

Internet Law: Class 4

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Class 4 (Wednesday, 21 April 2021)

1. Private ordering and content moderation
2. Network neutrality, search neutrality, and cloud neutrality
3. Antitrust issues in the ISP ecosystem
4. Future of norms on the internet
5. Conclusions—the current realities of the Internet

Liability of Internet Intermediaries

- Non-copyright provisions:
 - 470 U.S.C. 230 (Communication Decency Act)
 - 15 U.S.C. § 1114(2)(B)-(C) (Lanham Act - trademarks)
- 17 U.S.C. 512 – Digital Millennium Copyright Act (“DMCA”)

Crime Enforcement

Criminal Statutes

- CFAA 18 USC 1030
 - Computer Fraud and Abuse Act
- DMCA 17 USC 1201
 - Digital Millennium Copyright Act
- ECPA
 - Electronic Communications Privacy Act
 - Wiretap Act 18 USC 2511
 - Pen Register Statute 18 USC 3121
 - Stored Communications Act 18 USC 2701

18 U.S.C. §2318, 2319, 2319A, 2320; 17 U.S.C. 506

- knowingly trafficking in a **counterfeit label** affixed or designated to be affixed to a phono record or a copy of a motion picture or other audiovisual work
- willful infringement of a **copyright** for purposes of commercial advantage or private financial gain, or through large-scale, unlawful reproduction or distribution of a copyrighted work, regardless of whether there was a profit motive
- without the consent of the performer, knowingly and for the purposes of commercial advantage or private financial gain, **fixing the sounds or sound and images** of a live musical performance, reproducing copies of such a performance from an authorized fixation; **transmitting the sounds or sounds and images** to the public, or distributing, renting, selling, or trafficking (or attempting the preceding) in any copy of an authorized fixation
- intentionally trafficking or attempting to traffic in goods or services and knowingly using a **counterfeit mark** on or in connection with such goods or services

Internet Intermediaries and Fundamental Rights

47 USC 230 (Communications Decency Act, 1996)

(1) TREATMENT OF PUBLISHER OR SPEAKER

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) CIVIL LIABILITY

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

Prager University v. Google

- 9th Cir., 2020
- YouTube tagged several dozen of PragerU's videos as appropriate for the Restricted Mode and therefore third parties could not advertise on the videos
- PragerU claimed violation of the First Amendment, false advertising, and various state law claims
- YouTube is a private entity not subject to Free Speech obligations
- "YouTube may be a pragmatic public square on the Internet, but it is 'not transformed' into a state actor solely by 'providing s forum for speech'."
- YouTube does not perform a public function – a function that is "both traditionally and exclusively governmental."

Biden v. Knight First Amendment Institute

- S. Ct., 5 April 2021
- Whether the First Amendment deprives a government official of his right to control his personal Twitter account by blocking third-party accounts if he uses that personal account in part to announce official actions and policies.
- S. Ct. vacated the lower-court judgment and remanded to dismiss the case as moot

EU Digital Services Act Proposal

Article 12

Terms and conditions

1. Providers of intermediary services shall include information on any restrictions that they impose ... in their **terms and conditions**. That information shall include information on any policies, procedures, measures and tools used for the purpose of **content moderation** ...

2. Providers of intermediary services shall act in a diligent, objective and proportionate manner in applying and enforcing the restrictions referred to in paragraph 1, with due regard to the rights and legitimate interests of all parties involved, **including the applicable fundamental rights** of the recipients of the service as enshrined in the Charter.

EU Digital Services Act Proposal

Article 26

Risk assessment

1. Very large online platforms shall identify, analyse and assess ... **any significant systemic risks** stemming from the functioning and use made of their services in the Union. This risk assessment shall be specific to their services and shall include the following systemic risks:

(a) the dissemination of illegal content through their services;

(b) any **negative effects for the exercise of the fundamental rights** to respect for private and family life, freedom of expression and information, the prohibition of discrimination and the rights of the child ...;

(c) intentional manipulation of their service ...

