Platform Society: Copyright, Free Speech, and Sharing on Social Media Platforms

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Cover Page Footnote

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I.   COPYRIGHT REGIMES & AUTOMATED CONTENT MODERATION PANEL

Moderated by Ron Lazebnik,[1] the Copyright Regimes & Automated Content Panel focused on the development of copyright liability in different legal regimes and the difficulties in protecting

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[1]   Ron Lazebnik, https://www.fordham.edu/info/23156/ron_lazebnik/5479/full_bio [https://perma.cc/3GDF-RYZE].

copyright-holders internationally due to the ease in which content can cross international borders. Professor Lazebnik framed the discussion around the contrast between Section 512 of the U.S. Digital Millennium Copyright Act ("DMCA"),[2] which does not require active monitoring for copyright infringements, and Article 17 of the European Union's ("E.U.") Directive on Copyright in the Digital Single Market,[3] which does mandate active monitoring for copyright infringements.[4] Panelists included Pamela Samuelson, Director of the Berkeley Center for Law & Technology and Bacon–Kilkenny Visiting Professor of Law at Fordham University School of Law[5]; Giuseppe Mazziotti, Ph.D., Assistant Professor of Law at Trinity College Dublin[6]; Jennifer L. Pariser, Vice President, Copyright & Legal Affairs, Motion Picture Association of America[7]; Nora Choueiri, Senior Legal Counsel at Dailymotion[8]; and Brian Carver, Copyright Counsel at Google LLC.[9]

Pamela Samuelson's segment addressed the American copyright regime with particular focus on the DMCA framework for Internet Service Provider ("ISP") liability. The DMCA implemented a takedown regime codified in Section 512.[10] The DMCA framework

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[2]   Digital Millennium Copyright Act, 17 U.S.C. § 512 (2018).

[3]   Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/19/EC, 2019 O.J. (L 130) 92 [hereinafter Directive 2019/790], *available at* https://eur-lex.europa.eu/eli/dir/2019/790/oj [https://perma.cc/3KXQ-AGN5].

[4]   Directive (EC) 2001/29 of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2019 O.J. (L 167) 10 [hereinafter Directive 2001/29], *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001L0029 [https://perma.cc/2APR-DPNA].

[5]   Pamela Samuelson, https://www.fordham.edu/info/23193/school_of_law_visiting_faculty/10734/pamela_samuelson [https://perma.cc/G5TB-43DB]. Pamela Samuleson is also the Richard M. Sherman Distinguished Professor of Law at Berkeley Law School.

[6]   Dr. Giuseppe Mazziotti, https://www.tcd.ie/research/profiles/?profile=mazziotg [https://perma.cc/RFG6-X87Y].

[7]   Jennifer L. Pariser, https://www.pli.edu/faculty/jennifer-l.-pariser-10585 [https://perma.cc/9ZAW-8G62].

[8]   Nora Choueiri, https://www.linkedin.com/in/nora-choueiri (last visited Nov. 20, 2019).

[9]   Brian Carver, https://www.linkedin.com/in/brianwcarver (last visited Nov. 20, 2019).

[10]   *See generally* Religious Tech. Center v. Netcom On-Line Comm's, 907 F. Supp. 1361 (N.D. Cal. 1995). The DMCA was adopted in part based on this decision. *See* Emily M.

allows individuals to submit takedown notices which prompt the content provider to review for copyright infringement, and, if there is a violation, take down the infringing work.[11] The DMCA provides content providers safe harbors from strict liability since they are not required to monitor all content they post.[12] Professor Samuelson emphasized that the current system is not perfect, and the effects of the American system should be evaluated and compared to the effects of the EU's system. Samuelson summarized a study by UC Berkley and Columbia University researchers called "Notice and Takedown in Everyday Practice,"[13] and explained how the current copyright regimes have different influences on large and small ISP companies. Samuelson concluded that the differences between the DMCA and the E.U.'s Directive can be attributed to these jurisdictions' different political environments.

