

THREE SIZES FIT SOME: WHY CONTENT REGULATION NEEDS TEST SUITES

Rebecca Tushnet[†]

ABSTRACT

The European Union’s Digital Services Act (DSA) offers a new model for regulating online services that allow users to post things. It uses size-based tiers to delineate the different levels of obligation imposed on various services. Despite the tiers of regulation in the DSA, and very much in its copyright-specific companion Article 17, it’s evident that the broad contours of the new rules were written with insufficient attention to variation. Instead, regulators assumed that “the internet” largely behaved like YouTube and Facebook. Using three examples of how that model is likely to be bad for a thriving online ecosystem—counting users, providing due process, and implementing copyright-specific rules—this Article concludes that, to improve policymaking, regulators should use test suites of differently situated services to ensure that they are at least considering existing diversity and properly identifying their targets.

TABLE OF CONTENTS

I.	INTRODUCTION	921
II.	COUNTING USERS	922
III.	PROVIDING DUE PROCESS	926
IV.	COPYRIGHT-SPECIFIC RULES	929
V.	TOWARDS TRUE PROPORTIONALITY IN REGULATION	930
VI.	CONCLUSION: TAKING THE MULTITUDES INTO ACCOUNT	931

I. INTRODUCTION

The European Union’s Digital Services Act (DSA) offers a new model for regulating online services that allows users to post content online, as does its copyright-specific companion Article 17. Both sets of rules attempt to use tiers to distinguish among types of services. In general, smaller or otherwise less-commercial endeavors have fewer obligations. Despite these gestures towards customization, the broad contours of the new rules were written with

insufficient attention to variation, in part because the regulators were thinking about YouTube and Facebook as shorthand for “the internet” in full. This brief Article will discuss three examples of how that totalizing model is likely to damage a thriving online ecosystem. Problems of service variation—even among platforms that host substantial amounts of user-generated content—arise in counting users, providing due process, and implementing copyright-specific rules. The crude tiers in the system risk creating the situation they presume: an internet with substantially less variation. And this is unlikely to be good for creators, consumers, or anyone else.

This Article concludes by recommending the use of test suites in which regulators ask whether a variety of differently situated services have the features about which the regulations are concerned. This will increase the chances that regulators at least consider the existing diversity of internet services and increase the chances that they properly identify their targets.

II. COUNTING USERS

The first issue is the smallest but reveals the underlying complexity of the problems of regulation at the very outset of the regulatory process. As Martin Husovec wrote,¹ placement in the tiers depends on monthly active users of the service, which explicitly extends beyond registered users to recipients who have “engaged” with an online platform “by either requesting the online platform to host information or being exposed to information hosted by the online platform and disseminated through its online interface.”² While a recital clarifies that multi-device use by the same person should not count as multiple users,³ that leaves many other measurement questions unsettled, and Husovec concludes that “[t]he use of proxies (e.g., the average number of devices per person) to calculate the final number of unique users is thus unavoidable. Whatever the final number, it always remains to be only a better or worse approximation of the real user base.”⁴ And yet, as he writes, “Article 24(2) demands a number.”⁵ This obligation applies to every service because it determines which tier, including the small and micro enterprise tier, a service falls into.

1. Martin Husovec, *The DSA's Scope Briefly Explained* (July 4, 2023) https://ssrn.com/sol3/papers.cfm?abstract_id=4365029, at 1–2.

2. Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), O.J. (L 277) 1 EU, art. 3(p).

3. *Id.* Recital 77.

4. Husovec, *supra* note 1, at 4.

5. *Id.*

This demand is based on assumptions that are simply not uniformly true about how online services monitor their users, especially in the nonprofit or public interest sector. It seems evident—though not specified by the law—that a polity that passed the European Union’s General Data Protection Regulation (GDPR) would not want services to engage in tracking just to comply with the requirement to generate a number. As the search engine provider DuckDuckGo pointed out, by design, its search engine doesn’t track users, create unique cookies, or have the ability to create a search or browsing history for any individual.⁶ So, to approximate compliance, it used survey data to generate the average number of searches conducted by users—despite basic underlying uncertainties about whether surveys could ever be representative of a service of this type—and applied it to an estimate of the total number of searches conducted from the European Union.⁷ This doesn’t seem like a bad guess, but it’s a pretty significant amount of guessing.

