostitute might, nor as being equally corrosive of family values[39].

The issue of whether pornography should be legally construed as prostitution - that which would mean its coercive suppression in most countries - has generally been resolved in the negative in most legal systems. Nonetheless, it remains open at the philosophical level. In addition, because real-world pornography and prostitution can sometimes be found to overlap at the level of the infrastructures and methodologies that enable the recruitment of workers in both trades, new legal developments have emphasized the potential enmeshment of pornography with sex trafficking and thus with at least one (dark) dimension of prostitution. This is particularly the case with digital pornography, which has recently been the subject of relevant regulation through FOSTA[40] and SESTA[41], U.S. federal acts of 2018 to which I shall return in Ch. 3 and Ch. 4.

§3 Pornography and Obscenity

The right to freedom of speech enshrined in the First Amendment has traditionally been the principle grounding pornography legislation in the US. As seen in the previous paragraph, it was in reference to this principle that *People v. Freeman* distinguished pornography from prostitution. As reported above, however, the Court underlined the fact that the performers receiving fees for their acting were "performing in a *non-obscene* film" (emphasis added). Under U.S. law, some but not all pornography is obscene: non-obscene pornography enjoys protection under the First Amendment, while obscene pornography is criminalized. Drawing the line between what counts as "obscene" and what does not has occupied U.S. legislators for roughly sixty years.

[39] These points are far from controversial. There have been long narratives, typically associated with conservative moral views, condemning the consumption of pornography as on a par to that of prostitution. See KAYE (2016: 287-88) for a discussion.
[40] Fight Online Sex Trafficking Act, passed by the US Lower House in 2018.
[41] Stop Enabling Sex Traffickers Act, passed by the US Upper House in 2018.

The United States Supreme Court confronted the obscenity issue in *Roth v. United States* (1957)[42]. The Federal Obscenity Law, whose sources date back to the 19th century, prohibits the possession with intent to sell or distribute obscenity, to send, ship, receive, import, or transport obscenity across state boarders for purposes of distribution. Except for child pornography, after *Stanley v. Georgia*[43], the Supreme Court provided protection for persons who possess obscene material in the privacy of their own residences[44], yet the act of receiving such matter could violate the statutes prohibiting the use of the U.S. Mails (and, today, interactive computer services) for the purpose of transportation. Convicted offenders face fines and imprisonment. It is also illegal to aid or abet in the commission of these crimes, and individuals who do so are also punishable[45].

However, what constitutes "obscenity" remained undefined and was left to the judgment of courts in specific cases. The U.S. Supreme Court established the test that judges and juries use to determine whether matter is obscene in three major cases: *Miller v. California*[46] (1973); *Smith v. United States*[47] (1977) and *Pope v. Illinois*[48] (1987). The famous three-pronged *Miller* test for what constitutes obscenity is as follows:

1. Whether the average person, applying contemporary adult community standards, finds that the matter, taken as a whole, appeals to prurient interests (*i.e.,* an erotic, lascivious, abnormal, unhealthy, degrading, shameful, or morbid interest in nudity, sex, or excretion);
2. Whether the average person, applying contemporary adult community standards, finds that the matter depicts or describes sexual conduct in a patently offensive way (*i.e.*, ultimate sexual acts, normal or perverted, actual or simulated, masturbation,

[42] Judgment of the Supreme Court of the United States, 24th June 1957, *Samuel Roth v. United States.*
[43] Judgement of the U.S. Supreme Court, 7th April 1969, *Stanley v. Georgia*.
[44] *Stanley v. Georgia*.
[45] United States Code, Title 18, Citizen's Guide to U.S. Federal Law on Obscenity.
[46] Judgment of the Supreme Court of United States, 21st June 1973, *Miller v. California.*
[47] Judgment of the Supreme Court of United States, 23rd May 1977, *Smith v. United States.*
[48] Judgment of the Supreme Court of United States, 4th May 1987, *Pope v. Illinois.*

excretory functions, lewd exhibition of the genitals, or sadomasochistic sexual abuse); and

3. Whether a reasonable person finds that the matter, taken as a whole, lacks serious literary, artistic, political, or scientific value.

In an earlier version of the obscenity test, employed in *Memoirs v. Massachusetts* (1966)[49], the "literary, artistic, political, or scientific value" (alternatively labelled "redeeming social importance") mentioned had been deemed to potentially reside also in works on sex, because the court ruled that sex was "a great and mysterious motive force in human life". Only works that were "dominantly" appealing to "prurient interest" could be censored as obscene, while any work with (at least some) redeeming social importance was not obscene, even if it contained isolated passages that could "deprave and corrupt" some readers or viewers.

Any material that satisfies the three-pronged *Miller* test may be found obscene. Any material that does not (or can be argued not to) will instead enjoy protection under the First Amendment. That may include, and in many cases has come to include (at least in some US states, such as New York and California), much of the pornographic material that has in time earned the non-legal label of "mainstream".

The *Miller* judicial standard remains the leading instrument for obscenity cases, but it has been widely criticized for its vagueness, particularly with regards to what constitutes "redeeming social value" and "contemporary community standards". In addition, it remains unclear whether the community standards utilized in measuring the "appeal to prurient interest", should be based on local or national community standards were these found to diverge in relevant ways. As we will see in Ch. 2 and 3, the 'globalization' of pornography on the Internet has only amplified such concerns.

[49] Judgement of the Supreme Court of the United States, 21st March 1966, *A Book Named "Memoirs of A Woman of Pleasure", et al. v. Attorney General of Massachusetts*.

§4 Pornography and Sexual Domination

At least since the eighties, feminist activists have been campaigning against pornography, in the US and elsewhere, not because they wanted to defend "community standards" sexual morality from the ostensible threats posed to it by pornography, but rather because, in their view, pornography was a most powerful means to degrade women and violate their rights, and a form of representation of such misdeeds that perpetuated gender oppression and possibly encouraged violence and crime against women. Furthermore, feminist's philosophical contributions offered a critique of the justificatory apparatus founded on the right to freedom of expression as protected by the First Amendment, trying to show that such apparatus normalized the free expression of already existing patterns of gender oppression in society, and its employment to protect pornography was accordingly a way to legitimize women's sexual and professional subordination, "silencing" them against legally protected exploitation. On this view, pornography in legitimized on grounds of liberties that, exercised in context, constitute a systematic threat to gender equality[50].

These concerns have found their most explicit legal recognition in Canada. The Canadian Charter of Rights and Freedom (1982) expressly guarantees gender equality and gives to the Government the responsibility for implementing it. The Canadian Criminal Code also provides a peculiar definition of obscenity which has a built-in rejection of exploitation: "the undue exploitation of sex, or of sex and one or more of the following subjects, namely crime, horror, cruelty, and violence"[51]. In *R v. Butler*[52] (1992), and earlier in *R v. Oakes*[53] (1986), the Supreme Court of Canada stated that the production of pornographic representations of explicit sex, violent or non-violent, could disproportionally impose a substantial risk of harm to women, if the participants are subjected to a degrading or dehumanizing treatment. Therefore, material found to have "propensity to harm", would constitute the "undue exploitation of sex" within the terms of the Canadian Criminal Code.

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[50] For wide ranging discussion see: DWORKIN, MACKINNON (1990).
[51] Canadian Criminal Code, 1985, Part V, Section 163 art. 8.
[52] Judgement of the Supreme Court of Canada, 27th February 1992, *Donald Victor Butler v. Her Majesty the Queen.*
[53] Judgment of the Supreme Court Judgements, 28th February 1986, *R v. Oakes.*

In such legal setting, a concern for equality became an explicit constraint on preserving freedom of speech in pornography. This position continues to be dominant in Canada, although many strong challenges have been brought against it. Interestingly, the position has also been criticized in the name of equality itself. In 2000, the litigation in *Little Sisters Book and Art Emporium v. Canada*[54] revealed that officials might have abused of their censorship power to seize obscene material in a way that was unfairly penalizing gay and lesbian productions, as well as other niche genres such as sadomasochism (S&M). Some stated that this problem is built in the *Butler*'s standard, arguing that it tends to privilege majority views that can exclude alternative or niche sexual expressions and language that are looked at with prejudices[55].

The debate around which, between the US and the Canadian approach to pornography regulation, respects both freedom and equality and best balances them, is still open. Defenders of the American approach could underline how the highly protective free speech principle is meant precisely to serve the interest of the least powerful and minor groups. The latter are those who generally are more exposed to censorship laws, and the targeting of gay pornography that was the focus of the *Little Sisters Book*'s case in Canada might provide ammunition to that view. On the other hand, defenders of the Canadian approach could argue that making explicit the fact that women may be disproportionately harmed by porn production is an important first step towards an egalitarian enlargement of the circle of protected groups.

Even if one acknowledges a positive progressive edge in Canada's higher sensitivity to gender equality in pornography regulation, a conceptually trivial but practically crucial point is worth making here, which anticipates some themes that I shall return to in Ch. 2 and Ch. 3. Most pornography is digital today, and although most digital pornography is produced and distributed by a Canadian tech company, Mindgeek (my case study in Ch. 3), the production still takes place overwhelmingly in the US, while the company is legally registered in Luxemburg. Taken together, these two factors allow Mindgeek, and thus practically pornography at large, to escape Canadian anti-

[54] Judgement of the Supreme Court of Canada, 15th December 2000, *Little Sisters Book and Art Emporium v. Canada*.
[55] COSSMAN (2003: 91-92).

exploitation, equality-sensitive regulations. The de-localization of company structure and operations reduces the capacity of Canadian legal watches to enforce national legislation. As I shall note in Ch. 2, its globalized character is one of the main challenges to platform pornography's regulation in today's world.

§5 Pornography and Extreme Pornography

As seen in previous sections, both point 2 in the Miller test and the Canadian Criminal Code concerned themselves with sexual representations that might involve violence or other forms of inhumane treatments, leading to the criminalization of their production and distribution. Section 63 of the UK Criminal Justice and Immigration Act (CJIA) of 2008 – has provided a definition of what it termed "extreme" pornography and also criminalized the its possession and private consumption.

A pornographic representation is deemed to be extreme if it portrays, in an explicit and realistic way (such that a reasonable person looking at the representation would think it was real), any of the following acts[56]:

a) An act that threatens a persons' life,
b) An act which results, or is likely to result, in serious injury to a person's genitalia,
c) An act which involves sexual interference with a human corpse,
d) A person performing an act of intercourse or sex with an animal (whether dead or alive).

A further amendment was made by the Criminal Justice and Courts Act 2015, through which the possession of rape and/or non-consensual penetrative sexual conduct was also criminalized. CJIA sec. 63 innovated over the Obscene Publication Act 1959, according to which the relevant offense was made upon publishing and/or distributing obscene material[57]. Under CJIA sec. 63, even simple possession of extreme pornography can become an offense and impose criminal liability regardless of the lack of intention to disseminate the material

[56] CJIA 2008, Part V, s 63 (7).
[57] Act of Parliament of the United Kingdom Parliament, 1959, Obscene Publication Act, Ch. 66, s. 2

(unless the person has legitimate reason for possessing the image, or when he or she can demonstrate consensual participation in the act or any of the acts portrayed, and that no harm was caused to any person – as specified in sec. 65). In fact, CJIA sec. 63 made no explicit mention of dissemination but referred such cases to regulations contained in the Obscene Publication Act; in cases in which the disseminated material involved children, it referred regulation to the Protection of Children Act of 1978.

CJIA sec. 63 has attracted criticism. According to Nair (2019), prohibition of private consumption of extreme pornography might threaten the right to respect for private life as well as the right to freedom of expression, which includes the right to receive information[58]. This raises questions of compatibility with human rights law, including EU human rights law (specifically Art. 8 and Art. 10 of the European Convention on Human Rights, which establish the rights of adults to privately enjoy their intimate life[59] and the right to freedom of expression[60], respectively).

However these questions are resolved, for the purposes of this thesis what is relevant are the boundaries of the "extreme" rather than who or what comes to be criminalized with respect to such extreme. The UK pronouncement on what constitutes extreme pornography is useful in that it contributes to further individuate, as I have been progressively tried to do in this chapter, the pornography that is of most interest here, namely legal mainstream pornography. We can take a final step in that direction by looking at EU pornography regulation, before finally venturing a definition.

§6 Pornography and Vulnerability

Introducing a motion for a resolution entitled "Gender aspects and human rights implications of pornography"[61], on 9th April 2019 the German European deputy Frank Heinrich denounced to the

[58] NAIR (2019: 143).
[59] *Right to respect for private and family life,* Article 8 of the European Convention on Human Rights.
[60] *Freedom of Expression,* Article 10 of the European Convention on Human Rights.
[61] Motion for a resolution from the European Parliament, 09 April 2019, Doc. 14864, *Gender aspects and human rights implications of pornography.*

Parliamentary Assembly of the Council of Europe the negative impacts of pornography on gender equality and denounced the relative lack of dedicated regulation within the member states, the EU as a whole, as well as internationally[62]. He urged the Council of Europe and the Parliamentary Assembly "as a guardian of human rights and the rule of law […] to act fast, outlining legal policy proposals to tackle abuses against women and vulnerable persons in pornography"[63].

Heinrich was contesting the fact that the EU as a whole does not have a single legal framework for regulating pornography, a task which is left to member states. Member states regulation vary. Generally, pornography consumption, production and distribution are prohibited below the age of 18 and permitted above that. In Belarus and Iceland, however, production, dissemination and assembly of pornography are banned entirely. In some countries, such as Germany, the above-18 rule is very strictly enforced, while, in others, such as the Netherlands, Denmark and Italy, enforcement is rather more loose. Some EU countries combine apparently strict laws with flourishing porn production industries, such as Hungary and Czech Republic. Others host the main players in global online porn distribution (Luxemburg offers legal residence to the world's largest, MindGeek; Czech to the second largest, WGCZHoldings; Cyprus to the third, Hammy Media).

While leaving it to member states to regulate the limits of legal pornography, the EU has articulated binding directives regarding illegal pornography, such as Directive 2011/93/EU of the European Parliament and of the Council "on combating the sexual abuse and sexual exploitation of children and child pornography"[64]. Another supranational source of EU legislation is the EU Convention on Human Rights, which has been appealed to by the drafters of the resolution mentioned at the beginning of this section. Yet such Convention is also used to support the idea that individuals have rights to consume and produce pornography as permitted by law. Beyond such side constraints, however, most pornography-impacting legal innovation at EU level is rather coming from efforts at regulating online platforms

[62] Motion n.14864, *Gender Aspects and Human Rights Implication of Pornography*.
[63] European Centre for Law and Justice, October 2019, *Pornography and Human Rights*.
[64] Directive 2011/93/EU of the European Parliament and of the Council, 13th December 2011, *on combating the sexual abuse and sexual exploitation of children and child pornography.*

generally – the main medium through which pornography is distributed today. Such legislation is relevant to the main focus of this dissertation, namely (legal, mainstream) platform pornography, and will be the subject of Ch. 2.

§7 A rough and ready definition of "legal, mainstream" pornography

In this chapter, I have tried to let a definition of legal, mainstream pornography emerge out of the legal strictures that have traditionally constrained the consumption, production, and dissemination of more-than-erotic, explicit representation, printed or visual, of sexual activity. What has emerged is that legal, mainstream pornography should be understood as involving non-obscene, non-exploitative nor discriminatory, non-extreme sexual activities produced, performed, and consumed by consenting adults.

Obviously, many grey areas remain in the articulation of sub-standards that might, in specific cases, determine whether the thresholds set by these general criteria have been passed. But I hope the discussion above suffices to focus this thesis on the sort of pornography that is indeed most widely available today, particularly through the internet: what is generally considered legal, mainstream pornography. To the perennial challenges of regulating pornography that have been mentioned in this chapter, then, we must now add the unprecedented challenges of regulating online digital platforms. This is the task of Ch. 2.

CHAPTER 2

Digital Law and Platform Regulation

In less than a decade, most of the developed world got internet access, and the developing world is rapidly gaining access as well. Digital regulators exploring the expanding and mostly uncharted universe of cyberspace are now faced with numerous and in some cases unprecedented challenges, which also require the creation of innovative governance structures. These include co-regulated frameworks where entitled public authorities, private Internet service providers, and platform administrators can exchange information and act in tandem. The higher the number of mobile wireless devices that are connected to the Internet globally, the more urgent the need for solid legal instruments apportioning rights and burdens among digital users, platforms, content producers, and governments. This is true for any 'platform environment' today.

