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Introduction

Judit Bayer, Lorna Woods, Bernd Holznagel

1989 – 2021

Online communication has developed tremendously over past decades. In 1989, two innovations created the World Wide Web: HTML, a hypertext markup language, and HTTP, hypertext transfer protocol. These tools, and the related user-friendly browsers provided easy access to the internet for the general public. A rapidly growing offer of websites and services also gave floor to the first legal disputes in a number of jurisdictions, which raised the question: can intermediaries be liable for criminal content, or content that is contrary to private or administrative law?

Notably, many of those landmark cases were related to early forms of social media, such as Usenet (Godfrey v Demon[1]) and bulletin boards (Stratton Oakmont v Prodigy[2]), or otherwise questioning whether the website host takes responsibility for commissioned publications (Blumenthal v Drudge[3]).

The first legal rule applying to internet content was the Communications Decency Act of 1996, Section 230 of which is still subject to discussion. The aim of the act was to regulate indecency on the Internet. While those parts of that Act were struck down by the US Supreme Court in a landmark ruling, Section 230 – which provides for intermediary immunity in relation to content hosted - remained.[4]

The US legislation was relatively active in the period between 1996 and 2000, passing several laws for the protection of children, giving rise to repeated constitutional rulings which annulled the whole or part of some of these for violating the First Amendment. The Digital Millenium Copyright Act introduced the notice-and-takedown regime as a method to deal with copyright infringement. Similarly, the European Union passed

1 Godfrey v. Demon Internet Service (2001) QB 201.
2 Stratton Oakmont, Inc. v. Prodigy Services Co., 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995).
3 Blumenthal v. Drudge, 992 F. Supp 44 (D.D.C. 1998).
4 Reno v. American Civil Liberties Union, 521 U.S. 844 (1997).

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the E-Commerce Directive in 2000 according to which intermediaries enjoy immunity from suit provided they either did not know about the content complained of or acted expeditiously once on notice. While there are differences between the approach in the EU and the US (and again in other jurisdictions), with the assumption of some form of immunity, it looked like the responsibility of online service providers had been settled in a satisfactory way, giving room for development, but also providing for removal of content where the law provided so.

The mentioned laws are still in effect, even though the development of technology has long overhauled the structure of the 1990's for which they were tailored. The first social network sites were already there from 1996 on, and gained popularity as broadband connection penetrated households after the millenium: Six Degrees, 1996, Wikipedia in 2001, Friendster in 2002, MySpace, LinkedIn, Hi5 in 2003 and Facebook, 2004. During these years, the first attempts with mobile internet were also traceable, but they spread relatively slowly, due to the unattractive user interfaces in the first internet-enabled mobile phones. Meanwhile, the 3G network which enabled faster mobile internet connection, got launched in 2001 in Japan, 2002 in the US and 2003 in EU. The breakthrough happened in Japan around 2004, when software, user interface and other consumer-friendly features were combined to enable rapid access to the open internet. Mobile internet rapidly spread on the heavily regulated Japanese market, which was, however, isolated from the global trend. The international debut of mobile internet as we know it today, came when Apple's iPhone was released in 2007 (on June 29 in the US and on November 9 in the EU). The real „smartphone revolution" was enabled by other producers that produced cheaper hardware and software.[5] The penetration of smartphones and mobile internet opened a new era of how people used the internet.

These landmark steps from several areas were needed to get from the early internet to today's smart-phone dominated platform-based communication culture. Parallel innovations contributed to the accelerated development that occurred in telecommunication technology, hardware and software technology, and online services. Broadband enabled the use of images and sound. Platforms made publishing content a convenience to any lay person even without literacy. And mobile internet put the whole world into the pocket of every teenager – and made online presence a

5 Bloomberg. "The Smartphone Revolution Was the Android Revolution". Aug 6, 2019. https://www.bloomberg.com/graphics/2019-android-global-smartphone-growth/.

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uniquely personal, even intimate experience, a place where the social, personal and business life of the individual are blended.