Likewise, Wikipedia assumed that the average E.U. visitor used more than one device, but estimated devices per person based on global values for 2018, rather than for 2023 or for Europe specifically.⁸ Perhaps one reason Wikipedia overestimated was because it was obviously going to be regulated no matter what, so the benefits of reporting big numbers outweighed the costs of doing so, as well as the stated reason that there was “uncertainty regarding the impact of Internet-connected devices that cannot be used with our projects (e.g., some IoT devices), or device sharing (e.g., within households or libraries).”⁹ But it reserved the right to use different, less conservative assumptions in the future. In addition, Wikipedia noted uncertainty about what qualified as a “service” or “platform” with respect to what Wikipedia’s specific, and somewhat unusual, organization¹⁰—is English Wikipedia a different service or platform for DSA purposes than Spanish Wikipedia? That question obviously has profound implications for some services. And Wikipedia likewise reserved the right to argue that the services should be treated separately,¹¹ though it’s still not clear whether that would make a difference if none of Wikipedia’s projects qualify as micro or small enterprises.

6. *Digital Services Act (EU 2022/2065) Regulatory Reporting*, DUCKDUCKGO, <https://help.duckduckgo.com/duckduckgo-help-pages/r-legal/regulatory-reporting/> (last visited May 15, 2023).

7. *Id.*

8. *EU DSA Userbase Statistics*, WIKIMEDIA FOUND., https://foundation.wikimedia.org/wiki/Legal:EU_DSA_Userbase_Statistics (last visited May 15, 2023).

9. *Id.*

10. *Id.*

11. *Id.*

The nonprofit I work with, the Organization for Transformative Works (OTW), was established in 2007 to protect and defend fans and fanworks from commercial exploitation and legal challenge. OTW members make and share works commenting on and transforming existing works, adding new meaning and insights—from reworking a film from the perspective of the “villain,” to using storytelling to explore racial dynamics in media, or to retelling the story as if a woman, instead of a man, were the hero. The OTW’s nonprofit, volunteer-operated website hosting transformative, noncommercial works, the Archive of Our Own (AO3), as of early 2023 had over 4.7 million registered users, hosted over 11 million unique works,¹² and received approximately two billion page views per month—on a budget of under \$300,000 a year.¹³ Like DuckDuckGo, the OTW doesn’t collect anything like the kind of information that the DSA assumes online services have at hand, even for registered users (which, again, are not the appropriate group for counting users for the DSA’s purposes).

The DSA is written with the assumption that platforms extensively track its users. If that isn’t true, because a service isn’t trying to monetize them or incentivize them to stay on the site, it’s not clear what regulatory purpose is served by imposing many DSA obligations on that site. The dynamics that led to the bad behavior targeted by the DSA can generally be traced to the profit motive and to choices about how to monetize engagement.¹⁴ Although DuckDuckGo does try to make money, it doesn’t do so in the kinds of ways that make platforms seem different from ordinary publishers (monetizing

12. *April 2023 Newsletter, Volume 177*, ARCHIVE OF OUR OWN (May 9, 2023), https://archiveofourown.org/admin_posts/25846.

13. *OTW Finance: 2023 Budget*, ARCHIVE OF OUR OWN (Apr. 22, 2023), https://archiveofourown.org/admin_posts/25468.

