



City Research Online

City, University of London Institutional Repository

Citation: Shleina, V. ORCID: 0000-0003-1762-1332 and Fahey, E. ORCID: 0000-0003-2603-5300 (2020). The Law of Facebook: Borders, Regulation and Global Social Media (City Law School (CLS) Research Paper No. 2020/01). London, UK: The City Law School.

This is the published version of the paper.

This version of the publication may differ from the final published version.

Permanent repository link: <https://openaccess.city.ac.uk/id/eprint/24375/>

Link to published version: City Law School (CLS) Research Paper No. 2020/01

Copyright and reuse: City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

City Research Online:

<http://openaccess.city.ac.uk/>

publications@city.ac.uk



THE CITY
LAW SCHOOL
CITY UNIVERSITY OF LONDON
— EST 1894 —

Academic excellence for business and the
professions



City Law School Research Paper 2020/01

The Law of Facebook: Borders, Regulation and Global Social Media

Veronica Shleina and Elaine Fahey

16 May 2020

Veronica Shleina and Elaine Fahey

The City Law School

This text may be downloaded for personal research purposes only. Any additional reproduction for other purposes, whether in hard copy or electronically, requires the consent of the author(s). If cited or quoted, reference should be made to the name(s) of the author(s), the title, the number, and the working paper series

All rights reserved.

© 2020

The City Law School Working Paper Series are published by The City Law School, City University London, Northampton Square, London, EC1V 0HB.

An index to the working papers in The City Law School Working Paper Series is located at:
www.city.ac.uk/law/research/working-papers

**THE LAW OF FACEBOOK: BORDERS, REGULATON & GLOBAL SOCIAL MEDIA-
CONFERENCE REPORT**

Abstract

This paper provides an outline of the talks presented at the webinar event “The Law of Facebook: Borders, Regulation and Global Social Media” on 15 May 2020, jointly hosted by the City Law School Jean Monnet Chair of Law & Transatlantic Relations, the Institute for the study of European Law (ISEL) and the International Law and Affairs Group (ILAG).

Keywords: Facebook; EU law; Social Media; Jurisdiction; Facial Recognition; IT law; Global governance; *Schrems*; Privacy Shield; CJEU; E-commerce

Introduction

The event debated the decision in C-18/18 *Glawischnig-Piesczek v. Facebook*¹ and the wider legislative and regulatory context of borders, global social media and transnational regulation of the internet. In C-18/18 *Glawischnig-Piesczek v. Facebook* the Court of Justice considered in a small three judge chamber litigation concerning an Austrian politician suing Facebook Ireland. There, the Austrian Supreme Court referred to the CJEU whether a host provider was obliged to remove posts and whether national courts can order platforms to remove content only within the national boundaries, or beyond ('worldwide'). The decision of the Court has been seen as having the capacity to determine whether domestic courts can impose monitoring obligations on digital platforms, and of what nature, and how much power courts should be given in imposing their own standards of acceptable speech across national boundaries. It features as one of a host of decisions at national and supranational level as to social media, the internet and the high-profile GDPR but also other measures such as the E-Commerce Directive. Beyond the specificities of search engines, monitoring and data protection authorities and territorial limits, the panel reflected upon Facebook as a global titan of transnational social media activity and its constant battle to evade jurisdiction controls under EU law. It considered the litigation strategy of Facebook as to the EU-US Privacy Shield in litigation ongoing before the CJEU concerning data protection authorities' powers, individual enforcement of transnational agreements and worldwide jurisdiction. An outline of the individual talks of speakers is presented here next.

¹ Case C-18/18 *Eva Glawischnig-Piesczek v Facebook Ireland Limited* (2019) ECLI:EU:C:2019:821

1. Facebook and EU law: False Friends?

Elaine Fahey, City Law School, City, University of London

Introduction

Facebook subscribes to significant amounts of EU law readily e.g. GDPR or subscribes to voluntary EU codes of hate speech with Europe contributing 25% of Facebook's global revenues. While it has swiftly moved millions of Facebook users in the UK to US 'control' post-Brexit, it remains a strong advocate of EU law, even to the point of increasingly advocating for a global standard of the GDPR. It has helped along with Apple, Microsoft and Google nudge Privacy as Europe's First Amendment. While post-*Schrems*, the amount of last instance EU courts engaging in key litigation as to Facebook mostly relating to jurisdiction is increasing. Yet it frequently involves it being subject to weak indirect host provider obligations. EU courts have also emphasised the global dimension to EU law even in such instances. Is Facebook a good subject and object of the so-called 'the Brussels effect'? How much is the global reach of EU law actually provable as to Facebook for such a secretive entity as Facebook? Facebook subscribes to significant amounts of EU law readily e.g. GDPR or subscribes to voluntary EU codes of hate speech with Europe contributing 25% of Facebook's global revenues. While it has swiftly moved millions of Facebook users in the UK to US 'control' post-Brexit, it remains a strong advocate of EU law, even to the point of increasingly advocating for a global standard of the GDPR. It has helped along with Apple, Microsoft and Google nudge Privacy as Europe's First Amendment. While post-*Schrems*, the amount of last instance EU courts engaging in key litigation as to Facebook mostly relating to jurisdiction is increasing. Yet it frequently involves it being subject to weak indirect host provider obligations. EU courts have also emphasised the global dimension to EU law even in such instances. Is Facebook a good subject and object of the so-called 'the Brussels effect'? How much is the global reach of EU law actually provable as to Facebook for such a secretive entity as Facebook? Facebook is one of the most interesting entities, especially its recent relationship with EU law. This relationship begs the question of its general engagement with EU regulations – since it is described as 'Europeanist'² – is this a 'ceiling' or 'floor' engagement?