This change occurred in little more than a decade, and legal regulation did not follow through. The E-Commerce Directive's logic reflected the pre-platform age, where providing access, hosting and content could be clearly separated. The new service package provided by platforms did not fit. While the Directive seemed to provide immunity for third party content, provided that it was removed upon notice, courts did not apply this rule on platform intermediaries like eBay or a newspaper's comment section.[6]

Platforms grew and proliferated, to become dominant actors which connect and aggregate supply and demand in all areas of economy and society, from sale and tourism, to dating sites. The mediating role that they do is comparable to a traditional agency, but incomparable in the volume and speed with which the third party information is aggregated, categorised, and ordered to generate a personal offer for the other party. Platforms got access to all-inclusive information about their users: not only their social network, or shopping habits, but their business decisions, fear-generated searches, their whereabouts and many more became accessible information for personalised advertising and content offer.

This mind-boggling system operates on a legislative framework that has responded to the needs of the word-wide-web, the pre-broadband and pre-smartphone age.

In 2016, the potential of social media as an instrument has been demonstrated globally, and it became widely accepted that social media is able to make a global impact on real-life social processes, like elections. As it was later revealed, the US election campaign was infiltrated by disinformation actions and intentional manipulation.[7] The same was exposed regarding the political campaign preceding the Brexit referendum.[8] Both democratic decision-making events were regarded as a rupture to the „genuine" democratic processes and have been heavily investigated. Large research and

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6 Judgment of the CJEU Loréal v. eBay, C324/09, EctHR judgment Delfi v. Estonia, App.No. 64569/09, June 16, 2015.

7 116th Congress Senate Report of the Select Committee on Intelligence US Senate on Russian Active Measures Campaigns and Interference in the 2016 US Election. Volume 2. Russia's Use of Social Media With Additional Views. https://www.intelligence.senate.gov/sites/default/files/documents/Report_Volume2.pdf.

8 House of Commons, Digital, Culture, Media and Sport Committee. Disinformation and 'fake news': Final Report. 18 February 2019. https://publications.parliament.uk/pa/cm201719/cmselect/cmcumeds/1791/1791.pdf.

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policy efforts have been made to reveal who was responsible, and how to find an appropriate solution to online harms. Facebook's responsibility was also raised by the United Nation for enabling incitement to hatred, in regard of the regrettable Rohingya genocide by Myanmar.[9] The COVID-19 related surge of mis- and disinformation gave yet another impetus to the research and policy initiatives of social media responsibility.[10]

What happened on 6 January 2021 may be regarded as another landmark event. The leaving incumbent US President used his social media channel to express his sympathy towards a violent movement attacking the Capitol. After years of exceptional treatment, his account was suspended at Twitter, Facebook and Instagram for violation of the Community Standards. The event demonstrated that social media communication can contribute to accelerate violence, and gave new impetus to the debate on the boundaries of online free speech, as well as the role of social media platforms.

In view of these impacts of social media on society, no surprise that in the past years, instruments to counteract these possible undesirable effects have been considered around the globe. Hardly a week goes by without reports about the introduction of new measures whether it addresses an ancillary copyright (Australia), anti-trust measures including unbundling (USA) or effective measures against disinformation and hate speech (Canada). Against this background, researchers obviously take up the development and sense (global) trends of legal development in this area.

In December 2020, the European Commission issued two draft laws: the Digital Market Act, and the Digital Services Act. These aim to provide a basic legal framework for platform economy and the platform communications environment. Prior to this, the European Commission has fought hate speech and disinformation with various soft instruments, in particular with induced self-regulation, where the European Commission set the goals, convened the industry actors and let them draw up and sign their Code of Practice against Disinformation. The self-assessments

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9 UN Human Rights Council Report of the independent international fact-finding mission on Myanmar. A/HRC/39/64. https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_64.pdf. „Facebook has been a useful instrument for those seeking to spread hate."

