

Editorial

by **Orla Lynskey ***

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- 1 This JIPITEC volume has something for everyone interested in digital regulation, with the featured articles covering key aspects of the legal agenda including new approaches to AI regulation, data protection in data-saturated environments, copyright in contested contexts, platform and content regulation, solutions to smart contracting dilemmas and reflections on user rights in relation to content moderation.
- 2 Kicking off the issue with a thought-provoking cross-cutting framework for AI regulation is an article entitled ‘Regulating AI: A Matrix for Gauging Impact and its Legal Implementation’ authored by Maurice Chiodo, Henning Grosse Ruse-Khan, Dennis Müller, Lea Ossmann-Magiera and Herbert Zech. The piece urges us to think about AI regulation from a distinct and complementary vantage point to the existing regulatory provisions in legislation like the AI Act and the Digital Services Act. To this end, it identifies a new avenue for AI regulation centred around a matrix with two key parameters: the impact of the AI system (understood loosely as the number of people affected by it) and the size of the team involved in its development. Key observations follow from this: that team and AI size are often correlated but can sometimes differ and that, generally, the most risky AI potentially comes from ‘Small Team-Big AI’ while the safest comes from ‘Big Team-Small AI’. Armed with this matrix, the authors propose a two-tiered approach to AI regulation based on a form of strict liability for the harms caused by Small AI and a more intensive form of regulatory oversight through constant monitoring and cumulative penalty points for Big AI. We are encouraged to think beyond existential AI risk and to conceive of it also as ‘death by 1000 cuts’. In this vein, legal regulatory frameworks that overlook the risks in the 2x2 matrix proposed risk gaps through which AI harms will slip.
- 3 The second article featured brings us to data protection law. In their article entitled ‘The Metaverse as a Privacy Mosaic: Framing Data Protection in Hyper-Granular, Data-Drenched Digital Ecosystems’ Pablo Trigo Kramcsák and Vagelis Papakonstantinou conduct a forensic examination of the role of data protection in ‘the Metaverse’. The Metaverse, the authors acknowledge, ‘resists straightforward definition’. They therefore sketch its contours by identifying key features and technical attributes, and distinguish between centralised and decentralised metaverse platforms and distinct forms of data processed. The authors argue that the normative commitments found in the GDPR are difficult to translate into operational safeguards in the context of such granular data processing at scale. The frictions that emerge when data protection law is applied in a data-intensive networked system such as the Metaverse are highlighted, supporting the claim the authors advance: that we must critically reappraise how to preserve privacy and autonomy in such contexts. While not without its challenges, the solution, the authors suggest, lies in the legal requirement of data protection-by-design.
- 4 The third article of the issue is authored by Ewa Laskowska-Litak. In ‘The Mythical Code-Authorship’ she revisits the legal treatment of authorship for copyright purposes in the context of software. It takes aim at what Laskowska-Litak considers to be the growing mismatch between theory and practice: the foundational assumptions underpinning copyright protection of software and the nature of modern software production. Drawing on interdisciplinary insights, the author argues that software

production is inherently collective, collaborative and iterative which has been overlooked as it has been incorporated into copyright law. The paper proposes that rather than approaching copyright in this context through the solitary-author model, it should be understood more technically through ‘programmatically attribution’. This refocus would, from the author’s perspective, better align legal doctrine with socio-technical realities.

- 5 The fourth article of the issue by Jaime Torres Buelvas and his co-authors is entitled ‘The Code as an Element of Trust in Smart Contract Arbitration Clauses’. In this piece, they examine the doctrinal tensions and structural limitations in the interactions between smart contracts and arbitration. They highlight that the features of smart contracts do not immunise them from contractual disputes. In the event of such disputes concerning the contractual terms encoded in smart contracts, arbitration clauses play a critical role. They argue that given the significance of such arbitration clauses, including in digital contexts, a standardized framework codifying arbitration clauses must be adopted in order to provide confidence to contracting parties and to enhance the validity of such clauses in the event of conflict. Their work proposes such a codified arbitration clause model.
- 6 Last but not least, in ‘Social media bans and the Digital Services Act: A critical analysis of Statement of Reasons and Online Dispute Resolution’ by A.R. Lodder and J. Zeleznikow, the authors consider how the EU’s Digital Services Act (DSA) regulates the ‘banning’ of individuals from social media platforms which they define as the suspension or termination of user accounts. They examine whether the DSA provides users with the necessary tools to challenge such bans. Their focus is on user *transparency* (through the ‘Statement of Reasons’ provided for by Article 17 DSA) and user *redress* (through Article 20 DSA which requires regulated entities to put in place internal complaint-handling systems and Article 21 DSA which establishes out-of-court dispute resolution requirements). They suggest that while the statement of reasons might provide some valuable information to enable individuals to challenge such ‘bans’, the internal complaint-handling system may add friction to such challenges. They therefore advocate for the use of out-of-court dispute settlement as a more effective alternative. As they hint, time – and accurate empirical insights into the functioning of these mechanisms – are needed to test this hypothesis.
- 7 Happy reading to one and all!