It is suggested that Facebook is a 'subject' and 'object' to EU law and the relationship is moving at a frantic pace. Facebook is a 'strong' global advocate of EU law, more specifically it advocates for a global standard of the GDPR whereas other platforms moved over a billion people from Europe to the US to circumvent the GDPR. It has also become a professional 'lobbyist' against EU regulations, not through the usual transatlantic diplomatic channels.³ In

² Anu Bradford, *The Brussels Effect* (OUP 2020).

³ Anthony Gardner, *Stars with Stripes* (Palgrave Macmillan, 2020)

a general scheme, looking at the 'classic' understanding of the relationship between Facebook and EU law. The examples of the meetings between Mark Zuckerberg and the European Parliament show the executive-style of engagement between EU law and regulation. With regards to the GDPR there have been high volume of transatlantic businesses very carefully engaging with EU law and institutionalisation.

The current project the subject of this talk explores how there have been at least 30 proceedings before CJEU involving Facebook: from the established areas of law to the new and coming areas of regulation. In most of the instances, Facebook is not at the 'losing end' of the litigation - it has an enormous capacity to absorb within its bureaucracy. It is impossible to ignore that Facebook is also as enormous drive behind the capture of data, transparency, hate speech, disinformation and algorithms. It is becoming apparent that it is also a prevarication between institutionalisation and judicialization; the ways the EU can set up the schemes of bureaucracy; the volume of litigation; how much this bounce gets offset by entities such as Facebook. It is important to reflect on the idea of data, the term which is used loosely. The EU has begun an enormous drive towards single marketing data, common data spaces and AI regulation and Digital Services Act.

It is hard to predict how permanent the current state of affairs is. The EU is generally praised for being an international privacy pioneer. Yet, since the EU also suffers from patchy institutionalisation, imperfect competences and inadequate structuring, there is a variation between institutions on collaborative work, platform economy and other areas such as the eurozone, migration etc. On global and regional engagement levels, there is a significant amount of legal gaps and lack of cooperation in the areas such as net neutrality. From a legal perspective, the question remains is how to distinguish Facebook from other GAFA – whether it should be seen as a 'second-generation' GAFA. A number of years ago in Facebook/ Whatsapp merger the European Commission refrained from delineating a market for data as it held that the parties were not active in the market of selling stand-alone data products, a finding now that appears extraordinary. The EU also conducts manifold investigations on Facebook eg as to Libra, algorithms, underscore a lack of a fixed business model that they pursue- they are simply fluid. From legal vs economic perspective, third-party tracking is also notable. It is not prohibited under EU law but the placing of cookies and the processing of data both require a users' consent, covered possibly by the ePrivacy Directive (as to direct marketing) and the GDPR (as to processing).

Data Privacy Shield

EU data privacy shield is the world's largest data flow regime between the EU and the US.

There is a series of cases involving Facebook. For example, *Schrems II* case where the concept of 'consumer' under EU law was enlarged. The most recent case is pending on standard contractual clauses. It was significant to note how Facebook was involved in litigation in Ireland attempting to hollow out the judicial independence and suggested that broader study of its litigation strategy was essential.

Online Intermediaries

Online intermediaries is an extraordinary area, where Facebook is on another end of the litigation. The E-Commerce directive is rather old and Facebook has benefitted from the fact that libel was not seen as illegal content. Now, it is concerned with the legal changes taking place. The recent cases concerning 'the right to be forgotten seem to reveal Facebook's place within the scheme. Facebook is subject to a 'fudge' of sorts whereby the regulatory landscape went only so far and that there is an increased burden of proof imposed on tech companies and restrained obligations of Facebook, in turn, placed some sentiments to the effect that the EU has a global reach. There is also a strong empowerment of data protection authorities in a sense that the reach benefitted Facebook.