Giuseppe Mazziotti's segment focused on the E.U. Copyright Directive. Mazziotti described the European political climate as very diverse, even within political groups. As a result, the Directive took over two years to implement after it was originally proposed and remained a point of controversy between the European Parliament (representing citizens) and the E.U. Council (an intragovernmental body).[14] Mazziotti stated that the goal of the Directive is to support the content industries, and by doing so, Article 17 makes the platform directly liable for infringement issues.[15] The content industries are particularly important in European countries because of their impact on politics. Mazziotti emphasized that the Directive communicates that the European Parliament is satisfied with how the world is changing regarding the internet and copyright regimes; however, the Parliament is not satisfied with how traditional industries are being deprived of the power to monetize and control their content. Mazziotti clarified that individual Member States need to implement the Directive through their own laws.

Asp, *Section 512 of the Digital Millennium Copyright Act: User Experience and User Frustration*, 103 Iowa L. Rev. 751, 759 (2018).

[11]   *See* Directive 2019/790, *supra* note 3.

[12]   *See id.*

[13]   *See generally* Jennifer M. Urban et al., *Notice and Takedown in Everyday Practice* (U.C. Berkeley Public Law Research Paper No. 2755628, 2017).

[14]   *See* Directive 2019/790, *supra* note 3.

[15]   *See* Directive 2001/29, *supra* note 4.

Jennifer L. Pariser's segment approached the U.S. notice-and-takedown regime from the content-holder's perspective. Pariser explained that this regime previously required copyright holders to send a separate notice each time a content provider posted a video.[16] If a single website posted copyrighted content in different places, the copyright holder had to send a notice of removal for each direct link. This caused a flood of notices and takedowns.[17] Pariser explained that the current regime is massively ineffective and expensive for both the content-holders and media platforms. The lack of a national regulation for combatting online piracy has prevented the system from becoming more effective. Pariser emphasized that due to the tidal wave of notices, content providers do not have time to review individual files to determine if they have a valid fair use defense. Pariser suggested that, at a minimum, the United States should implement a national system that agrees on the format of the notices. She opined that this would continue to make the process more efficient, though still not necessarily more effective.

Nora Choueiri applied the perspective of a platform owner during her segment and focused on how Article 17 affects video-hosting platforms such as her employer, Dailymotion.[18] First, Choueiri distinguished the DMCA from Article 17, explaining that the DMCA has a safe harbor provision for online service providers. The DMCA does not require monitoring, though does mandate use of take-down provisions.[19] She contrasted this regime with France, which adopted the E.U. Directive by passing its own copyright law requiring content-hosting sites to obtain—or at least make a good effort to obtain—authorization from every copyright holder whose material they post. France's law does not require content hosting sites to monitor every video that is posted; yet the law instructs these

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[16]   *See* Terrica Carrington, *Twenty Years of the DMCA: Notice and Takedown in Hindsight (Part I)*, COPYRIGHT ALLIANCE BLOG (Oct. 26, 2018), https://copyright alliance.org/ca_post/dmca-notice-and-takedown/ [https://perma.cc/HCM7-FRF6].

[17]   BRUCE BOYDEN, CTR. FOR THE PROT. OF INTELLECTUAL PROP., THE FAILURE OF THE DMCA NOTICE AND TAKEDOWN SYSTEM: A TWENTIETH CENTURY SOLUTION TO A TWENTY-FIRST CENTURY PROBLEM 1 (2013), https://cpip.gmu.edu/2013/12/05/the-failure-of-the-dmca-notice-and-takedown-system-2/ [https://perma.cc/7RB8-4KQ8].

[18]   DAILYMOTION, https://www.dailymotion.com/us [https://perma.cc/9USX-F4CY].

[19]   *See* Directive 2019/790, *supra* note 3.

companies to use takedown notices.[20] Choueiri commented that sites like Dailymotion receive thousands of takedown notices every month, though many of these notices are from people fraudulently attempting to remove their competition. Choueiri explained that Dailymotion has chosen to address copyright infringement beyond what the law requires, such as by using upload filter technology that scans all uploaded videos to detect infringement.[21]

Brian Carver discussed Google's copyright-removal and rights-management tools. He argued that while sophisticated matching technologies can automate some aspect of this work, they will always require human judgment and management to reach appropriate outcomes. Carver explained that one of Google's tools for takedown requests is a trusted content removal program that can be used by content owners who need to make takedown requests in bulk.[22] Carver also identified Google's implementation of the Copyright Match Tool[23] which serves to identify nearly identical re-uploads and present them to the copyright owner and the first uploader in order to determine whether these two parties collaborated in uploading content or if an infringement occurred. Carver discussed how Google affords content owners the choice to monetize the reposting of their content or else block their content from being reposted instead of constantly sending out takedown notices. Carver argued that one of Google's most difficult copyright challenges is the difficulty in distinguishing what is actually unauthorized content.

