

# ← Public Copy of Syllabus: Regulating Internet Speech Platforms

---

## Regulating Internet Speech Platforms

Daphne Keller

Internet platforms like Google and Facebook play an enormous role in our online speech and information environment today. This class will review the Intermediary Liability laws that shape platforms' decisions about online content, and examine how successfully those laws achieve their goals. Students will be encouraged to think pragmatically about the legal, operational, and product design choices platforms may make in response to particular laws, drawing in part on the instructor's experience handling such questions as Associate General Counsel at Google. Readings and discussions will focus primarily on current US law, with some attention to non-U.S. (mostly European) laws and to proposed or pending legislation.

Important themes of the class include Constitutional and human rights constraints on Intermediary Liability laws; legal limits (or lack thereof) on platforms' enforcement of privatized speech rules under their Community Guidelines or Terms of Service; global enforcement of national laws requiring platforms to remove content; and connections between platform liability and other areas of law such as consumer protection or privacy.

### Class Agenda and Reading

#### Day 1 - September 25 - Introduction

*We will spend time on course logistics, and discuss the Lessig article as a frame for questions about how the law reconciles technical, commercial, and operational realities with societies' policy goals or constitutional mandates.*

#### Reading:

- Larry Lessig, [The Law of the Horse](#) (main text, you can skip the footnotes). *Don't worry about the specific laws or technologies he discusses. Focus on the arguments about regulation, power, and constitutional rights, and how the Internet might change legal thinking on these topics.*

#### Day 2 - October 2 - Content Takedown in Practice

*To craft smart regulations for platforms and online content, we need to understand how they handle user content under various rule systems today - what works, what doesn't, and why. We will discuss that topic for most of the class, then spend about fifteen minutes talking with CIS Intermediary Liability Fellow Joan Barata about international developments and the role of international human rights law.*

#### Reading:

- Kate Klonick, [The New Governors](#) pages 1625-1648
  - *Optional:* Alex Feerst, [Your Speech, Their Rules](#)
- Jennifer Urban, Briana Schofield, Joe Karaganis, [Notice and Takedown in Everyday Practice](#) pages 1-13, 28-34, 57-60 ("Fingerprinting and Filtering"), 66-67 ("Case Study: SoundLocker")
- Dave Lee, [Tech Firms Hail "Progress" in Blocking Terror](#)

#### Day 3 - October 9 - Rules versus Standards: U.S. Copyright and the DMCA

*What are the pros and cons of setting flexible standards for platforms -- versus giving them clear rules and steps to follow? We will consider that high level question, and the more concrete question of what workable rules and standards would look like. Much of our discussion will focus on one of the most robustly litigated and theorized Intermediary Liability laws, the U.S. DMCA.*

#### Reading:

## ← Public Copy of Syllabus: Regulating Internet Speech Platforms

- Optional: [Orban et al](#) pp. 10-15 (a good, quick DMCA overview)
- [UMG v. Shelter Capital](#) (abridged teaching edit). *This case illustrates the situation of intermediaries under DMCA rules.*
- [The Manila Principles](#) (click to expand and read each of the numbered sections on the page)

### Day 4 - October 16 - The eCommerce Directive and European Law Developments

**Note: These readings may change if important new documents are released.** European platform liability law is changing very rapidly. Changes arise through both legislation and case law; and at the level of individual EU Member States, possibly-soon-to-be-ex-EU Member States, EU-wide legislation (Regulations and Directives), EU fundamental rights law under the EU Charter, and Council of Europe human rights law under the European Convention on Human Rights. This reading selection is intended to provide a cross-section of developing issues. Class discussion and the notes below put the readings in context.

- Aleksandra Kuczerawy & Jef Ausloos, [From Notice-and-Takedown to Notice-and-Delisting: Implementing Google Spain](#), pp. 220-246 (i.e. don't read the appendices). *This reading is included in part because it provides a primer on recurring Intermediary Liability issues and the eCommerce Directive. For that reason, I recommend reading it first, even though it also treats a separate topic, the "Right to Be Forgotten." Important rulings clarifying the "Right to Be Forgotten" are due from the CJEU on September 24th.*
- Recitals 40-49 and Articles 12-15 of the [E-Commerce Directive](#). *This is the EU-wide law that, as implemented in national law of Member States, has governed platform liability for almost two decades. The remaining readings, below, all relate to legislative initiatives to explicitly or implicitly change its rules.*
- EU Digital Services Act - leaked [note](#) 2019. *This is the newly announced EU-level effort to overhaul many aspects of platform regulation.*
- Civil Society [Letter](#) Re Terrorist Content Regulation. *The Regulation itself has passed through the EU Commission, Council, and Parliament. The final version is currently being negotiated by those bodies.*
- UK [Online Harms White Paper](#), pp. 5-10, 41-47, and 53-58. *This is part of a broader trend toward (1) a "duty of care" approach, (2) extending media regulation models to Internet platforms, and (3) regulating both unlawful and merely "harmful" content online.*
  - Optional: Article 17 of the 2018 EU [Copyright Directive](#). *This has already passed into law, and is awaiting Member State implementation in most countries. It is important but hard to parse without learning a lot of additional EU copyright law. We will not focus on it.*

