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Lessons from the Digital Services Act and the U.S. Policy Landscape

NUP Jean Monnet / UNESCO Working Paper

26/2025



With the support of the
Erasmus+ Programme
of the European Union



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Development, Security & the
Fight against Transnational
Crime and Illicit Trafficking in
Cultural Property



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Frontpage picture: Generated with AI (Bing Image Creator)

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Free Speech in the Digital Age:

Lessons from the Digital Services Act and the U.S. Policy Landscape

Executive Summary:

The rapid evolution of digital platforms has revolutionized communication, creating unprecedented opportunities for expression while introducing significant challenges, including content moderation and censorship. The proliferation of unlawful content—ranging from hate speech to child exploitation—has prompted policymakers worldwide to seek balanced regulatory frameworks that protect free speech while curbing harmful content. In the United States, President-elect Donald J. Trump has revitalized the debate on online censorship with his "Free Speech Policy Initiative," aiming to restrict federal agencies from interfering with lawful digital expression and proposing reforms to Section 230 of the Communications Decency Act. From its part, the European Union's Digital Services Act (DSA) provides a relevant comparison, having implemented a structured framework to protect free speech while addressing illegal content. Although parallels exist between Trump's proposed policy and the DSA, notable differences remain. While many U.S. stakeholders admire the DSA's model, concerns about scalability and implementation persist. Similarly, Trump's initiative garners support from conservatives and free speech advocates, but questions remain about its feasibility, particularly regarding the revision of Section 230.

Keywords

Digital Rights, Free Speech, Censorship, Communications Decency Act, EU, Digital Services Act, Judicial Oversight

I. Introduction

In a digital world where anyone can voice their opinion freely, show and promote their work, or even start a whole movement, only by the click of a button, various issues can arise. Data overload in its sociological, not its technological sense, imposes dangers, with the threat of unlawful content being promoted always looming. Whether it is a terrorist group exposing civilians to its actions thus provoking them or it is adult content being openly posted on platforms legally used by minors, all unlawful content should and must be censored in protection of civil order and human rights. This has been the case ever since the first interactive online forums were created, with platforms doing their best to come up with ways to battle said content. Today though, social media has reached its pinnacle, with millions of users world-wide receiving and posting loads of content every second of the hour. The platforms' reaction to this was firstly, to create a system where another user could "flag" content, thus deeming it unlawful or against the platform's terms of service and secondly to create programs that can detect that content and take it down. Both solutions proved to be ineffective, as they were easily manipulated by users to target perfectly lawful content, on the pure basis that they disagreed with it or with the user that posted it. Later on, we could see that the social media was weaponized by groups to attack political free speech, with the climax of the situation being the historical blocking of the then ex-president Donald J. Trump by most social media platforms after the events of January 6th, with the alleged accusations being the fact that he was inciting hate and division. The lines were too blurred though and there was no exact law or rule, system or mechanism that one could refer to and understand the reasons media censorship, or appeal it for that matter, besides a greatly vague "terms of service" combination, that admittedly, only a very small percentage of users even attempted to read.

In December of 2022, roughly 2 years before his re-election, president elect Donald J. Trump shared his ambitions on tackling free speech censorship on major online platforms, naming it the "*Free speech Policy Initiative*". Now that he has been elected once again (November 2024), his stance on the matter and his objectives on how to approach it, seem to have re-emerged, with a plethora of important political and technocratic MAGA (Make America Great Again) supporters, by the likes of Robert F. Kennedy Jr. and Elon Musk, reposting the president elect's video announcement on social media, making it viral.

While this may be a rather, new development in the American people's everyday online activity, a quite similar legal framework has been adopted in the EU since 2022. The DSA (Digital Services Act) directly addressed the online platform free speech censorship issue, in an attempt to gradually decrease such incidents, among other regulations regarding online interactions, commercial or not.