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[20] *See* Directive 2001/29, *supra* note 4.

[21] *Dailymotion Announces Full Implementation of INA Technology for Detection of Copyrighted Video*, BUSINESSWIRE (Feb. 25, 2008, 8:45 AM), https://www.businesswire.com/news/home/20080225005530/en/Dailymotion-Announces-Full-Implementation-INA-Technology-Detection [https://perma.cc/BB84-V4A2].

[22] *See Trusted Copyright Removal Program Guidelines*, GOOGLE LEGAL HELP, https://support.google.com/legal/answer/7421674?product=websearch [https://perma.cc/89FX-GQSA]. To illustrate this point, Carver pointed to Google's 2018 Transparency Report, which showed that Google removed 700 million URLs that year, 75 percent of which never made it to the search index in the first place. *See Transparency Report*, GOOGLE, https://transparencyreport.google.com/?hl=en [https://perma.cc/74JR-YQH9].

[23] *See Copyright Match Tool*, YOUTUBE HELP, https://support.google.com/youtube/answer/7648743?hl=en [https://perma.cc/N3BZ-4C76].

II. HUMAN DIGNITY, AGENCY & ALGORITHMIC BIAS PANEL

Moderated by Andrew Selbst,[24] the *Human Dignity, Agency & Algorithmic Bias* Panel discussed the manifestations and impact of algorithmic bias in social media content moderation. The Panel explored various hot button topics in our society ranging from housing to free speech while sharing perceptive insight on ways to deal with algorithmic bias.

The Panel included Ana-Andreea Stoica, Ph.D Candidate of Computer Science at Columbia University[25]; Diane L. Houk, Of Counsel at Emery Celli Brinkerhoff & Abady LLP[26]; Rebecca Crootof, Assistant Professor of Law at University Richmond School of Law[27]; and Charlton D. McIlwain, Professor of Media, Culture and Communication at New York University.[28]

Ana-Andreea Stoica outlined the dangers of algorithmic bias and offered possible solutions to mitigate them. She first identified two interrelated sources of algorithmic bias: the first being algorithms that reflect the pre-existing human biases and the second being data sets themselves that the algorithms process. Although algorithms cannot inherently possess a discriminatory intent, they can still have a discriminatory impact due to either the implicit or explicit biases of their human programmers. These biases inadvertently added through the necessity of human programmers amplify various types of biases in our society.[29]

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[24]   Andrew Selbst, https://datasociety.net/people/selbst-andrew/ [https://perma.cc/4KMT-9PCK]. Andrew Selbst is a Postdoctoral Scholar at the Data & Society Research Institute.

[25]   Ana-Andreea Sotica, http://www.columbia.edu/~as5001/ [https://perma.cc/3ECL-YCPW].

[26]   Daine L. Houk, https://www.ecbalaw.com/our-people/diane-l-houk/ [https://perma.cc/4Q2C-MEH5].

[27]   Rebecca Crootof, https://law.richmond.edu/faculty/rcrootof/ [https://perma.cc/MZQ9-RD7K].

[28]   Charlton D. McIlwain, https://steinhardt.nyu.edu/people/charlton-mcilwain [https://perma.cc/A8N6-CXBT].

[29]   Sara Hajian, Francesco Bonchi & Carlos Castillo, Algorithmic Bias: From Discrimination Discovery to Fairness-Aware Data Mining at the 22nd ACM SIGKDD International Conference on Knowledge Discovery and Data Mining (Aug. 2016), https://www.isi.it/wp_blobs/publication/document/tut026.pdf [https://perma.cc/P2HA-MNY8].

