

6. To ban or not to ban?: Understanding the impact of platform discretion in content moderation on professional Twitch streamers

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1 INTRODUCTION

“I am the ultimate specimen of Twitch entertainment.” This bold declaration from the famous streamer Dr Disrespect, has been long emblematic of his confidence to mesmerise and attract viewers on the live-streaming platform. With his dynamic and engaging content, he has built up a sizeable following and secured a multi-year contract with Twitch, laying a solid foundation for a professional career in streaming. However, the trajectory of his career took an unexpected turn in June 2020, when Twitch decided to ban Dr Disrespect from the platform, without providing any explicit reasons.¹ This unilateral and abrupt decision has taken its toll on the gaming community, leaving fans and other content creators in a state of shock. Twitch, in response to queries surrounding this ban, issued a generic statement: “As is our process, we take appropriate action when we have evidence that a streamer has acted in violation of our Community Guidelines or Terms of Service. These apply to all streamers, regardless of status or prominence in the community.”² Dr Disrespect, refusing to accept the ban without a fight, filed a lawsuit seeking justice and clarification of this sudden expulsion. The legal saga unfolded

¹ J Kastrenakes, ‘Dr Disrespect is Gone and Twitch Won’t Say Why’ (*The Verge*, 26 June 2020) <<https://www.theverge.com/2020/6/26/21304907/dr-disrespect-twitch-ban-no-reason-given>> accessed 22 June 2024.

² S Hollister, ‘Dr Disrespect Breaks Silence, But Twitch Still Refuses to Say What’s Going On’ (*The Verge*, 27 June 2020) <<https://www.theverge.com/2020/6/28/21305822/twitch-dr-disrespect-alleged-ban-statement-guy-beahm>> accessed 22 June 2024.

over more than two years ago, culminating in a resolution that left both parties absolved of any wrongdoing.³

The situation involving Dr Disrespect serves as an example to highlight the discretionary power enjoyed by social media platforms in content moderation. Such power stems from the legal principle of contractual freedom, allowing online platforms to provide their digital services based on rules that they have drafted themselves: the so-called terms and conditions. This freedom of contract gave rise to the emergence of private governance frameworks, where social media platforms exercise enormous discretion in regulating user behaviours. The magnitude of this discretionary power can be better understood by examining how the terms and conditions are enforced by these platforms. The fact that their moderation activity is only partially connected to administrative procedures (e.g., judicial take-down orders) implies that they can remove content, ban users, and apply other forms of moderation at their own discretion. In this context, I define *platform discretion* as the power granted to and by online platforms to formulate and enforce the rules governing their contractual relationship with users.

The impact of platform discretion on users is undeniable, particularly on content creators who have successfully joined the monetisation programs offered by social media platforms. On Twitch, three monetisation programs are available to streamers: the Affiliate Program, the Partner Program, and the Partner Plus Program. Each of them enables streamers to generate revenue from various content monetisation strategies, such as advertising, subscriptions, or donations. The reliance of content creators on these programs for income and livelihood introduces a notable vulnerability in relation to platform discretion in content moderation. While becoming a Twitch Affiliate or Partner clearly offers streamers financial advantages on the platform, it also puts them at risk of sudden and unexplained bans. However, the exact harms arising from platform discretion in content moderation for professional content creators on Twitch remain highly unclear. In this chapter, I address this grey area of academic scrutiny by making three fundamental contributions to existing scholarship found at the intersection of law and media studies. First, I analyse how the agreement concluded between Twitch and its professional streamers can legally qualify as a work contract under French law. Second, I explore the contractual and legal framework that led to the development of platform discretion in content moderation. Third, I empirically describe and critically reflect on the types of harms that can arise from an abrupt and unilat-

³ A Chalk, 'Dr Disrespect Settles his Lawsuit with Twitch' (*PcGamer*, 10 March 2022) <<https://www.pcgamer.com/drdisrespect-settles-his-lawsuit-with-twitch/>> accessed 22 June 2024.

eral termination of affiliate or partnership relationships by Twitch, as a result of platform discretion in content moderation. The research question therefore analyses how platform discretion in content moderation can pose a threat to French streamers who earn (or used to earn) their living on the live-streaming platform.

2 TWITCH MONETISATION PROGRAMS: THE INTERPLAY BETWEEN PLAY AND WORK

Twitch is the largest live-streaming platform and has revolutionised the way individuals engage with online content. Established in 2011 as a development of *Justin.tv*, it started with a strong focus on gaming culture and electronic sports (eSports).⁴ Over time, the platform expanded its categories of content, spanning from ‘Food & Drinks’ to ‘Sciences & Technology’. Its monumental success is evident by its ranking as the 25th most visited website worldwide in 2023,⁵ and its acquisition by Amazon for \$1 billion in 2024.⁶ Beyond these numerical achievements, Twitch distinguishes itself through its practice of sharing advertising revenue, viewer subscriptions, and the sale of virtual goods (Bits) with some streamers.⁷ This monetisation strategy not only encourages content creators to professionalise their streaming activities, but also ensures regular content for consumers.⁸ However, the opportunity to earn revenue from streaming is exclusively accessible for content creators who are part of the Twitch Affiliate Program,⁹ the Partner Program¹⁰ or the recently introduced

⁴ M Johnson and J Woodcock, ‘“And Today’s Top Donator Is”: How Live Streamers on *Twitch.tv* Monetize and Gamify their Broadcasts’ (2019) 5(4) *Social Media + Society* 1, 2.