### Day 5 - October 23 - CDA 230 and American Law Developments

The CDA has, with the DMCA, been one of the two pillars of U.S. Intermediary Liability law for two decades. It is widely considered to be the law that "[made Silicon Valley](#)" or "[created the Internet](#)." Today, it is under almost daily attack.

- [Communications Decency Act 230](#) (CDA 230)
- Case about plaintiffs asking platform to take down more content - **reading to be determined by class vote:**
  - **Either** [Roommates.com 9th Circuit en banc opinion](#). *This is the canonical case defining key limits of CDA 230 immunity for unlawful user content. If you work in this area, it's the one you need to know best.*
  - **Or** [Herrick v. Grindr S.D.N.Y. Motion to Dismiss ruling](#). *This explains the Roommates case holding well, and is more contemporary and overlaps well with some other areas - privacy and products liability. The 2nd Circuit upheld this ruling, and plaintiff is petitioning for Supreme Court review.*
- Case about plaintiffs asking platform to take down less content: [King v. Facebook](#). *Is this case different from the numerous, more widely reported cases saying platforms are biased against political conservatives? Should it have been resolved under 230(c)(2) instead of (c)(1)?*
- Proposed legislative changes - **reading will be updated closer to class.** Candidates include any of three bills from Sen. [Hawley](#) or one from Rep. [Gosar](#).

## ← Public Copy of Syllabus: Regulating Internet Speech Platforms

~~Note: Final paper topic proposals are due by next week's class, November 6.~~

- [Smith v. California](#) (read majority opinion only)
  - Optional: [CDT v. Pappert](#)
- [Belen Rodriguez v. Google](#) (abridged teaching edit)
- Danielle Citron and Ben Wittes, [The Internet Will Not Break](#), pp. 418 (top of “Legislative Proposal” section) - 423
- Eric Goldman, [Why Section 230 Is Better Than the First Amendment](#), pp. 8-16 (starting at Section III). *For context, there are a half dozen articles and arguments from the past year or two about what Intermediary Liability law the First Amendment might mandate if we litigated that question for years. This excerpt focuses on the individual and societal costs of having to litigate those questions.*
- Daphne Keller, [Build Your Own Intermediary Liability Law](#)

### Day 7 - November 6 - Platform Speech Rules and the Private Rule of Law

*The Supreme Court has called platforms like Facebook and YouTube “the modern public square.” That doesn’t mean platform operators are bound by the First Amendment or other rules that applied in the real public square, though. What constraints, if any, does the law place on platforms’ discretionary content rules under Community Standards or Terms of Service?*

**Note: Final paper topic proposals are due today.**

- Jack Balkin, [Free Speech Is a Triangle](#), Sections I.A through II.B (i.e., everything prior to II.C, “Privatized Bureaucracy”)
  - Optional: For a rare U.S. case assessing state action “laundering” through pressure on private intermediaries, see [Backpage v. Dart](#)
  - Optional: For a very concrete human rights law-based review of real-life state/private content enforcement system, see Ken Macdonald, [A Human Rights Audit of the Internet Watch Foundation](#)
- [Jian Zhang v. Baidu](#)
  - Optional: Daphne Keller, [Who Do You Sue?](#) pp 11-12 (U.S. cases against platforms), 12-13 (cases against platforms in Brazil and Germany), 15-17 (Supreme Court case law relevant for users’ First Amendment claims), 17-22 (Supreme Court case law relevant for platforms’ First Amendment claims).
- Evelyn Douek, [U.N. Special Rapporteur’s Latest Report on Online Content Regulation Calls for ‘Human Rights by Default’](#)
- Daphne Keller, [Platform Content Regulation: Some Models and Their Problems](#)
- Review: [Communications Decency Act 230](#) (CDA 230) Section (c)(2)

### Day 8 - November 13 - Content Takedown Across Borders

*When can courts in one country impose their content removal requirements globally? **Reading to be determined** based on September 24 CJEU ruling in [Google v. CNIL](#), but may include items listed below.*