Intuition might suggest that designing a fair algorithm is a cure. Yet, Stoica pointed out that people have different notions of fairness and, more importantly, what is fair in one algorithm might not be fair in another. Accordingly, she proposed a case-by-case approach to evaluate potential algorithmic biases. This approach weeds out bias by identifying biases inherent in data and properly contextualizing them. Contextualization, Stoica noted, depends on the purpose of an algorithm. Furthermore, Stoica noted that our society needs to demand more transparency from content moderators because their decisions can have a long-term influence on real-life human interactions. Otherwise, content moderation ends up stoking polarization through people believing their voices are arbitrarily and thus unfairly excluded from online media platforms.

Diane L. Houk identified three layers of algorithmic bias and went on to outline how each layer has been (and will be) legally addressed. Houk used the Facebook litigation as her exemplar throughout her presentation; she represented the National Fair Housing Alliance in a lawsuit against Facebook for its "racial affinity" algorithmic function that allegedly helps housing advertisers to reach their preferred racial population.[30]

Houk explained that in the first layer of algorithmic bias, the most overt layer, the function would forthrightly ask which races the advertisers want to target, with whiteness as the baseline setting.[31] However, Houk argued that Facebook took advantage of the second layer of bias, inferential discrimination, in violation of the Federal Housing Act.[32] As an example, Houk pointed to the advertisers' ability to select zip codes, which, in practice, act as a proxy for race.

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[30] Complaint, Nat'l Fair Hous. All. v. Facebook, Inc., (S.D.N.Y. 2018) (No. 18 Civ. 2689), https://nationalfairhousing.org/facebook-complaint/ [https://perma.cc/Z3KS-YUJ5]. The lawsuit settled in March 2019. *See* Press Release, National Fair Housing Alliance, Fair Housing Groups Settle with Facebook: Transforms Facebook's Ad Platform Impacting Millions of Users (March 18, 2019), https://nationalfairhousing.org/2019/03/18/national-fair-housing-alliance-settles-lawsuit-with-facebook-transforms-facebooks-ad-platform-impacting-millions-of-users/ [https://perma.cc/B96Y-E9E9].

[31] Alex Hern, *Facebook's 'Ethnic Affinity' Advertising Sparks Concerns of Racial Profiling*, GUARDIAN (Mar. 22, 2016, 8:42 AM), https://www.theguardian.com/technology/2016/mar/22/facebooks-ethnic-affinity-advertising-concerns-racial-profiling [https://perma.cc/N3Z5-RETG].

[32] The Fair Housing Act, 42 U.S.C. § 3601 (1968).

Facebook subsequently adjusted its policy by imposing more re-strictions on ad-targeting in the housing and employment markets to avoid civil rights violations.[33]

The third layer of algorithmic bias is more insidious, and con-cerns the delivery of the advertisement. Under the current "lookalike audiences" algorithm, if someone clicks on an advertisement, the advertisement will be exposed to a similar demographic.[34] Houk argued that it is unclear as to whether the U.S. Housing and Urban Development ("HUD") Department will impose restrictions on this third layer based on disparate impact. Houk concluded by empha-sizing that policymakers, in addition to algorithm engineers, should be heavily involved in addressing the various layers of algorithmic bias that intersect with civil right issues.

As a corollary to the algorithmic bias presented on platforms, Dr. Rebecca Crootof argued that despite the benefits of using artificial intelligence ("AI") in the judicial process, such use would ultimately cause significant errors in case judgments as a result of algorithmic biases on a wide scale. Crootof provided examples for current successful use of AI in the judicial system, such as assisting citizens in their disputes of parking tickets,[35] and providing free automated legal chat services.[36] Additionally, Crootof cited to an Estonia as an example of a country that resolves minor contract dis-putes through AI.[37]

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[33]   Colin Lecher, *Facebook Drops Targeting Options for Housing, Job, and Credit Ads After Controversy*, VERGE (Mar. 19, 2019, 2:44 PM), https://www.theverge.com/2019/3/19/18273018/facebook-housing-ads-jobs-discrimination-settlement [https://perma.cc/8HCQ-4HET].

[34]   *About Lookalike Audiences*, FACEBOOK FOR BUSINESS https://www.facebook.com/business/help/164749007013531?id=401668390442328 [https://perma.cc/M4U4-3EPG].

[35]   *Dispute Any Parking Ticket in Any City*, DONOTPAY https://donotpay.com/learn/dispute-parking-ticket-and-win/ [https://perma.cc/F2EV-R6YU].