14. Katherine J. Wu provides a good summary of a common thesis: “Originally designed to drive revenue on social media platforms, recommendation algorithms are now making it easier to promote extreme content.” Katherine J. Wu, *Radical Ideas Spread Through Social Media. Are the Algorithms to Blame?*, PBS (Mar. 28, 2019), <https://www.pbs.org/wgbh/nova/article/radical-ideas-social-media-algorithms>. Thus the regulators’ focus on algorithms deployed by the large, for-profit services. See, e.g., Maximilian Gahntz & Claire Perhsan, *Action Recommended: How the Digital Services Act Addresses Platform Recommender Systems* (Feb. 27, 2023), <https://verfassungsblog.de/action-recommended/>; Paddy Leerssen, *Algorithm Centricism in the DSA’s Regulation of Recommender Systems* (Mar. 29, 2022), <https://verfassungsblog.de/roa-algorithm-centricism-in-the-dsa/>; *The EU’s Attempt To Regulate Big Tech: What it Brings and What is Missing*, EDRi (Dec. 18, 2020), <https://edri.org/our-work/eu-attempt-to-regulate-big-tech/> (identifying different regulatory needs for the dominant providers); *27th Annual BTLJ-BCLT Symposium: From the DMCA to the DSA: Keynote and Copyright Interactions* (Apr. 7, 2023), https://tushnet.blogspot.com/2023/04/27th-annual-btlj-bclt-symposium-from_7.html (statement of Matthias Leistner that the DSA starts from the premise that platforms will use algorithms to moderate content).

information about users and trying to keep them scrolling). Likewise, as a nonprofit's website, AO3 doesn't try to make itself sticky for users or advertisers even though it has registered accounts.

The AO3's tracking can tell its maintainers how many page views or requests it gets per minute and how many page views come from which browsers, since those things can affect site performance. The AO3 can also get information on which sorts of pages or areas of the code see the most use, which coders can use to figure out where to put their energy when optimizing the code and fixing bugs. But the AO3 can't match that up to internal information about user behavior. The AO3 doesn't even track when a logged-in account is using the site, only the date of every initial login, and one login can cover many, many visits across months.

AO3 users regularly say they use the site multiple times a day (one game on social media is to report how many tabs users have open on the site). One can divide the number of visits from the European Union by some number to gesture at a number of monthly average users, but that number is only an estimate of the proper order of magnitude. AO3's struggles are perhaps extreme, but they are clearly not unique in platform metrics, even though counting average users must have sounded simple to policymakers. Perhaps the drafters didn't worry too much because they wanted to impose heavy obligations on almost everyone, but it seems odd to have important regulatory tiers without a reliable way to tell who's in which one.

These challenges in even initially sorting platforms into the DSA's tiers illustrates why regulation often generates more regulation—Husovec suggests that, “[g]oing forward, the companies should publish actual numbers, not just statements of being above or below the 45 million user threshold, and also their actual methodology.”¹⁵ But even that, as Wikipedia and DuckDuckGo's experiences show, would not necessarily be very illuminating. And the key question would remain: why is this important? What are we afraid of DuckDuckGo doing and is it even capable of doing those things if it doesn't collect this information? Imaginary metrics lead to imaginary results—Husovec objects to porn sites saying they have low monthly average users,¹⁶ but if you choose a metric that doesn't have an actual definition it's unsurprising that the results are manipulable.

15. Husovec, *supra* note 1, at 4.

16. *Id.* at 4–5.

III. PROVIDING DUE PROCESS

A second example of the DSA's "one size fits some" design draws on the work of Philip Schreurs in his paper, *Differentiating Due Process In Content Moderation*.¹⁷ Along with requiring hosting services to accompany each content moderation action affecting individual recipients of the service with statements of reasons, the DSA also obligates platforms—that aren't micro or small enterprises—to put specific due process protections in place. These obligations apply not just to account suspension or removal, but to acts that demonetize or downgrade any specific piece of content.¹⁸

The DSA also requires online platform service providers to provide recipients of their services with access to an effective internal complaint-handling system.¹⁹ Although there's no notification requirement before *acting* against high-volume commercial spam, even when action is taken against high-volume commercial spam, platforms must provide redress systems. Platforms' decisions on complaints can't be based solely on automated means.