EU Competition

EU competition also extraordinary in regards to Facebook. Some time ago, the Commission fined Facebook €110 million for misleading information as to the merger which the Commission approved in 2014. In 2016, concerning the terms and conditions linking usernames with Facebook identities, it transpired that this was technically possible at the time of the merger. Bundestkartellamt in Germany found that Facebook abused its dominant position by limiting the amount of data generated by third party websites and merging it with users' accounts. Similarly, in 2018 the Italian Competition Authority found Facebook rules to violate Italian consumer protection law. Moreover, a few years FTSE fined Facebook \$5 billion. There is an 9-year ongoing litigation between the IRS and Facebook on the taxation of profits. It is concerned with the whereabouts of \$12 billion in European revenue passed through Ireland in 2016 with only \$29 million in taxes being paid prior to floatation in 2012. At a global level, however, a global digital services taxes has been mooted by the OECD and many EU countries have introduced digital global services taxes. The EU considers similar actions by the end of 2020. The US Trade representative is already investigating tariffs. While Facebook publicly has stated that it is willing to pay much higher taxes in Europe it must be remembered that the Apple case Ireland is looking to return €30 billion of revenue to reflect on a state aid regime. Significant question mark is going forward as to how EU digital services, taxes, global tech companies and regulatory first move all fit together.

2. The Facebook Oversight Board

Kate Klonick, St John's University

Introduction

Facebook is establishing a 40-person oversight board to pass rulings on whether or not content should remain on their platform. The board aims to represent all regions of the world, rulings are set to be released in multiple languages and decisions about content to be made expeditiously. Only one researcher, Klonick, was invited in to observe the process that went into establishing the framework for this oversight board. Klonick was embedded in Melno Park without a non-disclosure agreement, given full access to meetings and was able to record all the conversations and workshops. Throughout the process, she maintained her academic immunity, not accepting anything from Facebook, not even a free hotel room. Facebook did solve many of huge constitutional problems presented by content moderation. But how this board will scale, whether it will be overrun with appeals and how will the public will perceive its effectiveness are all significant questions.

Overview:

In light of the law of Facebook, there is a twitter thread is started – who's got dibs on the first legal clinic that is going to be representing people before the Facebook oversight board? It is predicted to be a reality – tension between traditional nation state governance and raise of third-party overlying sense of governance that is transnational. The pandemic has killed the idea of internet exceptionalism for speech when 98% of speech is reliant on private platforms. Klonick relied on Jack Balkin's 'Free Speech Triangle'⁴ as a framework for understanding of the law of Facebook. This contrasts with the old free speech model - the 'dyadic' model. This model provides for the relationship with the citizens on the one hand and the state on the other. The story of speech was a story which had Constitutions, trying to "keep the boot of the state off the neck of the citizens"; fought back with loyalty, exit, voice, voting, the pressing power of the citizens. Interestingly, the platforms completely eviscerated became a third part of this model turning it into a 'triotic' model. Citizens' concern is not the power of the state anymore – they can root around the power of the state through online platforms. The states, however, also rely on platforms, to root around democracy. Within that, there is an entire system of governance that is developing in the 'new triate' space of the platforms: a system of government that should try to be in concert with user citizens' needs, once desired expectations at the same time avoiding fines from the nation states and governments.

Why cannot the US government regulate Facebook? One of the reasons is the First

⁴ Jack M. Balkin, 'Free Speech is a Triangle' (2018) 118 *Columbia Law Review* 7

Amendment. Secondly, and most importantly, Facebook is a global actor that does not just answer to the US government, despite the latter's power. This global transnational problem cannot be resolved by traditional notions relied on in the past years, such as simply passing a new 'thorny' legislation. In Klonick's estimation, the oversight board could, at its greatest potential, be the first entrée into the platform's governance: the increasing direct user participation. This does not equate with democratisation as it does not include voting; the past experience shows the downsides of online voting. There has still to be more direct participation – so far based on the idea of 'cronyism' (the back-up of the speech by someone) and 'inevitism'. This existing system is not seen as sustainable anymore.

The Timeline

On November 18, Mark Zuckerberg announced the establishment of the oversight board, an appeals board to review Facebook's decision on keeping up or taking down the content that was 'flagged' by other users on the website. The Oversight board was not intended to be somewhat a Congress, jokingly labelled 'The Supreme Court of Facebook'. In January, Nick Clegg, from the UK, announced the launch of the process. The functions of the Board were being decided during the first six months; a vague draft Charter was drawn up. Interestingly, during the first six months of global consultancy. It involved 50 per cent of the stakeholders around the world, including Singapore, New Delhi, Nairobi, Berlin, Mexico City and New York. An open portal online has been created for the submissions as to what the Board should be like and the content of the Charter. In June 2018 a report was published that summarised the process. In August Facebook published a new set of values – revised 'under-voice', 'counter acting -voice' – the primary superceding value: safety, privacy and authenticity. It has to be noted that these are *Facebook's* values, not the values of the Board itself. To a certain extent, these are the substantive Constitutional values that the Board would have to hold Facebook to account in reviewing its decisions. In September, the Charter was released. It was a 'structural' document describing the procedure of the Board, its functions, organizations and the case process. In December the trust documents were released and an announcement made that a \$130million irrevocable grant to fund the Board for six years – a \$100million more than initially estimated. In January 2019, the oversight board's bylaws were announced. The structure, however, does not resemble a corporate charter – looks more like a constitution. Article 19, for example, provides for the executive director, Thomas Hughes, to be the Head of Administration to run the staff attorneys. In May the board members were announced: four co-chairs and a total of twenty members.