**Note: If you would like me to review a draft of your final paper, or other mid-stage work in preparation for the paper, email it by next week’s class, November 20.**

- Dan Svantesson, *Jurisdiction in 3D – “scope of (remedial) jurisdiction” as a third dimension of jurisdiction, sent to class by email*, Parts A-C (end at top of page 67). *This was as close to an introduction/overview as I could find. Don’t worry about remembering the specific doctrines or cases he talks about!*
- [Comparison](#) of cross-border requests for user data and cross-border requests to remove content, excerpted from AI Gidari 2017 piece
- [Google v. CNIL](#) (CJEU, October 2019) (abridged teaching edit)
- [Google v. Equustek](#) (Canadian Supreme Court, 2017) (abridged teaching edit). *Be aware that Google subsequently obtained a U.S. court order saying the Canadian ruling was unenforceable here. It then returned to a lower Canadian court, showed it the U.S. order, and said it showed a conflict of law sufficient for Canadian courts to change the global takedown requirement. The Canadian court disagreed, and the global order remains in effect.*

## ← Public Copy of Syllabus: Regulating Internet Speech Platforms

- [Response Papers](#) from other students

### Day 9 - November 20 - Converging Legal Regimes

*Throughout this class, we have noted overlap between the concerns of Intermediary Liability and Content Regulation laws, and those of other fields such as Competition and Privacy law. What issues arise from those points of overlap? Can we regulate wisely without examining them? These issues are under-examined in the literature and in legal proposals, so we have a patchwork of (mostly short) reading assignments this week, and lots of leads for people who want to dig deeper.*

**Note: If you would like me to review a draft of your final paper, or other mid-stage work in preparation for the paper, email it by today, November 20.**

*Are the problems with major platforms' "information gatekeeper" power really just competition problems? Can well-intentioned regulation backfire by entrenching incumbents?*

- Cory Doctorow, Regulating [Big Tech makes them stronger, so they need competition instead](#)
  - Optional: Cory Doctorow, [Adversarial Interoperability: Reviving an Elegant Weapon From a More Civilized Age to Slay Today's Monopolies](#)
  - Optional: Mike Masnick, [Protocols, Not Platforms](#)

*How can we reconcile the competition benefits of making platforms share data with the potential privacy harms (think Cambridge Analytica)?*

- Kevin Bankston, [How We Can 'Free' Our Facebook Friends](#)
  - Optional: Daphne Keller [Q&A](#) on Cambridge Analytica

*What other laws have potential unintended consequences in this area?*

- Corynne McSherry, [Want More Competition in Tech? Get Rid of Outdated Computer, Copyright, and Contract Rules](#). What McSherry describes is the tip of the iceberg. Scraping cases often involve dusty-sounding claims like Trespass to Chattels and more.
  - Optional: Orin Kerr's [summary](#) of *HiQ v. LinkedIn* CFAA case

*Are questions about speech and questions about markets converging? What does that mean for platform regulation in today's Supreme Court? How do regulations for Internet access providers (like ISPs) relate to regulation of user-facing platforms (like Facebook)?*

- [USTA v. FCC](#), denial of rehearing en banc, excerpt from dissent of J. Kavanaugh (abridged teaching version)
  - Optional: Annemarie Bridy, [Remediating Social Media](#). Bridy discusses reasons to treat access providers and user-facing platforms differently.
  - Optional: Harold Feld, [I Accidentally Write A Book On How To Regulate Digital Platforms](#). Feld discusses lessons from telecommunications regulation.
  - Optional: Matthew Prince, [Why We Terminated the Daily Stormer](#). Prince's company, Cloudflare, generally wants to be treated as infrastructure or even (sort of...) as a common carrier, but faces demands to act more like a curator.

*How important is transparency about platforms' real takedown operations for public discussion and regulation? Is transparency adequate for this purpose if it reveals only aggregate data (like voluntary transparency reports and mandated NetzDG reporting in Germany), or do independent researchers need access to concrete takedown examples (the kind of information Jennifer Urban's team had for the reading on Day 2)? Can meaningful transparency be resolved with other legal goals of content regulation?*

- Inform, [News: German Court orders Google not to link to Lumen database showing takedown order](#)
- [Excerpt](#) from Article 29 Working Party Guidelines on the Implementation of the Right to Be Forgotten (full document available [here](#))
  - Optional: NetzDG reports summarized and linked to in Heidi Tworek and Paddy Leerssen, [An Analysis of Germany's NetzDG Law](#)
  - Optional: Spandana Singh and Kevin Bankston, [The Transparency Reporting Toolkit: Content Takedown Reporting](#)