Further, when platforms are large enough, the DSA allows users affected by a platform decision to select any certified out-of-court dispute settlement body to resolve disputes relating to those decisions.²⁰ Such platforms must bear all the fees charged by the out-of-court dispute settlement body if the latter decides the dispute in favor of the user, while the user does not have to reimburse any of the platforms' fees or expenses if they lose unless the user manifestly acted in bad faith. Nor are there other constraints on bad-faith offenders, since Article 23 prescribes a specific method to address the problem of repeat offenders who submit manifestly unfounded notices: an initial warning explaining what was wrong with the notices, and then only a temporary suspension if the behavior continues. The platform must provide the notifier, who need not be a user, with the possibilities for redress identified in the DSA. Although platforms may "establish stricter measures in case of manifestly illegal content related to serious crimes,"²¹ they still must provide these procedural rights.

This means that due process requirements are the same for removing a one-word comment as for removing a one-hour video: for removing a politician's entire account and for downranking a single post by a private figure

17. Philip Schreurs, *Differentiating Due Process in Content Moderation* (unpublished manuscript) (on file with author).

18. Digital Services Act art. 17, 2022 O.J. (L 277).

19. *Id.* art. 20.

20. *Id.* art. 21.

21. *Id.* art. 64.

that uses a slur. Schreurs suggests that the process due should instead be more flexible, depending on the user, violation, remedy, and type of platform.²²

The existing inflexibility is a problem because every anti-abuse measure is also a mechanism of abuse. There may well be significant demographic differences in who is likely to appeal a moderation decision: Such differences are common in other areas in which the law provides the ability to make claims of right.²³ Meta's Oversight Board, for example, reported that more than two-thirds of all appeals of content moderation decisions came from the United States, Canada, and Europe in 2022, which was unrepresentative of actual user activity.²⁴ Differences in willingness to appeal can increase the impact of content moderation policies that already disfavor specific groups,²⁵ just as

22. Schreurs, *supra* note 17.

23. In general, the evidence suggests that willingness to make rights claims, and contest such claims, varies across predictable demographic lines. *See, e.g.*, Anna-Maria Marshall, *Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment*, 28 LAW & SOCIAL INQUIRY 659 (2003) (finding gendered differences in willingness to make legal claims); Hugh M. McDonald & Julie People, *Legal Capability and Inaction for Legal Problems: Knowledge, Stress and Cost*, 41 UPDATING JUSTICE 1 (2014) (finding that willingness to make a legal complaint varies by socioeconomic status and education level); Roger Michalski, *The Pro Se Gender Gap*, 88 BROOKLYN L. REV. 563 (2023) (finding a gender gap in self-representation); Calvin Morrill, Karolyn Tyson, Lauren B. Edelman & Richard Arum, *Legal Mobilization in Schools: The Paradox of Rights and Race Among Youth*, 44 L. & SOC'Y REV. 651 (2010) (finding racial differences in willingness to make legal claims).

24. Oversight Board, Annual Report 2022, at 32; *see also id.* at 33 ("We recognize that these figures do not reflect the spread of Facebook and Instagram users worldwide, or the actual distribution of content moderation issues around the world.").