The users' perspective on appeal procedure

If a user has a post removed, he can appeal that decision to Facebook. If the removal is upheld

on appeal too, an ID will be generated. They will have to copy and paste and take to a totally separate external website. The Oversight board then compiles a file, making a case. The case selection committee will be formed, choosing the cases for hearing; determining the most relevant. Afterwards, a five-person anonymous panel is formed to review the cases and reach decisions. The panel has to reach a majority verdict to be approved by the entire board. If approved, the decision is published and sent to Facebook for enforcement. At that point, Facebook is only obligated to take the single offensive piece of content, at its own discretion. The trust sits between the board and Facebook; the board recommends a new member and the Trust appoints them and releases the budget for the salary. The questions have been raised what is there for Facebook's reputation? Just because they are motivated by self-interest does not imply that they are not trying to make the platform 'better' for users. The common perception of the oversight board there is sprays in hitch hikers to 'galaxy' claiming this to be an 'SEP field' – 'somebody else's problem'. To a certain extent, the oversight board, might seem to be a 'somebody else's problem' – it does not fulfil its obligations as a content moderator.

3. Facial Recognition Technology and Facebook: another brick in the wall

Natalia Menéndez González, European University Institute (EUI) Florence

Introduction

Facial Recognition Technology (FRT) is in the spotlight nowadays due to its exponential adoption and potential impact on the technology, health and economy fields. Even before the iPhone X set its access control system by FRT, Facebook had put the technology into the mainstream with the face-tagging setting that later became Deepface, its current FRT feature empowered by Artificial Intelligence (AI).

Nonetheless, many privacy concerns have started to arise in both the U.S. and Europe regarding FRT (and its intertwining with AI further incorporates the concerns regarding the latter). Consequently, the pressure has increased the privacy scrutiny on Facebook, to the point that there has already been a number of cases against Facebook at this respect. The origin of the face recognition feature currently offered by Facebook was implemented in 2012. This idea was proposed by an Israeli company in 2009 and its origin stems from the website face.com. It invited the members of social networks to use photo- tagging systems and also allowed the developers to elaborate face-recognition applications: in May 2010, seven billion of pictures were scanned, increasing every minute of the day (as indicated with the automated

number teller on the website), allowing for the identification of (millions of) individuals. This number increased to over 30 billion pictures.⁵ Face.com was later acquired by Facebook. In 2012 Facebook guaranteed the European regulators that it would forego utilising facial recognition technology and erase the information used to recognise Facebook clients by their photos after the protest from the regulators and privacy companies. Besides, Facebook guarantees the European regulators it would restore the feature on the continent only after the approval. Later, Facebook turned on the facial recognition in Europe utilising the European Data Protection Regulation as a chance to gather more data from clients choosing the service. It also stated that it had informed the original regulator how the technology would function and how it would propose to request consent. The clients should also state expressly whether they permit or not to utilise this feature.

Opting in takes one click, compared to opting out which is a three-step process. This feature was conveyed ahead of the Data Protection Regulation (GDPR). With more than 2.5 billion monthly active users Facebook has the biggest database of faceprints. The way facial recognition system works – it analyses photos and videos on Facebook, for example profile pictures or pictures and videos the person has been tagged in. Facebook creates a unique number for them -called a ‘template’. When a person turns the face recognition setting on, Facebook uses the template to compare to different photographs, videos and other places where the camera is used (live video) to recognize if a person appears in that content. This is a significant departure from Facebook’s previous software showing the incorporation of Artificial Intelligence/ Deep learning which Facebook and its competitors have been vigorously on in the previous years. This area of AI includes software that uses artificial network to figure out how to perceive patterns and large amount of data.

Once a face template of an individual is created, Facebook can use it to identify that individual in hundreds of millions of other photos downloaded to Facebook each day as well as identifying the individual in a specific location. Facebook can also identify individual’s friends or acquaintances in the photo.

Facebook estimates that 90% of faces showing in photos are effectively recognised and of those 85% are effectively aligned. In this manner, around 76% of the faces showing have face signatures computed.

Legal Complaints

⁵ Els Kindt, *Privacy and Data Protection Issues of Biometric Applications* (Vol. 1) (Springer 2016).

In 2014 Facebook had an option to match around 67% of recognised faces with clients. Within these figures we can see a great contribution from AI. In 2018 an Alliance of Consumer Privacy Organisation filed a complaint with the Federal Trade Commission charging Facebook with Facebook's facial recognition practice needed privacy safeguards and violated the 2011 Consent Order with the Commission. This complaint followed another one, from 2011 against Facebook utilisation of facial recognition. A list of privacy organisations claimed that Facebook started gathering clients' biometric information without their knowledge or consent when it executed "Tag Suggestions" in 2011. The complaint requested that the FTC restrained Facebook's utilization of facial recognition until proper safeguards could be built up. The Commission at last missed to act on the complaint. Furthermore, Facebook's clients brought a legal claim under the Illinois Biometric Information Privacy Act ("BIPA").⁶

