

UCLA Institute for Technology, Law and Policy

Podcast Episode 3: Daphne Keller of the Stanford Cyber Policy Center on “Who Controls Online Speech”

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Biography: Daphne Keller joined the Stanford Cyber Policy Center in February 2020. Prior to that, she was the Director of Intermediary Liability at Stanford's Center for Internet and Society. Before that she was Associate General Counsel for Google, where she had primary responsibility for the company's search products. Her work focuses on platform regulation and Internet users' rights, and in particular on legal protections for users' free expression rights when state and private power intersect. She holds a B.A. from Brown University and a J.D. from Yale Law School.

Transcript:

(Note: This transcript has been lightly edited for clarity. The transcript is presented “as is” with no representations or warranties regarding accuracy. Please consult the original audio for the definitive record of the interview.)

John Villasenor: So first of all, I'd like to welcome Daphne Keller to the podcast. And before we get started, I'm going to read a quick bio. Daphne Keller joined the Stanford Cyber Policy Center in February 2020, and prior to that she was the director of intermediary liability at Stanford Center for Internet and Society. Before that she was associate general counsel at Google where she had primary responsibility for the company search products. Her work focuses on platform regulation and internet users' rights, and in particular, on legal protections for users' free expression rights when state and private power intersect. So let me just start by saying thank you very much, Daphne, for being willing to discuss these interesting topics with us.

Daphne Keller: Thanks so much for having me.

John Villasenor: Okay, so my first question is: Through the Hoover Institution, you've recently published a paper—very highly recommended by the way—titled, “Who Do You Sue? State and Platform Hybrid Power Over Online Speech.” And in that paper you make a number of fascinating and important points. One of your key points is that when it comes to control over online speech, this theoretically clear distinction between the government and internet platforms isn't actually so clear after all. Can you explain why that's the case?

Daphne Keller: So, there's kind of a continuum of reasons why the government might have an influence in a platform's decision to take down your content. At one extreme, it might be that the law actually requires the platform to take down content. So, that's very clear action by the state that leads to speech being suppressed and often appropriately so, if it's genuinely unlawful speech. At the other extreme from that you get situations where the government might be gently nudging platforms in a back room to take content down, and the platforms decide to do what powerful state actors want them to do, without the state having to go through the process of actually making a law or actually having something that users could challenge in court.

Daphne Keller: And anywhere along that continuum, there are opportunities for user's rights to really get trampled on. So, even if you're just thinking about laws that are legitimately only intended to make a platform take down truly unlawful speech, we know from a lot of research on these laws that what tends to happen is that people contact platforms and they say, "Hey, I found something illegal and I want you to take it down." And the platform says, "Well, if I leave it up, I'm risking liability for myself. So, the easiest and cheapest thing to do is just take it down." Not hire a lawyer to analyze it. And so we know that in laws that work like that, there's a fair amount of excessive removal of lawful speech by platforms that are being overly cautious.

Daphne Keller: So, there's a question about when users who are affected by those laws, could have the right to say, "Hey, this is my government passing a law that would foreseeable lead a platform to silence me." And at some point that law has gone too far and the government shouldn't be able to structure the laws that way. I mean, we know there's a limit from some 20th century Supreme Court cases about bookstores that said, for example, you can't hold a bookseller strictly liable for obscene books on the shelves. You can't have a rule that says they're liable even before they had an opportunity to know about it. So, we know there's some limit to how much the government can sort of outsource this policing obligation to private platforms, but we don't know exactly where that limit lies. But maybe the more interesting thing for listeners here might be the situation where the government doesn't bother to pass a law.

Daphne Keller: And there's this sort of circumvention of democratic process. In the US we have a few examples of cases where courts have said governments went too far. So, there was a case involving the sheriff in Cook County, Illinois, who pressured payment processors to cut off a webpage. And the court said, "Hey, wait a minute. You are stepping way outside your legal authority. You don't have the legal authority to decide what's illegal and you can't use your power to basically bully intermediaries, payment processors, into cutting off a particular kind of speech."

Daphne Keller: Despite that though, of course, politicians want to say to platforms, "Hey, I see a problem and I want you to take down this bad content. And if you don't do it, then I'm going to pass a law, and you're not going to like it." That's a very typical thing for a politician to do and it's normal and even appropriate in some other contexts about maybe consumer safety. But in the speech context, it means that a politician is getting platforms to say, "Oh okay, I'm going to voluntarily do this and take down content that's legal and that lawmakers could not have required the platforms to take down consistent with the First Amendment."