⁵ J Howarth, ‘Most Visited Websites in the World (November 2023)’ (*Exploding Topics*, 6 November 2023) <<https://explodingtopics.com/blog/most-visited-websites>> accessed 22 June 2024.

⁶ K Gittleson, ‘Amazon Buys Video-Game Streaming Site Twitch’ (*BBC*, 25 August 2014) <<https://www.bbc.com/news/technology-28930781>> accessed 22 June 2024.

⁷ M Sjöblom et al., ‘The Ingredients of Twitch Streaming: Affordances of Game Streams’ (2019) *Computers in Human Behavior* 20, 21.

⁸ M Törhönen, M Sjöblom and J Hamari, ‘Likes and Views: Investigating Internet Video Content Creators Perceptions of Popularity’ (*GaminFIN* 2018, Pori, May 2018) 108, 112.

⁹ Twitch, ‘Twitch Affiliate Program’ <<https://help.twitch.tv/s/article/joining-the-affiliate-program>> accessed 22 June 2024.

¹⁰ Twitch, ‘Twitch Partner Program’ <<https://www.twitch.tv/p/en/partners/>> accessed 22 June 2024.

Partner Plus Program.¹¹ Several initiatives and tools were created by the platform to help streamers qualify for these programs, such as the Creator Camp¹² providing training sessions with successful Partners or the Achievement Page to track progress towards meeting the necessary requirements.¹³ While each program has distinct selection criteria, Twitch tends to select streamers who demonstrate consistency, and most importantly, have succeeded in creating their own community.¹⁴ This focus stems from the fact that the main source of income for professional streamers comes from donations, subscriptions, and Bits.¹⁵ To encourage viewers in engaging with revenue affordances (e.g., subscription button), professional streamers should therefore build up their fanbase, maintain parasocial relationships, and foster a sense of community among their audience.¹⁶ This not only enables streamers to boost their earnings, but also benefits Twitch, who claims a 30–50% share of net subscription revenues, depending on the program streamers are enrolled in.¹⁷

By allowing streamers to turn their passion into a remunerated job, these monetisation programs have blurred the traditional boundaries between play and work.¹⁸ This shift has led to the development of a ‘hybrid worker’, one

¹¹ Twitch, ‘The Partner Plus Program is Live!’ (2 October 2023) <<https://blog.twitch.tv/en/2023/10/02/update-to-the-partner-plus-program/>> accessed 22 June 2024.

¹² Twitch, ‘Creator Camp’ <<https://www.twitch.tv/creatorcamp/>> accessed 22 June 2024.

¹³ Twitch, ‘Achievements Page’ <<https://help.twitch.tv/s/article/achievements>> accessed 22 June 2024.

¹⁴ M Cocq, ‘Constitution et exploitation du capital communautaire: Le travail des streamers sur la plateforme Twitch.nrt’ (2018) 18 *La nouvelle revue du travail* 1, 8.

¹⁵ A Houssard et al, ‘Monetisation in Online Streaming Platforms: An Exploration of Inequalities in Twitch.tv’ (2023) 13(1) *Scientific Reports* 1103, 1104.

¹⁶ J Woodcock and J Johnson, ‘The Affective Labor and Performance of Live Streaming on Twitch.tv’ (2019) 20(8) *Television & New Media* 813, 819; M Johnson and J Woodcock, ‘“It’s Like the Gold Rush”: The Lives and Careers of Professional Video Game Streamers on Twitch.tv’ (2019) 22(3) *Information, Communication & Society* 336, 342; N Baym, *Playing the Crowd: Musicians, Audiences, and the Intimate Work of Connection* (New York University Press 2018) 21.

¹⁷ Twitch, ‘The Partner Plus Program is Live!’ (2 October 2023) <<https://blog.twitch.tv/en/2023/10/02/update-to-the-partner-plus-program/>> accessed 22 June 2024.

¹⁸ Johnson and Woodcock, ‘“It’s Like the Gold Rush”: The Lives and Careers of Professional Video Game Streamers on Twitch.tv’ (n 16) at 340.

who converted their leisure activities into professional careers.¹⁹ In the past, user-generated content was seen as a form of uncompensated labour, primarily because users did not perceive their contributions as work or did not fully grasp their financial value to the hosting platforms.²⁰ However, the introduction of these programs has catalysed the transition from user-generated content, which once served as a means to express creativity, to professionally user-generated content.²¹ This transition is particularly evident in the context of Twitch, where many users have embarked on a journey towards establishing themselves as professional brands. A notable example is the success story of the Swedish content creator PewDiePie, who has emerged as an entrepreneurial figure in the gaming industry. In addition to his substantial number of subscribers on Twitch, he has actively contributed to four gaming titles, written a parody book, and co-owns a unisex clothing line.²² Although similar monetisation programs already existed on other platforms, such as YouTube, Twitch has rendered the attainment of tangible rewards more accessible for streamers by incorporating gamified elements and achievements.²³ The live-streaming platform does not hide the remunerated labour of its professional streamers: rather, it highlights it through the introduction of monetization features and increased revenue opportunities.²⁴ Twitch monetisation programs are therefore actively shaping the digital economy, aligning with the concepts of ‘playbour’²⁵ and digital labour.²⁶

The agreement concluded between streamers who have successfully joined one of the monetization programs and Twitch can qualify as a work contract

¹⁹ Sjöblom et al. (n 7).