[36]   Tom Martin, *How a Small Practice Attorney Used Automation to Build Profits and Reclaim Time,* ARAG LEGAL, https://www.araglegal.com/attorneys/learning-center/topics/practice-management-technology/how-to-automate-administrative-tasks-for-your-firm [https://perma.cc/QZ77-H6RN].

[37]   Eric Niller, *Can AI Be a Fair Judge in Court? Estonia Thinks So,* WIRED (Mar. 25, 2019, 7:00 AM), https://www.wired.com/story/can-ai-be-fair-judge-court-estonia-thinks-so/ [https://perma.cc/B2HU-WHME].

Crootof noted that AI initially appears attractive because judges as human arbiters are inconsistent. There is also a limited supply of judges that can each hear a limited number of cases. Crootof warned that while AI may provide cheap and quick access to justice, these systems operate by extracting rules from clear patterns in narrow circumstances and mechanically applying them. Crootof argued that this inflexibility is not ideal for judicial judgments that involve considerations of either extenuating circumstances or changing social norms. Crootof cited a recent study that translated speeding rules into judgments. One program was based on the letter of the law and the other on the intent of the law.[38] When evaluating the same scenario, the former issued an average of 498 tickets and the other averaged 1.5 tickets.[39] Crootof argued that AI cannot overcome algorithmic bias because the data it uses already includes bias. This problem is magnified by what otherwise seems to be AI's greatest appeal: scaling. Ultimately, she concluded that judges are necessary, because unlike AI, they can curb the worst excesses of human behavior by engaging in nuanced rule application and value-balancing.

Dr. Charlton McIlwain explored the tension between the potential for algorithmic systems to solve problems and the racial logic that underlies the coding that creates algorithmic bias. He quoted former President Lyndon B. Johnson,[40] author W.E.B. DuBois,[41] and former NAACP director Roy Wilkins[42] to argue that when a social group is called a problem, it is then associated with everything that describes itself as a solution. AI creates solutions in search of problems and race is an attractive one because it has been historically identified and continually persists. McIlwain argued that algorithmic bias today is simply another code for

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[38]   *See generally* Lisa Shay, Woodrow Hartzog, John Nelson, & Gregory Conti, *Do Robots Dream of Electric Laws? An Experiment in the Law as Algorithm*, 274, *in* ROBOT LAW (Ryan Calo, A. Michael Froomkin & Ian Kerr eds., 1st ed. 2016).

[39]   *See id*. at 289.

[40]   Lyndon B. Johnson, President Lyndon B. Johnson's Special Message to the Congress: The American Promise (Mar. 15, 1965), *available at* http://americanradioworks .publicradio.org/features/prestapes/lbj_congress.html [https://perma.cc/NX7M-E25H].

[41]   *See generally* W.E.B. DuBois, THE SOULS OF BLACK FOLK (1903).

[42]   *See generally* Roy Wilkins, *Computerize the Race Problem?*, L.A. TIMES, Sept. 11, 1967.

racism because the systems are written with a new "Jim Code."[43] Algorithmic bias, moreover, attaches itself to other social groups that are still considered "problems," such as the immigrants, poor, homeless, incarcerated, refugees, and unemployed. McIlwain closed by saying that if we are to fix, address, or even frame the problem of race within artificial intelligence, then we must examine its causes and effects within society and not be led astray into thinking that fixing the algorithms will fix the problems. The solution must focus on fixing our conceptions of what are the actual problems in society and only then can we collect data that empowers our algorithms differently.

III. KEYNOTE SPEECH

Kate Klonick, Assistant Professor at St. John's University School of Law and an Affiliate Fellow at Yale Law School's Information Society Project,[44] argued that several recent events signify new threats to speech in the age of the internet. Klonick began by chronicling several recent events which served to characterize the current state of free speech and platform governance. The Court of Justice of the European Union ("CJEU") issued two rulings which effectively grant EU Member States the power to issue global injunctions on defamatory speech.[45] Additionally, Facebook announced that politicians' speech will not be removed even if it violates their established community standards.[46] Klonick argued that these events highlight two problems: (1) nation states are imposing their speech policies on the rest of the world, and (2) politicians' speech is being privileged over political discourse.

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[43] *See generally* RUBA BENJAMIN, RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CODE (2019).