John Villasenor: Thank you very much. And just pushing into that a little more, one of the sections of your paper is titled "Laundering state action through private platforms." And I think you've already covered some of this, but just to talk about the specific taxonomy, for lack of a better word, that you have in the paper. In that section of your paper, you cite three ways in which state actors can influence content decisions by US-based internet platforms. The first is regulation, the second is pressure, and then the third is cross-border influence and obviously that would be from countries outside the United States. Can you explain, I guess, each of those and give an example of how that might operate in practice to the extent that you already haven't in your previous answer?

Daphne Keller: Sure. So the first one, any legal regime that requires platforms to take down content could fall into this category. Including some very normal laws that aren't especially controversial like the Digital Millennium Copyright Act for taking down copyright infringing content from platforms. The problem arises if lawmakers and judges and the public start thinking, "Oh, that was just the platform's choice to take something down and therefore I don't have any first amendment right to disagree with it." If the platform did it because it perceived the risk that the government was going to punish it for failing to take it down, the platform thought it had a legal obligation to take your speech down. That is a direct line from state power to speech coming down. And so it's important that laws like that have an opportunity for example, for people whose speech is affected to come back and challenge the removal.

Daphne Keller: In the middle ground, the sort of informal government pressure leading to content coming down. One of the most famous examples is the EU hate speech Code of Conduct, which was a formal agreement negotiated between the European Commission, so a law making body, and four big US platforms, YouTube, Twitter, Facebook, and Microsoft. And in that agreement, the platforms committed that they would use their terms of service to globally prohibit content that violated EU hate speech laws. So this is the EU using its power to get content taken down, but without actually passing a law to achieve that.

Daphne Keller: And lots of European civil society organizations objected vehemently to that because even within the EU, where in theory this is just enforcing their own laws, it's taking that enforcement and making it a matter of private platform terms of service enforcement. So users don't get to go to court and dispute the platform's interpretation of the law. They don't get to challenge the law. They don't get to have their equivalent of constitutional review-

John Villasenor: Because there's no law to challenge. Right?

Daphne Keller: Because there's no law to challenge. It's just a private agreement.

John Villasenor: Right.

Daphne Keller: Yeah. And that sort of bleeds into the third category of cross-border influence. In that case, this mandate that came from Europe and that in theory at least was only enforcing the law and not trying to go beyond European law, it was implemented through global terms of service. And so suddenly everybody in the whole world who's using those platforms is subject to European hate speech law standards.

John Villasenor: Because they ended up essentially just interpreting the terms of service in a way that was consistent with that agreement within Europe, everywhere.

Daphne Keller: Yeah. I don't know, for some platforms, I think they had existing terms of service they thought were consistent with European law anyway, so all they had to do was interpret them. Maybe others had to actually amend their terms of service. But from a platform perspective, if you're just thinking in terms of operational efficiency and not having to pay a thousand lawyers around the world, or enforce different standards for different users all over the world, it's much easier to just prohibit like a superset [crosstalk] countries you're in.

John Villasenor: You take the union of everything that anybody's objecting to and you prohibit all of that and that way nobody, you satisfy all the people who are knocking on your door asking you to police the content. Right?

Daphne Keller: Yeah. To be clear, I'm saying that's the easiest course. If you look at a big platform like Facebook or YouTube or Twitter, they have some things globally prohibited, but then if for example, Germany prohibits something that goes even beyond the platform's terms of service, then they'll take that down just for users in Germany. So, it's not that they really do adopt a single universal standard that is the lowest common denominator. But that is the path of least resistance.

John Villasenor: Right, you're saying that is certainly a factor in the tensions which lead to these decisions. Right? They're not completely ignoring these sort of jurisdiction specific differences, but there is a temptation to blur them, when they can do so in the interest of expediency without treading on the toes of the various countries involved. Is that?

Daphne Keller: It is the easiest course. And there's an interesting case on this. This is sort of an extreme case, but it illustrates part of the problem. I talk about it in the paper. It's the case of *Zhang v. Baidu*. So Baidu is China's biggest search engine, but they operate around the world. And a group of Chinese dissidents in the US sued Baidu in a US court and said, "Hey, Baidu is silencing our lawful speech about democracy. And they're doing it at the behest of the foreign government. And that violates our rights." And the court said, "No. Baidu wins." And the reason Baidu wins is both because these plaintiffs don't have a claim they can really articulate against this private company because it's a private company making the choice. Even though it's at China's behest, allegedly, probably actually. But the more important reason is the court says Baidu is a private actor with its own First Amendment rights, and Baidu can decide to take down whatever it wants in the exercise of its editorial discretion, even if what it wants is to make the Chinese government happy.