First of all, the tool recognises faces in uploaded pictures; the tool at that point standardises/aligns the face along the set of parameters, for example, orientation and size. In the next step, the face signatures are recognised. This is a series of numbers that represent that specific face. The Tag suggestions feature then looks at the database of stored templates for a match. There is a match where a face falls inside the threshold of similarity to a stored face template. Facebook claims that it stores templates and not face signature. Illinois Biometric Information Privacy Act ("BIPA") requires a corporation that gets an individual's biometric data to: get a "written release" from the client or the client's representative prior to collection; give them notice that their biometric data is being gathered and stored; and express the length the biometric data will be gathered, stored and utilized just as its particular reason. In this phase, the plaintiff already alleged that he has suffered a concrete injury because Facebook violated section 15(a) and 15(b) of the BIPA which, apart from the mentioned requisites, requires that companies erase biometric information within certain timeframe. This legislation has been passed in 2008 before the company behind the face.com contacted Facebook to ensure that welfare, security and safety of Illinois residents by regulating the collection, use, handling, guarding storage, retention and destruction of biometric information. The utilisation of biometric identifiers, developing particularly in financial sectors, the Illinois legislator was aware that biometric identifiers are biologically unique and cannot be changed. Nonetheless, the substance of the case inferring into processual questions of jurisdiction and territoriality and the effective concept of aggrieved, Facebook declared at the beginning of 2020 that it will pay \$550 million to settle in. Consequently, facial recognition technology and legal challenges associated with it were not sufficiently tackled in the case. The final decision stated that "Taking into account the future development of such technology as suggested in Carpenter,

⁶ *Patel v. Facebook* (2) (2018) 290 F. Supp. 3d 948.

[...], it seems likely that a face-mapped individual could be identified from a surveillance photo taken on the streets or in an office building. [...] We conclude that the development of a face template using facial-recognition technology without consent (as alleged here) invades an individual's private affairs and concrete interests.'

In the EU, in a similar line, but earlier on in 2012, an Opinion-29 WP stated that "Prior to a registered user uploading an image to the SNS [Social Network Service] they must first be clearly informed that these images will be subject to a facial recognition system. More importantly, registered users must also have been given a further option as to whether or not they consent to their reference template to be enrolled into the identification database.'

4. Global Platforms: Global Laws

Andrew Murray, London School of Economics and Political Science

Introduction

The Cyberlibertarian Myth

In 1996 John Perry Barlow informed "Governments of the Industrial World" that in Cyberspace "You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear". He was of course wrong, at least about the final part of that statement. Governments had already demonstrated the ability to regulate intermediaries and platforms in cases such as *Cubby v CompuServe* and *Stratton Oakmont v Prodigy*.

In fact, the fear of perfect regulation through intermediaries was strong enough to lead to the implementation of statutory "mere conduit" provisions in §230 CDA and A.15 E-commerce Directive. Over 25 years the wheel has slowly turned and now co-opted (intermediary) regulation is being seized upon by governments to leverage control into the online environment. However, the first part of Barlow's challenge remains – is this "moral"?

Murray's focus has been on the regulation of the platforms in the context of global social media. The 1990s marked a high watermark for 'high libertarianism', a utopian movement where cyberspace was seen as being free from the government interference. Alongside John Barlow's Declaration of Independence for Cyberspace, we also high- water libertarian legal Treaties see, Johnson Post's *Law and Borders – The Rise of Law in Cyberspace*. These documents make some bold political statements. This exceptionalism movement was not unique. Barlow's call was a direct response to President's Clinton's the Communication and Decency Act 1996. Rather than being exceptionalist or libertarian, the movement was, in fact, a response, to sovereign intervention. And in fact, if we look at the act of sovereign

intervention, the CDA, we find that it itself was not proactive, it was actually also reactive, at least in response to one key provision –§230. The move to online application and enforcement of the laws of sovereign states began in the early 1990s. As an illustration, Murray referred to Lawrence Lessig, who described cyberspaces being unique. They are the spaces where the governments are in the hands of private actors, such as AOL, Cyber Connect. Lessig's view has been influenced by Julian Dibbell's article,⁷ which talks about LambdaMOO, an online world. There, a wizard Tom Traceback took a direct action for 'cyberrape' against Mr Bungle, a virtual player. The action led directly to the adoption of democracy in LambdaMOO. Lessig believes that cyberspaces are self-regulating communities, similar to little states. He created an illusion of self-determination for the online community, where the cyberspace citizens make a decision as a legitimate government body. However, they were never online states. Rather, they were online clubs, with 'no more authority than Camden Cricket Club or the Morningside Golf Club.' While having had an absolute authority over their members, they had no *legal* authority. It is a simplified consent by the operation of contract law.

