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Massive Online Micro Justice: Towards Global ADR Mechanisms for Disputes on Internet Platforms?

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Outline

- Introduction: Massive Online Micro Justice ?
- Multiple regulations / one trend
- Perspectives

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Massive Online Micro Justice (MOMJ)


- Right to be “forgotten” (RTBF) => *RTB desindexed*
- Source: ECJ, Google Spain v AEPD and Mario Costeja Gonzalez (Case C-131/12), May 13, 2014

=> Where do we stand today ?

<small>Requests to delist</small> <div style="font-size: 2em; font-weight: bold; margin-top: 10px;">679,420</div>	<small>URLs requested to be delisted</small> <div style="font-size: 2em; font-weight: bold; margin-top: 10px;">2,530,882</div>
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Source: <https://transparencyreport.google.com/eu-privacy/overview>

Who decides on requests to be “forgotten”?


Legal Help

Search removal request under data protection law in Europe

When you make such a request,

we will balance the privacy rights of the individual

with the public's interest to know and the right to distribute information

officials.

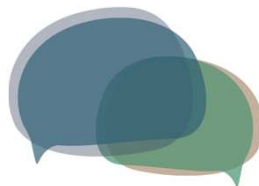


Massive Online Micro “Justice” ?

“Is the answer to accept as the natural order
that Google is going to act as adjudicator
and simply figure out ways to provide the search engine
with greater context?”

Nancy Scola, Designing ‘the right to be forgotten’

(Washington Post, August 4, 2014)



The Advisory Council to Google on the Right to be Forgotten

(Report of February 6, 2015)

<https://www.google.com/advisorycouncil/>

Request for transparency

“implementation of the ruling should be much more transparent for at least two reasons:

- (1) the public should be able to find out how digital platforms exercise their tremendous power over readily accessible information; and
- (2) implementation of the ruling will affect the future of the RTBF in Europe and elsewhere, [...]”

(Open Letter to Google from 80 Internet Scholars - May 13, 2015)

Google Transparency Report

Access to information

Quantitative transparency is good...

Qualitative transparency is better...

...*Offering (legal) guidance* to the platform
is even better



What happens if Google does not remove the URL?

“If we [Google] decide not to remove a URL from our search results, an individual may request that a local data protection authority review our decision”

(FAQ Google)

Is this system working ?

“As of now, only about 1% of requesters denied delisting are appealing those decisions to national Data Protection Authorities. [...] In the remainder of cases, the entire process is silent and opaque, with very little public process or understanding of delisting” (Open Letter to Google from 80 Internet Scholars)



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Same issue with other platforms



• What is not a Trademark Policy Violation?

Referencing another's trademark is not automatically a violation of Twitter's trademark policy. Examples include:

- Using a trademark in a way that is outside the scope of the trademark registration (e.g. territory, or goods and services identified in the registration).
- Nominative and other fair uses of trademarks are protected uses under our trademark policy, so long as the account is clearly distinguished from the trademark owner. This includes use by resellers in certain regions and accounts engaging in parody, commentary, or news.

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Nature of the disputes

- Not classical consumer disputes / Business to Consumer (B2C) disputes
- Rather *E-citizen* disputes about fundamental rights (freedom of expression / right of personality, image, privacy / IP)
- Frequently Citizen to Citizen Disputes (C2C)

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ADR for solving RTBF cases

« Establish a public mediation model, in which an independent arbitration body assesses removal requests. Several experts suggested this to be modeled on the process for resolving domain name disputes »

(Appendix to the Report: « Alternative ideas and technical proposals we heard for an adjudication process »)

=> Uniform Domain Name Dispute Resolution Policy (UDRP) as a Model ?

IL-DRP



ISRAEL INTERNET ASSOCIATION
ISOC-IL



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Outline

- Introduction: Massive Online Micro Justice ?
- **Multiple regulations / one trend**
 - (1) EU Recommendation – illegal content
 - (2) EU Regulation - fairness (proposal)
 - (3) Council of Europe Recommendation
 - (4) Privacy Shield Arbitration
 - (5) EU Copyright Directive (proposal)
- Perspectives



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(B) Multiple regulations / one trend

- (1) Recommendation of the European Commission on measures to effectively tackle illegal content online (March 1, 2018)
- (2) Proposal for a EU regulation on promoting fairness and transparency for business users of online intermediation services (April 26, 2018)

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- (3) Council of Europe: Recommendation CM/Rec(2018)2 on the roles and responsibilities of internet intermediaries (March 7, 2018)
- (4) Privacy Shield Arbitration (US – EU / CH)
- (5) EU Copyright Directive (proposal)

=> **All of them include (different) ADR systems**

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(1) EU Recommendation - illegal content

- Recommendation of the European Commission on measures to effectively tackle illegal content online (March 1, 2018)
- Streamlining of:
 - notices made to host providers for taking down illegal content (by «notice provider»)
 - Obligation to notify content provider and right to file counter-notice (with exception)

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- “Content providers should be given the possibility to contest the decision by the hosting service provider [to take down their content] within a reasonable time period, through the submission of a counter-notice to that hosting service provider” (para. 11)

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- “Member States are encouraged to facilitate, where appropriate, out-of-court settlements to resolve disputes related to the removal of or disabling of access to illegal content” (para. 14)
- “easily accessible, effective, transparent and impartial”
- “Attempts to settle such disputes out-of-court should not affect the access to court of the parties concerned” (para. 14)

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(2) EU regulation - Fairness and transparency

- Proposal for a EU regulation on promoting fairness and transparency for business users of online intermediation services (April 26, 2018)
- Protecting « business users » :
 - Change of ToS / suspension - termination of account
 - Rankings (transparency, discrimination etc.)