Texas House Bill 20 (2021)

CENSORSHIP PROHIBITED. (a) A social media platform may not censor a user, a user's expression, or a user's ability to receive the expression of another person based on:

- (1) the viewpoint of the user or another person;
- (2) the viewpoint represented in the user's expression or another person's expression; or
- (3) a user's geographic location in this state or any part of this state.

"Censor" means to block, ban, remove, deplatform, demonetize, deboost, restrict, deny equal access or visibility to, or otherwise discriminate against expression."

Texas House Bill 20 (2021)

- The U.S. District Court for the Western District of Texas agreed that the law is facially unconstitutional under the First Amendment and preliminarily enjoined the Texas attorney general from enforcing the statute.
- 11 May 2022: The U.S. Court of Appeals for the Fifth Circuit stayed that preliminary injunction.
- 31 May 2022: The U.S. Supreme Court vacated the order of the U.S. Court of Appeals for the Fifth Circuit staying the district court's preliminary injunction.

Texas House Bill 20 (2021)

- J. Alito, Thomas, and Gorsuch dissenting
- “The law before us is novel, as are applicants’ business models. Applicants claim that §7 of HB20 interferes with their exercise of ‘editorial discretion,’ and they maintain that this interference violates their right ‘not to disseminate speech generated by others.’”
- “It is not at all obvious how our existing precedents, which predate the age of the internet, should apply to large social media companies...”

Private Ordering

- “Private ordering is the regulation, enforcement and dispute resolution by private actors, as opposed to actors in the public legal order.”
- The role of ISPs in private ordering on the internet

eBay Dispute Resolution

- eBay first launched in 1995
- In 1999 Professor Ethan Katsh launched a pilot ODR program for eBay
- Later SquareTrade.com provided mediation services to eBay
- Since 2003, eBay's ODR in-house

eBay Dispute Resolution

- Types of disputes:
 - Payment disputes
 - Quality disputes
 - Feedback (reputation score) disputes
 - Owner (IP) rights disputes
- A “staircase” design:
 - Problem diagnosis
 - Working with the complainant
 - Direct negotiation assisted by technology
 - Evaluation phase

eBay Dispute Resolution

- Lessons Learned (Schmitz & Rule):
 - Resolutions should be fast and easy
 - Discoverability and easy access are very important
 - Consumers are not motivated by giveaways
 - Satisfaction is not a good way to measure the effectiveness of resolutions programs
 - Sellers have the advantage
 - You have got to set the right tone
 - Do not presume everything is fraud
 - Outcomes have to be consistent and fair
 - Resolution processes do not need to be binding
 - Resolution systems need to be continuously learning

Network Neutrality

Network Neutrality

- Professor Tim Wu
- “Network neutrality is best defined as a network design principle. The idea is that a maximally useful public information network aspires to treat all content, sites, and platforms equally. This allows the network to carry every form of information and support every kind of application.”
- “The principle suggests that information networks are often more valuable when they are *less* specialized – when they are a platform for multiple uses, present and future.”

http://www.timwu.org/network_neutrality.html

Network Neutrality

- De facto monopoly of broadband providers vis-à-vis individual subscribers
 - Multi-homing not widely practiced
 - High switching costs
- A gatekeeper position vis-à-vis edge providers
- Vertical integration in the industry
- Scarcity of broadband connection at peak hours

Network Neutrality: The 2010 Order

- “Open Internet Order”
- For “broadband”: “Broadband or high-speed Internet access allows users to access the Internet and Internet-related services at significantly higher speeds than those available through ‘dial-up’ services.”
- Bright-line rules
 - No blocking
 - No unreasonable discrimination
- Transparency rules
- Fixed broadband providers classified as an “information service”
- Partly invalidated in Verizon v. FCC (D.C.Cir. 2014)

Network Neutrality: The 2015 Order

- “Protecting and Promoting the Open Internet”
- Fixed broadband providers classified as a “telecommunications service”
- Bright-line rules
 - No blocking
 - No throttling
 - No paid prioritization
- No unreasonable interference or unreasonable disadvantage to consumers or edge providers
- Enhanced transparency rules

Network Neutrality: The 2018 Order

- “Restoring Internet Freedom”
- Fixed broadband providers classified as an “information service”
- A “light-touch regulatory scheme”
- Eliminated the bright-line rules of the 2015 Order
 - (no blocking, throttling, and paid prioritization)
- Scaled-back transparency rules
 - No exemption for small providers
- Antitrust law and consumer protection laws better forms of protection

Antitrust / Competition Law

“Today’s digital platforms provide avenues for historically unprecedented amounts of speech, including speech by government actors.

Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties.

We will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms.”

Justice Thomas in his concurring opinion in
Biden v. Knight First Amendment Institute, 593 U.S. – (2021), 5 April 2021

Antitrust and Intermediaries

- U.S. antitrust cases against Google as examples
- Monopoly position on the market
 - “General search services”
 - Search advertising

Antitrust and Intermediaries

- Abuse of the monopoly position
 - Exclusion of competition
 - Payments to Apple for exclusivity
 - Pre-setting Chrome as the default browser, including through Android
 - Anti-forking, pre-installation agreements, and revenue share agreements
 - Default on voice assistant devices, in automobiles
 - Limitation on SA360 interoperability
 - Directing consumers directly to particular destinations

Antitrust and Intermediaries

- Google offered concessions to the U.S. Department of Justice
- Bloomberg, 14 July 2022 (Leah Nylen, *DOJ Poised to Rebuff Google Concessions, Clearing the Way for Antitrust Suit*)

“The US Justice Department is likely to reject concessions offered by Alphabet Inc., clearing the way for an antitrust lawsuit over Google’s dominance of the online advertising market, according to people familiar with the matter.

While Google has made at least one settlement offer to the Justice Department’s antitrust division to address its concerns, the agency is poised to file a lawsuit in the coming weeks, two people said, speaking anonymously to discuss a confidential probe.”

Antitrust and Intermediaries - Cases

Against Google:

- EU:
 - abusing search dominance to favor its own shopping product,
 - abusing its mobile operating system dominance to favor its own services,
 - suppressing competition in digital advertising
- U.S.:
 - monopolizing search and online advertising,
 - monopolizing mobile app distribution and in-app payments
- Other countries:
 - monopolizing mobile operating systems,
 - monopolizing mobile payments

Antitrust and Intermediaries - Cases

Against Facebook:

- EU:
 - using its digital advertising market power to improperly compete against third-party advertisers on its platform
- U.S.:
 - suppressing competition from social media rivals
- Other countries:
 - monopolizing the world's supply of gifs,
 - using its digital advertising market power to improperly compete against third-party advertisers on its platform,
 - abusing its monopoly on social media to improperly harvest user data

Antitrust and Intermediaries - Cases

Against Apple:

- EU:
 - monopolizing mobile payments and app distribution,
 - monopolizing mobile music streaming
- U.S.:
 - monopolizing in-app purchases
- Other countries:
 - monopolizing mobile app distribution

Antitrust and Intermediaries - Cases

Against Amazon:

- EU:
 - using its e-commerce monopoly to unfairly compete against third-party sellers
- U.S.:
 - suppressing competition in e-commerce
- Other countries:
 - monopolizing e-commerce

EU Digital Markets Act Proposal

- Recital 5

“... Whereas Articles 101 and 102 TFEU remain applicable to the conduct of gatekeepers, their scope is limited to certain instances of market power (e.g. dominance on specific markets) and of anti-competitive behaviour, while enforcement occurs ex post and requires an extensive investigation of often very complex facts on a case by case basis. Moreover, existing Union law does not address, or does not address effectively, the identified challenges to the well-functioning of the internal market posed by the conduct of gatekeepers, which are not necessarily dominant in competition-law terms.”

EU Digital Markets Act Proposal

Article 3

Designation of gatekeepers

1. A provider of core platform services shall be designated as gatekeeper if:
 - (a) it has a significant impact on the internal market;
 - (b) it operates a core platform service which serves as an important gateway for business users to reach end users; and
 - (c) it enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future.
2. A provider of core platform services shall be presumed to satisfy ...