Despite Barlow's best attempts at political misdirection and Johnson's attempts to exceptionally define cyberspace's unique jurisdiction, state or sovereign legal authority had been already established in the space. In 1991 US District court decided the case of *Cubby Inc v. CompuServe Inc* where it was decided that the internet service providers were subject to traditional defamation law for their hosted content i.e. for content in cyberspace. Successive cases developed the jurisprudence, with a particularly complex case being *Stratton Oakmont v Prodigy*. Here, the New York Supreme Court ruled that Prodigy could be liable as a *publisher* of defamatory material as it exercised editorial control over messages on their bulletin boards. In other words, *Stratton* confirmed that the act of moderation was a positive act that turned an Internet Service Provider from a distributor with common law defences to a publisher of defamatory material. This was a perverse outcome - what these cases meant was to disincentivise moderation as only moderated content would fall foul of the Stratton Oakmont position. This perversity led directly to §230 of the CDA, the famous 'shield', the very Act Barlow was protesting. Much has been written on §230 and its counterpart, art12-15 of the E-Commerce Directive. Ironically, no provision has done more to create the impression for the cyber libertarian exceptionalism, than this act of direct intervention by the federal government of the US and the subsequent interventions by the EU institutions. It is a mirage of a space free of interference created by a legal safe harbour i.e. the act of legal positivism.

⁷ Julian Dibbell, "A Rape in Cyberspace or How an Evil Clown, a Haitian Trickster Spirit, Two Wizards, and a Cast of Dozens Turned a Database into a Society" (1994) 3 *Annual Survey of American Law* 471.

The Berkmen and Transnationalism

Once the errors of cyberlibertarianism were revealed, what Murray labels as 'cyberpaternalists' became the centre of the debate. They are generally a group of academic lawyers and policymakers. They accepted that legal positivists position made the laws apply to cyberspace and they welcomed the laws as protection from the worst excesses of the platforms. They fell into two schools: the Berkmen or techno-deterministic school on the one hand – founded on the groundbreaking work of Joel Reidenberg, adopted by Lawrence Lessig mostly connected to the Berkman Klein Centre at Harvard. From this school, we get the famous "The Code is Law" ethos. The school replaces legal positivism with binary positivism: we were once directed by linguistic statutory material and codes of the courts, now we are guided by the online regulatory instructions. It is less about the 'Law's Code' and more about 'The Code is Law'. The school remains strong with Berkman still being its 'spiritual centre'. It also finds itself in Tilburg in Brussels, where the modern 'priests and priestesses', such as Mireille Hildebrandt calls for the coders to understand law and the lawyers to understand code. Powerful responses to the concept of binary positivism have come from amongst others, David Post, Viktor Mayer-Schönberger and Murray himself. Murray has argued extensively that technology is not the driver of social interaction online or offline. The value of digital code as a tool for detection and enforcement should not be underestimated. It cannot fully replace societal communication values as a standard setter. This is what Murray refers to as 'network communitarianism'. For Murray, binary positivism cannot replace legal positivism as a foundational or normative value.

The second school, on the other hand, with the most longevity, is the 'transnationalist' or 'internet fallacy' school, exemplified by Jack Goldsmith but also would count Orin Kerr, Julie Cohen and Chris Reed among its early supporters. This school sees the internet not as a 'space apart' but as 'a space between'. Rather than being a 'self-determining' space, like a state or a canton, it is seen as a space of shared governance and responsibility, like the global telecommunications network, geostationary satellites or international air corridors. The best analogy is transnational commerce or operators that once regulated by all or none of the states with the question of who operates them would be a matter of international private law. This school, in Murray's view is the truest of the analogy of internet governance to the real world. The internet and the regulators thereof operate not outside of the legal governance but between them. The veracity of this school is established, but also its limitations. In the classic case of *UEJF and LICRA v Yahoo!* The resolution of a simple dispute rendered complex. Yahoo! options allowed the sale online of the memorabilia. Article R645-1 of the French Code stated that such sale is illegal in France, therefore Yahoo! Simply needed to comply with the local law. As per transnational commerce analogy, a US corporation WoHoo! were selling

items in a shop in Paris, an order was obtained in a local court and they removed the material and the shops closed down. However, Yahoo! argued that their shop was not in Paris, but in California and the French citizens were essentially 'travelling' to California.

Every Platform Wants to Rule the World

The transnationalist school probably would not describe the internet regulation even some five years ago, but nowadays the internet matured. The best analogy is the Radiocommunication Regulation – the radio transmission space was once an unregulated space. One could send or receive radio transmission on any frequency and using any equipment. However, this needed to be a regulated space. The early internet was like the early radio – too often people make a mistake saying it was like the 'wild west'. However, it never was – it was a communications medium: it was a 'send', 'receive' and bandwidth never control and enforceability. With the proliferation of sites, in 2005 there were popular sites dominated by single-product websites, Disney, Walmart, Target etc. The network was heterogenous and the ability of the states to apply legal control effectively was impaired. By 2020 the network has matured, multi-delivering platforms that dominate: Facebook, Youtube, Twitter, Bidoo, Instagram etc. many of the platforms are controlled by free companies – Google, Alphabet, Facebook and to lesser extent, Microsoft. Substantially, infrastructure support comes from other companies such as Apple or Amazon. To leverage effect of the larger portion of real estate sovereign state only need to convince the operators that their laws apply to their platforms. Thus, we enter the age of 'platform' law. There is a debate on the legitimacy of the platform capture, which is the regulatory capture of platform regulators by the states.