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Dispute resolution mechanisms

- Multi-tier/track system:
 - 1) Internal / easily accessible system for handling the complaints of business users (art. 9)
 - 2) Mediation (art. 10)
 - 3) Court litigation

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Internal complaint-handling system

Obligations to:

- Process complaints swiftly and effectively (art. 9 para. 2)
- Communicate to the complainant the outcome of the internal complaint-handling process (individual / clear and unambiguous language) (art. 9 para. 2)
- Report on the functioning and effectiveness of their internal complaint-handling system (number of complaints, subject-matter, time period needed to process the complaints and decision) (art. 9 para. 4)

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Mediation

- Obligation to “identify in their terms and conditions one or more mediators with which they are willing to engage to attempt to reach an agreement with business users” (art. 10 para. 1)
- Obligation to “engage in good faith in any attempt to reach an agreement through the mediation” (art. 10 para. 3)

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Mediation

- Costs borne by the providers: “reasonable proportion of the total costs of mediation” and in any case “at least half of the total cost” (art. 10 para. 4)

Specialised mediators

- Encouragement to the providers to “set up one or more organisations providing mediation services [...] for the specific purpose of facilitating the out-of-court settlement of disputes with business users arising in relation to the provision of those services [...]”

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Court litigation

- Mediation “shall not affect the rights of the providers of the online intermediation services and of the business users concerned to initiate judicial proceedings at any time during or after the mediation process” (art. 10 para. 5)

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(3) Council of Europe - Recommendation

- Council of Europe: Recommendation CM/Rec(2018)2 to member States on the roles and responsibilities of internet intermediaries (March 7, 2018)
- Perspective of human rights (freedom of expression)

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1.5. Access to an effective remedy

- States should “[...] ensure that intermediaries provide users or affected parties with access to prompt, transparent and effective reviews for their grievances and alleged terms of service violations, and provide for effective remedies, such as the restoration of content, apology, rectification or compensation for damages. Judicial review should remain available, when internal and alternative dispute settlement mechanisms prove insufficient or when the affected parties opt for judicial redress or appeal” (para. 1.5.2.)

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2.5. Access to an effective remedy

- “Internet intermediaries should make available – online and offline – effective remedies and dispute resolution systems that provide prompt and direct redress in cases of user, content provider and affected party grievances [...]” (para. 2.5.1.)
- “Intermediaries should seek to provide access to alternative review mechanisms that can facilitate the resolution of disputes that may arise between users. Intermediaries should not, however, make alternative dispute mechanisms obligatory as the only means of dispute resolution” (para. 2.5.5)

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2.5. Access to an effective remedy

- “Intermediaries should not include in their terms of service waivers of rights or hindrances to the effective access to remedies, such as mandatory jurisdiction outside of a user’s country of residence or nonderogable arbitration clauses” (para. 2.5.4.)


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(4) Privacy Shield Arbitration

Schrems busts Privacy Shield wide open


Dublin Judge asks European Court to look at data flows all over again

By Andrew Orlowski 3 Oct 2017 at 13:06

35  SHARE ▼

- Cross-Border Personal Data Flow
- US – EU + US - Switzerland Privacy Shield Framework
- Arbitration: Annex I

<https://www.privacyshield.gov/article?id=ANNEX-I-introduction>₃₀




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ARBITRAL FUND CONTRIBUTION

Announcement of EU-U.S. Privacy Shield Arbitral Administrator and Fund Manager and Privacy Shield Participants' Required Contributions to the Arbitral Fund

The Department of Commerce (DoC) is announcing the International Centre for Dispute Resolution-American Arbitration Association (ICDR-AAA) as the third party selected to administer arbitrations pursuant to [Annex I to the EU-U.S. Privacy Shield Principles](#) (Annex I); and manage the arbitral fund.



