

Businesses are exploiting human psychology to their advantage, why is the law not taking account of this?

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Dear Editor,

Given that many of the now biggest companies in the world have arisen in the last 12 years, I think it is safe to say that consumer behaviour is changing. The preferred medium for consumers has shifted, from initially preferring listening to the radio to moving to the television, and *now* consumers have focused their attention on mobile devices, and social media. For instance, as of Q3 2017, Facebook has 1.368 billion daily active users, whilst Snapchat's daily users have climbed from 46 million to 178 million between Q1 2014 and Q3 2017¹. Moreover, on Facebook's owned platforms (Facebook, Instagram and Whatsapp), amongst daily users, the average user individually spends 50 minutes a day.² This shows that Facebook not only has a wide range of consumer attention with different demographics of users, but also great depth, which creates money making opportunities. Significantly, this means the types of legal issues that large businesses have is changing. In the past when television was more dominant, it may have been that broadcasters disputed when their TV shows would be aired on channels³. However, copyright and trademark law is likely to become more prominent with tech-centred firms. Instagram, which is owned by Facebook, was legally able to copy Snapchat Stories with their Instagram Stories feature. This was because the underlying source code used by Instagram was different to that of Snapchat and because the interfaces, and therefore the expression of the two apps, were also different. I think that various forms of law, such as IP, have fallen behind modern technological innovations which creates an exciting, present opportunity as a lawyer to shape future law.

*The author is a current GDL student at City, University of London who has an interest in technology, particularly in intellectual property and trademark law. The author has written this letter to the editor through personal interest and hopes it will be particularly interesting for future lawyers in the society we are going to live in.

¹ All products require an annual contract Prices do not include sales tax, 'Facebook: Global Daily Active Users 2017 | Statistic' (*Statista*) <<https://www.statista.com/statistics/346167/facebook-global-dau/>> accessed 1 December 2017.

² James B Stewart, 'Facebook Has 50 Minutes of Your Time Each Day. It Wants More.' *The New York Times* (5 May 2016) <<https://www.nytimes.com/2016/05/06/business/facebook-bends-the-rules-of-audience-engagement-to-its-advantage.html>> accessed 3 May 2017.

³ Silvio Waisbord, 'McTV: Understanding the Global Popularity of Television Formats' (2004) 5 *Television & New Media* 381.

On the other hand, this may lead to turbulent times ahead, as the law is still catching up. Therefore, I think considering human psychology is important, to try and understand *why* consumers are moving to social media so quickly, and where they may move next, to understand where the law may need to be addressed. For example, as Moira Burke highlights, communicating on social media can increase your “social capital” and social standing amongst your peers⁴. However, Burke also highlights that direct communication on Facebook is more satisfying than the “one click communication” such as liking someone’s post, it stands to reason that social media communication would generally be less satisfying than human interaction. Although it can still have benefits given that social media allows you to contact friends who live further away, it makes sense that social media would cause “arousal” (in terms of...Respiratory activity), given that it can become addictive, as opposed to increasing “brain activity” like actual human interaction would⁵. The overarching narrative of this point is whilst social media gives a lower level of communication than actual communication, its *ease of access* along with giving some benefit, is a reason why it has become more popular. In the future, it is expected that businesses will continue to aggressively tap into human psychology to bring greater convenience to consumers. In turn, it should then not be surprising that new legal debates will emerge as businesses exploit new technology, such as voice technology.

It can be expected that voice technology, such as through Amazon Echo, is going to become increasingly popular as it saves time, and therefore brings convenience to the consumer. The device’s ability to order products through speaking, whilst not *much* faster than ordering online and clicking, in the long-run will be perceived as beneficial to consumers, as we tend to value time, which is finite, above other commodities. Already, novel legal issues have arisen, such as in America, the case of *Arkansas v Bates* (2016) where the law enforcement took an Amazon Echo device from a house as part of a murder investigation, and subsequently issued a search warrant to Amazon to seek data held on the device, such as any text records and audio recordings in the 2-day period around the time of the death.⁶ Notably, it is not clear how the Fourth Amendment (right against unreasonable searches) fits in with Amazon Echo, but clearly

⁴ Stephen Marche, ‘Is Facebook Making Us Lonely?’ [2012] *The Atlantic*

<<https://www.theatlantic.com/magazine/archive/2012/05/is-facebook-making-us-lonely/308930/>>.

⁵ Maurizio Mauri and others, ‘Why Is Facebook So Successful? Psychophysiological Measures Describe a Core Flow State While Using Facebook’ (2011) 14 *Cyberpsychology, Behavior, and Social Networking* 729.

⁶ “‘Alexa, Do You Have Rights?’: Legal Issues Posed by Voice-Controlled Devices and the Data They Create | Business Law Section’ <https://www.americanbar.org/publications/blt/2017/07/05_boughman.html> accessed 1 December 2017.

new technology is being able to run ahead of the law, whilst new precedents and judgements are being set.⁷

Lastly, a growing issue with technology is that businesses are clearly exploiting their workers through human psychology, and legal loopholes. This is evident with Uber, the taxi company, whereby to induce their drivers to work longer, automatically loads the next nearby passenger for them to pick up after they have finished with one, whilst also alerting them when they are close to an earnings target.⁸ As most of Uber's drivers are independent contractors rather than employees, they do not benefit from employee protections that may stop this behaviour. Amazon has operated in similar covert ways, as their 'Buy Box' is intentionally orange, as humans associate the colour with a "Call to Action" of some kind, either to subscribe, buy or sell a product.⁹

The largest businesses are fully aware of the nature of human psychology and are using it to their advantage, and it is time the law does the same to fight back.

Yours faithfully,

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⁷ George W Baltzell, 'The Constitution of the United States - We the People - an Easy to Read and Use Version' <<http://constitutionus.com/>> accessed 2 December 2017.

⁸ Noam Scheiber, 'How Uber Uses Psychological Tricks to Push Its Drivers' Buttons' *The New York Times* (2 April 2017) <<https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-psychological-tricks.html>> accessed 1 December 2017.

⁹ 'How Do Colors Affect Purchases? Infographic' <<https://blog.kissmetrics.com/color-psychology/>> accessed 1 December 2017.