25. *See, e.g.*, Oliver L. Haimson, Daniel Delmonaco, Peipei Nie, & Andrea Wegner, *Disproportionate Removals and Differing Content Moderation Experiences for Conservative, Transgender, and Black Social Media Users: Marginalization and Moderation Gray Areas*, 5 PROCEEDINGS OF THE ACM ON HUMAN-COMPUT. INTERACTION 1, 27, <https://dl.acm.org/doi/abs/10.1145/3479610> (noting that disproportionate content removals occurred for political conservatives, transgender people, and Black people; the first group of removals "often involved harmful content removed according to site guidelines to create safe spaces with accurate information, while transgender and Black participants' removals often involved content related to expressing their marginalized identities that was removed despite following site policies or fell into content moderation gray areas"); Brittan Heller, *Coca-Cola Curses: Hate Speech in a Post-Colonial Context*, 29 MICH. TECH. L. REV. 259, 263 (2023) ("It is doubtful that calling someone a Coca-Cola bottle [a racial slur in some African contexts] would violate the terms of service of a social media company utilizing a predominantly American perspective, unless the reference was seen as an infringement of intellectual property. These layers of social meaning likely would have evaded automated content moderation filters."); Oversight Board, *supra* note 24, at 12 ("Meta's policies on adult nudity result in greater barriers to expression for women, trans, and non-binary people on Facebook and Instagram."); Adi Robertson, *Tumblr is Settling With NYC's Human Rights Agency Over Alleged Porn Ban Bias*, VERGE (Feb. 25, 2022), <https://www.theverge.com/2022/2/25/22949293/tumblr-nycchr-settlement-adult-content-ban->

copyright takedown notices disproportionately deter women and younger people from counternotifying.²⁶

Relatedly, it is possible to use the system to harass other users and burden platforms by filing notices and appealing the denial of notices despite the supposed limits on bad faith. Even with legitimate complaints about removals, there will be variances in who feels entitled to contest the decision and who can afford to pay the initial fee and wait to be reimbursed. Such resources will not be universally or equitably available. The system can easily be weaponized by online misogynists who already coordinate attempts to get content from sex-positive feminists removed or demonetized.²⁷ We've already seen someone willing to spend \$44 billion to get the moderation he wants,²⁸ and although that's an outlier, there is a demonstrated willingness to use procedural mechanisms to harass.

One result is that providers may be incentivized to cut back on moderation of lawful but awful content, the expenses of which can be avoided by not prohibiting it in the terms of service or not identifying violations, in favor of moderating only putatively illegal content.²⁹ But forcing providers to focus on decisions about, for example, what claims about politicians are false and which are merely rhetorical political speech is likely to prove unsatisfactory; the difficulty of those decisions suggests that increased focus may not help without a full-on judicial apparatus.

Relatedly, the expansiveness of DSA remedies may water down their availability in practice. Reviewers or dispute resolution providers may sit in front of computers all day, technically giving human review to automated violation detection but in practice just agreeing that the computer found what it found. ProPublica has found similar practices with respect to putatively

algorithmic-bias-lgbtq (discussing Tumblr's adult content ban, whose implementation allegedly disparately impacted LGBTQ users).

26. See Jonathon W. Penney, *Privacy and Legal Automation: The DMCA as a Case Study*, 22 STAN. TECH. L. REV. 412, 450 (2019) (finding gendered reactions to DMCA takedown notices; women were more likely to feel chilled in speech; younger respondents were also more likely to be chilled than older ones).

27. See Samantha Cole, *#ThatAudit Is Compiling Massive Databases of Sex Workers and Reporting Them to PayPal*, VICE (Dec. 4, 2018), <https://www.vice.com/en/article/gy7yww/thotaudit-databases-of-sex-workers-and-reporting-them-to-paypal>.

28. See Caleb Ecarma, *We're Officially in the Elon Musk Era of Content Moderation*, VANITY FAIR (Nov. 21, 2022), <https://www.vanityfair.com/news/2022/11/elon-musk-twitter-content-moderation>.

29. See Ben Horton, *The Hydraulics of Intermediary Liability Regulation*, 70 CLEV. ST. L. REV. 201, 205, 234 (2022) (explaining that profit-driven firms will respond to greater intermediary liability by diverting resources from moderating "lawful but awful" content to focusing on allegedly illegal content).

mandatory human doctor review of insurance denials at certain U.S. insurance companies.³⁰

And, of course, the usual anticompetitive problems of mandating one-size-fits-all due process are present in the DSA: full due process for every moderation decision benefits larger companies and hinders new market entrants by increasing the costs of growth or capping their growth potential. Such a system may also encourage designs that steer users away from complaining, like BeReal's intense focus on selfies or TikTok's continuous flow system that emphasizes showing users more like what they've already seen and liked—if someone is reporting large amounts of content, perhaps they should just not be shown that kind of content anymore. It is hard to predict the effects, other than to note that they are not obviously going to be in the direction of high-quality, truthful, and useful content.