When it comes to platform pornography, the challenges involved in creating and refining such legal instruments are only compounded by the long-standing challenges of regulating the pornographic representations of sexual activity. Daunting as that task may seem, it is urgent because most pornography today is online, hosted on/by digital platforms. One most powerful tool to regulate pornography, therefore, is general digital platform regulation. I describe some developments in this field here, focusing on EU law in particular, and zero-in on platform pornography in Ch. 3.

§1 Internet/Digital Law

The Internet is a global digital (meta-)platform, and no single country can enforce a law governing it. The issuing of supranational legislation regulating the Internet also does not seem a feasible option, at least for the foreseeable future.

All countries use the Internet, and each does so while operating with different rules and regulations. Because of such lack of harmonization, the legal architecture for the global regulation of the Internet is still fragmented, fragile, and incomplete. For almost ten years since the

advent of smartphones in 2007, large digital platforms such as Google, Facebook, Amazon and others (including our case study, MindGeek's PornHub) have either been banned outright in some countries (as in China, Iran, and Saudi Arabia) or been the target of soft rather than hard power and mostly incentivized to self-regulate (as in the US and most European countries).

In its 2016 "Communication on Online Platforms", The European Commission provided a first assessment of the regulatory challenges posed by online platforms and proposed several ways of how related objectives would be achieved[65]. Regulators face two interrelated questions: *who* should regulate platforms, and *how* these platforms should be regulated. As to *what* should be regulated, one can distinguish platforms' *internal operations* - including data protection, liability, consumer protection and internal dispute resolution mechanisms - from their *external consequences*, which include the effects of their economic power and actions onto individuals, groups, and society at large.

This chapter is mostly dedicated to EU platform regulation. As noted in the Introduction and Ch.1, the US has also taken consequential steps in this domain under the Trump administration, some of which are directly relevant to platform pornography. I leave those to Ch. 3.

§2 Large Digital Platforms

The European Commission defines an online platform as "an undertaking operating in two (or multi)-sided markets, which uses the internet to enable interactions between two or more distinct but interdependent groups of users to generate value for at least one of the groups"[66]. Examples of platforms include search engines, marketplaces, social media platforms, gaming platforms and content-

[65] Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee, and the Committee of the Regions, 25th May 2016, *Online Platforms and the Digital Single Market Opportunities and Challenges for Europe.*

[66] Consultation of the European Commission, 24th September 2015, *Consultation on Regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy.*

sharing platforms[67]. The European Parliament adds: "It would be very difficult to arrive at a single, legally relevant and future-proof definition of online platforms at EU level, owing to factors such as the great variety of types of existing online platforms and their areas of activity, as well as the fast-changing environment of the digital world"[68]. It suggested that platforms "should be distinguished and defined in relevant sector-specific legislation at EU level according to their characteristics, classifications and principles"[69].

The 2008 financial crisis, and the consequent economic restructuring, supported by the advancement in digital technologies, have set the conditions for the rise of the platform economy. While many acknowledge platforms' potential to positively transform economic relations, others view the same transformations as dangerous to consumer welfare, work relations, distributive justice, and regulatory compliance[70].

Platforms are peculiar digital infrastructures that enable individuals to interact on a global level. Like intermediaries, they bring together any typology of users: customers, advertisers, service providers, producers, suppliers, and many others. The platform economy has also brought important changes in the job market, enabling people to sell their skills, products, and services online. Digital Platforms are particularly relevant in the present economic reality, since they compose the main business' advantage that today's suppliers have in this new era of Digital Capitalism[71]. Despite the global interest that the platform economy has generated among regulators and scholars, however, it seems that no legal definition for the online platform exists yet. Some have coined the term "law of platform"[72] which refers to the body of rule applying to platforms. However, there is no legal discipline to be called "platform law".

[67] For useful complementary approach to the platform see: BRATTON (2015).
[68] Report of the European Parliament, 31st May 2017, *Online Platforms and the Digital Single Market.*
[69] Report on *Online Platforms and the Digital Single Market.*
[70] For wide ranging discussions see generally: HARARI (2017), SUSSKIND (2018), ZUBOFF (2019).
[71] For wide discussion see: SHILLER (1999).
[72] LOBEL (2016).

The platform economy (also known as sharing economy[73]) encompasses both global platforms and more local online community exchanges. Regardless of the specific services that platforms provide, they all use communication tools and networks to make users connect, and then capture and use the data produced by these interactions. Platforms typically do not invest directly in the creation of products or services that they distribute, but typically rely on third-party resources.

Beyond these common features, platforms differ widely, as they may establish connectivity to various types of services. They can access the workforce and the intellectual abilities of people, as Reddit does. Crowdfunding platforms or digital payment networks such as PayPal, MasterCard or Crypto Currency circuits, may access cash or capital. Other platforms known as social networks, like Facebook or LinkedIn, have access to private and professional data. Others yet, such as Amazon and Booking, can access products and services from third-party online markets and sell them. Search engines like Google can provide for the general traffic of information, while other platforms such as YouTube and Pornhub, are more content-specific. These and many other platforms let users upload self-produced content with so-called User-Generated Content or UGC. In this way they transform consumers in content providers (so-called *prosumers*)[74].

Platforms have grown in a legal vacuum of their own making, and their development can be defined as extra-legal and mostly self-regulated. It is undeniable that, over the last fifteen years, online platforms have brought significant benefits to consumers and increased the efficiency of markets by facilitating cross-border circulation of goods, services, and information. At the same time, the legal and economic environment in which the business of these platforms is carried out is extremely controversial and this contributed to the development of widen uncertainty for users and society at large.

Given the lack of an established legal framework for platforms, even a classification of their operations is challenging. Can these platforms be considered simple intermediaries that allow information and services to be exchanged between private individuals, or are they companies in a

[73] DAVINSON, FINCK, INFRANCE (2018).
[74] For a wide analysis on the figure of the prosumer, see: RAYNA, STRIUKOVA (2016).

more substantive sense, with their own agendas which happen to be furthered by hosting the interactions of others? Related to this, are the producers of digital content that are contributing to enlarge the profits of the platforms' shareholders to be considered platform employees, or should they remain in the category of freelancer workers? Is the free provision of personal data by platform users to be understood as free labour?[75]

§3 Online Platforms Regulation in the EU

The framework for digital services has not particularly changed since the adoption of the E-Commerce Directive[76]. Three distinctive options have been applied to platform regulation in the EU: traditional "top-down" secondary legislation, self-regulation, and co-regulation.

Online platforms are in part self-regulating entities but remain under existing supranational rules, including Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), consumer protection provisions, the protection of personal data, and the fundamental economic freedoms[77]. Beyond that, EU's regulatory action is associated with State-level secondary legislation crafted under the ordinary legislative procedure[78]. Such legislation is generally State- or EU-centred, unified, hierarchical, and unpinned by a commitment to the rule of law[79]. States' legislation is what is traditionally known as "top-down" regulation; however, several features of platforms provide reasons to doubt that top-down state regulation be a feasible way of regulating them.

§4 Platform Self-regulation

According to some, digital platforms have an inbuilt tendency and capacity to escape state laws. As Strowel and Vergote (2017), suggest "to be constrained by rules applicable on a national territory appears an

[75] For an analysis on the topic, see: TERRANOVA (2000).
[76] Directive of the European Parliament and of the Council, 8 June 2000, 2000/31/EC, *on certain legal aspects of information society services, electronic commerce, in the Internal Market.*
[77] RUPPRECHT, KREIFELS (2016: 33).
[78] Article 294 of the Treaty of the Functioning of the European Union.
[79] WILKINSON (2010: 673-74).

anachronism for platforms which have global perspective and outreach"[80]. Beyond the general mismatch between national laws and global online platform operations, and thus the diminished capacity of national courts to enforce national criteria onto such operations, most platforms challenge specific national laws in different places (for example on data protection, labour relations, competition, trade, or free speech[81]).

What is traditionally considered a matter of public law, such as rulemaking and dispute-adjudication, is so on the assumption that only States can implement binding norms. However, in a digitally globalized scenario, such assumption loses ground. The absence of state's binding force has allowed global digital platforms to become, at least to a large extent, free-standing standard-setters and determining agents in the development of legal norms and governance mechanisms. The difficulty of territorial laws enforcement allows platforms, pornographic ones included, to enjoy a sort of self-executive power, developing private regulatory frameworks on a mostly voluntary basis[82].

In the European context, self-regulation has been defined as "the possibility for economic operators, social partners, non-governmental organizations or associations to adopt amongst themselves and for themselves common guidelines at the European level"[83]. Self-regulation can be adopted by a platform independently or in collaboration with other platforms, and it may often be constrained by higher-order laws (platforms that offer ride-, car-, scooter-sharing, for example, must comply with public traffic laws). A key argument that has been advanced in favour of platforms regulating themselves is their exclusive access to and understanding of their own functioning and potentials.

Most legally relevant aspects of platforms' intermediary function are shaped by internal technical mechanisms and procedures rather than

[80] STROWEL, VERGOTE (2017: 9).
[81] For wide ranging discussions, see: HARARI (2017: 372-402) and SUSSKIND (2018: 163-344).
[82] BELLI, ZINGALES (2017: 37).
[83] Interinstitutional Agreement between The European Parliament, The Council of The European Union, and the Commission of the European Communities, 31st December 2003, 2003/C 321/01, on *Better Law Making*, para. 22.

external legislative principles. The platform's code of conduct regulates the behaviours of content providers as well as users. These terms work like pre-established contracts that include a wide range of elements, such as accountability provisions, liability provisions, opt-out provisions, and copyright and privacy policies, among others. In most cases, they are used to define prohibited operations, e.g. posting content that violates general terms of the platform, contents that could harm others, unauthorized content or contents infringing copyrights. Pornographic platforms such as Pornhub typically include further restrictions against creating, posting, sharing, any content that is found to depict any person under 18 years of age (or older, in locations where 18 is not the minimum age), and/or which depicts non-consensual sexual activity, revenge porn, blackmail, intimidation, torture, violence, racial slurs or hate speech[84].

Platform self-regulation comes with its own compliance mechanism. User-generated content, or simply user-posted content, can be removed or suspended if they do not respect the platform's internal rules. The evaluation of illegitimate behaviour is at the discretion of the platform's administrators and content moderators. They could (but are typically not obliged to) also take appropriate legal action, including referral to law enforcement, if illegal use of the platform is detected, or in cases in which the illegal content posted could create liability for the platform itself.

Platforms' regulatory frameworks do not need public executive organs for the implementation. Platforms directly implement their regulation by designing their technical structure in accordance to the Terms of Service provided to users. Algorithms that enable or disable functionalities let the platform run its own architecture of norms. Such technical, knowledge-intensive management of users' behaviours as well as contents is likely to complicate the state's tasks of enforcing protection of citizen's rights and freedoms.

It is worth noticing that the lack of uniform regulatory standards under self-regulatory models could result in a case-by-case litigation to determine applicable rules, which is undesirable for platforms but also for regulators[85]. Platform's self-regulation does not ensure

[84] Pornhub.com/Terms of Service.
[85] GLAESER, SHLEIFER (2003: 402-03).

accountability, innovation and transparency. The delegation of enforcing regulation to platforms could also incentivize them to heighten regulatory barriers to prevent the entry of competitors in the market[86]. In addition, self-regulators are more likely to neglect stakeholders' interests[87].

§5 Co-regulatory legal framework

Since States in a globalized world no longer enjoy the exclusive capacity to enforce and function as mediators between economic and social actors, the co-regulatory approach enables them to regain some grounds. Co-regulation marks a shift from top-down to participatory models of rulemaking, compliance, and enforcement in which subnational and non-state actors take centre stage[88].

Given the complexity of the environment in which public legislators are required to act, and the need for reliable data to make informed decisions, the involvement of non-state actors, including companies, could make the states' information gathering much easier. The Commission has recognized the value of co-regulatory experimentation in respect of data accessibility and advocates sector-specific experiments[89]. For what regards the platforms, the Commission has also encouraged public authorities to "pilot innovative regulatory approaches to verify the feasibility and sustainability of innovative solutions in light of their complexity and of their changing nature"[90].

In the European context, co-regulation has been defined as a "mechanism whereby a European Union legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognized in the field (such as economic operators,

[86] FINCK (2017: 13).
[87] *Ibid.*
[88] SCOTT, TRUBEK (2002: 8).
[89] Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, 10th January 2017, *Building a European Data Economy.*
[90] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 28th October 2015, *Upgrading the Single Market: More Opportunities for People and Business.*

the social partners, non-governmental organizations, or associations)"[91]. Co-regulation disposes of various regulatory methods in which "the regulatory regime is made up of a complex interaction of general legislation and a self-regulatory body"[92]. It also incorporates hybrids that do not meet the "administrative and statute-based legitimacy of regulation yet perform some elements of public policy more than self-regulation"[93].

This co-regulatory framework, proposes a collaborative relationship between public authorities and private entities, facilitating the regulation of the private operations while accounting for its peculiarities and ensuring the pursuit of public policy objectives. Endorsing the complex interaction between the market, states, and technologies, co-regulation can reflect the new governance approach which recognizes the "benefits to including a broader pool of stakeholders and decision makers in the articulation, execution and evolution of policy, law, norms development, oversight and regulation"[94].

A significant advantage of involving platforms in regulation is that many regulatory objectives can be fulfilled more efficiently, since platforms can help customize regulation to specific domains and cases. The experimental nature of this approach allows for collective learning and the recognition of best practices, as well as for the most relevant rules to be dynamically modified over time. However, the more space is given to platforms, the more the distinction between making, applying, and obeying the law is blurred[95].

§6 Competition

A further problem with platform regulation relates to the risk of monopolization. Given the magnitude of the economic activities that take place on the web, the capacity of competition authorities and States to define the business activities of platforms is strongly limited. In

[91] Interinstitutional Agreement 2003/C 321/01, *Better Law Making*, para. 18.
[92] MARSDEN (2011: 46).
[93] MARSDEN (2011: 211).
[94] BRESCIA (2016: 134).
[95] FINCK (2017: 18).

addition, "[r]egulatory uncertainty and fragmentation across and within Member States complicates (or even impedes) market access and limits investment opportunities"[96].

The Commission, with the Digital Single Market Strategy, highlights the anxieties caused by the tendency of digital companies to centralize and abuse their market power (examples include the use of price restriction, asymmetries of bargaining power, vertical integration, mergers acquisitions, and the role of data and its impacts on competition law enforcement) [97]. For this reason, competition authorities and the courts are required to investigate on the behaviours of digital companies.

Article 102 of the TFEU prohibits and considers as incompatible, the "abuse of a dominant position by one or more undertakings within the internal market"[98], insofar as it affects or impedes trade between Member States within the EU's internal market. A "dominant position" in EU Competition Law, refers to a position of economic strength which enables an economic undertaking to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers[99]. Dominance is not unlawful per se. However, dominance should not damage fair competition. Aggressive commercial behaviours are less legitimate for a business that has strong market power compared to one that has little. Dominant positions can trigger exploitative and exclusionary behaviours, like charging excessively high prices, refusal to supply services or goods and predatory behaviours towards new competitors.

In the European context, the Commission remains the final enforcer of EU competition law, whose policies work as deterrent or punitive. After the hearing of a competition complaint, the Commission can initiate a *Statement of Objection*, giving the accused firm the right to exercise its

[96] Working Document of the European Commission, 28 October 2015, SWD 202, final, *A Single Market Strategy for Europe: Analysis and Evidence.*
[97] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 6th May 2015, *A Digital Single Market Strategy for Europe.*
[98] Art. 102, Title VII, Ch.1, Sect. 1 of the Treaty on the Functioning of the European Union.
[99] Supplementary Written evidence of Competition and Markets Authority on Online Platforms and the EU Digital Single Market (OPL0055).

defence. Once complainants and the firms have been heard, the Commission decides how to proceed, by either closing the case, or by passing it to a Committee of National Competition Authorities.

Directive 2019/1/EU was signed into law in December 2018. The purpose was to ensure the proper functioning of the internal market and empower the competition authorities of Member States with more effective enforcing tools[100]. The Directive aims to ensure that, when applying shared EU antitrust rules, national competition authorities have the appropriate enforcement tools, so as to bring about a more harmonious and ultimately fairer competition system. To that end, the proposal provides for minimum guarantees and standards to empower national competition authorities to reach their full potential[101]. The platforms' economic behaviour is regulated with different degrees of regulatory influence by states' authorities and competition law entities.

The problem of online monopolies is clearly exemplified by platform pornography. Most mainstream professional pornography is today produced and distributed by MindGeek, which owns several of the sector's most visited sites including Pornhub, RedTube and YouPorn. It also owns a conglomerate of numerous sub-companies and affiliates that work as production companies and sponsorship. MindGeek towers over the adult industry in Europe and in America and this allows it to offer many contents for free. For these reasons, tiny, independent companies, production studios and sites that do not want to depend on MindGeek for their work and income struggle to access the market, as it is impossible for them to sell content for free.