How the states establish transnational principles for the borderless Internet?

The space is not governed by the international Treaties or Convention. In order to explain the current position, Murray provided the analogy with the 19th century West. The US was largely settled by the land claims: in 1862 the Congress passed the Homestead Act.⁸ The Act gave the citizens and every foreigner seeking the citizenship in the US the right to claim the government land. If a seeker used the land for a home or a farm, he would be deemed the owner within five years as long as he paid \$10. The land was allocated on the 'first come first served basis'. Now, by contrast, the governments make claims in digital platforms space. Legal positivism creates 'uncultivated' digital space which is allowed to be claimed and re-claimed by virtue of s230 of the Communications Decency Act and articles 12-15 of the GDPR. One of the examples is the *Glawischnig-Piesczek*,⁹ where it was held that the E-commerce

⁸ The Homestead Act 1862, promoting the "vote yourself a farm" policy in the US during 1840s-50s.

⁹ Case C-18/18 *Eva Glawischnig-Piesczek v Facebook Ireland Limited* (2019) ECLI:EU:C:2019:821

directive does not preclude a member state from ordering a hosting provider to remove or block content that was declared unlawful as well as the content that is identical to unlawful information. Austria can occupy a part of Facebook-protected space and it can strike a claim. This is only one of the many instances where it is said that the GDPR claimed influence far beyond the borders of the EU allowing the EU institutions to strike a claim for part of the platforms space. Similarly, in *Google v Equustek* the Canadian courts sought to capture part of Google space. In *Deripaska*, the Russian regulator sought to capture part of Youtube space. Legislators too, are alive to these possibilities. The UK Parliament has proposed a specific duty of care for online platforms. Germany has an NetzDG law. Australia also has proposed a new Online Safety Act.

Murray concluded that what is 'old is new again.' He recalled the summer of 1995. Music won't come from Coolio, Take That and The Outthere Brothers. We won't be going to the cinema to see Toy Story, Pocahontas or Goldeneye. We won't be watching Friends, ER or Seinfeld (except on Netflix). But as with the Stratton Oakmont decision in May 1995 we are slowly stripping away the protections from platforms (as we once did with ISPs) and states are once more seeing intermediaries as an enforcement proxy for the application of their laws, also seeing article 17 of the Digital Single Market Directive. We should not expect a new 230 of the E-commerce directive, legal positivism is not going to protect digital positivism. Instead, platforms will enter political space and maybe the legal space. The oversight board in the first of the many such platforms to 'stake' their own claims on the space and keep governments at an arm's length. We should not assume this is a positive development although it is true that the platforms should definitely take greater responsibility for the content they disseminate. It is not always the case that law is better itself than co-regulation.

5. Assessing the Limits to the Law of Facebook

Maria Tzanou, Keele University School of Law

Introduction

Tzanou's contribution focused on the relationship between Facebook and the Court of Justice of the EU as seen in two lines of cases *Glawischnig-Piesczek* and *Schrems I & II*. She sought to discuss whether there are any limits to the Law of Facebook and if so, in what ways these can be framed. The CJEU's *Glawischnig-Piesczek v. Facebook* judgment dealt with the removal of certain defamatory content from Facebook under Directive 2000/31/EC. Two main issues arose in this decision: the type of contents that can be removed by platforms such as Facebook and the range of application of EU law.

Looking at the *Glawischnig-Piesczek* judgment, it seems that the Court tried to rein in Facebook (and Internet intermediaries in general) by showing that Facebook's law is not unfettered but is subject to limitations. This was done under the intermediary liability regime established by the E-Commerce Directive, but in the context of a national court injunction. This is important in Tzanou's view because it situates the case in a public enforcement sphere where national courts are involved in issues of rights' adjudication as opposed to cases where intermediaries such as Facebook assume the quasi-judicial role to decide the removal of content upon a party's notice in the context of private enforcement. It also seems positive that the CJEU in *Glawischnig-Piesczek* restrained itself from framing the debate on online adjudication by Internet intermediaries in terms of fundamental rights - the issue was rightly decided in the context of EU secondary law and the obligations of the E-Commerce Directive, unlike cases concerning the rights to privacy and data protection, such as *Google Spain* where the Court has used extensively a fundamental rights terminology to resolve private party disputes and has delegated fundamental rights adjudication to big tech companies.

The *Glawischnig-Piesczek* judgment is extremely problematic in many respects. In fact, despite the Court's attempt to rein in Facebook, the judgment ends up doing the opposite: it is delegating Facebook even more power combined with less accountability. Briefly, this decision raises many normative, doctrinal, practical, technological, jurisdictional and procedural questions and is fraught with paradoxes:

- i) How is Facebook expected to distinguish cases of 'general monitoring' from monitoring obligations 'in a specific case' when asked to remove 'equivalent content'?
- ii) Why is it assumed by the Court that automation technologies are able to identify equivalent content?
- iii) How can this assumption work in practice in different contexts over time regarding different infringers if the intermediary is not expected to carry out 'an independent assessment' of the content? How does this differ from general monitoring?
- iv) Why did the Court decide to significantly broaden the scope of injunctions in *Glawischnig-Piesczek* without paying any attention to its previous case-law (*SABAM/Netlog*, *UPC Telekabel*) and the principle of proportionality?
- v) What are the implications of potentially worldwide injunctions granted for unharmonized rights?