Daphne Keller: And so that kind of illustrates both how cross-border influence can flow in the bluntest possible way. But it also illustrates how there isn't a recourse for it. You can't go to court in the US and say, "Stop doing what China wants in the realm of speech," at least according to this Baidu case, because Chinese power has been sort of laundered through a private company, and the private company can do what it wants.

John Villasenor: So, that sort of leads to my next question. What are some solutions that you think could help protect platforms from state actors exerting inappropriate control over online content? I think the last place we'd want to end up in this country with respect to online content moderation is to have every government in the world be able to kind of lob in their demand about content we can see or not see in the United States, and have the platforms obey those demands. So, how do we prevent that?

Daphne Keller: Yeah. I think the thorniest part of this is probably the cross-border piece, because unless well-meaning governments get together and agree not to try to enforce their laws on other countries' territories, not to prioritize their country's preferences, there isn't really a legal barrier to platforms following what influential governments want them to do. So that one is very hard to solve without something like a treaty making process or some kind of transnational agreement. It would take a lot of functioning transnational communication between governments, more than we're seeing right now.

Daphne Keller: But the other pieces of it, to the extent that you can tackle this within an individual democracy, there's a lot more to be done. So, for example, people talk a lot, including me, talk a lot about demanding more transparency from platforms, which is incredibly important. We all need to know for the major powerful platforms, including my former employer, Google, we need to understand what they're taking down and why. But we don't just need transparency from platforms. We should also be demanding transparency from government. If there are people in government going to platforms and saying, "Hey, take this down. That should be something that they have to disclose to the public so we know it's happening."

Daphne Keller: And so either we can use a legal recourse, say, actually this was so bad, it violates the First Amendment and, "Hey Senator, you're not allowed to do this." Or political and public pressure, say, "Whether or not this violates the Constitution, we're mad at you, and we're going to vote you out of office if you keep doing it."

John Villasenor: So let me just make... One thought that occurs to me in response is, of course, it would be good not to have other countries be able to reach into the United States and exert their power in extraterritorial manner. But, at the same time in a different domain, not content moderation, but I'm sure you remember the Microsoft Ireland case, I think it was *Microsoft v. US* and that led to the passage of the Cloud Act. And I may be misstating it, but my recollection is the Cloud Act does give subpoena power over data stored outside the United States. Right?

John Villasenor: And so, I guess there's a little bit of a consistency question there that arises. Right? On the one hand, if we in the United States say, "Hey, we don't want anybody else coming in and telling us how to manage our content here." Yet at the same time, we have a statute which purports to give us the authority to grab data that's stored in some other country, regardless of what that other country's laws might say. At least that's what the statute says in theory. Right?

Daphne Keller: So, I think there are tensions even closer to the area of content moderation. Because when Americans complain, for example, about France wanting to enforce its right-to-be-forgotten laws globally, which the EU's highest court, the CJEU said . . .

John Villasenor: Oh yeah, that was last fall. Right?

Daphne Keller: Yes. This was reported as a ruling that they can't, that's incorrect. The ruling said they don't automatically get to enforce it globally, but maybe kind of sort of sometimes if it seems appropriate, they can require Google to take down certain search results globally. And in a ruling a month later, the same court said that sometimes Austria can require Facebook to take

down defamation globally. And this was in a case that was about defamation of a politician. Somebody called this politician a treacherous oaf and a member of a fascist party, which here is ordinary political discourse, but in Australia is defamation.

Daphne Keller: And the highest court in Europe said, "It's okay Australia, you can order Facebook to prevent everyone in the world from saying those things." So, Americans complain about these things and I think... Not just Americans. Indians complain about these things. Mexicans complained about these... There are many people around the world that are worried about global enforcement of European rules.

Daphne Keller: But, if you talk to Europeans about it, they say, "Yeah, well what about the DMCA, the Digital Millennium Copyright Act? Platforms are enforcing US copyright law globally, and in many cases, for example, something might be in the public domain, as close as in Canada, but it comes down globally because of US copyright law.

John Villasenor: Right. So you're saying that there's inconsistency is even closer, even in the domain of content itself. We don't have to go to the Cloud Act to find inconsistency. Thank you for that. So my next question is, in another section of your paper you discuss litigation against internet platforms initiated by people who are unhappy with the decisions that they've made regarding content. And in particular, you discussed something that are called "must carry," claims, and I was hoping you could briefly explain what a must carry claim is, and what lessons such claims offer us about how to seek balance between the power held by online platforms and the power held by individuals who rely on those platforms.