It should be emphasized that platform competition law is bound up with data law. The capacity to exercise market power that most platforms, including Pornhub, have is mostly given by the systemic collection and processing of data that these companies operate, which raises further issues for regulators. The data collected are used not only for transmitting targeted advertisement and generate targeted content for users, but also to develop algorithms and methods that can strengthen

[100] Directive of the European Parliament and of the Council, 11 December 2018, 2019/1/EU, PE/42/2018/REV/1, to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.
[101] Directive 2019/1/EU.

the capacity of the company to dominate the sector[102]. A platform's capacity for data-gathering can thus also be seen as a competitive strategy, and as such it should be taken in consideration in competition policies development. Yet strategic data usage can elude competition law, as "online platforms do not trade data as a stand-alone product, as a result of which no supply and demand exists, and no relevant product market for data can be defined under current competition law standards"[103].

§7 Privacy and Cookies

The capacity to collect vast quantities of customer's information lies at the heart of the technical and economic strength of digital platforms. The intensity of the collection of information can vary among the platforms, but it involves almost all digital services providers[104].

Pivotal to the understanding of the market technique of digital companies is the network effect. It describes the relationship between the value of a service and the user's perspective and behaviours of the others. Network effects can be understood as the external effects that the economic agent, in this case the platform, produces on the value of that product to other users, generating a cycle whereby more users beget more users (which leads to platforms having a natural tendency towards monopolization)[105].

Explaining how platform can afford providing free material, Srnicek (2016) suggests that the more numerous the users, the more valuable that platform becomes for everyone[106]. By providing digital space for the others to interact in, platforms became apparatus for data collection[107]. On one side, platforms are thus able to reduce prices of service, enabling free registration and navigation, but on the other side, they raise money from advertising, thus recovering the losses of free

[102] Report from the Commission to the Council and the European Parliament, 10th May 2017, *Final Report on the E-commerce Sector Inquiry*, §3.1.3 *The use of data in e-commerce.*
[103] GRAEF (2015: 489-90).
[104] SRNICEK (2016: 57).
[105] SRNICEK (2016: 45).
[106] *Ibid.*
[107] SRNICEK (2016: 48).

service provision. This is called cross-subsidization[108]. Search engines like Google also feature network effects; it brings together multiple user groups who search, advertise, and communicate to one another, generating more search queries[109].

The fact that platforms can extract, process, and sell immense amounts of information about their customers threatens violations of individual rights[110]. Indeed, data-gathering has implications on individuals' capacity to fully enjoy their rights and fundamental freedoms, such as consumer's rights, right to personal freedom and autonomy, right to seek justice, privacy issues and transparency, among others[111]. In the last years, many users have complained about the lack of transparency of platforms' use of their data, their methods of mining information for marketing purposes and the exchange trade among companies.

Article 8(1) of the Charter of Fundamental Rights of European Union recognizes the "Protection of Personal Data" as a fundamental right that everyone has a right to benefit from[112]. In 2002 the European Parliament and the Council adopted the ePrivacy Directive, also known as Cookie Law[113].

Cookies are the primary tool that advertisers use to track users' activities in order to target highly specific advertisements or content, and optimize their revenues. Cookie Law regulates the memory of the web and is the EU's main response to privacy-related concerns about data-gathering online platforms. According to the ePrivacy Directive, each time someone visits a site, he or she must be informed if their cookies are being used by the site and for what purpose[114]. The Directive was conceived to protect online privacy by making users aware of when, how, and to what ends their information is gathered and processed by platforms, and giving them a choice on whether to allow it or not.

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[108] *Ibid*. 46.
[109] *Ibid.* 48.
[110] SINGER (2018).
[111] For wide ranging discussion see: KSHETRI (2014).
[112] The Charter of Fundamental Rights of the European Union. Art. 8.
[113]Directive of the European Parliament and of the Council, 12 July 2002, 2002/58/EC *Concerning the processing of personal data and the protection of privacy in the electronic communications sector*.
[114] Directive 2002/58/EC, sec. 25.

Indeed, both the European Court of Justice decision[115] in 2019 and the Recital 32 of the Regulation 2016/679 (General Data Protection Regulation) states:

"Consent should be given by a clear affirmative act establishing a freely given, specific, informed, and unambiguous indication of the data subject's agreement to the processing of personal data relating to him or her, such as by a written statement, including by electronic means, or an oral statement. This could include ticking a box when visiting an internet website, [...]. Silence, pre-ticked boxes or inactivity should not therefore constitute consent"[116].

The CJEU also underlines the importance of providing users with an option to opt out from automatic storing of records of their personal activities on the web. This last point remains problematic, since not all websites provide the relevant "refuse" button[117].

The General Data Protection Regulation 2016/679 (GDPR) is the more recent instrument that the EU has passed to impose obligations on digital companies, including those operating outside European borders but collecting data related to people in the EU. The Regulation 2016/679 requires websites and digital platforms to inform and to get consent from visitors on each session[118]. Given the amount of data that session cookies can contain, they can be considered personal data in given circumstances and be subjected to the GDPR. Indeed, the Recital 30 of the Regulation 2016/679 states:

"Natural persons may be associated with online identifiers provided by their devices, applications, tools, and protocols, such as internet protocol addresses, cookie identifiers or other identifiers such as radio frequency identification tags. This may leave traces which, particularly when combined with unique identifiers and other information received

[115] Judgment of the European Court of Justice, 1 October 2019, Case 673/17, *Verbraucherzentrale Bundesverband eV v Planet49 GmbH.*
[116] Regulation of the European Parliament and of the Council, 27 April 2016, 2016/679/EU, *On the protection of natural persons with regard to the processing of personal data and on the free movement of such data,* and repealing Directive 95/46/EC.
[117] LOMAS (2019).
[118] Regulation 2016/679/EU.

by the servers, may be used to create profiles of the natural persons and identify them"[119].

Most of the mainstream consumer services provided by tech-based companies are based on "for free" models, in which consumers are tracked and profiled as they navigate on the web, in exchange for using the service[120]. The misuse of personal data is the main source of concerns for consumers using platforms[121]. The concerns are compounded when it comes to online pornography consumption, which exposes data about sexual preferences and fantasies. However, the tracking dynamics employed by adult websites are different than popular non-pornographic sites. Indeed most behavioural trackers are not present on adult sites, aside from Google Analytics and DoubleClick. This is because most trackers do not want to be associated with porn, and because they are often not able to derive actionable marketing intelligence from user's specific preferences for adult material. However, several consumer's privacy risks remain, as data derivable from search terms and category tags can easily leak to third parties. Given the large leak of private information, and the growing attempts to extort personal information collected online, consumer protection authorities should provide more attention to the privacy issues related to consumption of pornography specifically.

§8 Tackling illegal content online

Internet service providers (ISPs) play an essential role in the digital economy, as they facilitate and speed up the circulation of information, opinions, and ideas. However, in some cases, these services can be abused to favour the distribution and dissemination of illegal activities and contents, including child sexual abuse, hate speech or infringements of consumer's protection laws. In light of the pivotal role that online platforms have in cyberspace, in a framework of co-regulation the need for corporate responsibility in aiding state authorities in tackling illegal content that may be disseminated through their services is increased.

[119] Regulation 2016/679/EU.
[120] Supplementary written evidence of The European Consumer Organization (BEUC), (OPL0068) on *Online Platforms and the EU Digital Single Market.*
[121] Supplementary written evidence on *Online Platforms and the EU Digital Single Market.*

Tackling illegal content online is fundamental as it serves to ensure the protection of the different fundamental rights at stake of all the parties concerned. Those rights include freedom of expression, freedom to receive and impart information, the protection of personal data and the protection from the exposure to harmful or dangerous content. They may also include freedom of hosting service providers to conduct business, protection of property including intellectual property, and non-discrimination.

Several Directives in EU law provide a legal framework with respect to illegal contents that are available and disseminated online. The presence of illegal content related to sexual images on the internet is a serious problem also given the vast quantity of young people navigating. Directive 2011/93/EU of the European Parliament and of the Council requires Member States to take measures to remove web pages containing or disseminating child pornography and allows them to block access to such web pages, subject to certain safeguards[122]. In accordance with the Directive 2004/48/EC of the European Parliament and of the Council, judicial authorities can also issue injunctions against intermediaries whose services are being used by a third party to infringe an intellectual property right[123].

Among voluntary measures taken by online service providers are *notice-and-action* procedures[124]. These facilitate the notification of content that the notifying party found illegal to the hosting provider interested (notice) and the request to remove or disable access to that content (action). Building on this option, the Commission has encouraged member states to establish legal obligations for hosting service providers to inform law enforcement authorities on the prevention, investigation, detection or prosecution of criminal offences, in compliance with the applicable legal requirements, regarding the protection of personal data in particular. "Fast-track" procedures should

[122] Directive of the European Parliament and of the Council, 13 December 2011, 2011/93/EU, *on combating the sexual abuse and sexual exploitation of children and child pornography*.
[123] Directive of the European Parliament and of the Council, 29 April 2004, 2004/48/EC, *on the enforcement of intellectual property rights.*
[124] Directive of the European Parliament and of the Council, 8 June 2000, 2000/31/EC, *on certain legal aspects of information society services, electronic commerce, in the Internal Market.*

also be provided to process notices submitted by competent authorities[125].

Directive 2000/31/EC[126] constitutes the ground for the development of procedures for removing or disabling access to illegal content. The removal or the disabling of the access to those who are found to commit illegal operations, must be conducted in transparency and fairness. Article 14 of the Directive 2000/31/EC of the European Parliament and of the Council contains liability exemptions which are, subject to certain conditions, available to certain online service providers, including providers of hosting services. To benefit from that, hosting service providers must act promptly to remove or disable access to the illegal content. To avoid undue removals, content providers should in principle be informed on the decision to remove or disable access to the content stored, and be allowed to contest the decision through a counter-notice[127].

In 2017, the Commission adopted a Communication with guidance on the responsibilities of online service providers with respect to illegal content online[128]. Recommendations on how to do so follow the proposal adopted on 25 May 2016 for the amendment of Directive 2010/13/EU[129], for the coordination of regulation and administrative actions in member states concerning video-sharing and social media services. However, there is idiosyncrasy among national regulations, and service providers could be subjected to diverging legal requirements. It is necessary to set out certain main guidelines and principles to guide the activities of service providers and member states.

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[125] The Fast Track Procedures (FTPs) are a set of procedures that offer United Nations Population Fund, to country offices in special situations greater delegation of authority and flexibility in specific program and operational areas for a time-bound period. They represent a modification to the standard policies and procedures, and are designed to facilitate a rapid response to country demands.

[126] Directive 2000/31/EC.

[127] Commission Recommendation on *measures to effectively tackle illegal content online*, 1st March 2018.

[128] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 28th September 2017, *Tackling illegal content online, towards and enhanced responsibility of online platforms.*

[129] Directive of the European Parliament and of the Council, 10th March 2010, 2010/13/EU, *on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.*

§9 The Audio-Visual Media Services Directive

In November 2018, the Council adopted the revised Audio-visual Media Service Directive[130] (AVMSD). Based on the definition under Article 1(1) (aa) of the AVMSD, "video-sharing platform service" may be identified based on the following definition:

[...] A service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, where the principal purpose of the service or a dissociable section thereof is devoted to providing programs, user-generated videos or both, to the general public, for which the video-sharing platform provider does not have editorial responsibility, in order to inform, entertain or educate, by means of electronic communications networks [...]; and the organization of which is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing.

The Directive's Art.1(h) provides a further definition for "audio-visual commercial communication":

[…] Images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal person pursuing an economic activity; such images accompany, or are included in, a program or user-generated video in return for payment or for similar consideration or for self-promotional purposes. Forms of audio-visual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement[131].

Given the heterogeneity of the cases, States should proceed on a case by case basis, considering all the specificities of the concerned service. Cooperation among the parties, particularly during the gathering of the

[130] Directive of the European Parliament and of the Council, 14th November 2018, 2018/1808/EU, amending Directive 2010/13/EU, *on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.*
[131] Directive 2018/1808/EU art.1(h)

necessary information to support the assessment, is essential to avoid divergent interpretations of the indicators.

The appropriate measures shall be determined in light of the nature of the content in question, the harm it may cause, the characteristics of the category of persons to be protected as well as the rights and legitimate interests at stake, including those of the video-sharing platform providers and the users having created or uploaded the content as well as the general public interest[132].

The revised AVMSD also strengthened the *Country of Origin* principle. Member States are free to require ISPs to comply with more detailed or stricter rules within their jurisdictions, where their national independent regulatory authorities or bodies find that alternative courses of action have proven insufficiently effective in combating the diffusion of illegal content online[133].

Furthermore, the AVMSD legally obliges multi-media platforms to prohibit certain type of contents in their Terms and Service. However, the regulatory framework still lacks an articulation of mechanisms of due process and appeal for individuals who see their content unduly removed.

Given the EU definition of video-sharing platform service, platform pornography is included in the directive regulatory framework. The Art.6a of the Directive requires Member States to take appropriate measures that ensure that audio-visual media services that may impair the physical, mental, or moral development of minors are made available in a way that ensure that minors will not access them or see them[134]. The Article expressively includes pornography among the most harmful content that therefore shall be subject to stricter measures[135].

[132] Directive (EU) 2018/1808 art.28b (3)
[133] Directive (EU) 2018/1808 art.4a, para.3
[134] Directive (EU) 2018/1808 art.6a
[135] Directive (EU) 2018/1808 art.6a

§ 10 Concluding Remarks

In this chapter I tried to provide a general description of current attempts at regulating digital platforms, looking particularly at recent EU legislation. I have described general obstacles, such as the impossibility of apply local legislation across borders, and the complex challenges of tackling illegal content online, which are clearly relevant to the specific case of platform pornography regulation. And a co-regulatory approach seems the most promising in the case of platform pornography as well.

The co-regulation approach emphasizes and encourages flexibility and adaptability. Since platforms are likely to be in the best position to implement required standards, co-regulation allows legislators to focus on the outcomes rather than on the process, by establishing the objectives to be achieved and then leaving platforms to choose how to best achieve them. This kind of collaboration is also stimulated by tech itself: new digital tools have the potential to increase the forms of policy dialogue and the network of policy making.

CHAPTER 3

Platform Pornography

This chapter zeroes-in on platform pornography and looks at a most representative case study, MindGeek's Pornhub.

The history of the adult industry is marked by structural shocks caused by the disruptive forces of new technologies. Tech innovations have diffused pornography from red-lights theatres to home DVDs, and lately to personal computers and streaming platforms. During the latest transitions, the audience of adult entertainment has expanded vertiginously due to increased accessibility and the low costs of streaming high-quality digital material. The capacity of states to monitor online contents is reduced by the large and ever-increasing quantity of material disseminated. Adult-only websites supply enormous quantities of material with only mild barriers to accessibility and, thus, a possibly unlimited audience.

Not only pornography consumption has increased, but also its production. Once the equipment necessary to record is nothing more than a video-camera or a smartphone, people without any specific skills can produce content and upload it on peer-to-peer platforms, and possibly monetize it. Among this User-Generated Content there is a disturbing quantity of material found to feature minors and/or have been recorded without consent. But because of the vast quantity of content available, and shortcomings in overseeing complex technological infrastructure, it is difficult to detect and to eliminate these once they are online.

In addition, pornography happens to be very elusive in cyberspace. There are numerous apps, chats, streaming channels, that even if originally did not include sex-related contents, are now widely used to exchange short amatory porn video or images. In addition, since one Internet Service Provider can offer many different services in one platform or website, the evaluation of their business activity by regulatory agents is challenging.

Yet my focus here is on porn-dedicated platforms and the professional (non-amateur) portion of content that they distribute. Today, most of the adult industry relies on the Internet and its output is distributed via different varieties of platforms. The digital-based market sector is highly competitive and major distributors of content have developed models of data-collection that tend to reinforce their leading positions. Platforms expand in the ways described in Ch. 2 and then, once a consistent number of data about users is reached, they tend to bolster their investments in targeted, more niche and peripheral sectors, optimizing their competitive position by occupying market new space.

Among the most powerful platform-based Internet Service Providers (ISPs) in the world is one, almost unknown, that climbed the ladder of Internet success during the economic recession of the late 2000's, and climbed higher and more quickly than others, by engaging in porn distribution mainly. After describing the basics of platform pornography architecture and rehearsing some early attempts at regulating online pornography in the US and the UK, this chapter will move to the tech behemoth that is behind most of the adult content business, whose name is MindGeek and whose most famous platform is Pornhub.