10 Wunderman Thompson, The University of Melbourne and Pollfish, World Health Organization (WHO). "Social Media & COVID-19: A Global Study of Digital Crisis Interaction among Gen Z and Millennials. Key Insights." https://covid19-infodemic.com/assets/download/Social_Media_COVID19_Key_Insights_Document.pdf.

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of the Code's implementation have been published by the Commission and evaluated by the European Regulators' Group for Audiovisual Media (ERGA).[11] Even though self-regulation proved less effective than hoped, there seems to be no room for strict legislative intervention because of the complexity of these areas. The goal is to design a stricter cooperation between the industry and the Commission as well as national authorities, amounting to co-regulation. This would include that the Commission will facilitate the drafting of the Code, and regularly monitor and evaluate the achievements and its objectives (read more on this in 1.2. by Jan Kalbhenn).

This volume collects a variety of perspectives, representing a geographical diversity, and drawing inspiration from various sectoral approaches. The editors believe that such a discussion can provide an advantage in the drafting process, which may prove to be a long road.

The structure of this book

The idea of this book developed gradually. The first idea emerged in a café in Münster, whose name preserves the memory of the Westphalian Peace Treaty (1648). The idea has further developed and expanded as the second and third wave of the global pandemic limited all contact to online conferences. This ironically allowed us to widen the planned scope of the workshop series, and integrate researchers from other continents as well. Papers which report about the specific perspectives of the regulatory needs in Japan, Taiwan, Russia and the African continent provide an invaluable insight to understand global processes. The first chapter of the volume includes papers which discuss the regulation of online platforms from wide, systemic perspectives. The first paper attempts to shed light on how the extent of platforms' freedom and competence in defining their own rules and deciding about content moderation is perceived, through court decisions and legal instruments. It argues that it would be of primary importance to define platforms' role and responsibility in the communication chain, realising their unique role in aggregating and ranking content. The following papers discuss and analyse the legislative initiatives from three large jurisdictions. Jan Kalbhenn's writing analyses the European

11 ERGA Report on disinformation: Assessment of the implementation of the Code of Practice. https://erga-online.eu/wp-content/uploads/2020/05/ERGA-2019-report-published-2020-LQ.pdf.

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Union's draft Digital Services Act, with special regard to its rules regarding very large online platforms. Lorna Woods describes the systems approach and the idea of „Statutory Duty of Care", and Sarah Hartmann introduces the debates and policy developments in the US around a reform of the existing legislative framework. The final two papers address innovative approaches to social communication: the writing of Jörg Becker, Bernd Holznagel and Kilian Müller discusses the interoperability of messenger services. This might be a step as decisive as the milestones listed in the first part of this introduction were. The final paper of the first chapter by Mårten Schultz critically explores the Facebook Oversight Board.

The second chapter departs from the usual transatlantic perspective, by including four reports on platform regulation from Taiwan, Japan, India and Latin-America. Taiwan keeps its eyes on the transatlantic legal development and is a favoured hub for the online industry. China's proximity adds a special flavour to its democratic regulatory intentions. The paper by Kuo Wei Wu, Shun-ling Chen and Poren Chiang provides the reader an understanding of this complexity. The Japanese regulatory approach takes the multi-stakeholder view, relying on self- and co-regulation. An overview along with a historical context is provided by Izumi Aizu. India has passed a new regulatory regime in 2021, addressing ethical guidelines for intermediaries and the digital media. This, in the context of freedom of expression is introduced by Siwal Ashwini. The chapter is closed with samples of platform regulation from Latin-American states, with a special focus on copyright by Maria L. Vazquez, with co-authors Maria Carolina Herrera Rubio and Alejandro Aréchiga Morales.

