

Excerpt re Europe and the Digital World Two Decades Later—excerpted from Judge McKeown article re changes in landscape since early 2000s

I reflect on the extraordinary changes in the European legal landscape spawned by developments in the digital world since our first meeting in Paris. Facebook was not a company, GDPR was not a recognized acronym, and Europe had yet to make its mark in the regulation of technology markets. Just as George's earlier work foreshadowed the role of cultural values, the rise of transnational litigation, and the importance of environmental protection, consumer rights and health and safety in shaping this landscape, his future scholarship will undoubtedly underscore the importance of the digital world and Europe's role in the global debate about technology regulation. In the same way that George declared that "international arbitration and the European Union may be described, without hyperbole, as on a collision course,"¹ so too the European Union and the tech world may be described, without hyperbole, as on a collision course.

Back when we met, George taught European Union Law and I launched a course in International Internet and Intellectual Property Law. At the time, our academic spheres had barely begun to intersect, and, in truth, we were teaching in

¹ George Bermann, *European Union Law and International Arbitration at a Crossroads*, 42 *FORDHAM INT'L L. J.* 967, 968 (2019).

parallel. George's celebrated textbook, *Cases and Materials on European Union Law*, which he co-authored with Roger J. Goebel, William J. Davey, and Eleanor M. Fox, was firmly rooted in European history and the creation of the European Union in 1993 by the Maastricht Treaty. For the EU, predicated on the free movement of goods and workers and the harmonization of laws through directives, Brexit would be decades down the road.

By the early 2000s, the internet had been commercialized in the United States for a relatively short period of time, only since the mid-1990s. Netscape dominated the US and European browser market until Microsoft became a serious competitor. Companies like America Online, Prodigy, and Earthlink were the recognized internet service providers. North America and Europe had roughly equal numbers of internet users (108.1M versus 105.1M), statistics that, by 2017, had grown to roughly 397.3M and 463.2M, respectively, with both regions boasting internet penetration of just under 90% of their populations. Notably, today both regions are eclipsed by Asia.² These numbers have driven significant policy and legal changes in Europe that ripple well beyond the continent.

Internet law was hardly a field of study back then. The United States Supreme Court did not consider its first internet case until 1997. In a landmark

² See Hannah Ritchie, *How Many Internet Users Does Each Country Have?*, OUR WORLD IN DATA (Jan. 22, 2019), <https://ourworldindata.org/internet>.

decision, *Reno v. ACLU*, the Court ruled that a portion of the Communications Decency Act, crafted to protect minors from “indecent” and “patently offensive” communications, was an unconstitutional restriction on the First Amendment’s freedom of speech.³ The Court recounted the “extraordinary” growth of the internet, described the world wide web as “a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services,” and marveled that “[t]hrough the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.”⁴ Though lower courts earlier had considered jurisdiction and other aspects of the internet, the Supreme Court set the stage for the intersection of the internet and free speech.

Nor was internet law prominent in Europe before Yahoo! learned in 2000 just how far its internet presence stretched in collision with French criminal law and cultural values. In a suit brought by La Ligue Contre Le Racisme et L’Antisemitisme against Yahoo!, the Paris court (Tribunal de grande instance de Paris) ordered Yahoo! to remove French citizens’ access to its auction site and web pages containing Nazi-related messages, images, and relics because such material

³ See *Reno v. ACLU*, 521 U.S. 844, 849 (1997).

⁴ *Id.* at 870.

violated French criminal law.⁵ Companion litigation in the US brought the opposite result in terms of free speech: a federal district court determined that the French court order was inconsistent with the First Amendment and could not be enforced in the US, although that decision did nothing to change the illegality under French law.⁶ The world of international internet litigation was launched.

Against this backdrop of a settled framework for European Union law, the explosion of the internet, and the nascent world of international internet law, I offer a snapshot of a few dramatic developments in Europe spawned by the digital world over the past two decades.

Privacy Law Goes Global

Privacy rights have become a flashpoint between Europe and the US and represent a perfect storm of the American *laissez faire*, decentralized approach and the highly-regulated order in Europe. Though the regimes were an ocean apart in the early 2000s, significant regulatory and judicial developments have spawned a convergence.

⁵ *La Ligue Contre Le Racisme et L'Antisemitisme v. Yahoo! Inc.*, T.G.I. Paris, No. RG: 00/05308 (Orders of May 22 and Nov. 20, 2000).

⁶ *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme (LICRA)*, 145 F. Supp. 2d (N.D. Ca., 2001), *rev'd*. 433 F.3d 1199 (9th Cir. 2006) (en banc) (dismissing on ripeness grounds LICRA's declaratory judgment suit regarding enforcement of the French judgment).