§1 Platform pornography's architecture

Platform pornography comes in many forms. A first distinction that helps us circumscribe our focus is between professional and amateur online porn. The latter I do not discuss. Within professional porn, different productions will have different economic means, and will cater to various sexual tastes, counting on different pools of actors and professionals. Within legal boundaries, some productions will be classified as more or less hardcore than others, and some will pursue a more sectorial audience than others.

In all this variety, one can still distinguish a core of major production houses which have brought porn to a very high level of professionalism and even produced celebrities who have become known to a mass audience and have today a powerful presence on social media, if not their own personal websites that exercise influence in the business. This kind of professional pornography can be classified as 'mainstream' in a sense now not only legal (as in Ch. 1) but also statistical (in terms of

its large diffusion among "average" consumers). It is primarily diffused through online streaming services, which are fast, anonymous, and easily accessible from every phone with internet connection. Through digital platforms supply of pornographic contents, goods and services are open to global demand.

As noted in Ch. 2, content sale is only one, and often a small one too, of the revenue sources of digital platforms and websites. Platforms' business model focuses on attracting large amounts of internet traffic, generating revenues through advertisements and the generation, collection, and use of data. In all that, mainstream adult contents distributors follow the same business model of their non-pornographic counterparts.

Mainstream digital pornography takes two main shapes: Pay-sites and Free- content sites. Pay-sites are the core of the online adult industry. They typically act as "content providers", producing and distributing pornography via their web pages and charging fees in return. The revenue model is centred around customer membership. To acquire members the adult pay sites use marketing techniques, such as traditional "tour of the website" or exclusive access to premium material[136]. Pay-sites are typically owned and operated by pornography production companies and feature full-length pornographic videos approximately 30 to 60 minutes long.

Next to pay-sites, there is a vast quantity of pornography that is offered for free. Free sites call themselves Link Collectors, Thumbnail Gallery Posts (TGPs) or Movie Gallery Posts (MGPs)[137]. It is distinctive of free sites that they do not produce their own content but work as showcases for the pay-material. Link collection consists of a series of hyper-links to other web-sites[138] (a web page created to provide access to further sites). They receive media from other providers or directly from users, and their main economic role is marketing for pay sites, finding further affiliates to their membership networks[139]. Free-content sites monetize from traffic trading and advertising. Free sites attract significant traffic

[136] WONDRACEK ET AL. (2010: 6).
[137] *Ibid.* 3.
[138] *Ibid*.
[139] *Ibid*.

through free pornography and are thus golden springboards for the conversion of visitors to subscribers.

Indeed, once the visitor enters the free site, he or she is targeted with hyperlinked advertisements that, once clicked, brings the potential payer to a pay site with hopes that, once in, the customer will purchase the subscription. The companies that receive payment from the subscriber then pay free sites a percentage (typically the equivalent of half a month subscription fee), in all those cases in which the hyperlinked advertisement on a free site directed the potential payer to a pay site. The payment processor can track which free site, registered as affiliate, directed the customer, with the affiliate URL, and/or with the user's history tracker (the cookie)[140]. The free site remains able to host free trailers versions of the pay sites' full-length material.

§2 Regulation of Internet pornography

Meant to prevent children's exposure to adult pornography, the *Communication Decency Act* of 1996, (CDA 1996) was the first attempt to regulate online pornography in the United States. The Act is also the Title V of the Telecommunications Act 1996, legislation enacted by the U.S. Congress in 1996.

The CDA criminalized "the knowing transmission of obscene or indecent content to a person under eighteen years of age"[141]. In addition, §223, prohibits any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication [...]"[142]. The CDA excused senders of online "indecent" materials, if they took reasonable good-faith efforts to exclude children, (including the restriction of access by requiring use of a verified credit card)[143].

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[140] *Ibid.*
[141] United States Code, Title 47, Ch.4, Sub. Ch. II, Part I § 223.
[142] United States Code, Title 47, Ch.4, Sub. Ch. II, Part I § 223.
[143] United States Code, Title 47, Ch.4, Sub. Ch. II, Part I, § 223.

Portions of the CDA, especially those regarding its phraseology, were immediately challenged in court. Free speech activists and civil groups have opposed the vagueness of this provision. As soon as the Bill was signed into law by President Clinton, the American Civil Liberties Union (ACLU) joined by numbers of other civil liberties groups, filed a legal challenge to the U.S. Supreme Court, against the implementation of the indecency provision of the CDA. Already in 1997, federal judges found that the indecency provisions abridged the freedom of speech granted by the First Amendment. This decision was confirmed by the U.S. Supreme Court.

The provisions regarding indecent and patently offensive materials were found to violate the freedom of speech protected by the First Amendment and were removed from the CDA[144]. The judgment seemed to recognize that even if obscenity is not protected under the First Amendment, adults have a qualified right to engage in indecent speech, and regulation to protect children from it should not result in adults having no access to it.

In 2003, the phraseology of the CDA was again challenged in *Nitke v. Ashcroft* (after renamed *Nitke v. Gonzales*). The plaintiff Barbara Nitke argued that the use of local community standards to determine whether the content was obscene was an infringement of her First Amendment right, as online content is shared with a global community with varying standards[145]. Unfortunately, the plaintiff was unable to meet the burden of proof necessary to support her claim, as she could not demonstrate the harm inflicted to her from the CDA[146].

The CDA, and particularly its request that credit card numbers be employed as validation of access, impacted ISPs economically. Other than that, however, it left them in the clear with regards to liability for content posted by users. Section 230 of the CDA contains a federal protection to any cause of action that would make ISPs liable for information originating with a third-part user of the service[147]. The

[144] Judgment of the U.S Supreme Court, 26th June 1996, *Reno v ACLU*.
[145] Judgment of the United States District Court for the Southern District of New York, 25th July 2005, *Nitke v. Gonzales*.
[146] The US Supreme Court denied an appeal against the decision in *Nitke v. Gonzalez* on March 20th, 2006.
[147] United States Code, Title 47, § 230 (c).

section protects online forums and ISPs from federal legal action (yet it does not exempt providers from applicable state law, criminal law, communications privacy regulations, or intellectual property law[148]).

The protection granted to ISPs under Section 230 has recently been weakened by the FOSTA and SESTA amendments[149]. In 2018, the Senate's Stop Enabling Sex Traffickers Act and the House's Victims to Fight Online Sex Trafficking Act, together known as SESTA and FOSTA, became law. Broadly speaking, these laws make it illegal for ISPs to knowingly assist, facilitate or support activities related to sex trafficking on their websites and platforms[150]. The two laws, as a package, amend Section 230 of the Communication Decency Act with the objective of holding platforms and websites legally liable if their users are found to be in any way facilitating sex trafficking through their services.

European regulators have also traditionally been concerned with protecting the most vulnerable from accessing pornography on the internet. They have proposed parental control software, identity disclosure or registration of personal credit cards. In United Kingdom, the Digital Economic Act 2017 (DEA 2017) covers areas relating to electronic communications and copyrights. Part 3 regulates access to online pornography, preventing people under the age of eighteen from accessing commercially operated pornography websites[151] and mandating the implementation of the Age Verification System[152] to "all service providers and others involved in making pornographic material available on the internet on a commercial basis to persons in the United Kingdom"[153].

[148] United States Code, Title 47, § 230 (e).
[149] Bills enacted by 115th United States Congress, 11st April 2018, A bill to amend the Communications Act of 1934 to clarify that section 230 of such Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking, and for other purposes.
[150] Stop Enabling Sex Traffickers Act, passed by the US Upper House and Fight Online Sex Trafficking Act, passed by the US Lower House.
[151] Digital Economy Act 2017. c.30, Part 3, Sect.14.
[152] Digital Economy Act 2017. c.30, Part 3, Sect.16.
[153] Digital Economy Act 2017. c.30, Part 3, Sect.18 (3).

Under DEA 2017 The British Board of Film Classification (BBFC), has been nominated the regulator of the age verification system with the support of the Information Commissioner's Office (ICO), given the BBFC's lack of statutory authority. This guidance from the BBFC sets out the conditions in which the same BBFC, as the age verification regulator, will also monitor business facilitating the availability of online pornography as Ancillary Service Providers (ASPs)[154]. Section 21 (5) defines ASPs as those whose business provides a service that enables a person or persons to provide online pornography[155]. The list includes online platforms, social media, and IT service providers on which non-compliant sites might be present. In these cases, ASPs should withdraw their service to the non-compliant party[156].

Cooperation can impact significantly the effectiveness of regulation in cyberspace. Regulation envisaged under DEA 2017 brought into the picture several different stakeholders trying to engage them in an ambitious common endeavour. Yet several challenges emerged. As most commercial pornographers are based outside the UK, the biggest challenge for the applicability of the DEA 2017 is the enforcement of its age verification provision across borders. In addition, there are potential implications on privacy and data protection, because of the required disclosure of users' personal information. Further concerns are related to the role acquired by the BBFC in blocking access to websites containing extreme pornography, which gives it potential censorship powers. Opponents also point out that many of the acts deemed as 'extreme', and thus illegal, appear to be arbitrarily chosen, of dubious danger (face-sitting), or to relate to women's sexual pleasure (female ejaculation)[157].

Yet another objection is that this regulation may just miss most of the action. Websites hosting pornography come in all shapes and sizes. The technological apparatus that serves the functioning of the age verification system might not reach the millions of porn websites that are online. In addition, while dedicated porn websites are the most common avenue to online porn, there is a plethora of non-dedicated

[154] Explanatory Memorandum of the Draft British Board of Film Classification (BBFC), 26th March of 2018, *Guidance on Ancillary Service Providers.*
[155] Digital Economy Act 2017. c.30, Part 3, Sect. 21
[156] Digital Economy Act 2017. c.30, Part 3, Sect. 21
[157] TARRANT (2016: 122).

alternatives, including mainstream social media such as Facebook, Instagram, Twitter, or Snapchat, which are all intermediaries of pornographic content, yet the age verification system does not apply to social media. And finally, as usual, there is the jurisdictional elusiveness of platforms whose operations are disseminated globally.

Further concerns relate to the providers of the technologies for age verification systems. Adult websites can individually choose how and which kind of technological support to introduce for age verification. Age verification services are inevitably a market in themselves. The most known and applied technology is AgeID, designed by the same company that leads the way in both the production and the online distribution of porn, namely MindGeek (see below). As is appropriate, researchers have also raised concerns that the data collected through AgeID might both represent a breach of privacy and further help Mindgeek monopolize the market via savvy analytics[158].

Many alternatives to AgeID exists, like AgeChecked and AgePass. Each of them have different methods to make people prove they are old enough, like credit card data, ID information, driving license details, face scanning and blockchain. Pornographic sites can use more than one age checking company simultaneously. However, since Virtual Private Network[159] (VPN) is common among internet users, subverting a porn block is relatively easy.

§3 MindGeek

Even though the common consumer of adult video would not recall its name, the sites and brands that MindGeek owns, such as YouPorn, Brazzers, Pornhub, RedTube, among others, are some of the most trafficked site for pornography[160]. Control over a huge investment network of advertising services as well as over the AgeID verification system confer to this Canadian company a large competitive advantage

[158] For wide ranging discussion see: ROBERTSON (2020).
[159] Protected information system link utilizing tunneling, security controls, and endpoint address translation giving the impression of a dedicated line. VPN technology is widely used in corporate environments or to navigate without being tracked.
[160] Ranked by Adultsiteranking.com.

over its chief competitor WGCZ Holding, a Czech-registered company, founded by two French citizens, which controls such websites as XVideos, XNXX, and Bang Bros (and information about which is to be found only in the legal disputes in which it is involved, including against MindGeek[161]).

Founded sixteen years ago, MindGeek has its origins in Mansef and Interhub (respectively owners of Brazzers and Pornhub), companies founded in 2004 and 2007 by graduates of Concordia University of Montreal. Internet entrepreneur Fabian Thylmann bought both companies in 2010, changed the name from Mansef to Manwin, and went on an acquisition of several other popular pornographic websites. In April 2011, Manwin raised US$362 million in financing from Colbeck Capital, which Thylman used to buy other pornographic companies such as Playboy Tv, Digital Playground, Twistys, YouPorn, Gaytube, and Redtube, among others.

In 2013, after coming under tax evasion charges, Thylmann sold his stakes in Manwin to the senior managers of the company in Montreal, Feras Antoon and David Marmorstein, for $100 million. They later changed the company's name into MindGeek.

Today, MindGeek's real owners are mostly out of sight. Very little is known about the new group of operators, also because MindGeek infrastructure extends across multiple global data centres, enabling service monitoring on all hosted sites. The company runs on a conglomerated structure, with numerous holdings, billing companies and subsidiaries, located in Nicosia, London, Montreal, Ireland, Mauritius, the Netherlands, Curaçao, Bucharest. The legal headquarter of the company is registered in Luxembourg, a locality known for special tax exemptions to tech corporations[162].

MindGeek describes itself as a global industry-leading information technology, specialized in content delivery, streaming media and online advertising solutions, offering the most successful strategies to ensure

[161] Judgement of US District Court for the District of Nevada, 2nd July 2015, *Hydrenta HLP Int. Limited v. WGCZ, S.R.O. et al.*
[162] For wide ranging discussion see: WIER, TORSLOV, ZUCMAN (2018).

top-ranking in search engine traffic[163]. The company's website appears as a glamourous showcase of the numerous services that it can provide to its potential clients. MindGeek said that "it understands the business requirements, vision, and needs to provide the best customized solution"[164]. Aside from online advertising services like TrafficJunky, the company offers its competences in data-gathering and processing techniques, as well as digital market strategy, coding, and identification systems architecture.

MindGeek also provides a social media service, which helps new brands widen their exposition and grow, developing customized content strategies to cater to a larger audience. Moreover, MindGeek delivers TV broadcasting and Internet streaming: "Our Content Delivery Network (CDN) [...] provides content as quickly as possible to customers, no matter where they are, with the highest quality real-time streaming service possible"[165]. On its website, the company never mentions that the 115 million of daily visitors and 3 billion of advertising impressions, are mostly provided by some of the biggest, most trafficked pornographic websites in the world, such as Pornhub.

MindGeek does not talk openly about its business and remains a very notable big-tech giant which most scientific, academic and financial research, however, do not talk much about. Even some of the most prominent and critical books on digital economy give scant attention to MindGeek (and generally to the topic of platform pornography)[166]. Considering the amount of attention devoted to other tech giants, such as Facebook and Amazon, and their owners, the scarce academic and political scrutiny devoted to this particular tech giant seems an anomaly.

Although MindGeek masters most of the European and American pornography, basic facts about the company are almost unknown. This used to include information about the main beneficiary and backers of MindGeek, which, however, has brought to public attention a recent investigation by the *Financial Times* (FT)[167].

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[163] From the official site of MindGeek.com/Services.
[164] MindGeek.com/Services.
[165] MindGeek.com/Services.
[166] LESSIG (1999); SRNICEK (2016); GREENFIELD (2017); ZUBOFF (2019).
[167] NILSSON (2020).

A businessman called Bernard Bergemar, seems to be the most successful porn tycoon, but he is almost invisible online. His name, before the FT report, appeared only in a court case, where he gave evidence as the director of RedTube, the porn site acquired by MindGeek, after Mr. Thylmann's exit. According to the FT's inquiry, MindGeek keeps Bergemar's identity a company secret. Bergemar is not listed in the company's corporate filings, but FT revealed that "in the complex structure involving shares in MindGeek controlled subsidiaries, Mr Bergemar is the group's largest owner and biggest beneficiary"[168]. The FT also mentioned the names of some of the financial backers of the company – including JP Morgan Chase, Cornell University and Fortress Investment Group.

Despite the many legal inquiries to which it is called to respond, MindGeek has become one of the most powerful players in the global online content delivery field. Its research in innovative technologies, online traffic support, and data mining and processing is comparable to that of other major digital players that are far more known to the public, such as Google, Amazon, Facebook, and Netflix, among others. MindGeek shares the DNA with these firms, in their extended power on data extraction, analysis, use and selling. In addition, the complex structure organization, with the international dissemination of the subsidiaries and aggressive acquisition strategies of peripheral companies, and the establishment of the headquarters often in countries recognized as tax paradises, are all recalling characteristics of digital corporation business models.

The significance of large platforms in current and future human affairs can hardly be overestimated. Their extensive ability to diversify their investments allows these companies to provide a wide variety of different services and penetrate the social fabric in various ways. While Amazon may enter our diets by purchasing Wholefoods, Google can shape and influence the future of work and education through its own online learning platform *Coursera*, releasing courses (typically related to IT support, digital skills and data analysis) that cost a fraction of traditional university education. Google Career then offers job and apprenticeship opportunities. MindGeek, too, advertises its own

[168] NILSSON (2020).