²⁰ R Caplan and T Gillespie, ‘Tiered Governance and Demonetisation: The Shifting Terms of Labor and Compensation in the Platform Economy’ (2020) 6(2) *Social Media + Society* 1, 3.

²¹ J Kim, ‘The Institutionalization of YouTube: From User-Generated Content to Professionally Generated Content’ (2012) 34(1) *Media, Culture & Society* 53, 58.

²² A Singh, ‘5 Popular Streamers Who have Built a Successful Business Empire’ (*Sportskeeda* 24 April 2023) <<https://www.sportskeeda.com/esports/5-popular-streamers-built-successful-business-empire>> accessed 22 June 2024.

²³ Sjöblom et al. (n 7) at 20, 21.

²⁴ Johnson and Woodcock (n 4) at 3.

²⁵ M Törhönen, ‘Play, Playbour or Labour? The Relationships between Perception of Occupational Activity and Outcomes among Streamers and YouTubers’ (Proceedings of the 52nd Hawaii International Conference on System Sciences, 2019) 2559.

²⁶ T Scholz, *Digital Labor: The Internet as Playground and Factory* (Routledge 2012) 1.

under French law. As established by the *Cour de Cassation*, three key elements must be present for an agreement to be considered as such: a provision of service, remuneration element, and subordination link. In this way, a work contract is understood as an agreement by which an individual undertakes to make their services available to another under the latter's authority, in return for remuneration. The existence of such a contract between Twitch and its professional streamers therefore depends on whether these criteria are fulfilled.²⁷ Professional streamers fulfil their contractual obligations – arising from agreements with advertisers, sponsors or Twitch itself – through the platform. The latter therefore serves as their digital workplace to conduct streaming activities,²⁸ similar to a traditional employment setting providing employees with the necessary space and tools to perform their tasks. Additionally, the introduction of different monetisation programs, each offering unique benefits and income potential, drives content creators to perform at their best. Just as employees strive for promotion by excelling in their roles, streamers are motivated to maintain and expand their channels in order to access higher-tier programs and associated financial rewards.²⁹ Another resemblance to an employment relationship is that not every streamer can generate revenue from their activities due to the selection procedure for entering monetisation programs. This process mirrors the conventional method of recruiting individuals for employment, akin to the screening and selection used by employers to find qualified candidates for their workforce. After being selected, Twitch's metrics assess the performance of streamers and play a crucial role in determining future contracts, much like an employer evaluating the work of employees.³⁰ The platform therefore has the authority to shape the future of its professional streamers and assess whether their profile remains in line with the program they are enrolled in.

Going back to the French legal test, first, there is a provision of service in the sense that streamers actively create content on the platform to attract viewers and engage with audiences. Their streaming activities highly contribute to the

²⁷ Ass. Plén. 4 mars 1983; Cass. Soc. 4 avril 2012 n°18.28.818 à 18.28.830.

²⁸ V Richter and Z Ye, 'Influencers' Instagram Imaginaries as a Global Phenomenon: Negotiating Precarious Interdependencies on Followers, the Platform Environment, and Commercial Expectations' (2023) 0(0) *Convergence* 1, 9.

²⁹ M Johnson, M Carrigan and T Brock, 'The Imperative to Be Seen: The Moral Economy of Celebrity Video Game Streaming on *Twitch.tv*' (2019) 24(8) *First Monday* 1, 3.

³⁰ V O'Meara, 'Weapons of the Chic: *Instagram* Influencer Engagement Pods as Practices of Resistance to *Instagram* Platform Labor' (2019) 5(4) *Social Media + Society* 1, 4.

success of Twitch which, in turn, generates revenue through various content monetization strategies. However, it should be mentioned that professional content creators are not typical workers due to the level of freedom, creativity, and autonomy they enjoy. Streamers are not bound by fixed working hours or location, allowing them to work from the comfort of their own home and choose the activities or games they want to broadcast.³¹ Content creators are typical examples of so-called neoliberal worker subjects, characterised by their entrepreneurial spirit, flexibility, and self-direction.³² However, this freedom also brings with it a sense of precarity, defined by de Peuter as the “existential financial, and social insecurity exacerbated by the flexibilisation of labour markets”.³³ Professional streamers invest time, resources, and energy into building their channels with no guarantee of success or financial stability. This precarity is common in the gig economy, where content creators frequently lack the job security and benefits associated with traditional employment.³⁴ Second, the remuneration element is central to the relationship between Twitch and its professional streamers: joining one of the monetization programs provided by the platform is largely based on the desire to earn revenue from streaming activities. Lastly, the subordination link is evident in the dynamic between the live-streaming platform and its professional content creators. While the latter enjoy a degree of autonomy and freedom, they are subject to a number of rules and conditions set forth by Twitch, ranging from acceptable content to copyright policies. This subordination increases the uncertainty surrounding the work of professional streamers, as the platform holds significant control over the reach and overall success of content creators.³⁵ While streamers are the primary attraction for viewers, they have limited influence over their algorithmic visibility and the platform’s decision-making processes.³⁶ This subordination link is particularly obvious in content moderation, where social media platforms enjoy a wide discretionary power.

³¹ Richter and Ye (n 28) at 11; Z Glatt, ‘We’re All Told Not to Put Our Eggs in One Basket: Uncertainty, Precarity and Cross-Platform Labor in the Online Video Influencer Industry’ (2022) 16 *International Journal of Communication* 3853, 3857.

³² R Gill and A Pratt, ‘In the Social Factory? Immaterial Labor, Precariousness and Cultural Work’ (2008) 25(7–8) *Theory, Culture & Society* 1, 20.