[44] Kate Klonick, https://www.stjohns.edu/law/faculty/kate-klonick [https://perma.cc/GP9A-XJ2D].

[45] *See* COMM'N NATIONALE DE L'INFORMATIQUE ET DES LIBERTÉS, RIGHT TO BE FORGOTTEN: THE CJEU RULED ON THE ISSUE, (Sept. 24, 2019), https://www.cnil.fr/en/right-be-forgotten-cjue-ruled-issue [https://perma.cc/79Q9-EQ93]; *see also* Case C-18/18, Glawischnig-Piesczek v. Facebook Ireland Ltd., 2019 E.C.R. 821.

[46] *See* Nick Clegg, *Facebook, Elections and Political Speech,* FACEBOOK NEWSROOM (Sept. 24, 2019), https://newsroom.fb.com/news/2019/09/elections-and-political-speech/?mod=article_inline [https://perma.cc/X2JS-DF46].

Klonick emphasized that the CJEU rulings provide the EU with the power of extraterritorial jurisdiction.[47] While the imposition of Western democratic values on powerful, private platforms may seem like a good idea at first glance, Klonick stressed that there is one major drawback—there is no democratic accountability mechanism in place for a global user either through a platform or through any one nation state. For example, a user in Thailand has no more ability to exercise a democratic vote in the EU than they do with a private platform such as Facebook. Thus, Klonick argues, the European Union's extraterritorial imposition of its law on Facebook provides no more democratic legitimacy to global users than if Facebook were entirely self-governed. Klonick calls this problem "the digital democracy deficit."

Klonick also argued that Facebook's new policy, which exempts politicians' speech from its community standards,[48] poses a threat to the balance of political discourse. Under Facebook's new policy, a political figure can post a campaign advertisement onto Facebook replete with falsehoods onto Facebook and even if the advertisement is proven untrue, Facebook will not remove it.[49] Klonick conceded that the policy serves to protect political speech, which is widely accepted as a core principle of the First Amendment.[50] Klonick also acknowledged that some might argue that all political figures' speech should be protected because doing so promotes democratic values and political discourse. Klonick, however, posited that there are three problems with that argument: (1) private online plat-forms can accelerate and amplify dangerous speech, (2) privileging political speech reinforces historical power structures, and (3) the CJEU rulings combined with the new Facebook policy constitute a

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[47]   Extraterritorial jurisdiction is the legal ability of a government to exercise authority beyond its normal boundaries. *See generally* Anthony J. Colangelo, *What Is Extraterritorial Jurisdiction*, 99 CORNELL L. REV. 1303 (2014).

[48]   *See* Casey Newton, *Facebook's Decision to Allow Lies in Political Ads Is Coming Back to Haunt It,* VERGE (Oct. 15, 2019, 6:00 AM), https://www.theverge.com/interface/2019/10/15/20913906/facebook-political-ads-lies-zuckerberg-warren-profits [https://perma.cc/V863-EUV3].

[49]   *See id.*

[50]   *See* Citizens United v. FEC, 558 U.S. 310, 329 (2010) ("Political speech . . . is central to the meaning and purpose of the First Amendment.").

new threat in the form of politicians' ability to promote misinformation and silence critics.

Klonick went on to argue that, before the internet, the most prominent threats to citizens' free speech and privacy rights came from the government. These threats include censorship from the state, warrantless searches of the home or person, and prior restraints on the press. Klonick referred to this as a dyadic model of speech governance consisting of citizens on one side and government on the other.[51] The advent of the internet, however, seemed to usher in a new era in which national borders, governments, and their speech laws were increasingly obsolete. Klonick suggested that the emergence of private online platforms morphed the dyadic model into a triadic model of speech governance which allows for citizens to use online platforms to route around government censorship.[52] Private online platforms may have created a third realm, but Klonick argues that this has not diminished the relevance or power of nation states to govern speech. Instead, Klonick believes that nation states have capitalized on the rise of private online platforms by using the internet to seize power.

Klonick then chronicled Facebook's creation of an independent content Oversight Board.[53] In November 2018, Mark Zuckerberg announced that Facebook was in the process of launching the Oversight Board.[54] In January 2019, Facebook began a six-month global consultancy, which included talking to over 2000 people in 88 different countries and conducting six workshops.[55] Finally, in

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[51]   Klonick ascribed this understanding of a "dyadic model" of speech governance to scholar Jack Balkin. *See* Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation,* 51 U.C. DAVIS L. REV. 1149, 1187 (2018).