Daphne Keller: Yeah, so must carry is a term of art in communications law and I took it and used it more broadly. And I'm seeing a lot of uptake, it's a useful term, and I'm reading another paper about German law right now for example, that uses it. What I call must carry claims are situations like the recent Prager University case in the Ninth Circuit where somebody has a presence on an internet platform, and then the platform either terminates their account, takes down a particular post, demotes their content in some way, and somehow restricts their access to the platform. And the plaintiff says, "Hey, you don't have a right to kick me off. You have to carry my content even though you don't want to."

Daphne Keller: These have had a lot of attention in the US recently particularly as a manifestation of concerns about political bias by platforms, but these cases actually go back to the 90's. There've been 30 or more cases like this in the US, and the platforms always win. Every single one, and I think unless there is some major change, either legislative change or first amendment doctrine change from the Supreme Court or both, that will continue to be

the case. This Prager University case that came out down from the Ninth Circuit a couple of months ago says the exact same thing as all the previous ones, which is, "This is a private company. You don't have a First Amendment right against a private company. That's a right you only have against the government. You can't sue them and compel them to take care of your content."

John Villasenor: Okay, thank you. My next question is about algorithms, and I guess the question is how do algorithms play into all of this? I mean, after all of course, if you look at the volume of content that's uploaded or created through Twitter and YouTube and Facebook, a lot of content moderation decisions are made at least initially by algorithms. How might more advanced algorithms and in particular AI, artificial intelligence, be viewed as a potential solution to these challenges or as a complicating factor in relation to these challenges?

Daphne Keller: I think they're very much complicating. I think people like the idea of algorithmic demotion, for example, as a solution to problems like so called fake news. The sort of like, "Well, we're not going to prohibit it and take it away completely, but we will make it harder to see." And that's appealing in part because it gives you a more nuanced response. It's not this binary determination that something becomes completely deleted or is fully present. You can do something that's more on a gradient.

Daphne Keller: But, if you're thinking about the First Amendment consequences of the government mandating that, it doesn't matter that much whether they're saying you must take this down or you must hide it. Those are very similar things. And if you're somebody who's worried about private platform power and doesn't like big, powerful, important companies in California making these decisions, that distinction might not be very reassuring either to say, "Oh well, we're going to stop Facebook from taking this down, but they can put it on the 20th screen down as you scroll."

John Villasenor: Right, right, because no one's ever going to get to the 20th screen. Right?

Daphne Keller: Yeah, and it's also, there's an article by Jonathan Blevins that I think is pretty insightful on this. It's very hard to imagine what regulation looks like if we're thinking about requiring platforms to change their ranking algorithms because ranking algorithms are these massively complex, constantly evolving things.

John Villasenor: And they're proprietary as well. Right? I mean, and that's one of the ways that they differentiate, right? I mean Google was able to be so spectacularly successful in search because it was able to develop a superior search algorithm.

Daphne Keller: Yeah. And I don't mean to be too much of a skeptic, because I think people's concerns about the gatekeeping influence of platforms are very, very legitimate. And I think their concerns that algorithms are part of how that influence is effectuated are also very, very legitimate. It's just that trying to think through what a law that would look like that would build on that is... I have yet to hear of anything that seems like the benefits outweigh the costs and complexity.

John Villasenor: And the challenge when as soon as one puts pen to paper and tries to draft the language, you end up, there's all these unintended consequences, right, that can occur if the government tries to wade into telling search companies how they should rank their search results. It just seems like that opens the door to all sorts of unintended consequences.

Daphne Keller: I mean, there's a real nexus here with competition concerns, and I talk toward the end of the piece about some very nascent ideas that I've heard kicked around over the years. And I would love to see people do more work on them, which is sort of what about an unbundling model? You know what if you said, "Okay," we'll make it not about Google since that's my old client, but we'll make it Facebook. "Okay, Facebook, you are sitting on this unparalleled trove of data, and no one can compete with you because they can't get access to that data. And so we are going to allow you to continue offering your service to people. But you also should allow competitors to come along and build on that data and offer a different UI, a different content moderation policy that is more or less tolerant of nudity or violence."

Daphne Keller: "You should allow there to be the Disney flavor of Facebook and the ESPN flavor and the ACLU flavor, and sort of have different competing versions built on top of what's there now. My tentative conclusion in the paper is there are too many problems with that idea for data privacy reasons among others, but I think we haven't really started to think through what the possible ways forward even look like, if you start drawing on basically telecommunications precedent like that, and merging the speech questions and the competition questions.

John Villasenor: Right. I can also imagine any number of complications with GDPR, for example, if you started... We talked about the influence, and a lot of companies have tried to become compliant with GDPR here in the United States just because it's easier, right, than doing something different. If you start mandating that they share their data or open source their data or something, then I can imagine all sorts of concerns.