³³ G de Peuter, ‘Creative Economy and Labor Precarity: A Contested Convergence’ (2011) 35 *Journal of Communication Inquiry* 417, 418.

³⁴ Glatt (n 31) at 3861.

³⁵ C Are and P Briggs, ‘The Emotional and Financial Impact of De-Platforming on Creators at the Margins’ (2023) *Social Media & Society* 1, 4.

³⁶ S Bishop, ‘Managing Visibility on YouTube Through Algorithmic Gossip’ (2019) 21(11–12) *New Media & Society* 2589, 2591.

3 THEORISING PLATFORM DISCRETION IN CONTENT MODERATION

Although Twitch allows content creators to generate revenue from their streaming activities, it is also prone to disruptive content and behaviours. For that reason, it must engage in content moderation, defined by Gillespie et al. as the “detection of, assessment of, and interventions taken on content or behaviour deemed unacceptable by platforms and other information intermediaries, including the rules they impose, human labour and technologies required, and the institutional mechanisms of adjudication, enforcement, and appeal that support it”.³⁷ To conduct this complex task, Twitch established its own set of rules regulating the flow of information and the behaviour of its users, leading to the emergence of private governance.³⁸ These rules, which are of a contractual nature, are made available through two main documents: the terms of service and the community guidelines. While the former defines the conditions under which Twitch and its users interact, the latter specifies the categories of content and behaviour that are prohibited on the platform.³⁹ As this research focuses on professional streamers, the Twitch Monetized Streamer Agreement is another important document which provides additional terms and conditions applicable to monetisation programs.⁴⁰ One might believe that the purpose of these rules is to safeguard content creators from the precarity and uncertainty they face on a constant basis. However, a closer look at these contractual rules reveals significant power imbalances between Twitch and its users and cannot be said to represent the interests of professional streamers above content moderation norms. By using persuasive language and relying on borrowed values, they explicitly empower Twitch with the authority to remove content or suspend an account, for any reason, at its own discretion. For instance, the Twitch Monetized Streamer Agreement explicitly states that the platform

³⁷ T Gillespie et al, ‘Expanding the Debate About Content Moderation: Scholarly Research Agendas for the Coming Policy Debates’ (2020) 9(4) Internet Policy Review 1, 2.

³⁸ J Balkin, ‘Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School of Speech Regulation’ (2017) UC David Law Review 1151, 1182.

³⁹ T Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions that Shape Social Media* (Yale University Press 2018) 46; S West, ‘Censored, Suspended, Shadowbanned: User Interpretations of Content Moderation on Social Media’ (2018) 20(11) New Media & Society 4366, 4369.

⁴⁰ Twitch, ‘Twitch Monetized Streamer Agreement’ <<https://www.twitch.tv/p/en/legal/monetized-streamer-agreement/>> accessed 22 June 2024.

can suspend or terminate an agreement “in its sole and absolute discretion” if a streamer allegedly infringes its rules.

To understand the extent to which Twitch enjoys discretionary power in content moderation, it is necessary to describe the legal and contractual regime that allowed for the development of such power. The reason why platforms find themselves arbitrating tastes and interpreting self-regulatory rules is closely linked to the principle of ‘freedom of contract’. Rooted in the liberal politics of *laissez-faire*, it asserts that individuals should have the freedom to determine their own contractual terms within the limits of mandatory law.⁴¹ It assumes that parties are best equipped to establish what is in their own best interests and are best positioned to conclude the contract they desire.⁴² In the context of Twitch, it means that whenever it is offering access to its digital services, it can do so according to the rules that it has drafted itself. The broad discretion enjoyed by social media platforms is further accentuated by their reliance on standard contracts, which have not been subject to prior negotiation between the contractual parties.⁴³ These contracts are, in turn, presented to users on a take-it-or-leave-it option, leaving users no room to object to specific terms and considerably increasing the platform’s discretionary control.⁴⁴ In this chapter, I empirically explore the harms arising from platform discretion in content moderation on Twitch professional streamers who have been banned from the platform and used to generate revenue from their online activities. I define *platform discretion* as the power granted to and by online platforms to formulate and enforce rules that govern the contractual relationship between the platform and its users.

4 METHOD AND ANALYSIS

I conducted ten semi-structured interviews with Twitch streamers to discuss their experiences with platform discretion in content moderation. All interviewees were professional content creators, with two Affiliates and eight Partners, earning revenue from their streaming activities. The majority rely (or

⁴¹ J Smits, *Contract Law: A Comparative Introduction* (Edward Elgar 2014) 10.

⁴² E McKendrick, *Contract Law: Text, Cases, and Materials* (Oxford University Press 2005) 13.

⁴³ M Perel, N Elkin-Koren and G De Gregorio, ‘Social Media as Contractual Networks: A Bottom-Up Check on Content Moderation’ (2021) 107 Iowa Law Review 987, 1027.