[52]   *Id.* at 1189.

[53]   Klonick directly observed a Facebook team which was working toward the launch of the independent oversight board. She documented the team's efforts for several weeks during their global consultancy campaign.

[54]   *See* Ben Collins, *Facebook Announces Content Oversight Board as Zuckerberg Responds to Lobbying Crisis,* NBC NEWS (Nov. 15, 2018, 9:59 PM), https://www.nbcnews .com/tech/tech-news/facebook-announces-content-oversight-board-zuckerberg-responds-lobbying-crisis-n936806?cid=public-rss_20181123 [https://perma.cc/D5VY-CVZU].

[55]   *See* Brent Harris, *Global Feedback and Input on the Facebook Oversight Board for Content Decisions,* FACEBOOK NEWSROOM (June 27, 2019), https://newsroom.fb.com/ news/2019/06/global-feedback-on-oversight-board/ [https://perma.cc/F2YM-DYAL].

September 2019, Facebook announced the results of that campaign and how they planned to use that information going forward.[56]

Klonick described the planned structure of the Board. Facebook will appoint two co-chairs who will, with Facebook's help, pick nine additional members of the Board.[57] When the Board reaches eleven members it will start hearing cases.[58] The Board will hear cases regarding the censorship of "simple objects" such as photos, videos, and text on appeal from the user whose content was censored.[59] The decision that the Board reaches, whether censorship is appropriate or not, is binding on Facebook.[60] The Board can also issue non-binding policy suggestions—Facebook must publicly respond to whether or not they choose to adopt these suggestions.[61] Klonick believes that Facebook's good faith effort to cede some power back to their user base is a small step in the right direction.

IV. PLATFORM GOVERNANCE PANEL

Moderated by Professor Abner S. Greene,[62] the Platform Governance Panel focused on different governance models for regulating content on social media platforms. Panelists included Zoe Mentel Darmé, Manager, Global Affairs and Governance at Facebook[63]; Robert J. deBrauwere, Partner and Co-Chair, Digital Media Group at Pryor Cashman LLP[64]; Evelyn Douek, S.J.D. Candidate at Harvard Law School and Affiliate at the Berkman

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[56] *See* Brent Harris, *Establishing Structure and Governance for an Independent Oversight Board,* FACEBOOK NEWSROOM (Sept. 17, 2019), https://newsroom.fb.com/news/2019/09/oversight-board-structure/ [https://perma.cc/5G6L-MVMG].

[57] *See id.*

[58] *See id.*

[59] *See id.*

[60] *See id.*

[61] *See id.*

[62] Abner   S.   Greene,   https://www.fordham.edu/info/23141/abner_s_greene [https://perma.cc/2TV8-GLM3].

[63] Zoe   Mentel   Darmé,   https://www.linkedin.com/in/zoe-mentel-darm%C3%A9-a8661a4/ (last visited Nov. 20, 2019).

[64] Robert J. deBrauwere, https://www.pryorcashman.com/lawyers/robert-j-debrauwere.html [https://perma.cc/L4ZH-G2B7].

Klein Center for Internet Society[65]; and Nadine Strossen, John Marshall Harlan II Professor of Law at New York Law School.[66]

Zoe Mentel Darmé's segment focused on describing the content Oversight Board being created by Facebook. The Board is an independent entity funded by a trust set up by Facebook and will have the power to review and render judgement on difficult content review cases.[67] It will consist of eleven to forty members and have a balanced gender and geographical representation, as well as a diversity of disciplines and expertise.[68] Both Facebook and its users will be able to refer content to the Board.[69] Once the Board has made a determination on content, Facebook will be bound by it.[70] Darmé explained that this model was created in response to criticism of Facebook's current content review policies and Facebook's own feeling that input from external sources on tough content decisions is valuable. She emphasized that this was not a replacement for government action and that the Board would not be reviewing cases about content that is already considered unlawful.