University on its official website, and offers learning and financial support to those who wish to develop their talents in the digital sector. Some big tech companies have also recently announced their interest in developing their own cryptocurrencies, as an alternative method of exchange[169] that needs no institutional intermediators like governments and banks. Facebook has announced its Libra in 2019. Pornhub accepts cryptocurrency Verge as a payment method.

§4 Pornhub

MindGeek-owned Pornhub is one of the most visited mainstream pornography platforms in the world. It was launched in 2007, within the company Interhub. In 2010, it was purchased by Fabian Thylmann, entering the MindGeek conglomerate. Pornhub is one of the websites of the MindGeek's network of user-generated pornographic content platforms, such as RedTube, YouPorn, Thumbzilla, PornMD, and others.

Pornhub's fans are a very active community. In 2019, there were over 42 billion visits and 39 billion searches performed[170], which means there was an average of 115 million visits per day (it is the equivalent of Canada, Australia, Poland and Netherlands population, visiting the site in one day). In the same year, Pornhub registered the record of uploads, over 6.83 million new videos, which leads to 1.36 million hours of content[171]. In 2019, every minute on Pornhub meant 80,032 visits, 77,861 searches and 219,985 video views. People are using Pornhub as a social media too, exchanging more than 70 million messages and viewing 14,799 profiles yearly. Over 98,000 new models joined Pornhub in 2019, bringing the total number of verified models to 130,000.

Despite the recent shift of consumers' preferences to other adult-content platforms (like XVideos) and the emergence of new forms of access to digital pornography (such as live video streaming and camming, where the service is far more interactive compared to the traditional porn video), Pornhub remains the most famous porn site globally. Its fame is mainly due to the large quantity of pornographic

[169] For more on crypto-currency see: GREENFIELD (2017).
[170] PornHub.com/Insights/*The 2019 Year in Review*.
[171] PornHub.com/Insights/*The 2019 Year in Review.*

content that is everyday supplied and uploaded for free. Some of the most widely known performers in the adult industry have contracts with Pornhub. Besides the content produced by models, Pornhub also hosts a vast quantity of active users that transfer material not financed or recorded by production studios (in fact, amateur remains the most searched category of 2019, with many new verified users that are interested in practicing as amateur pornographers[172]).

Pornhub's ability to provide precise statistics about the interactions that take place on the platform, is very impressive. The United States continues to be the country with the highest daily traffic to Pornhub, followed by Japan, United Kingdom and Canada[173]. Among the Europeans, France, Germany and Italy are the first three[174]. Pornhub's statisticians can tell which is the most popular day to visit Pornhub and the one with lowest traffic (in 2019, Sunday was the most popular worldwide and Friday was the lowest). They can tell the hour people prefer to watch pornography, the time spent per visit, and the differences in searches between gender and sexual orientation. Most searched for terms, or for male/female porn stars, are influenced by current popular trends on other social media, and might differ among countries, but the video categories that the platform offers are always the same and this can give solid indications about what people sexual fantasies are.

For what concerns gender demographics, the type of porn watched on Pornhub tends to differ among men and women. Women's presence among the audience can be the first proof that mainstream pornography and Pornhub, can be "female friendly" and that real women's demand for porn exists. The new category "Popular with Women" brings together all the porn that women enjoyed watching, based on the female customer's feedback. In 2019, the proportion of worldwide female watchers increased of 3 percentage points over 2018[175], reaching 32%. Dr. Laurie Betito, a noted sexual therapist and director of the Pornhub's Sexual Wellness Center, recognized this statistic as good news, since it indicates that women are taking control of their sexuality, discovering

[172] PornHub.com/Insights/*The 2019 Year in Review*.
[173] PornHub.com/Insights/*The 2019 Year in Review*.
[174] PornHub.com/Insights/*The 2019 Year in Review.*
[175] PornHub.com/Insights/*The 2019 Year in Review*.

themselves and what they like with less shame and stigma on pornography[176]. If the quantity of female visitors has increased in the late years, the number of 18 to 24 years old visitors dropped by 1 percentage point[177]. On average, Pornhub users are 35.3 years old, with 60% being under the age of 35.

Pornhub can provide insights about the most trafficked Web Browsers, and about the top game consoles which enable visiting Pornhub, such as PlayStation and Xbox. Pornhub's knowledge of people's preferences and behaviours is quite intimate and forms a great basis for market research and targeted marketing. And since movie and TV characters or models tend to drive a lot of sexual fantasies Pornhub will also capture the audience's preferences trends in other market sectors, like cinema, fashion, social media, and entertainment more generally.

Pornhub's statisticians can say which are the most followed events of the year, internationally and regionally, comparing the event's time with the same period's drop in traffic on the site. Golden and Grammy Awards, international sports events, and music live TV shows, all cause, in the relative periods, fluctuations in Pornhub traffic.

Part of the explanation for the over 100 million visits per day on Pornhub is that most of the material streamed on the platform is free. One main reason why Pornhub platform decides to supply content for free is that it seems to encourage a consolidation of more consumers than if services came at a cost. Much like Facebook convinced news publishers to promote material on its platform with the hope that it would drive up subscriptions, many porn production studios post fragments of their films on Pornhub, expecting at least some viewers to develop a willingness to pay in order to see more. Broader accessibility increases visibility and future access, and enlarges the quantity of potential future payers and active users.

The bigger the community gets, the larger the credibility and the visibility of the platform. Among the customers, there is a (no small) minority that is interested in subscribing to further services such as higher-definition or more exclusive and customized material. With the digitalization of the adult entertainment sector, the ways to generate

[176] PornHub.com/Insights/*The 2019 Year in Review*.
[177] PornHub.com/Insights/*The 2019 Year in Review*.

profits have increased, but also mutated. Since the economic value of porn videos has generally declined, also given the challenges with protecting copyrights online, performers too enter direct partnerships with Pornhub, to take advantage of the wide visibility and to earn money from banner ads, click-throughs, or premium subscriptions. They often supply alternative services, like camming or live chats.

Today's mainstream porn industry no longer needs the classical value chain of producers, studios, directors, and retailers. Pornhub and the other X-rated tubes are acting as content-providers and studio producers at once, becoming determining players in the industry. Many models, performers, and producers try to take advantage of falling production and distribution costs, to produce as much material as possible and distribute it through platforms like Pornhub.

§5 Pornhub's Travails

For what regards the protection of children from pornography, Pornhub seems committed to protect minors from its adult contents online, being a member of the associations which campaign for measures that restrict minors' access to adult content. Many social welfare organizations provide resources and membership programs that assist many adult web sites to protect children from restricted-age content. The protection of minors from inappropriate content has been endorsed through partnership programs that support policymaking and provide stakeholders with a general framework of business responsibility.

Material that is uploaded on the platform must adhere to self-established safeguarding terms, which include numbers of requirements that "help protect the sexual liberty and expression of the community and the integrity of the platform"[178]. As other highly trafficked porn sites, Pornhub provide lists of prohibited contents that undermine the safety of users and performers on the platform[179]. These rules apply to all creators and uploaders of video or images or advertisement, and in case of infringement the Pornhub team can (but it is not obliged to)

[178] Pornhub.com/Terms of Service.
[179] Pornhub.com/Terms of Service.

remove content, block future uploads through fingerprint, and even terminate the account subscription if necessary[180].

The efficacy of all this self-regulatory apparatus was recently questioned by a *New York Times* report, which accused Pornhub of hosting videos showing child abuse and non-consensual sex, and to benefit economically from them[181]. After this, MasterCard and Visa instructed the financial institutions that connect the site to their payment networks to terminate acceptance (it is not clear if the two companies are applying the same new policy on all other pornographic websites they collaborate with).

The shut-down of cards-payments on Pornhub comes after a further enquiry launched by Mastercard itself, which seemed to confirm the alleged presence of unlawful content. The Mastercard's CEO Ajay Banga explained that the company's decision to cut off the popular pornography websites was a measure to apply legal standards, since child-pornography is illegal, and not based on a moralistic basis[182].

However, Visa and Mastercard's decision to terminate their collaborations with Pornhub is controversial and has been challenged. The termination of payment services has dramatic effects on those who upload legal adult content on Pornhub, and on those who legally exercise their rights to buy such content[183]. The community of Sex Workers Outreach Project Behind Bars (SWOP) stated that the decision taken by Visa and Mastercard is a "war against sex workers"[184], that it is not clear how it could help victims of non-consensual imagery, and that it rather damages the laborers who have made contracts with Pornhub to use its Amateur Program or ModelHub services, who depend on the platform to earn a living.

Granted the importance of holding Pornhub accountable for the content that it disseminates, it should be noted that decisions like that of Visa and Mastercard, can damage the financial security, business freedom and independence of sex workers. Moreover, the kind of conduct

[180] Pornhub.com/Terms of Service.
[181] KRISTOF (2020).
[182] SWISHER (2020).
[183] COLE (2020).
[184] ANDREWS (2020).

adopted by giant lobbies like MasterCard and Visa shows a potential alarming veto power that big financial and tech companies have in the dissemination of information and of content on the web. Neither Visa or MasterCard dispose of the expertise or of the public authority to determine speech in the cyberspace, much as they do not and should not in physical space.

These events underscore the complex challenges that platform pornography at once poses and must deal with when it comes to content monitoring and moderating. Even before the NYT's report, Pornhub had announced on its official blog its commitment to trust and safety, enacting safeguards measures to eliminate uploads of illegal material[185], including non-consensual material and child sexual abuse material[186]. Pornhub's administrators also decided to apply a more robust moderation process, by banning unverified uploaders (those who create and upload material without being content partners or without being members of the Model Program) and suspending all their precedent uploaded contents[187]. In its official statement on the matter, Pornhub underscored measures such as these have not been instituted by any other large platform yet, be it Facebook, YouTube, Snapchat, or Twitter[188]. It is worth underlining that these latest upgrades in the management of content internal to the platforms have been advocated by porn performers for years. Many have requested Pornhub to adjust unverified upload policies long before the New York Times scandal[189].

§6 Concluding Remarks

Ch. 3 familiarized us with online porn regulation. It has also familiarized us with online pornography's main player, MindGeek, and its most famous deliverance, the platform Pornhub. The chapter has

[185] Pornhub.com/Official Blog.
[186] Definition as used in the Optional Protocol to the Convention on the Rights of Child on the sale of Children, Child Prostitution and Child Pornography, 22nd May 2000.
[187] As the administrators communicated on the platform official site.
[188] Pornhub.com/Official Blog.
[189]Pornographic Platforms should link the ability to register and enforce copyrights on pornographic works to the creators' compliance with a regulatory scheme designed to promote the safety and well-being of pornographic performers by confirming their consent. For wide discussion, also on copyright enforcement in pornography, see: BARTOW (2008).

traced the contours of MindGeek's complicated corporate structures and operations, as well as described Pornhub, its impressive figures as well as latest travails. In the next chapter I focus on platform pornography's murky relations to performers, and propose a sketch for a performer-oriented regulation of platform pornography.

CHAPTER 4

Performers and Platform Pornography

As I tried to show in previous chapters, regulating the pornography industry, particularly in its current online platform version, is a unique challenge that involves deep and complex questions about individual rights and limits thereof (of producers, consumers, distributors), gender relations, social acceptability, corporate responsibility, digital (algorithmic, data intensive) business, regulatory feasibility, jurisdiction in globalized cyberspace, and more.

In this chapter, I take up one area of regulation that is only poorly and haphazardly pursued, though its pursuit is vehemently invoked by the very group that is most immediately exposed to the darkest dangers of pornography, and whose treatment has always ranked high among the concerns of most anti-pornography activism and initiatives, including recent ones (see the Introduction) – namely performers, and particularly female performers.

Many performers have mobilized to represent group interests and claim their rights as workers and as human beings. The advent of platform pornography, with its monopolistic yet labyrinthic chains of command and outsourced services, and its nebulous, financially and technologically savvy companies like MindGeek, acting as global sources and terminals of a flow of multifarious pornographic material in a fuzzy and fragmented legal landscape, has only made the call of performers louder and more urgent.

Most explicit or implicit requests for a legal ban on porn, in most countries and at different times, have sourced supporting arguments in a cluster of concerns about the violence, degradation and exploitation that performers, and particularly female performers, risk being subjected to during production, and more generally by operating within the industry. Yet, somewhat paradoxically, few proposals have come for a more performer-centred regulation of the industry, and little support has traditionally been given to the ever more insistent requests by performers that their voice be heard. What has typically happened is

that the voice of performers has rather been silenced by louder claims for the abolishment, rather than a better regulation, of the industry.

Laws and regulation enforced to protect labour and human rights in all other legal industries are routinely disregarded in porn. For example, porn is the only industry where racial and gender discrimination are often the very bases for hiring decisions. It is also one in which health and safety requirements are routinely disregarded, and performers sign contracts only as freelancers. Most such contracts are part of a chain ultimately leading up to MindGeek, but only through a series of intermediate steps, along which MindGeek's corporate responsibility for the protection of performers' labour and human rights is quickly dissolved.

In this chapter I suggest that, when it comes to platform pornography, the legal requirement that performers give their consent to shooting each pornographic scene is too thin a protection for performers, and that it should be complemented by regulations that oblige monopolistic entities like MindGeek to take on the responsibility to protect the dignity and integrity (physical and mental)[190] of performers along the whole chain of production, also ensuring that all outsourced services be bound by the same integrity principle. I also suggest that a performer-oriented regulation of platform pornography that combines the principle of performer autonomy (consent) with one of dignity and integrity (physical and mental) can be a pivotal stepping-stone towards a better (effective, nuanced, fair) regulation of platform pornography more generally.

I articulate these claims as I discuss two performer-initiated legal cases against MindGeek, one of which never got to trial, while the other was won by performers. In both cases consent had been given but performers claimed their dignity/integrity was violated in various unacceptable ways. Later in the chapter I consider the closest real-life

[190] The Charter of Fundamental Rights of the European Union (2012) states in Title I, Art.3(1) refers to *Right to Integrity of the person*: "Everyone has the right to respect for his or her physical and mental integrity". And Article 31(1) on Fair and just working conditions, underlines that: "Every worker has the right to working conditions which respect his or her health, safety and dignity". In particular, Bodily Integrity has been discussed under terms of Human and Sexual Rights by HEIDARI (2015).

model of what a performer-centred pornography would look like – namely a family of production and distribution methods that identifies under the umbrella term of "Ethical Porn"[191].

§1 Performers

In legal, mainstream pornography, performers are consenting adult professionals providing contracted acting services to sexually explicit media productions operating within the boundaries of the law. They are legal workers operating within a legal industry.

Though the porn industry and the services these performers provide are legal, performers are still exposed to an unusually high risk of workers and human rights violation[192]. They are exposed to a higher risk of discrimination, exploitation, and physical abuse than most other working categories[193]. They may often see their complaints ignored by courts or be denied access to basic health services and social benefits[194]. There are numbers of adult performers' testimonies on their bank's accounts being closed without any preventive communication or explanations, or even denial of funding-support for sex-related businesses[195]. Intellectual property rights and rights to privacy of performers are also constantly threatened, particularly in a digitized context[196]. To complicate matters, when workers and human rights of porn performers are violated, there is a risk that rescue policies applying to other, illegal sectors of the sex industry be extended to porn productions, with the effect of criminalizing performers[197].

[191] For wide ranging discussion see: MONDIN (2014).
[192] Performers of pornography seem not entitled to their right as citizens and workers, such as "a fair and public hearing by a competent, independent and impartial tribunal established by law" (as the International Covenant on Civil and Political Rights, Art.14.). FOSTA and SESTA Bills package impedes the operations of associations of sex-workers online. The right of association is a protected and recognized right and freedom in the International Covenant on Civil and Political Rights, Art.22.
[193] ARMSTRONG (2018).
[194] Report of the European Conference on Sex Work, Human Rights, Labour and Migration, Brussels (2005).
[195] CHAMBERS (2014).
[196] BARTOW (2008).
[197]UNAIDS, the joint United Nation program on HIV/AIDS global action, public health experts from the Lancet, the Global Network of Sex Work Projects, that promote health and human rights for sex-workers, have found the criminalization of sex-work as negatively impacting on the health of sex-workers, as the capacity to

Although it is difficult to find record-keeping on pornography's workers' rights violations (the literature tends to focus on the "street-sex workers"), adult performers' record keeping is assisted and supported by numerous organizations, unions and attorneys, including the Free Speech Coalition (FSC), the Adult Performer Advocacy Committee (APAC). Other, more generalist organizations, like Human Rights Watch and Amnesty International also advocate for the improvement of safety and working conditions in and around the industry, by giving performers assistance in terms of education, organization, protection, and representation, in matters that affect their health, relationships, citizenship, and the reception of the adult industry community by those outside it[198].