The third chapter examines theme-based regulation of certain aspects of online platform communication. The first and the second paper both explore the media law approach. Bernd Holznagel and Jan Kalbhenn introduce and analyse the amended German Media State Treaty which – as a first in the globe – provided for pluralism measures also for social media platforms. This media regulation takes a comprehensive view to sustain a diverse media sphere, with a special place in it for public broadcasters. Canada, at the time of writing this book, was discussing a new broadcasting legislation, which addressed the streaming services, among others. Michael Geist writes about the bill and the relating controversies in the legal discourse, in particular regarding issues with competition and freedom of expression. The UK, beyond a developing systemic regulation of platforms that has been discussed in chapter 1, also addresses new media with a variety of sectoral laws. These legal concepts, such as data protection, with its implications in advertising law and child protection; competition and consumer protection are elaborated by Lorna Woods.

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The topical discourse in Russia is concerned about finding a balance between the protection of personal data and allowing commercial use of big data, as written by Juliya Kharitonova and Larissa Sannikova.

Hate speech and disinformation have been the major triggers for policymakers' reaction in the past decade. In comparison to previous concerns like pornography, copyright and terrorism, this was more difficult to compartmentalise. Hate speech and disinformation have infiltrated the political discourse and impacted social harmony. The basic structure of societies' and of democratic operation are now at stake. Hate speech and disinformation share the feature that they are at the verge of legality. They are often context-dependent and cannot easily be judged. Some states are more tolerant in dealing with these than others. According to the case law of the European Court of Human Rights, falsity alone is not a sufficient reason to restrict freedom of expression, unless there is a legitimate aim, such as the reputation of others. Restriction of commercial content was found more acceptable by the Court, however, the Court also held that it would be unreasonable to restrict freedom of expression only to generally accepted ideas in a sphere in which uncertainty reigns, which is also the case in relation to the COVID-19 infodemics. The regulation of hate speech shows perhaps the largest divergence around jurisdictions among other types of content. In the past five years, both phenomena entered loudly the highest political circles. This prominence enables a more intense impact and reduces the chances for successful regulation. Chapter 4 addresses hate speech, and Chapter 5 disinformation in various states.

Canadian regulation is discussed in the first chapter: in the fourth, its hate speech legislative process is introduced. It is proving harder than anticipated to strike the balance between freedom of expression and the protection of minorities. Richard Janda's article introduces the existing legal framework, the various policy options and recommends ways to depart from a platform business model that serves to amplify extreme content.

Germany has pioneered the fight of illegal hate speech with its Network Enforcement Act. Despite initial criticism, the law is operative and has been amended twice to extend user rights and enable a tighter regulatory control. Maximilian Hemmert-Halswick provides a thorough description and analysis of the law's operation, relating controversies and amendments.

In the global south, hate speech and its suppression both can cause troubling consequences. Giovanni di Gregorio and Nicole Stremlau discuss with a fresh look how internet shut-downs are employed for censorship,

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and take on the perspective of international law and the humanitarian doctrine to frame information interventions.

International human rights law is explored also by Jacob Mchangama in his essay on over-censorship under the pretext to fight hate speech, with particular focus on South-Africa. With a big geographical leap, we get to Finnish online hate speech. Discriminative online harassment is becoming a social problem that chills the freedom of expression of its victims. A close scrutiny by Päivi Korpisaari and Kristiina Koivukari of the possibilities of further criminalisation concludes that the principles of freedom of expression and of criminal legal guarantees do not leave room for further restriction. Enni Ala-Mikkula examines whether the Finnish labour rules provide guidance to employers to protect their employees from online hate speech.

The fifth chapter discusses the measures in the fight against online disinformation. Trisha Meyer and Alexandre Alaphilippe provide an invaluable account and overview of the self-regulatory responses applied by platforms as a response to the global infodemic. Elda Brogi and Konrad Bleyer-Simon examine disinformation in the light of media pluralism. They introduce the results of the Media Pluralism Monitor in this area, describe the European Digital Media Observatory's activity in relation to disinformation, and discuss European policy solutions. As the last episode in the volume, Ang Peng Hwa and his co-author Gerard Goggin present the counter-disinformation regulation of Singapore and its application.

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