Robert J. deBrauwere's segment focused on explaining the historical context and evolution of the normative principles of platform governance. He argued that while the First Amendment does not apply to privately-owned social media companies, laws still shape platform governance. He noted that the operational principles of social media platforms are clearly shaped and dictated by the DMCA.[71] With the passage of this act, Congress shifted the burden on copyright owners to notify online service providers when infringing content is published on the site.[72] In *Cubby, Inc. v. CompuServe, Inc.,* the court likened CompuServe to a distributor rather than a publisher and held that the companies could not be held

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65   Evelyn Douek, https://www.evelyndouek.com/ [https://perma.cc/C7RX-37FC].

66   Nadine   Strossen,   https://www.nyls.edu/faculty/faculty-profiles/faculty_profiles/
nadine_strossen/ [https://perma.cc/6A3N-FAFD].

67   *See* Harris, *supra* note 53.

68   *See id.*

69   *See id.*

70   *See id.*

71   Digital Millennium Copyright Act, 17 U.S.C. § 512 (2018).

72   *Digital Millennium Copyright Act*, CORNELL L. SCH. LEGAL INFO. INST.,
https://www.law.cornell.edu/wex/digital_millennium_copyright_act   [https://perma.cc/
T86R-DLG9].

liable for content published on its platform.[73] However, in *Stratton Oakmont, Inc. v. Prodigy Services. Co.*, the court held that because Prodigy curated its content it acted as an editor and could be held liable for content on its site.[74] This decision prompted Section 230 of the Communications Decency Act of 1996, which states that online platforms cannot be held liable for content posted by others on their platforms.[75] DeBrauwere argued that companies need to look at context for their governance model to make sure they have created an environment that best suits the interests of the company.

In her segment, Evelyn Douek took a broad view of governance across social media platforms. She argued that content moderation systems have been undergoing a crisis of legitimacy since 2016 and that there are concerns about the consequences of what social media deems to be hate speech, as well as what fake news is allowed online. She further argued that while leaving these decisions to private companies is problematic, government regulation of speech has the potential to invade private rights. Douek stated that due to public pressure, many social media platforms are responding with various experiments to moderate content on their own platforms.[76] Douek expressed skepticism about Facebook's model, stating that it would not settle disputes about the limits of free speech, would not create global norms, and that there was very little due process. However, she also argued that the Oversight Board could create an independent check on Facebook and could provide a space for public reasoning, transparency, and contestation around the rules on free speech.

Nadine Strossen's segment argued for platform oversight via corporate governance and individual choice as opposed to government regulation. Strossen began by giving a brief history of regulating speech online. The Communications Decency Act was

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[73]   Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 140 (S.D.N.Y. 1991).

[74]   Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995).

[75]   *See CDA 230: Legislative History*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/issues/cda230/legislative-history [https://perma.cc/DT3V-MZYJ].

[76]   *See generally* TARLETON GILLESPIE, CUSTODIANS OF THE INTERNET (2018).

passed due to public fears in the early years of the internet, particularly fears about child pornography.[77] In response, the ACLU formed a task force to address civil liberties online.[78] Later, the Supreme Court agreed with the ACLU position and ruled that the free speech principles, which apply to print media, should apply online.[79] Strossen argued that individual users should be able to determine what they would and would not like to see. She argued that smaller platforms should have autonomy but the largest networks, such as Facebook, should voluntarily comply with the standards set out in Article 19 of the 1948 Universal Declaration of Human Rights. To protect against the negative impacts of certain types of online media, Strossen advocated for vigorous media literacy education, starting from a young age.

Videos of the entire Symposium can be found on the Fordham Intellectual Property, Media & Entertainment Law Journal's website here: http://www.fordhamiplj.org/2019/10/10/the-27th-annual-iplj-symposium-platform-society-copyright-free-speech-and-sharing-on-social-media-platforms-friday-october-4-2019/.

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[77]   *See generally* Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 IND. UNIV. FED. COMM. L.J. 51 (1996).

[78]   *See* Noa Yachot, *The 'Magna Carta' of Cyberspace Turns 20: An Interview With the ACLU Lawyer Who Helped Save the Internet*, ACLU (June 23, 2017), https://www.aclu.org/blog/free-speech/internet-speech/magna-carta-cyberspace-turns-20-interview-aclu-lawyer-who-helped [https://perma.cc/ZRX9-8K9L].

[79]   *See id.*