Most porn performers suffer from the same stressors that plague other workers in show business and beyond: lack of job security, short periods of intense work under pressure, lack of creative control, and discriminatory hiring and firing practices[199]. However, industries like television or music do not face the same social stigma that does pornography; and studies have confirmed that a bad perception of pornography tends to trickle down to a negative judgment about performers (particularly female performers[200]). In another version of this "damaged good theory", those who understand pornography as socially ill tend to paternalistically regard performers (particularly female performers) as desperate victims of the industry rather than full agents[201].

Even if the adult movie industry is a legal business, stigma and paternalism continue to exercise great influence even in domains where performers could reasonably be expected to bring important contributions to regulation, including on occupational safety and health measures. Performers' experiences and opinions are routinely

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protect them from sexually transmittable diseases and infections is dramatically reduced.

[198] MURPHY (2015).

[199] SULLIVAN, MCKEE (2015: 37).

[200] One of the biggest areas of frustration and anxiety reported by actresses comes from their treatment by those outside the industry. For wider discussion see: ABBOTT (2010), and GRIFFITH ET AL. (2013).

[201] SULLIVAN, MCKEE (2015: 41)

discounted when legislation on the condition of workplace are drafted[202]. Thus marginalized, performers lose important instruments to exercise and access other key rights, such as legal equality and respect of personal dignity, physical and psychological integrity, sexual freedom, and reproductive freedom, among others[203].

During the XBIZ Berlin, the Free Speech Coalition has sponsored in October 2020 a public forum on the priorities for the adult movie performers. International human rights bodies called on states to ensure the rights of all sex workers of all sexual orientation, including porn performers, to access sexual health services, to prevent and suppress violence and discrimination by state agents or private persons, and to have access to equal protection from the law. The Coalition has supported for long time producers, performers and free speech groups in America and Europe.

§2 Health concerns and medical issues

Performers are exposed to significant bodily and medical risks, most of them related to the contraction of Sexually Transmittable Diseases (STDs) on set. In the United States, The Adult Industry Medical Health Care Foundation (known as AIM) launched, in 1998, the provision of HIV tests and health counselling to all sex industry workers. While this move was revolutionary at the time, it was not enough to prevent a shutdown of Californian productions in 2004, when it was revealed that an HIV positive performer had infected others, and that that was not the only case in which such thing had happened[204]. This caught a lot of media coverage and, in 2012, an ordinance mandating condom use by porn performers during filming, also known as Measure B, was campaigned for by the AIDS Healthcare Foundation (AHF) in Los Angeles County, headed by Michael Weinstein, who poured millions of dollars into lobbying for the proposed law[205].

Arguments in support of Measure B emphasized that mandatory condom use would succeed in the prevention of diseases and infectious

[202] *Ibid.* 43.
[203] Report of the European Conference on Sex Work, Human Rights, Labour and Migration, Brussels (2005).
[204] SULLIVAN, MCKEE (2015: 46).
[205] GEE (2016).

outbreak among porn performers, and thus also avoid transmission to outside sexual partners who had not consented to the health risks of the industry. In 2012, a study conducted by the Los Angeles County Department of Public Health, the John Hopkins Bloomberg School of Public Health, and the University of California, Los Angeles, found that the 28 percent of adult performers had tested positive for chlamydia and/or gonorrhoea[206]. This fuelled the argument that regular testing of porn performers was not enough to avoid STDs transmission. In addition, it was noted that performers' rate of infection might also be underestimated, since undiagnosed STDs are common in the adult industry and are very often asymptomatic, and not all performers might be able to afford to pay for testing with regularity[207].

Performers are required to pay for tests and vaccinations, which is inconsistent with the State of California's Division of Occupational Safety and Health (Cal/OSHA) standards, which require employers to bear the costs of work-related health tests[208]. This requirement is difficult to enforce in the adult entertainment sector since performers are inevitably contracted as freelancers rather than employees. In addition, there are no global standards for testing, nor consistent practices to assure workers' safety on sets[209].

Since there is little market demand for porn scenes featuring condoms, the ordinance seemed to many a disguised attempt to push the industry out of business. Some companies such as Vivid Entertainment sued Los Angeles County, to prevent the implementation of Measure B; other production companies, like Wicked Pictures, decided to apply condom use; others yet implemented their own health and safety standards. Today, most pornographic videos and clips continue not to feature condoms, and this prompted the AHF to file to the Cal/OSHA numerous accusations against both straight and gay production studios such as Reality Kings, Bang Bros, Hustler and Vivid[210]. In addition, Measure B and other mandatory condom policies do not apply at a federal level, as they are state-based obligations in California.

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[206] RODRIGUEZ-HART, GOLDSTEIN, KERNDT, TAVROW (2012).
[207] *Ibid.*
[208] BAKER, SUM (2015).
[209] STARDUST (2016).
[210] MOTIL (2014: 218-20).

It is in the industry's interest to ensure the health and safety of the performers, if only to avoid becoming the object of drastic restrictions by the law. Unfortunately, in 2011 the industry lost the support of AIM, which had been for decades the entity taking care of the sexual health and safety of performers. The AIM's database was hacked and the personal information of over 12,000 porn performers was released on a website called Porn Wikileaks[211], including information like home addresses, test results and legal names. Ensuing lawsuits over privacy infringement forced the AIM to file for bankruptcy and cease its work of coordinating STDs testing for the industry. AIM was one of the few examples of coordinated industry-based regulation of the health and safety of porn workers anywhere in the world[212]. After its demise, no further agency has stepped in to take its place. Without institutionalized coordination, standards remain volatile and difficult to monitor.

There have been attempts to strengthen Measure B recently. Proposition 60 is one of these[213]. The proposition requests allowance for Cal/OSHA to prosecute enforcement action anytime a condom is not visibly present on the pornographic movie or clip[214]. In addition, Proposition 60 would also make the film's producers liable for violations, allowing anyone to press charges against them, and requiring producers to take charge of vaccinations, testing, and medical examinations related to STD's.

The idea of making producers' responsible for the sexual health of performers is commendable but bumps once more against the stubborn fact that many performers are only contracted as independent workers on a gig contractual basis. In fact, then, responsibility for their sexual health is inevitably left to the performers themselves. To ensure company's responsibility regarding performers' health during work, the working status of the performer should change from freelance to employee[215].

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[211] SULLIVAN, MCKEE (2015: 47).
[212] *Ibid.* 48.
[213] Proposition 60 from Legislative Analyst Office, 18th July 2016, Adult Films. Condoms. Health Requirements. Initiative Statute.
[214] Proposition 60.
[215] This is all the more urgent in other locations of pornography production. Although Los Angeles County remains the largest site for pornography production, further Western and non-Western countries have started producing sex-related material, particularly Hungary, Czech, and Thailand, where sex-workers are often vulnerable

In addition to concerns about sexually transmitted infections, some worries derive from the prevalence and impact of cosmetic surgery, like breast implants or Botox for women. Critics underline that the rigid beauty standards in mainstream pornography can have increased the number of breast implants, not only among actresses but also among women generally. Sheila Jeffreys wrote about the breast implant surgery as a harmful cultural practice, and that the pressure of pornography and "pornified" culture puts disproportionate and unjust burdens on the female population[216]. Julia Long, a famous anti-porn author, associates the beauty practices of today's world, like breast implants or even waxing, to pornography becoming normalized[217]. However, it remains hard to determine that an increase in breast augmentation in the general population is relevantly linked to pornography becoming normalized.

Male performers face different but equally strong pressures. The most obvious concern their capacity to keep themselves erect. Viagra came into the sector around 1998, but there are numerous substances that actors can use to boost performance: Levitra, Cialis, herbal product, TriMix-gel, among others. These products are thought to cure erectile dysfunctions but are used by actors to keep recording for prolonged periods of time. Off-label use of erectile dysfunction medication among porn actors is quite high, and many of them have reported medical harm as a result of it[218].

§3 More Than Consent Alone

In the next pages, I will try to bring together some important concerns relative to performers' circumstances in a world of platform pornography, by looking at two cases in which performers have sued not only on-the-ground producers of porn content but also the mother house MindGeek. The two cases are very different in many respects,

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and unable to negotiate occupational conditions. Many developing countries are organizing sex-workers into unions and collectives. In Europe, the Sex Worker Advocacy Network supports less wealthy regions, advocating for freedom and self-determination, and maintaining a data base to connect the voices of female, male, and transgender sex workers. See SULLIVAN, MCKEE (2015: 54).

[216] JEFFREYS (2015: 139-59).

[217] TARRANT (2016: 136).

[218] DUBIN, GREER, ET.AL (2018).

but they both show how an exclusive focus on consent as the legal instrument on which to premise the protections afforded to performers may not be enough at a time of platform pornography.

In both cases, consenting performers lamented violations to their dignity and physical and mental integrity before, during or after production. In both cases, they have tried to hold MindGeek responsible for negligence in ensuring their dignity/integrity. In one case a veteran of the pornography industry, Nikki Benz, sued MindGeek but never saw her case get to trial. In the other case a group of non-professional young women sued MindGeek for participating in illegal practices with the GirlsDoPorn website that produced their videos, winning a landmark case. In between, the Trump Administration had passed FOSTA and SESTA Bills Package (see Ch. 3 and below).

What these two "performer vs. platform" cases have in common is that they signal the shortcomings of consent as a final criterion for what can be done with and to performers, both on set and when later circulating their material online. What emerges, particularly in an environment characterized by long chains of delegation and widespread outsourcing and subcontracting of services, is the need to complement consent with an additional principle, that of dignity and integrity (physical and mental), and to ascribe responsibility for the enforcement of that principle of performer's protection to platforms themselves.

§3.1 Nikki Benz v. Tony T, Brazzers, and MindGeek

In 2016, just a few months before #MeToo took Hollywood by storm, actress Alla Montchak, a veteran pornstar publicly known as Nikki Benz, posted on Twitter that she had been sexually assaulted on the set of a production house owned by MindGeek, Brazzers, by director Tony T and male performer Ramòn Nomar. She had previously reported to the police that while she had agreed to conduct potentially extreme sex scenes, the scene she ended up shooting would not qualify as merely "potentially extreme" but rather as straightforwardly violent by industry standards. Ms. Benz added that she did not obtain a script beforehand displaying what sex acts she was supposed to perform, and that Tony T did not address the essence of the scene with her, except being a boy/girl-anal scene, contrary to common practice on sets.

According to what Ms. Benz said in the police report, after Nomar ripped off her clothes she began to panic at the extent of violence that took place during the scene, particularly because the director of the scene, Tony T, began to take part in the alleged violence by choking her[219]. Court papers filed by her defence lawyers noted that a boy/girl scene requires physical contact between only the two actors, not two actors and the director: the latter option is contrary to industry guidelines[220]. Both Ms. Benz and the scene director, Tony T, filed a court document confirming that only Benz, Tony T, and Benz's scene partner, Ramón Nomar, were present when they were filming, as the director had ordered the rest of the crew to leave the room, another anomaly.

Even though much of that day was recorded on tape, Ms. Benz still needed to convince the jury that was on tape was not consensual[221]. Ms. Benz obtained a meeting with the Los Angeles District Attorney, who, two weeks later, declined the case "due to insufficient evidence"[222]. Finding herself largely isolated by most of her industry colleagues, estranged from her former company Brazzers and rejected by the criminal justice system, she filed a case against MindGeek, because the platform, which owns Brazzers, had failed to create mechanisms that would have covered and protected her bodily and psychological integrity[223]. The lawsuit sought damages for battery, assault, sexual battery, gender violence and, among other allegations, negligent hiring and supervision, including punitive damages[224].

Brazzers started an internal investigation and later fired director Tony T (who then sued Benz for defamation and related damages). In response to Ms. Benz's allegations, however, Brazzers stressed that it does not produce content on its own but outsources it to independent

[219] OPPENHEIM (2018).
[220] LANGE (2018).
[221] LANGE (2018).
[222] It is worth noticing that the lack of industrial standards to guarantee safety and integrity of performers do not provide to the court the elements to evaluate the alleged violation in the case of Nikki Benz. The concept of autonomy, and thus the free and autonomous choice of Ms. Benz to take part of the video, impeded to the violation of her integrity and dignity, as human and worker, to be recognized. However, Nikki Benz, as an individual and citizen, enjoy a right to due process and equal protection, as it also guarantees by the XIV Amendment, Sect. I of the U.S. Constitution.
[223] LANGE (2018).
[224] LANGE (2018).

production crews, such as Tony T's. Speaking to BuzzFeed News, Ms. Benz contested such disavowal of liability, arguing that Brazzers selects scenes meticulously, in response to data analytics about users' preferences, and works routinely with a consolidated cluster of trusted production crews, including Tony T's[225]. Ms. Benz's suit also alleged that MindGeek, Brazzers, and Tony T were not new to the mechanisms they respectively adopted at the different stages of her case. To the accusations of negligent hiring and supervision, MindGeek gave no response, nor were MindGeek's representatives ever called to testify.

Witnessing the public support of #Metoo a few months later, Ms. Benz sent a pleading email about her case to the Attorney General. In it she wrote:

I am baffled as to why the mainstream actresses are getting the proper recognition/justice for speaking out against their abusers, yet I have spoken out about this almost a year ago and I have yet to hear back. Why am I fighting this hard to prove that I was physically/sexually abused when it's on film?[226].

Several other women in the industry had already complained about Tony T when Ms. Benz first tweeted about her experience in 2016; and many other performers have seen their boundaries violated on set[227]. But while #MeToo prompted an avalanche of support for women in many industries, porn performers like Benz did not benefit from it. This may be yet another outcome of a general stigma attached to porn performers, leading to unjustified discrimination.

Nikki Benz accused Brazzers and the mother house MindGeek for negligence in hiring and lack of supervision on the set. The fact that Ms. Benz failed to even get such case to court shows how difficult it can be for a single performer, even a veteran porn star, to hold accountable any of the elements of the long supply chain that leads from a set to a platform thumbnail. MindGeek's lack of supervision increases the risk of performers to incur into unpleasant situations down along that chain, and, considering MindGeek's weight in the industry, effectively impedes the development of consolidated labour standards.

[225] LANGE (2018).
[226] LANGE (2018).
[227] CLARK-FLORY (2017).

More technically, the Benz case revealed how hard it can be for performers to prove that situations of violence or harassment recorded on video were not indeed consented to. Ms. Benz could show the violation of her physical and mental integrity on video, but not her lack of consent in relation to it, and on these grounds her request for trial was denied. The anomalous participation of the director in the scene and the missing script were also not taken as relevant evidence.

Ms. Benz's case reveals some limits of the principle of consent as the final bastion of performer's protection. That shows in the absence of structured mechanisms that track and prevent violence or harassment in the platform pornography industry. The APAC, Adult Performer Advocacy Committee, is pushing to implement sexual harassment and assault training alongside STD's testing, mandating performers to present evidence of the training before shooting much like they present evidence of clear STD's test results[228].

Since 2018 Adult Performers Actors Guild (APAG) has created a performer consent list known as "The Benz List". The list is thought to provide a true representation of performers' viewpoints by listing what the performer is willing to do on camera, and his or her conditions for feeling comfortable on set. The list was created with Ms. Benz's support. It was sent to agencies and industry groups, and posted on the Guild's websites. However, since the guild cannot legally oblige enforce the document on anyone, it should plausibly fall on MindGeek, with its dominance of the industry, to impose that. Or, at least, that is what a performer-centred regulation of platform pornography would counsel.

§3.2 GirlsDoPorn

Founded in 2006, GirlsDoPorn.com was a pay site featuring contracted sexual performances of 18 to 22 years old women who had never before appeared in a pornographic movie or video and did not plan to start a career in the industry. During the period of activity, owners Michael

[228] APAC provides representation for performers in the adult film industry and advocates for the protection of performers' rights, and for a safer and more professional work environment. More information is available on the official site *online*.

Pratt and Douglas Wiederhold filmed pornographic videos in hotel rooms across San Diego, with the same Mr. Pratt as videographer, and Wiederhold as co-actor. After some time, other profiles were added to the group, with Matthew Wolf and Andre Garcia as substitute of Mr. Wiederhold (as the latter was also working on a similar website featuring older women).