Was President elect Trump inspired by the Digital Services Act? And if that is the case, could this lead to a new set of policies, closer to the European liberal viewing on human rights, just like the right to free speech? In what way

could a possible American counterpart to the European DSA be implemented on a federal level via Congressional legislation?

II. Policy Breakdown

To begin with, a legal and political breakdown of Trump's intended policy ought to help achieve a deeper understanding of what is to come and what he is actually looking to achieve with it.

He very clearly stated in the announcement that within the first hours of his Inauguration he vows to sign an executive order banning any federal department or agency from colluding with any organization, business, or person, to censor, limit, categorize, or impede the lawful speech of American citizens. He then proceeded to emphasize how federal money is being used in resources that ban domestic speech and how he intends to ban it, in addition to firing any federal bureaucrat who has engaged in free speech censorship, directly or indirectly.

While the goal to alienate federal officials from vast digital data companies may be of political interest to Trump, the legal implications of such an executive order is of great importance. It highlights the modern era need for the perseverance of the separation of powers, as scholars all around the world have ascertained that media truly is the fourth power and government agencies meddling with it could harm not only the right to free speech, but also, democracy as a whole. Even if, executive orders seem to offer only temporary solutions in the US, they certainly can hint to a certain partisan direction, in which the Republican Congressmen/women will most likely move towards, thus creating a more formal piece of legislation.

Another ambitious goal of his is to revise Section 230 of the Communications Decency Act (CDA) of 1996. This, however, may be a rather difficult task to achieve as it involves a great deal of legal complexity, which we shall analyze further.

Section 230 is a section of the Communications Act of 1934 that was enacted as part of the Communications Decency Act of 1996, which generally provides immunity for online computer services with respect to third-party content generated by its users. At its core, Section 230(c)(1) provides immunity from liability for providers and users of an "interactive computer service" who publish information provided by third-party users:

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

Section 230(c)(2) further provides "Good Samaritan" protection from civil liability for operators of interactive computer services in the good faith removal or moderation of third-party material they deem "*obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected*".

This part of the section appears to be the one Trump intends to submit to Congressional revision. As he stated "*From now on, digital platforms should only qualify for immunity protection under Section 230 if they meet high standards of neutrality, transparency, fairness, and non-discrimination. We should require these platforms to INCREASE their efforts to take down UNLAWFUL content, such as child exploitation and promoting terrorism, while dramatically curtailing their power to arbitrarily restrict lawful speech.*". Careful analysis of the law in question highlights the importance of protecting major platforms from civil liability for materials provided by third-party users that may be subject to lawsuits. Such protection is fundamental to their operation, as the risk of liability would otherwise be too great to sustain these platforms. The law treats these platforms as mere publishers and nothing more, creating a safe and prosperous digital space for them, so they can themselves provide that very space to everyday users. This is the core of the section and President Elect Trump does not seem to disagree with it in any way.

In his perspective, the problem lies at the platform's right to remove and moderate content "in good faith". To avoid creating a legal paradox where the attempt to establish a fair digital platform for free expression ultimately undermines that very right, he is likely to request that Congress devise a set of prerequisites for platforms to qualify for immunity under Section 230.

Lastly, as regards to the issue of online free speech censorship the president elect has proposed an interesting new concept of fundamental modern-era legislation: the "Digital Bill of Rights".

James Madison, the lead author of the original Bill of Rights and the famous first amendment to the Constitution back in 1791 composed it, in hopes of recognizing the protection of the freedom of speech, religion, the press, and making complaints and requests to the government. The official text of the amendment is presented as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Trump, being the politician that he is, purposefully managed to detect and address the lack of a proper digital *lex scripta* that protects fundamental human and political rights. He then looked to appeal to the American voters' sense of safety that lies in the original Bill of rights, thus conjuring up feelings of patriotism and excitement to the sound of a digital Bill of Rights. In his exact words "*This should include a right to digital due process—in other words,*

government officials should need a COURT ORDER to take down online content, not send information requests such as the FBI was sending to Twitter.” By many, the issue of restoration of fundamental rights and the access to competent judicial access to support the rule of law online, has been overdue.. Over-blocking content and people with no rightful legal process reminds us of earlier, darker times in history and is certainly an ineffective approach to addressing genuinely unlawful content.. An obvious, but rather complex solution to the problem could be a form of online infrastructure, where a citizen is able to appeal to and receive a clear and lawful response as to why their content has been censored.