The tech giants—love ‘em or hate ‘em—have come to dominate the debate over consumer privacy, competition, innovation, and more in a way almost unthinkable twenty years ago. Back then, the leading tech companies, sometimes called the Four Horsemen, were Microsoft, Intel, Cisco, and Dell, because of their market dominance. But in the contemporary landscape, the new Big Four, also colloquially referred to as the Four Horsemen, are Amazon, Apple, Facebook, and Google, and they have shaped the digital economy in a transformative way.⁷ Eric Schmidt, co-founder and former chief executive of Google, excludes Microsoft from the group because “Microsoft is not driving the consumer revolution in the minds of the consumers.”⁸ Nonetheless, Microsoft remains a dominant market force and the European privacy regime has forced all of these companies to face a new world of extraterritorial regulation.

In the 1990s, the European Commission was prescient in its fear that diverging national data protection laws would hinder the international market in the EU. That recognition led to the 1995 Data Protection Directive 95/46EC.⁹ Although not perfect, and plagued by problems with harmonization and

⁷ See Scott Galloway, *THE FOUR: THE HIDDEN DNA OF AMAZON, APPLE, FACEBOOK, AND GOOGLE* (New York: Portfolio/Penguin, 2017).

⁸ See Peter Kafka, *Eric Schmidt’s “Gang of Four” Doesn’t Have Room for Microsoft*, *ALL THINGS D* (May 31, 2011).

⁹ Council Directive 95/46/EC, 1995 O.J. (L 281) 31-50.

enforcement, Europe's initiative planted a significant stake in the data privacy arena. In contrast, the US has had no centralized privacy law and instead relies on a patchwork of sector-related laws, such as banking and health, supplemented by the Fourth Amendment's prohibition against unreasonable searches and seizures and by various state legislation,. To many, Europe had the reputation of a region with comprehensive rules and lax enforcement, while the US was seen as a country without a broad rule-based regime, although it had an effective, though underfunded, enforcement agency, the Federal Trade Commission.

The first European challenge to freedom of movement of data on the internet came in 2003, when the European Court of Justice ruled that reference by name or other identifying information to a person, among others, on an internet page violated data protection regulations.¹⁰ That ruling was the first of many that elevated the privacy rights of European citizens. But the most transformative change came when the 1995 Directive was superseded by the ground-breaking General Data Protection Regulation 2016/679 ("GDPR"), which became effective in 2018.¹¹ This updated and comprehensive regulation declares a fundamental

¹⁰ Case C-101/01, *Bodil Lindqvist v. Åklagarkammaren i Jönköping*, 2003 E.C.R. I-12971 (ruling on the scope of Directive 95/46/EC).

¹¹ See Regulation (EU) 2016/679 of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1.

right to data protection and governs the processing of personal data and the free movement of data. As the most innovative data regulation in the internet arena, a key component of the GDPR is the novel right to be forgotten, also known as the “right of erasure.” This right entitles EU citizens to access, control, and remove their personal data from the internet under defined circumstances. The US has no corresponding right, although nearly 75% of its adult population supports such protection and an overwhelming number have serious concerns about their data privacy.¹²

Significantly, the GDPR takes on a global reach because it prohibits the transfer of personal data outside of the European Economic Area, absent appropriate safeguards or a declaration of adequacy by the European Commission. Obviously, this restriction presented a challenge for the predominantly US-based tech companies, though they quickly responded to reach an accord. Even so, efforts to craft a transatlantic data exchange agreement have encountered a rocky road. Although the European Commission decided in 2000 that US principles

¹² See Brooke Auxier & Lee Raine, *Key Takeaways on Americans’ Views About Privacy, Surveillance and Data Sharing*, PEW RESEARCH CENTER (Nov. 15, 2019), Shortly after the GDPR became effective, California passed a privacy law that gives consumers more control over their personal information. California Consumer Privacy Act, Cal Civ Code § 1798.100.

related to data transfer complied with the 1995 Directive (the “US-EU Safe Harbor Agreement”), the European Court of Justice invalidated that agreement in 2015.¹³

That result led to a renewed effort to reach accommodation, culminating in the EU-US Privacy Shield, a framework for transatlantic data exchange. The Privacy Shield was hailed by the US as ensuring that privacy is protected on both sides of the Atlantic.¹⁴ Any optimism soon took a deep dive when the European Court of Justice intervened once again. In 2020, the court struck down the agreement because it did not provide sufficient protections to EU citizens, particularly with respect to access by US public authorities to personal data transferred from the EU to the US for national security purposes.¹⁵ The long-standing tension between data use for government surveillance versus commercial use continued. Although the court did not invalidate the use of the standard data contract provisions, coupled with “supplementary measures” to ensure protection, the ruling left a regulatory gap and spawned uncertainty about transatlantic data

¹³ See Court of Justice of the European Union Press Release 117/15, The Court of Justice Declares that the Commission’s US Safe Harbour Decision is Invalid (6 Oct. 2015).