The idea was that of filming "girls next door". These girls were supposed to never appear again in a pornographic video. To silence and overcome girls' obvious reservations, GirlsDoPorn developed a scheme that relied on fraud, coercion and intimidation, applied in the phase of recruitment. The scheme was mostly carried on by giving lots of money to the girls (although most times never paying in full) to overcome their contrition against taking part in the video, and lying about the video dissemination by falsely claiming that they would be distributed only in foreign countries and on DVD. They even recruited false reference models to assure the victims that their privacy and anonymity would remain intact. Recruitment advertisements were posted on Craiglist.com, offering large sums of money for modelling jobs. The advertisements directed to other fake modelling websites, all owned by GirlsDoPorn. None of the websites mentioned pornography.

GirlsDoPorn not only lied about dissemination, but also about the payment for the job, which needed to be high enough to convince the women to fly to San Diego. Once the girl was alone in the hotel room, GirlsDoPorn (precisely Mr. Garcia) fabricated excuses to pay them less, by claiming physical flaws in the victim's body, like cellulite, scars, or uneven breasts, even blaming the victim for submitting misleading pictures. If the girl would not accept lower payment, she would be required to pay for the flight and for the hotel room. Many of the girls had little choice but to accept the new conditions, since they were alone, far from home, with two agitated males, risking the worst.

Like the sham reference models, the entire crew was instructed to confirm whatever GirlsDoPorn said to the victims, signing non-disclosure agreements that prevented them from telling the truth about the business to which girls were victims. The women had to sign unclear and complicated contracts just a few minutes before starting to film. Some of the victims declared that once they were asked to sign, pressure was exerted on them not to read what was written on the

contract. The contracts failed to mention that the videos would be also published on GirlsDoPorn.com, as well as dozens of other free tubes, and marketed with other affiliates – as it happened.

The full-length videos were posted in the member area of the paysite GirlsDoPorn.com and GirlsDoToys.com. Once published, the aggressive marketing strategies included partnership with MindGeek via its Content Partners, including Pornhub, and Viewshare Programs, for free dissemination.
Cynically, GirlsDoPorn sent links of the trailers to social media accounts of people in the victim's social circle, including friends, parents and teachers, exploiting their curiosity and potential willingness to pay to view the entire video, or their instinctual drive to share it with others that might be acquainted with the protagonist. By making the video go viral like this, GirlsDoPorn assured the monthly subscription of a much larger audience, reaching at least some who, otherwise, would have had no interest in subscribing to it. Publicly available videos on MindGeek's Tube sites created significant traffic to GirlsDoPorn's paysite, where they maintained ten to fifteen thousand subscribers per month. The Federal Bureau of Investigation (FBI) estimates GirlsDoPorn made over $17 million between 2009 and 2019.

After the dissemination of the videos, the victims of GirlsDoPorn were fired from their jobs, ostracized by their families and friends, and suffered from important psychological distress. Four of them filed an action in the Superior Court of California, and to the San Diego Superior Court, against GirlsDoPorn, for intentional misrepresentation, personal injury, fraud, concealment, and misappropriation of likeness[229]. By November 2017, eighteen more victims joined the State Court Action, for a total of twenty-two plaintiffs.

On October 2019, since the victims' testimonies accumulated, the United States Attorney for the Southern District of California charged GirlsDoPorn's three principals, Mr. Pratt, Mr. Wolfe and Mr. Garcia, and three others, with the accusation of conspiracy to commit sex trafficking and federal sex trafficking, under Title 18 United State

[229] Hearing of San Diego Superior Court, 6th December 2018, *Doe v. GirlsDoPornCom*.

Constitution § 1591[230]. The civil trial in the State Court Action ended on November 26, 2019, about six weeks after the arrest of the defendants. The decision collectively awarded the twenty-two plaintiffs with nearly $13 million in compensation and punitive damages[231].

This decision is in line with the United States Congress significant action to fight sex trafficking on the Internet. § 1591 of the Criminal Code of U.S. Constitution, charges businesses potentially frequented by sex traffickers – like websites, social media platforms and online dating applications – with the duty to deny the service to the suspected sex traffickers, or in the case of provision of the service, and acceptance of profits from it, to face liability to the sex trafficking. This includes third parties who knew, or should have known, that they were profiting a sex trafficking venture. In addition, § 1595 allows any individual who is a victim of a violation of this kind to bring civil action against the alleged perpetrators, or against whoever has benefited financially, or received anything of value from participating in a venture that they knew or should have known was premised on a violation[232].

Until 2016, Section 230 could have shielded MindGeek from § 1595, but the amendment to Section 230 contained in FOSTA and SESTA (and given the Backpage.com scandal[233] that initiated the GirlsDoPorn case action), has disabled the immunity clause. In addition, since the amendment to Section 230 is retroactive, it applies whether the conduct alleged occurred, or is alleged to have occurred, before, on, or after the enactment. Since GirlsDoPorn was found to be a venture under the meaning of Section 1595, and the Court found MindGeek to have benefitted from and participated in the sex trafficking venture, both were declared guilty under Section 1595[234].

How was MindGeek involved? From 2011 until the end of 2019, MindGeek worked with GirlsDoPorn, marketing it and taking economic advantages from the videos featuring the victims of fraud. MindGeek offered channels for GirlsDoPorn's contents on its tube

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[230] U.S. Code Title 18, Part I, Ch. 77 § 1591.
[231] Judgement of U.S. District Court Southern District of California, 15th December 2020, *Jane Doe n.1 through 40, v. MG FREESITES, LTD, et al.*
[232] U.S. Code Title 18, Part I, Ch. 77 § 1595(a).
[233] Judgement of United States Court of Appeals for the First Circuit, 14th March 2016, *Jane Doe n.1 v. Backpage.com, LLC.*
[234] *Jane Doe n.1 through 40, v. MG FREESITES, LTD, et al.*

sites, showing trailer versions to stimulate curiosity. On Pornhub, around seventy videos were posted, with more than 700,000 subscriptions, and almost 700 million views. YouPorn, Tube8, RedTube, and other tubes owned by MindGeek also channelled these kinds of unchecked videos, collecting billions of views.

It is not clear that MindGeek knew about the practices at GirlsDoPorn. However, the company maintained the partnership and never started an investigation or questioned the evidence that it was receiving from the victims. The partnership lasted until October 2019, when the Department of Justice shut down GirlsDoPorn completely, and issued a warrant for the principals' arrest.

Doubts about the alleged extraneousness of MindGeek are justified, since many of the victims testified having sent numbers of complaints directly to MindGeek itself. The lack of investigation or action from MindGeek, is proof of its dangerous level of negligence about what really happens on the sets of the numerous studios production and affiliates that it owns or transacts with. Negligence and lack of supervision were the same dangerous shortcomings denounced by Nikky Benz also.

Until very recently, MindGeek websites still hosted GirlsDoPorn videos and the material was present both on pay and free sites. MindGeek did not employ due diligence regarding GirlsDoPorn's business practices prior and during its partnership with them. On September 2017, the plaintiffs in the State Court Action served MindGeek with a subpoena seeking documents related to the takedown requests for PornHub.com, YouPorn.com, and RedTube.com.

The victims of GirlsDoPorn practices were helped by FOSTA and SESTA Bills, which in 2016 had made it illegal for online services to knowingly assist, facilitate or support activities related to sex trafficking on their websites and platforms[235]. FOSTA and SESTA are important tools that could allow officials to police websites and allow victims of sex-trafficking to sue those websites for facilitating their victimization. But while GirlsDoPorn victims received justice, it is easy to see how professional porn performers could be negatively impacted

[235] Stop Enabling Sex Traffickers Act, passed by the US Upper House and Fight Online Sex Trafficking Act, passed by the US Lower House.

by FOSTA and SESTA. Platforms are also instruments for law-abiding performers and producers to earn an honest living within the boundaries of the law. The targeting of all online platforms as potentially involved with sex-trafficking may push porn platforms to take down pages involving sex services, including consensual and legal activities, out of fear of being sue[236]. In addition, the two bills blur the boundaries between consensual sex work and non-consensual sex work, and related content creation and dissemination. For this reason, the bill may negatively impact the work and rights of adult performers who work on/through platforms.

After the bills were enacted, performers started to sound the alarm, claiming that their incomes could be put at risk, as well as their safety insofar as they rely on many of these platforms also to share information that may protect them from various risks, including health risks. On such platforms sex workers, including porn performers, build communities distributing harm-reduction information and techniques to identify and screen potentially dangerous customers. This kind of networked community is only possible on platforms. Legal sex workers, including porn performers, have higher control over their lives and safety with the support of online vetting of clients and safety information sharing. FOSTA and SESTA may undermine that.

The GirlsDoPorn's case ought not to be interpreted as the routine in porn. Most legitimate porn companies follow procedures opposite to those followed by GirlDoPorn. It is important for the wellbeing of the professional adult performers that legal processes are nuanced enough to distinguish practices of trafficking from legal sex work. Yet many performers fear that the outcome of GirlsDoPorn's case will be used to discredit and undermine their social position and the same digital platforms that provide them services and income.

MindGeek, as well as the administrators of affiliated platforms, should become active builders of labour standards based on performer's necessities and demands. Being able to negotiate the conditions with the industry in accordance with his or her body and mental limits is

[236] The right of association is recognized to American citizens by the First Amendment of the U.S. Constitution. FOSTA and SESTA have reduced dramatically the capacity of performers and sex-workers to exchange information among them, harming the capacity to organize and associate through digital service providers.

fundamental to a performer's physical, psychological and social integrity. This includes the articulation of safe sex standards, confidentiality agreements, and transparent negotiations regarding sex, kink and risk.

MindGeek should not leave its affiliated studio productions to self-organize. From its dominant position and with its leverage it rather should articulate and enforce along its supply chains those tools and criteria that may ensure fulfilment of performers' necessities and rights, including the protection of their physical, psychological, and social integrity.

More generally, internal regulation of the adult industry, as well as national and international law related to platform pornography, should put performers' dignity and integrity (mental and physical) at centre stage, giving it at least as much normative relevance as is currently accorded to their consent. After all, the integrity of other groups that are in various ways especially vulnerable to platform pornography, such as minors, has been pivotal to regulation. That has not happened in the case of performers yet. This might seem incoherent at best, and unjust at worst. If an especially significant level of vulnerability marks groups as especially worthy of consideration in the context of regulation (as in the case of minors), then performers (and their rights and claims as workers and humans) should also be especially worthy of consideration in the context of regulation. And if in the one case 'vulnerability' is referred to the threatened integrity of the vulnerable, then it could also be in the other, if not over and beyond at least next to consent – and both the Benz and the GirlsDoPorn cases point to the conclusion that, at least from the point of view of performers, it should.

From the point of view of the professional performers who make an honest living on/through platforms and websites in particular, a concern for their integrity should be operationalized in such a way as to make their work on platforms safer rather than more precarious, as FOSTA and SESTA threaten to do. The virtuous objective of making platforms responsible for illegal pornography should not be pursued by pushing platforms to shed away their responsibilities towards legal pornographers, particularly performers and particularly the women among them. Even radical legislation should be nuanced.

§ 4 Ethical Porn: performer-centred pornography

There are good practices to look at and build upon. Despite shortcomings in formal regulation, some performers and producers have developed their own informal industry standards. Performer dignity/integrity is highly valorised in a specific pornography sector that prioritizes performers' perspectives and experiences in the development of the product and in the setup of working environments. Performers' sexual freedom, safety, welfare, and integrity are central concerns in so-called "fair-trade pornography"[237] production, distribution and consumption. This kind of pornography is also called "ethical porn" and advocates for constructive role-modelling for and by performers, self-articulated labour standards, and producer-performer creative dialogue for imaginative and innovative content.

The leader of this line of vision is the Ethical Porn Partnership (EPP), founded by sex educator and journalist Nichi Hodgson[238]. The EPP is a coalition of adult content producers, performers, consumers, and supporters who encourage porn productions to make responsible choices about consenting adult content. The goal of ethical pornography research and activism is that of informing consumers about supply and command chains within and around the production, the working conditions in which the scenes are shot, and the ways in which performers draw meaning and value from their work. The privilege accorded to the performer's perspective discloses his/her agency and self-determination, including travails thereof. This upsets the standard model of power in anti-pornography discourses, which presents performers as objectified and women performers, in particular, as passive victims[239].

Furthermore, the examination of the specific conditions of porn performance, drawing attention to the performer's self-explanation, provides compelling insights about how sexual expression and gender identity can be articulated and valued by all sexual subjects[240],

[237] CHRISTAKIS (2012), MONDIN (2014).
[238] MINTER (2015).
[239] SULLIVAN, MCKEE (2015: 191).
[240] *Ibid.*

regardless of gender qualifications. This runs against many feminist, moralistic, public health, or stereotypical interpretations that tend to premise their anti-pornography stances on a pre-packaged gender ontology of masculine vs. feminine, with the former dominating the latter. This may justify and reinforce conservative paternalism[241]. The performer-centred framework of ethical or fair-trade porn, instead, also sources information and inspiration from the actual, embodied identities, sexual orientations, sensibilities, and expressions of those who do the work that most others simply consume, profit from, or despise.

In contrast, lack of focus on performers may normalize gender inequity and sexual coercion as simply part of the business, underplaying and delegitimizing the pride performers may take in skill, creative cooperation, authorship and self-determination[242]. Indeed, the EPP's line of action is that of showing that doing pornography, and sex-work in general, is not inherently exploitative nor necessarily empowering, but that meaningful positive assertions of personal agency and responsibility are possible if and when performers have a voice over their own services. Just as, and indeed more so than with any other work, porn performers must be able to negotiate the demands of the industry with solid reference to their physical and psychological powers and limits.

Against the phobia of a "pornification" of culture, producers and performers in fair trade or ethical pornography are exploring new forms of sexual politics. While it has offered for show some of the most sinister deliverances of human cruelty, pornography can also offer new inspiring modalities of exploration of human sexuality that directly and practically oppose oppression and stigmatization.

Unlike the ethical porn community, the pornography industry that refers to MindGeek or similar giants tends to be run mostly by men, and caters primarily to a heterosexual audience of men. It also continues to place financial profit as the central motivation of its business practices, making huge profits for the clean-handed distributors, but not for performers[243].

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[241] *Ibid.* 192.
[242] *Ibid.*
[243] SULLIVAN, MCKEEN (2015: 210).

The producers of ethical or fair-trade porn tend to be women, and to be feminists. Yet feminist porn is not exclusively for or about women. In fact, much of it re-evaluates the circumstances and role of males and masculine sexuality. Much platform pornography portrays males as less-than-full agents as well, and as one-dimensional sexual-objects that always must have a dominant and assertive attitude[244]. Seeing male performers' faces in a video is much rarer that seeing those of women. Men are very often paid less than women. Most mainstream porn videos are made for heterosexual males, and female bodies remain the main object of arousal. The assumption is that it would make the (male) audience uncomfortable to sexualize a man's body[245]. Portraying masculinity in new ways in pornography, as well as femininity and other forms of sexuality and sexual self-understanding, can also help society negotiate its perennial (and today digitally magnified to planetary scales) disorientation when it comes to gender relations and human sexuality[246].

§5 Concluding remarks

Once relegated to the dark spot of the media world, the contemporary adult entertainment industry is now fully out there, enjoying unprecedented visibility in public and mainstream culture. Some denounce the "pornification" of culture[247], but it is ultimately not clear if it was the pornography industry that permeated culture or if one of the ways globalized culture is negotiating sexuality is by creating a deregulated online world.

The porn industry has always been, and overwhelmingly remains, a largely unregulated one. The impediments to effective and nuanced regulation, however, are not due to lack of clarity or misrepresentation of the real issues concerning performers. These have been exposed to the public many times over. Rather, the political and legal dialogue around pornography that represents it as a "huge health crisis", for those who participate in it, for those who watch it, and for the entire community, reinforces a mistaken perception the working with and

[244]KLASSEN, PETER (2015: 722).
[245] MAYHEM (2013: 82-3).
[246] *Ibid.*
[247] PAUL (2005: 172).

through sex cannot be good for individuals. In addition, the porn industry itself is still highly stigmatized compared to other creative industries. This could be a further impediment to effective, nuanced and fair performer-centred regulation.

What I tried to show in this chapter is that workers should be the core of the new adult industry regulation. I have suggested that, at a time of platform pornography, protecting performers' dignity and physical and mental, integrity should be of primary concern. This entails acknowledging and giving centre stage to the perspectives of porn performers in debates on porn regulation.

Conclusions

The advent of the Internet has drastically and irreversibly changed the ways pornography is produced, distributed, and consumed. With that, new and complex challenges to pornography regulation have emerged, compounding those that have perennially accompanied the difficult task of marking the boundaries between the permissible and the impermissible in a sphere whose grey areas are numerous and nuanced, and which both instigates and interrogates deep layers of human sexuality that are typically left hidden from view.