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(5) EU Copyright Directive (proposal)

Art. 10 “Negotiation Mechanism”

- “Member States shall ensure that parties facing difficulties related to the licensing of rights when seeking to conclude an agreement for the purpose of making available audiovisual works on video-on-demand services, may rely on the assistance of an impartial body or mediator with relevant experience. The body or mediator shall provide assistance to the parties with their negotiations and help them reach agreements, including, where appropriate, by submitting proposals to the parties” (art. 10 para. 1, Presidency compromise proposal (consolidated version) of 13.12.2017)

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Fair remuneration in exploitation contracts of authors and performers

- “Member States shall provide that disputes concerning the transparency obligation under Article 14 and the contract adjustment mechanism under Article 15 may be submitted to a voluntary, alternative dispute resolution procedure” (art. 16 para. 1, Presidency compromise proposal (consolidated version) of 13.12.2017)

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Perspectives

- Multiplicity of independent (draft) regulations
- Fragmentation:
 - Legal fields (privacy, copyright, etc.)
 - Geography
 - Dispute resolution mechanisms (mediation, arbitration/ ADR service providers)

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Perspectives

- Need to adopt transversal solutions:
 - Beneficiaries (*who?*): individuals & businesses
 - Type of disputes (*what?*) (e.g. « illegal content »)

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Perspectives

Anticipate new types of disputes ?

- Right of portability of data (under General Data Protection Regulation, GDPR)
- Liability for cyberbreaches

Is Cyberinsurance Really Worth It? Using ADR to Resolve Cyberattack Disputes

By Daniel Garrie and Andrew Nadolna

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Geneva Cybersecurity Law & Policy Conference

What Civil Liability for Cyberattacks?

June 21, 2018
University of Geneva



www.cybersecurity-liability.ch

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Perspectives

- Paradigm shift from national offline court litigation to global online ADR for Internet platform disputes ?
- Can we « transplant » the UDRP (which has become mainstream) ?

WIPO Cybersquatting Cases Reach New Record in 2017

Geneva, March 14, 2018
PR/2018/815



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Is the UDRP « transplantable » to other types of Internet disputes ?

- Request submitted by the victim to the Internet platform
 1. Decisions made by the platform
 2. If challenged, decisions submitted to an ADR body

ADR : what procedural rules ?

- Formalized procedural rules (// UDRP):
 - Independent experts (1 or 3)
 - Standard rules of procedure, forms and deadlines
 - Participation of the platform & third parties
(e.g. those having posted the content online)

ADR : what substantive rules ?

- Application of global rules (≠ local data protection / IP etc. law) => lex Internet (// UDRP)
- N.B. Right of the claimant to bring the case before national DPA / courts (not arbitration)
- => Choice between (fast) online proceedings under global law and (slower) national court proceedings under national law (// UDRP)

Costs

- What about the costs of the ADR proceedings ?
UDRP => claimant/trademark owner
- « [...] we think that it would be worthwhile for search engines to consider jointly funding an arbitration board »
(Report Advisory Council to Google)

Global standards

- Need to develop global standards:
« Different search engines should collaborate to standardize the removal process and provide a single, efficient and effective interface for data subjects requesting removals » (Report Advisory Council to Google)



HOW TO APPEAL

Most social media platforms allow you to appeal decisions made about your content—though what you can and can't appeal may differ from company to company. This is a brief explanation of the options available to you and how decisions are made inside each company.



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**Geneva Internet Disputes
Resolution Policies 1.0**


www.geneva-internet-disputes.ch

 **Topic 1**
Which national courts shall have jurisdiction in Internet-related disputes ?

 **Topic 2**
How to structure an alternative dispute resolution system for Internet-related disputes ?

 **Topic 3**
How shall disputes about the licensing of Standard Essential Patents (SEP) under Fair, Reasonable and Non-Discriminatory (FRAND) terms be solved ?

 **Topic 4**
How shall immunities apply on the Internet ?

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Perspectives

What incentives for / pressure on platforms to act ?

- New « safe harbor » requirement:

=> Obligation of platforms to adopt *fair* and *efficient* dispute resolution mechanism in order to avoid liability:

=> Complaint-handling process with appeal / ADR

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Facebook, Google and Twitter accept to change their terms of services to make them customer-friendly and compliant with EU rules

European Commission

Better social media for European consumers:
overview of changes

February 2018


Facebook agreed to:

- clarify the grounds that can lead to the removal of user generated content.

Facebook still needs to:

- acknowledge its obligation for a prior notification of the user
- clarify the procedure for an appeal against such a removal.

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Perspectives

Guiding values

- Procedural values: due process - right to be heard / fairness / impartiality (etc.)
- Transparency of the decision-making process

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Risks of automated / AI justice

- « [...] Companies are using computer algorithms to scan content posted to the Internet for possible copyright violations and issue automated takedowns. This process is vulnerable to significant error and does not allow for judgments to be made about possible fair use exceptions, therefore resulting in the censorship of vast amounts of legitimate (i.e. legal) speech and creative expression on the Internet » [\(https://www.takedownabuse.org/\)](https://www.takedownabuse.org/)

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Accessibility as key value

- Right of access to the Internet
e.g. Brazilian Marco Civil da Internet, Italian Dichiarazione dei diritti di Internet (etc.)
- Right of access to justice
=> Right of access to justice
for Internet platform disputes
- ADR can contribute to this for MOMJ

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Thank you for your @ttention

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