III. DSA’s Context of Free Speech Protection

Returning to E.U. politics, a careful assessment of the European legislation is necessary to properly identify similarities between the DSA and Trump’s proposed policy.

The Digital Services Act (DSA) and the Digital Market Act (DMA) form a single set of rules that apply across the whole EU. They have 2 main goals:

1. To create a safer digital space in which the fundamental rights of all users of digital services are protected
2. To establish a level playing field to foster innovation, growth, and competitiveness, both in the European Single Market and globally.

For the objectives of this paper, we shall focus on the first goal. The European Commission submitted the DSA alongside the DMA to the European Parliament and the Council on 15 December 2020. The DSA was prepared by von der Leyen Commission members Margrethe Vestager and Thierry Breton. On 5 July 2022, the European Parliament approved both the DSA and the DMA. After this, on 4 October 2022, the European Council gave its final approval to the DSA, leading to the EU adopting it on 19 October 2022 and publishing it in the Official Journal of the European Union on 27 October 2022. It ultimately came into force on 16 November 2022.

A closer examination of the legislation reveals that articles 19-22 stipulate that users can contest content moderation decisions that restrict their accounts or sanction their content in several ways. As we can see, this right also applies to reports of illegal content that were rejected by the platform, which is an interesting approach as it does not only look out for the right to free speech, but also emphasizes the need to quickly and effectively censor unlawful content. According to the DSA, users may also appeal to the internal complaint-handling system of platforms, which requires platforms to review their decisions.

The DSA also enables users to refer to out-of-court dispute settlement bodies. These bodies are an alternative to judicial proceedings offering a faster and more cost-effective way to settle disputes. Users may select any out-of-court dispute settlement body - that has been EU certified for their type of

dispute - and request a review of a platform's content moderation decision. Online platforms are obliged to engage with this body. Lastly, users may always take the matter to their national courts. Both users and online platforms must engage in good faith with the selected out-of-court-dispute settlement body with a view to resolving the dispute. The allocation of the fees depends on the outcome of the procedure. In any case, for the recipients of the service, the dispute settlement will usually be available free of charge or at a nominal fee. Out-of-court dispute settlement bodies do not have the power to impose a binding settlement of the dispute on the parties, but they offer a fair and swift review.

Furthermore, it is important to note that companies that do not comply with the new obligations risk fines of up to 6% on their global annual turnover. In addition, the Commission may impose periodic penalties of up to 5% of the average daily worldwide turnover for each day of delay in complying with remedies, interim measures, and commitments. As a last resort measure, if the infringement persists and causes serious harm to users and entails criminal offences involving threat to persons' life or safety, the Commission can request the temporary suspension of the service.

IV. Comparison of the Two Approaches

Having examined both Trump's and E.U.'s approach to the matter, it is now easier to identify potential areas of common ground. E.g. Trump's views on establishing due process align closely with the right to appeal in both internal and external complaint systems implemented by the DSA in the EU. This suggests that, if the Bill is passed by Congress, it is likely to closely mirror the European procedure in this regard.

The main difference that occurs though, is that historically, hate speech is often interpreted differently in the US and the EU. Even though political correctness is a Western-world-wide phenomenon, in which countries mostly agree on what is appropriate to be publicly spoken, the clarification of what is hate speech remains an unresolved issue between U.S. and E.U. According to the U.S.'s *Fifth Circuit* ruling of hate speech as "*any unlawful expression and certain speech that 'incites criminal activity or consists of specific threats,'*" while the E.U. *DSA Code Of Conduct*, which the platforms have agreed to abide by, quite vaguely states that "*hate speech is public incitement to violence or hatred.*", thus ultimately leaving it to the discretion of the ruling body to decide whether it is considered as such.