⁴⁴ F Borgesius et al, ‘Tracking Walls, Take-It-Or-Leave-It Choices, the GDPR, and the ePrivacy Regulation’ (2017) European Data Protection Law Review 353, 353.

used to rely) on streaming as their full-time profession and others use it as an additional source of income, with the hope of one day completely transitioning their passion into a career. Interviewees had channels of different sizes, ranging from a small number of followers (between 50 and 5,000) to a higher number (above 50,000). Only streamers that were banned from Twitch for allegedly violating the terms of service, or any other rules, were selected: while some experienced a 24-hour ban, others were permanently banned and still do not have access to their account. Interviewees were recruited based on the dashboard of the Twitch Partner Bot ‘Streamer Bans’, which maintains a record of every banned streamer with their name and the duration of the ban.⁴⁵ They were then contacted via their X account (previously Twitter), and a snowball method was used to establish contact with additional streamers based on recommendations from other interviewees.⁴⁶ The geographic scope of the sample was limited to France, and all interviews were carried out in French on Microsoft Teams or Zoom. After conducting ten interviews, each lasting approximately one hour, a point of saturation was reached as no new themes or patterns emerged from the collected data. Although streamers addressed diverse elements of their experiences with platform discretion, the observed harms were remarkably consistent across the participants. Interviews were recorded, manually transcribed, coded, and analysed using an inductive research process to create a comprehensive overview of the themes emerging from the data. These semi-structured interviews provided insights into the harms that streamers encountered following an abrupt and unilateral termination of their affiliate or partnership relationships with Twitch. Two categories of harms arising from platform discretion in content moderation were identified: material harms and immaterial harms. Each of these categories is discussed more extensively in the following sub-sections.

4.1 Material Harms Arising from Platform Discretion

4.1.1 Financial instability and economic loss

The primary material harm arising from platform discretion in content moderation was the financial loss suffered by streamers after the termination of their affiliate or partnership agreement with Twitch. Interviewees have unanimously reported that the suspension of their account had a tangible economic impact on their lives: Twitch served as their workplace where they could

⁴⁵ Streamer Bans, ‘Dashboard’ <<https://streamerbans.com/>> accessed 22 June 2024.

⁴⁶ D Mertens, *Transformative Research and Evaluation* (Guilford Press 2009) 215.

generate revenue from their streaming activities. While banned streamers lose the possibility to stream on the platform, they are also deprived from the income generated through the various monetisation methods. However, the exact amount of this loss is difficult to determine as it largely depends on the number of subscribers, donations, and sponsorships received by streamers. According to the interviewees, their monthly salary typically ranges from €100 for Affiliates with 10 viewers to €10,000 for Partners with 3,000 viewers. Suspending an account not only affects the streamers and viewers who subscribed to their favourite channels but also impacts Twitch itself, as it receives a portion of the money generated through these monetisation programs. While most interviewees used to share 50% of their revenue with the platform, others have negotiated a more favourable rate securing 70% of their earnings. It is important to note that, according to Twitch, the latter rate is only accessible to streamers enrolled in their Partner Plus Program, which, at the time of the interviews, had not yet been launched.⁴⁷ This variation in revenue-sharing on Twitch aligns with the concept of tiered governance, introduced by Caplan and Gillespie, whereas YouTube offers different sets of rules and treatments to its users.⁴⁸

The financial loss resulting from platform discretion is heightened as content creators are not eligible for social protection schemes and do not have access to unemployment benefits if their account is suspended. Professional content creators are merely hosted by online platforms and, therefore, do not benefit from the labour rights afforded to traditional employees.⁴⁹ As noted by several interviewees, the absence of safeguards is a major flaw in the system, particularly for streamers facing unpredictable working hours and economic uncertainty. As expressed by one interviewee:

When you are a content creator, your livelihood is at the mercy of Twitch. If it decides to ban you: it is an economic apocalypse, a complete wipeout. Streaming is not just my passion; it is my job and my financial heartbeat. And to top it off, even the government is grabbing its share through taxes – leaving us gasping for breath to survive when our account is suspended for pronouncing a forbidden word according to Twitch rules. (Respondent E).

⁴⁷ Twitch, 'The Partner Plus Program is Live!' (2 October 2023) <<https://blog.twitch.tv/en/2023/10/02/update-to-the-partner-plus-program/>> accessed 22 June 2024.

⁴⁸ Caplan and Gillespie (n 20) at 2.

⁴⁹ O'Meara (n 30) at 4.

4.1.2 Content exclusivity clauses and streaming restrictions

The pecuniary loss reported by banned streamers is inherently linked to another material harm arising from platform discretion: the prohibition to stream on a different platform. Seven interviewees, all of whom were Twitch Partners, highlighted that the platform's discretionary power is so extensive that it can prevent them from streaming elsewhere – even if their account has been suspended. This prohibition is rooted in the content exclusivity clauses found in the affiliate and partnership agreements, as stated by one interviewee. Exclusivity clauses play a pivotal role in live entertainment on social media: the interest of Twitch viewers lies in their ability to establish direct and privileged connections with streamers.⁵⁰ Nevertheless, one interviewee felt that Twitch may be abusing its dominant position in the live-streaming industry by preventing its content creators from broadcasting on other platforms. He also reported that the moderation staff threatened him, stating that the tiny possibility of getting his account back would disappear if he streamed on his YouTube channel, although his account was permanently banned at the time (Respondent G). Another interviewee, who found himself in the same situation, had to wait almost two months for Twitch to confirm the end of their partnership agreement before he could stream on another platform. These exclusivity clauses go against the adage of “not putting all our eggs in one basket”, encouraging content creators to diversify their work and income across various platforms to establish sustainable professional careers.⁵¹

Interestingly, two interviewees admitted that even if they were allowed to broadcast on a different platform, such as YouTube, the financial loss caused by Twitch's unilateral decision to suspend their account would not be fully compensated. As noted by one of them, while viewership numbers on YouTube might be higher, the revenue is considerably lower compared with Twitch – sometimes up to ten times less. Such findings can be explained by the fact that the YouTube community is less prone to rewarding streamers with donations or engaging in community-building compared with Twitch viewers.⁵² The live-streaming platform has successfully cultivated an environment with gamified elements and monetisation schemes, which stimulate viewers to con-

⁵⁰ J Woodcock and M Johnson, ‘Live Streamers on Twitch.tv as Social Media Influencers: Chances and Challenges for Strategic Communication’ (2019) 13(4) *International Journal of Strategic Communication* 312, 333; T Taylor, *Watch Me Play: Twitch and the Rise of Game Live Streaming* (Princeton University Press 2019) 75.