EU Digital Markets Act Proposal

Article 5

Obligations for gatekeepers

In respect of each of its core platform services ... a gatekeeper shall:

(a) refrain from combining personal data sourced from these core platform services with personal data from any other services offered by the gatekeeper or with personal data from third-party services...

(g) provide advertisers and publishers to which it supplies advertising services, upon their request, with information concerning the price paid by the advertiser and publisher, as well as the amount or remuneration paid to the publisher, for the publishing of a given ad and for each of the relevant advertising services provided by the gatekeeper.

EU Digital Markets Act Proposal

Article 6

Obligations for gatekeepers susceptible of being further specified

1. In respect of each of its core platform services ... a gatekeeper shall:

(b) allow end users to un-install any pre-installed software applications on its core platform service without prejudice to the possibility for a gatekeeper to restrict such un-installation in relation to software applications that are essential for the functioning of the operating system or of the device and which cannot technically be offered on a standalone basis by third-parties;

(c) allow the installation and effective use of third party software applications or software application stores using, or interoperating with, operating systems of that gatekeeper and allow these software applications or software application stores to be accessed by means other than the core platform services of that gatekeeper. ...

A Declaration for the Future of the Internet

- April 2022
- 33 signatories, including the European Union and the United States (as of 15 July 2022)
- “Adhering to the principles contained in the Declaration does not create legally binding effects for the European Union and its Member States and does not preempt or prejudice our position in other fora.”

A Declaration for the Future of the Internet

“Digital technologies should be produced, used, and governed in ways that enable trustworthy, free, and fair commerce; avoid unfair discrimination between, and ensure effective choice for, individual users; foster fair competition and encourage innovation; promote and protect human rights; and, foster societies where:

- Human rights and fundamental freedoms, and the well-being of all individuals are protected and promoted;
- All can connect to the Internet, no matter where they are located, including through increased access, affordability, and digital skills;
- Individuals and businesses can trust the safety and the confidentiality of the digital technologies they use and that their privacy is protected;

A Declaration for the Future of the Internet

- Businesses of all sizes can innovate, compete, and thrive on their merits in a fair and competitive ecosystem;
- Infrastructure is designed to be secure, interoperable, reliable, and sustainable;
- Technology is used to promote pluralism and freedom of expression, sustainability, inclusive economic growth, and the fight against global climate change.”

A Declaration for the Future of the Internet

Protection of Human Rights and Fundamental Freedoms

...

- Reaffirm our commitment that actions taken by governments, authorities, and digital services including online platforms to reduce illegal and harmful content and activities online be consistent with international human rights law, including the right to freedom of expression while encouraging diversity of opinion, and pluralism without fear of censorship, harassment, or intimidation.
- Protect and respect human rights and fundamental freedoms across the digital ecosystem, while providing access to meaningful remedies for human rights violations and abuses, consistent with international human rights law.

A Declaration for the Future of the Internet

A Global Internet

- Refrain from government-imposed internet shutdowns or degrading domestic Internet access, either entirely or partially.
- Refrain from blocking or degrading access to lawful content, services, and applications on the Internet, consistent with principles of Net Neutrality subject to applicable law, including international human rights law.

...

Class 1 (11 July 2022):

1. Introduction and administrative matters
2. The terms “internet” and “internet law” in context
3. Physical infrastructure and regulation of the Internet
4. Localization on the internet and geolocation
5. Geoblocking and circumvention of geoblocking
6. Localization requirements
7. Regulatory jurisdiction on the internet

Class 2 (13 July 2022):

1. Adjudicatory jurisdiction on the internet
2. Choice of law
3. Recognition and enforcement of foreign judgments
4. Internet domain names
5. Metatags, keywords, and adwords

Class 3 (15 July 2022):

1. Immunity and liability of internet service providers
2. Notice and takedown under the DMCA
3. DSM Directive
4. Immunity from suit under the CDA
5. Blocking orders

Class 4 (18 July 2022):

1. Private ordering and content moderation
2. Network neutrality, search neutrality, and cloud neutrality
3. Antitrust issues in the ISP ecosystem
4. Future of norms on the internet
5. Conclusions—the current realities of the Internet

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