Whether it is a chasm in values and culture, or political reasoning is hidden behind this conflict, the issue of free speech will certainly be a great difference between the two legislations when the time arrives for the Congress to announce it.

Another clear distinction is that, unlike the DSA, Trump's policy involves much greater judicial oversight in censorship rulings. As previously mentioned,

he aims to establish laws that require court orders for platforms to take down posts, block users and accounts and altogether censor media. Whereas the DSA follows a different route to resolving the problem. Their strategy could be defined as “*take down now – inspect later*”, which essentially means that aside from the *Code of Conduct* that the platform has to abide by no other restrictions are to be set on flagging and taking down content.

While both approaches seem highly ambitious, in practice they heavily rely on other unstable factors, not always controlled by the platform itself, for them to work respectively. Trump’s policy being more protective and reassuring, with the trusting courts of law watching over and ensuring a fair process can be extremely slow to tackle unlawful content. It is no secret that justice should take the proper time to look over all the occurring facts and one can never have enough resources or people to cover a space as vast as the internet. On the other hand, the DSA, if not correctly implemented, can lead to gaps that people and most importantly, and quite frankly worryingly, artificial intelligence of ill-intent can fill and cause mass flagging of content, leading to them being taken down. This would result in an apparent infringement of the right to free speech, which could only -halfway- be mended by a rapid internal response from the platform assessing the matter, something that tech and programming experts alike have stated is extremely costly and difficult to maintain.

V. Political and Social Reactions

All in all, with the Republicans having House and Senate majority, the landscape is clear as ever for Trump to implement the plans he has in mind. The limited negative reactions to the European DSA within the U.S. legislative body were expressed in the early stages by a bipartisan group of Senators, whose primary concern was the commercial aspects of the Act. They felt it would create a great disadvantage for certain American firms and that it would strongly sever digital trade ties between the 2 unions. No other complaints were made for the rest of the legislation whatsoever, which is a crucial factor in the President elect’s race to formally introduce his initiative.

Along with an apparent approval of the DSA by Congress politicians, American big tech representatives, journalists, Human Rights advocates and other scholars have made their stance clear, standing by the European digital movement, heavily signaling that this will be the case in Trump’s Initiative as well. Other tech experts, aren’t exactly against the European legislative piece, but gave a rather lukewarm response when addressing the matter, stating that “*it is highly reliant on individual action and a vague risk assessment is not the way to go*” but still are keen on the idea and the new concepts it brings to the table.

VI. CONCLUSION

In conclusion, it is clear that the European Union is leading the way ineffectively addressing human rights issues and digital complexities, bringing in new approaches that the rest of the world can learn from. The very core of the E.U. lies in the mutual agreement of nations to protect these rights and enforce the rule of law where it must to achieve that. The United States' political landscape on the other hand, divided as it may be, is a nation where free thinkers have always thrived. Confronting illegal censorship has always been a top priority, ever since the first papers were introduced, so why should it be different in the context of a digital paper? Fighting this issue head on, requires bipartisan support, as both democrats and republicans take pride in their nation being the pinnacle of democracy and the western civilization as of the past century. Legal improvements in digital areas have long been awaited, and Governments must move fast to catch up with the rapid technological developments, in order to protect the people and the rule of Law.

To summarize, despite a few differences in viewpoints between the 2 Unions, President Elect Trump's "*Free speech Policy Initiative*", could turn out to be very similar as far as politics and the law itself go. The E.U. has been trying to assess the matter for roughly 4 years, and it is only now that we are seeing DSA's first consequences come into play. A long and thorough examination, with the co-ordination of many digital and legal experts is the key to a successful adaptation of the American counterpart to the DSA by the Congress. It's undoubtedly a much-needed legislation in this modern era and shall ultimately lead to a much smoother, fairer and most importantly safer digital world for everyone.

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