⁵¹ Glatt (n 31) at 3860.

⁵² Sjöblom et al. (n 7) at 21.

sistently support their favourite streamer.⁵³ Additionally, the focus of Twitch on the gaming culture makes it more likely to attract viewers who are highly comfortable engaging with revenue affordances.⁵⁴ Another factor to take into account, as mentioned by one interviewee, is the difficulty of transferring an audience from one platform to another – suggesting that a permanent ban is a major setback for streamers who have built up their entire fanbase on Twitch. Nevertheless, five interviewees took this prohibition to stream on another platform as an opportunity to relax and take a break from the streaming industry. It should be mentioned that Twitch has recently removed these content exclusivity clauses from its affiliate and partnership agreements, which was not the case yet at the time the interviews were conducted (Respondent E).

4.1.3 Subscription drops, shadow-banning consequences, and reputational impact

Along with the financial loss and the prohibition to stream on other platforms, platform discretion has caused another harm to those interviewed: a decline in their number of subscribers. Most interviewees reported that the suspension of their account had a long-term impact on their reputation. It affected their ability to reach their audience and to maintain the subscriber community they had built on the platform prior to being banned. One interviewee revealed that his number of subscribers dropped from 1,600 to 300 after Twitch suspended his account twice for allegedly violating its community guidelines (Respondent B). Another suspected that the platform shadow banned him after getting his account back, as viewers were no longer receiving notifications when he was streaming, and his broadcasts kept on cutting out for no reason (Respondent I). Shadow banning – defined as a content moderation sanction involving delisting and downranking⁵⁵ – is a common practice in the social media ecosystem and has received sustained attention in the existing literature for its adverse impact on content creators.⁵⁶ To counter this material harm caused by platform discretion in content moderation, most interviewees have released a YouTube video explaining the reasons behind their account suspension and expressing their views as to whether the ban was justified. They

⁵³ Ibid.

⁵⁴ Johnson and Woodcock (n 4) at 9.

⁵⁵ P Leerssen, 'An End to Shadow Banning? Transparency Rights in the Digital Services Act Between Content Moderation and Curation' (2023) 48 *Computer Law & Security Review* 1, 2.

⁵⁶ K Cotter, 'Shadow Banning is Not a Thing: Black Box Gaslighting and the Power to Independently Know and Credibly Critique Algorithms' (2020) 26(3) *Information, Communication & Society* 1226, 1233; Glatt (n 31) at 3863.

confessed that this type of content serves as a means to communicate with their audience, and to ensure that viewers will return to their channels once their account is no longer suspended.

Despite experiencing a decrease in their subscriber counts, six interviewees reported feeling warmly welcomed by their audience upon their return to the platform. Some attributed this support to their YouTube video discussing their bans, while others explained it by the fact that people were aware that they could not work for some time and wanted to make up for it. Streamers were paying particular attention to expressing their gratitude to donors by mentioning their names, a common practice in the live-streaming industry. In fact, viewers are typically attracted to channels where they feel recognised and influential, a sentiment that can foster engagement and financial support for the streamer.⁵⁷ Whatever the reason, the majority of interviewees stated that the pecuniary loss resulting from platform discretion was offset by the generosity of their audience the following month. As explained by one streamer:

Most folks do not juggle a hundred streamers, but rather stick to four or five streamers that they truly like. Like a well-kept secret, they understand that financially supporting your content is the only way to make sure that it does not fade away (Respondent I).

4.2 Immaterial Harms Arising from Platform Discretion

4.2.1 Psychological impact and cyber-bullying

The emotional distress caused by platform discretion in content moderation was the primary immaterial harm mentioned by interviewees. All of them recognised that the decision of Twitch to suspend their account, at its own discretion, caused them a great deal of stress, anger, and sadness. The strongest reactions came from two Twitch Partners who were permanently banned, which is the most severe form of moderation on social media. In line with the concept of tiered governance,⁵⁸ the platform treated these two streamers differently, as one was unable to appeal the suspension of his account for six months while the other had immediate access to the appeal procedure. Both interviewees have confessed to feeling extreme financial stress as, due to their partnership agreement with Twitch, they could not stream on any other platform. They also expressed a sense of anger towards the live-streaming

⁵⁷ D Gros et al, 'World of Streaming. Motivation and Gratification on Twitch' in G Meiselwitz (ed), *Social Computing and Social Media: Human Behavior* (Springer 2007) 47; W Patin, 'Watch Me Pay: Twitch and the Cultural Economy of Surveillance' (2019) 17(1–2) Platform Surveillance 1,

⁵⁸ Caplan and Gillespie (n 20) at 2.

platform for not hesitating to suspend their accounts, although they were generating revenues for it. Another interviewee compared the discretionary power enjoyed by Twitch over its streamers to the right of life and death, a source of fear that often keeps him awake at night (Respondent E). Platform discretion in content moderation is therefore another factor increasing the uncertainty and precariousness of their work described in existing literature.⁵⁹ As declared by one interviewee:

Twitch has limitless and absolute power over us, which is a terrifying feeling. It is a chilling authority where a single click can shatter livelihoods and dreams – and I consider this situation as a form of modern slavery (Respondent E).