Daphne Keller: It starts looking like Cambridge Analytica, that what it starts looking like.

John Villasenor: So the last question I at least had thought of in advance is, is that much of the public dialogue on these issues focuses on consumer facing internet platforms like the ones we've been talking about, Facebook, Google, Twitter, so on. But the online ecosystem also includes other critical components where content decisions can be made. And for example, CloudFlare famously dropped 8chan as a customer after it aired footage of the New Zealand massacre. And what are your thoughts on some of the questions that arise in relation to these sorts of decisions that is not made by consumer facing companies but by the companies on which those consumer facing companies rely to stay online?

Daphne Keller: This is a huge issue. It's really, really important. And I see a lot of risk of lawmakers not focusing on it enough, and passing laws that are generically about the platforms, but are really intended for Facebook. And if you pass a law that contemplates Facebook but actually governs little tiny companies that don't have Facebook's resources or as you say, infrastructure companies like CloudFlare or DNS providers.

John Villasenor: And just to clear my question, I wasn't suggesting that it was a bad idea to basically not support 8chan in airing that content, but the broader question is, that action in sense sometimes elevated CloudFlare to all of a sudden being a moderator. Right?

Daphne Keller: Absolutely.

John Villasenor: And so that's the sort of fundamental question I think it raises. Right?

Daphne Keller: Yes. And if you sort of push the moderation responsibility down from the outside edges of the internet, the consumer facing pieces, and down toward infrastructure providers who can really effectively kick you off the whole internet all together, that is a dramatic change. That means that speech that is lawful but disapproved by someone, by a private company, can really disappear from the whole internet. And so I think we should think very, very hard about whether we want to put those companies in that position, precisely because they may be vectors for who knows what influence. If they have unrestrained private power to take on what they want, they might have reason to do what China wants. They might have reasons to do what their biggest advertiser wants, their biggest customer. So I think maintaining free flow of information at the infrastructure layer is extremely important.

John Villasenor: You can imagine a hypothetical, I've not seen any evidence that this has occurred. You can imagine a hypothetical where an infrastructure provider wanted to take down content representing one side of the political spectrum but not the other, either side. Right? But there would be little in place that would stop them, right, from doing that. And so on the one

hand, I think your sense and my sense as well is that you don't want to sort of overregulate and kind of wade into this. On the other hand, you do have these companies that are sort of below the radar screen that have just enormous power, usually unutilized, but have enormous power to moderate content sort of without... They're over the horizon for most internet users.

Daphne Keller: Yeah. And CloudFlare was very resistant to using that power. Matthew Prince, their CEO, wrote an op-ed in the Wall Street Journal the first time that they did it, when they took down the Daily Stormer website after the Charlottesville killing and he said basically, "I woke up cranky this morning and decided to kick some Nazis off the internet, and that felt really good, but no one should have this power. This should not be something that sits in my hands." And you can read that almost as a call for regulation. The sort of like, right now I'm in a position where I can take down whatever I want, and that makes me vulnerable to pressure, as illustrated by the decision that I just took. Maybe I shouldn't have that power. Maybe infrastructure providers should be shielded somehow from having outside influence pressure them to take down content.

John Villasenor: That's a really interesting point. So, I guess, I'll just close by asking, first of all, any other sort of broader points, kind of recommendations for our online ecosystem as we navigate this in the coming months and years?

Daphne Keller: Well, I'll make another plug for the importance of transparency, without better information from platforms and companies about what's coming down and why we just can't make smart laws. We will continue to make dumb anecdote driven laws, which is what's happened a lot in the US and elsewhere. So, I think that's particularly important. And I'll also plug for the legal wonks in the audience. I have a short piece on the Balkinology Blog. That's Jack Balkin at Yale Law School's blog called, "Build Your Own Intermediary Liability Law: A Policy Kit for Wonks of All Ages." And it's about three pages and it basically lists all the knobs and dials that you can adjust, and what you want to think about with the unintended consequences. So it has things like, do you want the same rule for Facebook and for infrastructure providers? Do you want users whose content has been taken down to have an opportunity to appeal and contest that?

Daphne Keller: There's a lot of known things to work with in the law here. We don't have to sort of make things up as we go along.

John Villasenor: Okay, well I just want to thank you again, Daphne Keller. Really, really interesting things. I highly recommend, once again, her paper published fairly recently, the Hoover Institution titled, "Who Do You Sue? State and Platform Hybrid Power Over Online Speech," available online. Just a

really, really interesting and thoughtful paper. So, I thank you very much for being on the podcast and for discussing these really important issues with us.

Daphne Keller: Thank you so much for having me here, John.

John Villasenor: Okay, thank you.