Likewise, the DSA's existing provisions for excluding services that are only ancillary to some other kind of product—like comments sections on newspaper sites, for example³¹—are partial at best, since it will often be unclear what regulators will consider to be merely ancillary.³² And the exclusion of ancillary services enhances, rather than limits, the problem of design incentives. It will be much easier to launch a new Netflix competitor than a new Facebook competitor as a result. Notably, even Meta hesitated to launch its new Threads app in the EU, pending a better understanding of the rules.³³

IV. COPYRIGHT-SPECIFIC RULES

The DSA is not the only major European intervention into content moderation. It was enacted soon after the European Union also required countries to make new rules about copyright online. These copyright-specific rules are subject to the same basic problem. Based on complaints that were largely about YouTube or at least about major streaming sites, the European Union demanded changes from the internet as a whole.³⁴ But Ravelry—a site

30. Patrick Rucker, *Maya Miller & David Armstrong. How Cigna Saves Millions by Having Its Doctors Reject Claims Without Reading Them*, PROPUBLICA (Mar. 25, 2023), <https://www.propublica.org/article/cigna-pxdx-medical-health-insurance-rejection-claims>.

31. Digital Services Act Recital 13, 2022 O.J. (L 277).

32. Even the comments sections are apparently subject to review for whether they are really ancillary. *Id.* (“For example, the comments section in an online newspaper *could* constitute such a feature, where it is *clear* that it is ancillary to the main service represented by the publication of news under the editorial responsibility of the publisher.”) (emphasis added).

33. Makena Kelly, *Here's Why Threads Is Delayed in Europe*, VERGE (July 10, 2023), <https://www.theverge.com/23789754/threads-meta-twitter-eu-dma-digital-markets>.

34. *See generally* GLYN MOODY, WALLED CULTURE: HOW BIG CONTENT USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND KEEP CREATORS POOR 117–

focused on the fiber arts—is not YouTube. The cost-benefit analysis of copyright filtering is very different for a site that is for uploading patterns and pictures of knitting projects than for a site that is not subject-specific.

Sites like the Archive of Our Own receive very few valid copyright claims, whether considered as a percentage of works uploaded, time period, or any other metric, and so the relative burden of requiring YouTube-like filtering and licensing is both higher and less justified.³⁵ The differences are not just between websites, but between types of works. Negotiating with photographers for licensing is very different than negotiating with music labels, but the European Union’s framework requires attempts to license from organizations representing copyright owners of all kinds. It assumes that the licensing bodies will be functioning pretty much the same no matter what type of work is involved.

It is possible that the new framework may be flexible enough to allow a service to decide that it doesn’t have enough of a problem with a particular kind of content to require licensing negotiations, but only if the European authorities agree that the service is a “good guy.”³⁶ And it’s worth noting, since both Ravelry and the Archive of Our Own are heavily used by women and nonbinary people, that the concept of a “good guy” is likely both gendered and racially coded, which raises concerns about its application.

V. TOWARDS TRUE PROPORTIONALITY IN REGULATION

Ultimately, proportionality is much harder to achieve than just saying “we are regulating more than Google, and we will make special provisions for startups.” To an American, the claim that the DSA has lots of checks and balances seems in tension with the claim made at the symposium, both by supporters and critics, that the DSA looks for good guys and bad guys. This is a system that works only if its subjects have very high levels of trust that the definitions of good and bad guys will be shared.

42 (2022) (describing Article 17, the struggle to implement it, and its practical filtering mandate).