Having their account suspended is undeniably a stressful and terrifying experience for professional streamers, and it brings with it an additional burden: the judgement of others. After their account was banned for alleged harassment, the three interviewees with the largest audience found themselves subjected to attacks and insults. Regardless of whether their ban was justified or not, they were labelled as stalkers by the public at large, which was, according to them, extremely difficult to handle mentally speaking. One of them, who previously had a good relationship with Twitch France, noted that the platform was well aware he was not a harasser, but overlooked the fact that there was a real person behind the screen (Respondent B). Luckily, interviewees were strong enough to overcome these attacks, but this might not be the case for all streamers on the platform. As one interviewee testified:

Maybe one day, someone will take these insults personally and could find themselves in a tragic situation. I know several streamers who are emotionally vulnerable, and banning them from Twitch could be extremely dangerous. They put their heart and soul into their channels, and having their accounts suspended overnight is far from easy (Respondent I).

4.2.2 Loss of spontaneity, self-restraint, and censorship struggles

Following the emotional distress caused by platform discretion, the majority of interviewees embarked on a quest to find strategies that will shield them from being banned in the future. They unanimously agreed that the most effective approach is self-censorship, as the platform, according to one interviewee, has evolved into a “dictatorship where you cannot say anything”. Banning stream-

⁵⁹ D Hesmondhalgh and S Baker, ‘A Very Complicated Version of Freedom: Conditions and Experiences of Creative Labor in Three Cultural Industries’ (2010) 38(1) *Poetics* 4, 13; B Duffy, A Pinch and M Sawey, ‘The Nested Precarities of Creative Labor on Social Media’ (2021) 7(2) *Social Media + Society* 1, 4.

ers without a valid ground not only interferes with their freedom of expression, as discussed in the literature,⁶⁰ but also disrupts future speech and opinions. Interviewees have reported that the fear of a permanent ban impacted the way they spoke and behaved, either to comply with the platform's rules or in response to a breach of the community guidelines. This behaviour supports the argument that punitive measures by social media platforms, such as suspending an account, carry the risk of suppressing or chilling important discourse.⁶¹ After experiencing two account suspensions for hate speech, one interviewee decided to place Post-It notes with offensive words around his computer screen to ensure that he would not use them while streaming. Another interviewee shared:

I have memorised the list of banned words to the point where I cannot even pronounce them anymore in the offline world, outside of Twitch. These words are completely removed from my mind, and they cannot come out of my mouth, otherwise, I risk losing everything (Respondent G).

The fear of facing a ban not only results in self-censorship, but also robs professional streamers of their spontaneity, authenticity, and sincerity. According to four interviewees specialised in eSports, the initial purpose of Twitch was to offer a platform for authentic gaming competitions with viewers actively seeking authenticity and streamers sharing emotional reactions without any filters. They all agreed that the acquisition of Twitch by Amazon has fundamentally altered the platform's identity on which they used to feel independent and free. Even the streamers who served as role models for some interviewees and inspired them to pursue streaming as a career have completely changed to comply with the standards established by the platform. In other words, the discretionary power enjoyed by Twitch in content moderation prevents streamers from providing 'underground' content and indirectly forces them to clean up their image. Such a finding is not surprising, as, with the rise of monetisation methods such as sponsorships, one is no longer an autonomous actor on Twitch

⁶⁰ B Sander, 'Freedom of Expression in the Age of Online Platforms: The Promise and Pitfalls of a Human-Rights Based Approach to Content Moderation' (2019) 43 *Fordham International Law Journal* 939, 956; G De Gregorio, 'Democratising Online Content Moderation: A Constitutional Framework' (2020) 36 *Computer Law & Security Review* 1, 4.

⁶¹ E Armijo, 'Reasonableness as Censorship: Section 230 Reform, Content Moderation, and the First Amendment' (2021) 73(6) *Florida Law Review* 1199, 1217; J Balkin, 'Old-School/New-School Speech Regulation' (2014) 127(8) *Harvard Law Review* 2296, 2341.

but becomes bound by the expectations of corporate entities.⁶² By serving as an intermediary between brands and streamers, the live-streaming platform must therefore fulfil its role as a moderator to guarantee that its environment is fit for commercial interests. One interviewee commented:

I am aware that my personality has changed since I started making money on Twitch. I am fully aware that, in order to boost my monthly earnings, I make the conscious effort of maintaining a positive image to keep my current sponsors and to attract new brands (Respondent A).

4.2.3 Cultural crossroads: Americanisation and the clash of values

The last, but certainly not least, consequence of platform discretion in content moderation is what some interviewees refer to as the ‘Americanisation’ of streamers. Three interviewees, who were familiar with Twitch prior to its acquisition by Amazon, declared that the self-regulatory measures adopted by Twitch are largely based on American culture. According to them, Twitch regulates user-generated content in line with American values, corporate responsibility, and the economic need to create an environment that aligns with content monetisation. They believe that the live-streaming platform has deliberately hired lawyers who were trained in the American legal system, and whose thinking has been influenced by this legal jurisdiction. This lack of diversity behind social media platforms is a concern that has been discussed in existing literature: content moderation rules created by a small group with a particular view may not effectively consider diverse experiences, cultures, or value systems.⁶³ Even those responsible for drafting content policies for social media platforms have openly acknowledged their American cultural biases.⁶⁴ As a result, some interviewees expressed the feeling of being forced to ‘Americanise’ themselves in order to please the live-streaming platform and to avoid another account ban. One interviewee stated:

If we want to continue our career as professional streamers on Twitch, we are pushed to embrace American culture, or even to become American. It is a challenging task, considering that French values and norms can significantly differ from the American ones (Respondent B).