Where does this judgment leave the Court in its encounter with Facebook?

Instead of delivering a doctrinally and theoretically robust decision regarding injunctions and the role of intermediaries in content removal that provides legal certainty and clarity, it exposes the CJEU's technological ignorance and seems to be leaving important interests to be decided by Facebook and its automation systems and algorithms. Instead of clarifying, it further muddies the waters of what constitutes impermissible general monitoring and acceptable removal of equivalent content. And also this is not limited to the EU context. This is extremely problematic if the Court wants to show that it has European or even worldwide authority to put limits to Facebook's law- when it cannot interpret consistently EU law and cannot grasp the practical and technological implications of its judgment.

Facebook's litigation strategy in Glawischnig-Piesczek

The one expected: Present itself as a **neutral** intermediary, a mere carrier of content and facilitator of conversations, to avoid as much responsibility for how its users behave or how its own law and systems are designed and deployed. However, Facebook's own law gives an impression of a better judgment than the one of the CJEU. Facebook did not seem even to make a particular controversial decision in this case- the person at issue, Ms. Glawischnig-Piesczek was a public figure involved in politics and the allegedly defamatory comments were concerning a media article regarding her political party's policies. While admittedly the CJEU, does not deal with the facts of a case in preliminary ruling proceedings- that's an issue for the national courts, the overall picture that comes from this case is not good for the Court. In fact, the optics and the impression we get from this case is that -if anything- Facebook did the right thing while the ECJ got it wrong.

The second line of cases discussed were *Schrems I* & *Schrems II*. These cases concern transatlantic data flows and the protection of EU fundamental rights within the context of US surveillance programmes, but they originated as a dispute between Max Schrems and Facebook regarding the latter transferring Schrems' personal data to the US where they could be to NSA surveillance following the Snowden revelations. As you know, in its *Schrems I* decision the CJEU invalidated the Commission's Safe Harbour adequacy decision that allowed commercial companies including Facebook to transfer EU originating personal data to the US.

The decision is again very problematic because it established the extraterritorial application of EU fundamental rights but failed to provide clear and in depth analysis regarding the standards of the extraterritorial application of these rights and regarding the way the Court assessed US

law. In fact, the CJEU has been accused by mainly American scholars of engaging ‘in a series of errors’; and, of being driven ‘by EU perceptions that ignore reality’. *Schrems II*, concerns primarily the validity of data transfers to the US under Standard Contractual Clauses, but the fate of Privacy Shield that replaced Safe Harbour might be decided in that case as well. The Court has not delivered its judgment on *Schrems II*- this is expected in July, but the AG has issued an Opinion in this respect that shows an effort to address the significant deficiencies of the *Schrems I* judgment.

Where does the Schrems I case leave the Court in its encounter with Facebook?

While it establishes the extraterritorial application of EU fundamental rights, it is a theoretically and methodologically very weak judgment that once again fails to recognize technological realities – for instance thinking of the CJEU’s artificial and erroneous analysis of the essence of the right to privacy that is breached when the content of communications is accessed, but not the metadata.

What is Facebook’s litigation strategy in respect to the Schrems cases?

The litigation strategy appears to be aggressive. In *Schrems II*, besides arguing in favour of the inadmissibility of the Court’s proceedings, stating that what was at issue was outside the scope of EU law and questioning the powers of data protection authorities, it is really striking that Facebook raised substantive arguments before the CJEU that concern EU law’s application- for instance Facebook argued that ‘it would be unjustified, if a third country were expected to comply with requirements that did not correspond to obligations borne by the EU Member States’, questioning the scope of application of the EUCFR in such cases. This clearly goes beyond Facebook’s position as a mere intermediary, although it is understandable because Facebook is implicated in the *Schrems* cases as a commercial entity (and not as an intermediary) that therefore has to fight to preserve its commercial rights.

Concluding Remarks

To conclude, the two lines of cases *Glawischnig-Piesczek* and *Schrems I & II* reveal some interesting common points: on the one hand, the ECJ is trying to put limits to the law of Facebook by establishing strict rules, but at the same time it has delivered very weak judgments that ignore technological realities and undermine legal clarity and the overall authority and leadership that the Court wishes to show. It seems therefore that so far the CJEU is all bark but little (not effective nor efficient) bite in its relationship with Facebook.

The City Law School
City, University of London
Northampton Square
London EC1V 0HB

T: +44(0)20 7040 3309
E: law@city.ac.uk



Email enquiries:
law@city.ac.uk

Telephone enquiries Find out more, visit
+44 (0) 44 02 7040 5787 www.city.ac.uk/law

www.city.ac.uk/law