35. See generally Jennifer M. Urban, Joe Karaganis & Brianna L. Schofield, *Notice and Takedown in Everyday Practice*, UC BERKELEY PUBLIC LAW RESEARCH PAPER 2755628 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628 (explaining the substantial divide between large sites that face high volumes of infringement claims and sites that don’t).

36. The concept that regulators would accept mistakes by “good guys” was important to many of the defenses, and explanations, of the DSA offered at the symposium for which this contribution was prepared. See Rebecca Tushnet, *27th Annual BTLJ-BCLT Symposium: From the DMCA to the DSA—A Transatlantic Dialogue on Online Platform Liability and Copyright Law* (Apr. 7, 2023), <https://tushnet.blogspot.com/2023/04/27th-annual-btlj-bclt-symposium-from.html> (summarizing comments of João Quintais).

Regulators who are concerned with targeting specific behaviors, rather than just decreasing the number of online services, should make extensive use of test suites. Daphne Keller of Stanford and Mike Masnick of Techdirt proposed this two years ago.³⁷ Because regulators write with the giant names they know in mind, they tend to assume that all services have those same features and problems—they just add TikTok to their consideration set along with Google and Facebook. But Ravelry has very different problems than Facebook or even Reddit. There are many other examples of services that many people use, but not in the same way they use Facebook or Google: Zoom, Shopify, Patreon, Reddit, Yelp, Substack, Stack Overflow, Bumble (or your own favorite dating site), Ravelry (or your own favorite hobby-specific site), Bandcamp, LibraryThing, Archive of Our Own, and Etsy. They are used, and abused, in ways that don't match up with the DSA's assumptions.

A test suite can reveal regulators' assumptions about how online services work in ways that clarify regulatory goals and make them more achievable. If a relevant service doesn't have the features that regulators assumed all services did—for example, it doesn't track its users well enough to give reliable estimates about their numbers—then regulators have options. They can either exclude such services (because without tracking, they can't be manipulating user data in worrisome ways) or provide alternative rules. Wikipedia was big enough to make it into the DSA discussions, but most others weren't. The other, less “charismatic” platforms who weren't considered may be burdened most because they haven't built the automated systems and data collection for reporting purposes that the DSA essentially requires. Not only may those systems be unnecessary for particular sites, but many of them are now required to do things that Facebook and Google weren't *able* to do until they were much, much bigger.

VI. CONCLUSION: TAKING THE MULTITUDES INTO ACCOUNT

Although enforcement discretion can moderate the effects of impossible regulatory demands, discretion has its own dangers. Clearer recognition of the inevitable ambiguities and errors entailed by platform regulation can improve system design more than regulators' ad hoc consent to a failure to achieve the

37. @daphnekh, TWITTER (Feb 22, 2021, 5:53 AM) <https://twitter.com/daphnekh/status/1363849276690849800>; Mike Masnick, *The Internet Is Not Just Facebook, Google & Twitter: Creating A 'Test Suite' For Your Great Idea to Regulate the Internet*, TECHDIRT (Mar. 18, 2021), <https://www.techdirt.com/2021/03/18/internet-is-not-just-facebook-google-twitter-creating-test-suite-your-great-idea-to-regulate-internet>.

unachievable—and certainly more than that lenience alone.³⁸ Ordering websites to do things they can't, and then excusing them if they seem nice enough, risks both arbitrariness and non-arbitrary discrimination against politically unpopular sites or users, especially in an age of democratic retrenchment.

The more complex the regulation, the more regulatory interactions need to be managed. Thinking about fifty or so different models of online services and considering how and indeed whether they should be part of this regulatory system could have substantially improved the DSA. Not all processes should be the same, just like not all websites should be the same, unless we want our only options to be Meta and YouTube.

38. It's true that many prevention mandates could be achieved by platforms going out of business—no social media, no social media disinformation—but neither the underlying problems (disinformation now spreading by email and word of mouth) nor the goals of regulation (better functioning social media) would thereby be achieved, so I am comfortable with the claim that full compliance is regularly going to be impossible.