¹⁴ See U.S. Federal Trade Commission, Statement of FTC Chairwoman Edith Ramirez on the EU-U.S. Privacy Shield Agreement (Feb. 29, 2016).

¹⁵ See Case C-311/18, *Data Protection Comm’r v. Facebook Ireland Ltd.*, ECLI:EU:C:2020:559 (Jul. 16, 2020).

protection. This gap has caused considerable consternation, particularly among American technology companies.

Europe Takes a Stand on Antitrust

With Europe's focus on competition and the impact on the consumer, each of the Big Four plus Microsoft has been the target of European antitrust enforcement. How the world has changed. In the late 1990s, when The Boeing Company sought to merge with McDonnell Douglas, leaving Boeing and Europe's Airbus Industries as the only two competitors in the commercial aviation market, the European Commission was a newcomer to the league of major international merger oversight. Though the FTC approved the merger and concluded that the acquisition would not "substantially lessen competition," the EU antitrust authority, Directorate General IV of the European Commission, for the first time flexed its muscle in a significant way and said not so fast.

Despite significant pressure from the US, with lawmakers and others claiming outrage and decrying the "audaciousness" of the EU's effort to block the merger, Boeing accepted certain conditions. Ultimately, the EU gave the green light to the merger and fears of a potential trade war were diffused.¹⁶ In the face of claims of bias toward Airbus, the Commission rested its decision on the Merger

¹⁶ See Editorial, *A 'Dangerous' Merger?*, WALL ST. J., July 21, 1997, at A22.

Regulation, its own past practice, and the jurisprudence of the European Court of Justice.¹⁷ These traditional foundations of EU law and structure are nicely laid out in the extensive Competition Policy segment of Bermann's *Cases and Materials on European Law*.

The challenge to the Boeing merger was but an hors d'oeuvre of what was to come from the European Commission. Now EU regulators are often heralded as the world's leading tech industry watchdogs, as the EU aggressively addresses anticompetitive practices that it sees as challenging the bloc's economic, political, and social democratic values.

The EU's shift toward Big Tech, came about a decade after the Boeing experience. In 2007, the EU brought suit against Microsoft for anticompetitive practices concerning interoperability and its dominant position in the market.¹⁸ A few years later, the EU opened its first investigation into Google's online position. Since 2010, the EU has fined Google nearly \$10 billion for multiple antitrust violations ranging from the blocking of rival search engines to the manipulation of online advertising practices.¹⁹ The Commission also took note of Facebook's rise

¹⁷ See European Commission Press Release IP/7/729, The Commission Clears the Merger Between The Boeing Company and McDonnell Douglas Under Conditions and Obligations (Jul. 30, 1997).

¹⁸ See Case T-201/04, *Microsoft v. Commission*, 2007 E.C.R. II-03601.

¹⁹ Jeanne Whalen, *Europe Fined Google Nearly \$10 Billion for Antitrust Violations, But Little Has Changed*, WASH. POST, Nov. 10, 2020.

and, in 2016, the EU launched rigorous investigations into Facebook's use of user data to unfairly influence its own sales platform and stifle competition. Facebook put up a fight. After being required to disclose over 300,000 documents to EU authorities, the company sued EU regulators for excessive data requests and won a temporary halt to further data demands.²⁰ By 2018, Amazon became the center of an EU investigation for using data from retailers on its own platform to gain an unfair advantage. Formal charges were brought in 2020 and, on the same day, EU regulators announced an additional investigation to determine whether Amazon favors product offers and merchants that use its own logistics and delivery system.²¹ Also in 2020, EU regulators opened twin investigations into Apple for anticompetitive practices involving the Apple App Store and Apple Pay.²²

The tech companies are fighting actions on both sides of the Atlantic. In 2011, the FTC opened investigations into Google's methods of arranging search

²⁰ See generally Stephanie Bodoni & Aoife White, *Facebook Wins Temporary Halt to EU Antitrust Data Demands*, BLOOMBERG TECH., Jul. 28, 2020; Emily Glazer, Valentina Pop & Sam Schechner, *EU Deepens Antitrust Inquiry Into Facebook's Data Practices*, WALL ST. J., Feb. 6, 2020; Foo Yun Chee, *Facebook Sues EU Antitrust Regulator for Excessive Data Requests*, REUTERS, Jul. 27, 2020.

²¹ See Kelvin Chan, *EU Files Antitrust Charges Against Amazon Over Use of Data*, ASSOCIATED PRESS, Nov. 10, 2020.