At the same time, as two interviewees pointed out, attempting to apply American norms and standards in a global company, such as Twitch, might

⁶² Johnson and Woodcock (n 4) at 6.

⁶³ West (n 39) at 4370; Gillespie (n 39) at 201.

⁶⁴ K Klonick, ‘The New Governors: The People, Rules, and Processes Governing Online Speech’ 2018 131(6) Harvard Law Review 1598, 1642.

give rise to complex legal consequences. As expressed by one of them, “if I am talking about a specific topic that is not violating any French rules, but does in the United States, the latter will prevail no matter what” (Respondent I). This statement relates to concerns previously raised by scholars about the incentive for social media platforms to excessively delete lawful content during their moderation processes.⁶⁵ However, the cautionary approach adopted by Twitch is not surprising: the platform, hosting a vast amount of content daily, must react rapidly upon any sign of questionable material, rather than engage in the time-consuming balancing act with the fundamental rights of streamers. It should be mentioned that the deletion of lawful content by Twitch and other social media platforms is likely to increase in light of the *Glawischnig* case, a landmark judgment issued by the Court of Justice of the European Union (CJEU).⁶⁶ In this decision, the CJEU paved the way for Member States to issue global content takedowns for content deemed unlawful, including any identical or similar content, even in jurisdictions where the material at stake would comply with national legislation.⁶⁷

5 CONCLUSION

This chapter analysed how platform discretion in content moderation can pose a threat to Twitch streamers who earn (or used to earn) their living on the live-streaming platform. I first examined whether the dynamic between Twitch and its content creators, who are part of a monetisation programme, can be compared with an employment relationship. While certain parallels with traditional employment were identified, there are some crucial nuances which, in turn, leave professional streamers inadequately protected. The monetisation programs offered by Twitch allow content creators to generate revenue from their streaming activities, to conclude agreements with brands, and to receive financial support from their audience. However, the precarity and uncertainty inherent in the gig economy are exacerbated by the need for social media platforms to engage in content moderation at their own discretion.

Striking a balance between content moderation and the financial opportunities provided by Twitch monetisation programs, such as the Affiliate Program or Partner Program, is a challenging task. While legal obligations and commer-

⁶⁵ Sander (n 60) at 950; D Keller, ‘Internet Platforms: Observations on Speech, Danger, and Money’ (2018) No. 1807 Hoover Institution’s Aegis Paper Series 1, 18.

⁶⁶ Case C-18/18 *Eva Glawischnig-Piesczek v Facebook Ireland Limited* [2019] ECLI:EU:C:2019:821.

⁶⁷ *Ibid*, para 37.

cial incentives require social media platforms to moderate content, the affiliate or partnership agreements concluded between the platform and some streamers add another layer of complexity. This balancing exercise is entirely left to the discretion of social media platforms, due to the contractual freedom they enjoy and their reliance on standard contracts, as explained in this chapter. However, platform discretion comes at a cost, particularly for professional streamers who depend on these monetisation programmes for their revenue. Drawing on data gathered from ten semi-structured interviews, I presented the material and immaterial harms that arose from an abrupt and unilateral termination of affiliate or partnership agreements by Twitch at its own discretion. Economic loss, being forbidden to stream on another platform as well as reputational damage were identified as the material harms arising from platform discretion. As for the immaterial harms, the psychological impact, self-censorship, and the so-called Americanisation of streamers highlight the broader implications of platform discretion in content moderation.

As we navigate the evolving landscape of social media platforms, it becomes essential to cultivate an environment where professional content creators can thrive, while complying with their own legal obligations. A fundamental step in achieving this goal is the legal recognition of content creators like Twitch Partners and Affiliates as workers or employees of the platform, ensuring their access to unemployment schemes and other benefits in the event of account suspension. The recently adopted French Influencer Law could have been the perfect opportunity to do so.⁶⁸ In addition to clarifying and adding new obligations for influencers, it also allegedly aimed at enhancing their protection by shedding light on the legal framework surrounding their activity.⁶⁹ While it tackled the relationship between influencers and their agents, it overlooked a critical aspect: the relationship between professional content creators, such as Twitch Affiliates or Partners, and social media platforms. This omission leaves them completely unprotected, reduces their chances of prevailing in a lawsuit if they wish to challenge the decision of the platform to ban their account, and fosters an environment where platform discretion is only likely to escalate.

⁶⁸ Loi no. 2023-451 du 9 juin 2023 visant à encadrer l'influence commerciale et à lutter contre les dérives des influenceurs sur les réseaux sociaux <<https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000047663185>> accessed 22 June 2024.

⁶⁹ Assemblée Nationale, 'Travaux parlementaires: lutte contre les arnaques et les dérives des influenceurs sur les réseaux sociaux' <https://www.assemblee-nationale.fr/dyn/16/dossiers/influenceurs_derives_reseaux?etape=16-AN1> accessed 22 June 2024.