Platforms are a new environment for pornography, and in response pornography is evolving, in its forms and modalities, channels and structures as well as scaling up vertiginously. Platform pornography constitutes at least one third of Internet traffic, and the companies that are behind it, such as MindGeek, are in fact digital innovation powerhouses whose technological research and agendas extend far beyond the limits of porn to shape how cyberspace works generally, and thus how digital society will work in the future. There is a real sense in which, for companies like MindGeek, the pornography offered on their websites and produced in their studios is but a Trojan horse serving a larger cyberspace colonization project, financed by data syphoning. In this, MindGeek is no different from other large tech companies who do not use pornographic Trojan horses – such as Facebook with its chats, livestreams and images, Amazon with its goods, Netflix with its movie services, Spotify with its music, and so many others.

MindGeek sells porn. If society is at pains to manage the pervasiveness of platforms whose services are (or at least are typically categorized as) morally uncontroversial, it is only expectable that platforms that own and sell pornographic services will be even more thorny to manage. Platform pornography, with its long, patchy, hidden, and risky chains of supply and delegation, and its globalized outsourcing mechanisms, is buzzing in the background of each smartphones in our pockets. Fuelled by unprecedented worries about the online magnification of all dark aspects of pornography, real as well as feared or assumed, and by its technologically enabled pervasiveness, moral opposition to pornography is at a whole time high.

There are powerful signals that some forms of opposition to the expansion of platform pornography be more than appropriate. The online porn industry is a dangerous place to work in for performers, and the psychological effects of massive porn consumption on individuals, relationships, families, as well as societies at large are still only very partially understood, if only because platform pornography has been running at full speed for only less than fifteen years and because researchers interested in pornography get precious few grants. Surely the law has a lot to catch up with when it comes to online porn; and as it does it will also have to chase its galloping new developments, from Virtual Reality to one-to-one performer-consumer services, and expectably many others.

Yet, at least in liberal societies, a moralistic legal ban on pornography as a practice seems as legally unjustified now as it did before porn went online. Whether such ban could even be feasible in a globalized world, or effective in its objectives, are also eminently debatable questions. But one thing that is surely unsettling about the porn ban option is its disregard for the fate of at least one class of vulnerable stakeholders, namely professional porn performers.

Illegal pornography should be prosecuted, and in times of platforms pornography regulation must be ready to constantly renegotiate the boundaries of legality as circumstances quickly evolve, scale effects materialize, supply and delegation chains get longer, responsibilities are diffused and fragmented, and technologies progress.

But within boundaries that must surely be regulated and policed far more strictly, there remains a core of legal pornography whose suppression would be a violation of more than one human right of many people in their different roles. That core is a for-profit business whose functioning is legitimately regulated by classic liberal principles, the Harm Principle and the Principle of Consent.

Being a legal business, pornography (professional pornography) must be regulated as such. This means first and foremost putting legal barriers against harm to the most vulnerable, and the law has done that by implementing extra protections for minors, banning child pornography production, online distribution and increasingly also consumption. But another group that is most vulnerable to the workings

of an industry like porn, and particularly exposed to its potential harms in times of globalized platform pornography, is that of performers, particularly (but far from exclusively) female performers.

Adult women, just like any other adult of any gender or sexual persuasion, should be free to autonomously choose to work in porn, and to work in conditions that respect and promote their dignity and integrity (physical and mental). Yet performers in the porn industry, and particularly now that such industry has reached planetary scales and operates on and through monopolistically run global platforms, have weak negotiation power and are especially exposed to health hazards, violence, social stigma, and economic instability. Their vulnerability calls for urgent legal intervention as much as that of other any other vulnerable group. If the potentially exploitative working conditions that performers can suffer on set and by working in the porn industry generally, and especially in its platform version, are not blocked by law, then it is easy to foresee that the industry will harbour more and more exploitation.

Performers have rights as humans, citizens and workers, and these rights must be respected and promoted. In an environment characterized by long chains of delegation and widespread outsourcing and subcontracting of services, the Principle of Consent that protects a performer's autonomy is in need of being supplemented by a more stringent application of the Harm Principle that protects a performer's dignity and physical and mental integrity along the entire chain from set to thumbnail.

By "more stringent" I mean three things. First, the legal relevance of the harm that performers may suffer ought not to be discounted on the sole grounds that consent was given. Second, the definition of what counts as a harmful violation of dignity and integrity is to be defined by performers themselves through organized means and procedures whose recommendations must go to inform relevant legislation: individual performers should not be left alone to negotiate the boundaries of their dignity and integrity on a contractual, case-by-case basis. Third, the burden of enforcing performer-centred provisions all along the supply and delegation chain must be borne by the apexes of the chain. In the platform pornography industry, one of these apexes is MindGeek.

Platforms, including pornographic platforms, are being and will increasing be targeted by regulation. Pressures behind the necessity to find ways to hold platforms, including and especially porn platforms like MindGeek's Pornhub and so many others, liable for hosting criminal activities remain legitimate and well justified. Indeed, as we have seen in the GirlsDoPorn's case, the FOSTA and SESTA anti-sex trafficking amendment to Section 230 - which used to provide immunity to online providers in case of illegal content disseminated by third parties on their platform - was decisive in rightly ruling MindGeek guilty.

The GirlsDoPorn case as much as Ms. Benz's case are clear examples of the dangerous level of negligence of the tech-based company that today owns most of the pornography studio productions and platforms. But while FOSTA and SESTA protected the non-professional women that GirlsDoPorn deceitfully turned into performers, they would likely not have protected Ms. Benz, a professional who had wilfully consented to a scene which, however, in practice diverged from what was on paper in ways that she found harmful to her dignity and integrity (as was later the failed attempt to bring her case to court).

From the point of view of professional performers, legal initiatives like FOSTA and SESTA regulate porn platforms in the wrong way. They run the risk of treating their work in legal pornographic production and distribution as illegal, insofar as they also target platforms that may host their legally produced content as well as various mutual help, information, and network services that may be crucial to the continued protection and promotion of their autonomy, dignity, and integrity as workers in the industry, as well as humans and citizens. FOSTA and SESTA may push platforms to take all these down in fear of potential lawsuits and bankruptcy. Other initiatives along the same sweeping lines, such as Visa's and Mastercard's shutdown of their payment services on Pornhub following the New York Times's that I described in Ch. 3, may also disproportionately impact performers. That decision targeted the platform in such a way as to deprive legal and legally acting performers from the income they would have collected by partnering with or otherwise through the platform. They also lost some of their digital-based instruments to exchange and share basic work information within performers' digital community.

Given its complexity and the complexity of its premises and implications, there are and need to be many ways to regulate the platform pornography industry. I have argued that one such way focuses and pivots on performers' rights. This is a relatively and unjustifiably unexplored avenue to platform pornography regulation. There are, of course, other such avenues, which should be seen as complementary.

One of these is mandating far more stringent obligations of content-filtering to pornographic platforms. Every platform that offers audio-visual media content should employ moderators (humans as well as artificial intelligences) for the monitoring of the content of the material disseminated. Currently, it is unclear that MindGeek and the platforms it owns have moderators reviewing the footage on websites and flagging and suspending those who upload illegal content. As it should be the responsibility of the company to monitor the physical working environment of the industry, it also should be company's responsibility to monitor its digital deliverances.

Ultimately, I believe that pornography is neither inherently good nor bad for individuals nor society, and my intention in this dissertation was to agnostically inspect this under-theorized human practice now that it has gone global via giant online platforms. Pornography research has often been delegitimized, or perceived as tricky by scholars, but it is rather in-depth analysis of the phenomenon that is needed to navigate the high waters of consumer education and culture, sexual and gender politics, industrial regulation, and human rights protection that platform pornography agitates in cyberspace, often mirroring our tensions, unresolved contradictions, and hypocrisies offline.

Future scientific research and legal regulation of platform pornography should not be guided by preconceived notions and political partisanship. It should rather be guided by a full recognition of performers' rights, based on the only too realistic acknowledgement that much pornography is justifiably legal and yet undeniably at constant danger of turning violent and exploitative, particularly in times of platform pornography.

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Regulating online pornography means regulating a third of the Internet and at least some factors and elements in its future evolution. In addition, it means regulating a most controversial human practice, which has long predated the Internet, and whose regulation has long been fraught with intense controversy and taken very different paths in different times and places. Today, some countries ban pornography outright, while most others allow it more or less liberally; some countries emphasize regulation of pornography consumption, others of its production, others yet of its distribution. The very task of attempting pornography regulation inevitably mobilizes deep value layers, social norms, and conceptual frameworks governing some of the most sensitive dimensions of human life, including sexuality, gender and gender relations, individual liberty, moral tolerability, and their complex interrelations. These are among the very lines along which cultures divide and distinguish themselves one from the other. Global harmonization of online pornography regulation appears virtually impossible even as the web entangles all countries in shared flows of representations and data.

Even if one restricts the question "what does the law say about pornography?" to exclusively Western contexts – those contexts in which pornography is typically allowed rather than prohibited - one can only respond with general pointers about the side constraints that the law has established through the years. The legal landscape currently prevailing in western countries is one of general permissiveness towards production, distribution, and consumption of pornography, constrained by prohibitions over representations that involve children and non-consensual violence.

Around this core legal posture are fuzzy boundaries, subject to contention about what are typically called, following terminology from US jurisprudence, 'contemporary community standards'[248]. Yet in contemporary society standards change quickly (partly due to accelerating rates of technological developments) and communities are

[248] Judgement of the U.S. Supreme Court, 21st June 1973, *Miller v. California*; Judgment of the Supreme Court of the United States, 24th June 1957, *Samuel Roth v. United States.*

not isolated and localized but globally connected and shifting. And the Internet Service Providers (ISPs) that connect communities across continents are in many respects legal novelties, whose processes and operations are technically complex and ever-evolving.

Pornography is a morally charged and often strongly ideologized topic. Once platforms became the medium for pornography, traditional concerns about the regulation of pornography were compounded by new challenges in the regulation of platforms. The pervasive diffusion of platform pornography is a phenomenon of great societal impact that surely calls for sophisticated legal regulation: yet platform pornography (like most of what goes on cyberspace) is also a new, complex, multifarious, evolving and still only partially understood phenomenon.

These factors significantly complicate efforts at legal regulation. With many people, I believe that existing regulation is in various ways and respects unfit to the task of tackling the overwhelming phenomenon that platform pornography is. In this dissertation, I consider legislation relevant to pornography regulation (in Western contexts, particularly the US and Europe) developed before and after the advent of the Internet, and discuss the ways in which such legislation has shaped today's regulation of platform pornography (the pornography distributed through platform websites such as Pornhub).

My research question is: What is conspicuously missing from the regulation of platform pornography that would be likely to address, at least to some significant extent, important worries that are typically attached to the operations of the adult industry, particularly now that its deliverances are distributed online?

My central claim is that what is missing is a robust performer-centered legislation binding the long supply and delegation chain that leads from a porn set to a website thumbnail. Such chain is today ultimately in the hands of tech giants like MindGeek, the owner of Pornhub, Youporn (and Redtube and many others), and I suggest it is these companies that should bear the burden of ensuring respect of performer-centered legislation all along the chain of supply and delegation.

A tech company like MindGeek, which owns the Pornhub platform as well as the Brazzers Studios producing the videos that are available

(also) on Pornhub, should bear the legal obligation of protecting performers' rights and promote their interests, drafting dedicated requirements applying to every step of the chain of sub-contracting services. Performer-centered legislation, I believe, should be informed not only by a concern for performers' consent but also by an equally weighty concern for performers' dignity and integrity, as defined by performers themselves. On this view, performers' consent is a necessary but not sufficient condition for the regulation of porn production, and because the latter is ultimately in the hands of its online distributors, of online pornography more generally. A further principle should be given equal weight, which aims at protecting consenting performers from physically, psychologically, and socially intolerable premises and implications of porn production.

What constitutes the "intolerable" should not only be determined on a case-by-case contractual basis by individual performers and individual producers, but also respond to an independent set of overarching "dignity/integrity-protectors" systematized by law and inspired by performers' indications as a group. That performers should have such direct say in defining platform pornography's regulation is justified by considerations relating to their rights, and it is urged by the high level of vulnerability to integrity violations that performers (as a group) are exposed to along the extended supply and delegation chain that leads from a set to a thumbnail in times of platform pornography. I believe this approach, besides leading to a fairer distribution of rights and burdens among performers and platforms, has also the attractive feature of cutting through a number of objections to pornography as a practice, which have often polarized public debate in a sweeping and divisive "pro or anti porn" disagreement.

My approach takes pornography regulation to be about regulating the pornography industry rather than pornographic imagery. The latter approach is favored by anti-pornography groups that dwell on the corrosive effects that pornographic imagery has on individual welfare and traditional morality. The former approach is traditionally favored by feminist thinkers or activists that dwell on the status of women within or as represented by the porn industry. I take issue with conservative anti-porn positions. I agree with feminist focus on regulating the industry but take issues with any construal of such task that contemplates or promotes abolishing pornography. I believe

criminalization of the porn industry is, at least in Western context, legally unjustifiable. I also believe, however, that the regulation of the industry's operations is legally justified, particularly now that most of its operations are online, and are online the way they are. From these starting points, I suggest that making a concern for performers' dignity/integrity pivotal to platform pornography regulation would be the best way to balance respect for the rights of personal autonomy, sexual citizenship and privacy that justify doing porn, with the rights to personal dignity and integrity that forbid being done or asked to do certain things in and outside porn.

The dissertation is structured as follows. Ch. 1 discusses pornography, by sketching the contours of traditional debates regarding its legal status. After a first general overview, I adopt a "residualist" strategy whereby I let a working definition of legal, mainstream pornography emerge as what is left after some legally relevant distinctions, boundaries, and constraints have been brought to bear on the practice of depicting sexually arousing material for wide distribution. I thus zero-in on my main subject matter by rehearsing some legal landmarks and central parameters in pornography regulation (as developed in the US, Canada, UK and the EU), which have in time sharpened a core understanding of what pornographic material is legal (that whose production, distribution and consumption is protected by right). This is material that represents, to consenting adults, sexual activities among consenting adults that are not deemed obscene and extreme.

Chapter 2 discusses some legal basics of digital platforms regulation, and the challenges such regulation must face even when unconcerned with pornography. Part of the difficulty is due to the relative inability of States to monitor and apply appropriate regulation to globalized content production and distribution in cyberspace. The mostly extra-legal (or maybe pre-legal) framework in which the online platform economy has evolved favors a set of circumstances whereby the protection of users' and platform workers' rights is mostly left to platforms themselves. These problems are inevitably replicated in the case of platform pornography.

The latter is discussed in Chapter 3, which describes the basics of platform pornography architecture, business operations, and legal regulation. I then present my case study, the platform Pornhub, owned

(along with many others) by Canadian tech behemoth MindGeek, by far the most important (if largely under-investigated) player in the adult industry today. I look at MindGeek's intricate corporate structure and Pornhub's opaque business operations, along with some of its most recent travails.

Chapter 4 presents and discusses legal issues related to professional performers' rights, as these come under pressure in a platform pornography world dominated by monopolistic tech giants along extended and convoluted supply and delegation chains. It is here that I advance my suggestion in favor of a performer-centered (or at least an increasingly performer-centered) regulation of platform pornography. Most explicit or implicit requests for a legal ban on porn, in most countries and at different times, have sourced supporting arguments in a cluster of concerns about the violence, degradation and exploitation that performers, and particularly female performers, risk being subjected to during production, and more generally by operating within the industry. Yet, somewhat paradoxically, few proposals have come for a more performer-centred regulation of the industry, and little support has traditionally been given to the ever more insistent requests by performers that their voice be heard. I suggest this should change. In particular, I suggest that when it comes to platform pornography the legal requirement that performers consent to engage in pornographic scenes is too thin a protection for performers, and that it should be complemented by regulations that oblige monopolistic entities like MindGeek to protect the dignity and integrity (physical, psychological, social) of performers along the whole chain of production, taking responsibility for ensuring that all outsourced services be bound by those principles. I also suggest that a performer-oriented regulation of platform pornography, with combines the principle of performer autonomy (consent) with one of integrity (physical, psychological, social), can be a pivotal stepping-stone towards a better (effective, nuanced, fair) regulation of platform pornography more generally. I articulate these claims while discussing two performer-initiated legal cases against MindGeek. In both cases consent was given but performers claimed their integrity was violated. The chapter closes by presenting the closest real-life example of what performer-centred pornography would look like, namely a family of production and distribution methods that identifies itself under the umbrella term of "Ethical Porn".