²² See European Commission Press Release IP/20/1073, *Antitrust: Commission Opens Investigations into Apple's App Store Rules* (16 June 2020); see also Tom Warren, *EU Opens Apple Antitrust Investigations into App Store and Apple Pay Practices*, THE VERGE (Jun. 16, 2020).

results, but ultimately chose not to file charges in an effort to avoid conflict with EU regulators working with the company to solve similar concerns.²³ Not until 2020 were formal charges brought against Google for “abusing its dominance for online search and advertising,”²⁴ along with FTC investigations launched against Amazon, Apple, Facebook, and Microsoft for additional anticompetitive practices and unreported mergers and acquisitions.²⁵

These enforcement actions are just the tip of the iceberg. In November 2020, the European Commission introduced the Digital Governance Act, designed to facilitate data sharing across sectors and member states.²⁶ Soon after, in December 2020, the Commission proposed two legislative initiatives that also take aim at the digital world. The Digital Services Act endeavors to limit large online platforms from spreading illegal material on their networks and force them to police content ranging from hate speech to disinformation campaigns and counterfeit goods. In the competition arena, the Digital Markets Act, described as

²³ See Edward Wyatt, *A Victory for Google as F.T.C. Takes No Formal Steps*, N.Y. TIMES, Jan. 3, 2013.

²⁴ See Michael Balsamo & Marcy Gordon, *Justice Dept. Files Landmark Antitrust Case Against Google*, ASSOCIATED PRESS, Oct. 20, 2020.

²⁵ See generally Cecilia Klang & Mike Isaac, *U.S. and States Say Facebook Illegally Crushed Competition*, N.Y. TIMES, Dec. 9, 2020; U.S. Federal Trade Commission Press Release, *FTC to Examine Past Acquisitions by Large Technology Companies* (Feb. 11, 2020).

²⁶ “Shaping Europe’s digital future, Digital Governance Act, European Commission Factsheet, 25 Nov. 2020.

“organizing [the EU’s] digital space for the next decades,” takes aim at platform operators that serve as gatekeepers in digital markets.²⁷ Both proposals include substantial fines for noncompliance.²⁸

From the sleepy days of occasional enforcement against foreign companies, the European Commission has responded to the rise of the digital market and has changed the face of antitrust enforcement. The catch phrases of “global,” “international,” “transborder,” and “transnational” have taken on new meaning in this environment.

European Copyright Law Targets the Digital Market

Just as the EU’s competition initiatives are targeted at tech firms, so too is the controversial 2019 copyright reform—the Directive on Copyright in the Digital Single Market.²⁹ According to the European Council, key goals of the Directive include protecting press publications online; reducing the “value gap” between profits made by internet platforms and content creators; encouraging collaboration

²⁷ See David Meyer, *Big Tech Risks Big Fines, and Even Breakup, Under Europe’s New Content and Antitrust Rules*, FORTUNE, Dec. 15, 2020.

²⁸ *Id.*; see also Aline Blankertz & Julian Jaursch, *How the EU plans to Rewrite the Rules for the Internet*, BROOKINGS (Oct. 21, 2020).

²⁹ See Council Directive 2019/790/EC, 2019 O.J. (L 130) 92-125 (amending Directives 96/9/EC and 2001/29/EC on copyright and related rights in the Digital Single Market).

between these two groups, and creating copyright exceptions for text- and data-mining.³⁰

Opposition to the Directive has been fierce, with the tech companies teaming up with digital rights activists on one side versus content providers, such as traditional press publishers, music labels and the movie industry, on the other. Rights holders have accused Google, among others, of freeriding on their content. Key elements of the reform include: mandatory licensing agreements between Youtube and record companies; licensing deals between online platforms and press publishers; and compensation for songwriters, film directors, actors, musicians, and screenwriters for exploitation of their work on internet platforms under the “principle of appropriate and proportionate remuneration.”³¹ Copyright is poised to become the next battleground between digital companies and EU regulators.

The face of the EU has certainly changed over the past two decades, from an expanding bloc through new accessions to the withdrawal of the United Kingdom after 47 years as a member state. During this same period, the EU has expanded its leadership in data protection, privacy, antitrust and digital rights, driven in large

³⁰ See European Council Press Release, Copyright Rules for the Digital Environment: Council Agrees Its Position, (May 25, 2018).

³¹ See Laura Kayali, *Winners and Losers of Europe’s Copyright Reform*, POLITICO (Feb. 14, 2019); see also Kelvin Chan, *Europe Looks to Remold Internet with New Copyright Rules*, ASSOCIATED PRESS, Apr. 15, 2019.

part by the expansion of the internet and the economic rise of the Four Horsemen and other tech companies, coupled with a commitment to an expansive array of fundamental rights. In contrast to twenty years ago, Europe is driving the conversation on regulation of the digital economy. The worlds of EU law and international internet law are both converging and colliding. George was prescient in highlighting the potential of European institutions to address complex challenges and astute to focus on the importance of a transnational perspective, both of which have played a role in shaping data protection, privacy, antitrust, and the digital rights legal landscapes. Today's scholars and commentators would do well to take a page from his book.