Backup
Can users sue platforms to reinstate deleted content? Lessons from US and German jurisprudence

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Bad content, right fully deleted? Or bad deletion decisions ignoring public role of platforms?

- “Napalm girl” on Facebook: first deleted, then undeleted
- III. Weg - Decision of the German Federal Constitutional Court: first without profile, then back on FB
- Knight First Amendment Institute v. Donald J. Trump: first blocked, then unblocked
1. Online content governance between states and companies

2. Wunderbar together? Diving into US and German case-law

3. Towards a Private Order of Public Communication?
Online content governance between states and companies
The Theory

- Jürgen Habermas: public sphere (gatekeepers)
- Yochai Benkler: networked public sphere (no gatekeepers)
- Stuart Geiger: algorithmic public sphere (new gatekeepers)
- And now: Meet the really new gatekeepers ...
- ... They are the old gatekeepers using new gatekeeper’s technology
The Law

- Primary responsibility of states re human rights
- Secondary obligation of companies
- Widely diverging realization of their interrelation
The Incentives

- Business model of platforms depends on communication.
- But it is communication “on their terms”
- Content moderation is highly complex.
- Overblocking happens. Put-backs usually don’t.
- Acuteness of the problem rises with the publicness of the platform.
- Wronged individuals sometimes sue.
The Questions

- Can users sue platforms to have deleted posts and videos reinstated?
- Do they have a right to a [Facebook, Twitter, Weibo, VKontakte etc.] account?
- Do platforms have the obligation to treat users equally in furnishing contractual communication platform services
  - as long as users do not violate the terms of service
  - or as long as users do not violate local law?
The Questions

- And what does this tell us about the relationship of private communication spaces and public law and, what we term, POPCO, the private order of public communication?
Wunderbar together?
Diving into US and German case-law
Integrating public values (and law) into private contracts?

United States

• **Must carry obligation** (−)
  - Platforms are protected under First Amendment (Negative Speech)
  - Protection against interference of the government

Germany

• **Must carry obligation** (+/−)
  - Facebook’s terms and conditions are a legal expression of the freedoms of FB protected by Art. 2, 12, 14 Basic Law (GG)
  - Indirect third party effect of fundamental rights
  - Content moderation by Facebook is a “specific constellation” in the sense of *Stadion Ban*
  - Facebook is gatekeeper for public discourse providing “essential” services as a “quasi-monopoly”
United States
Private spaces under private rules

• "Must carry" - claims

• Immunity under Sec. 230 CDA + Digital Millennium Copyright Act (DMCA)

• (Negative) Freedom of Speech also protects platforms from being forced to host content

• Marsh v. Alabama: company town rule (1964)


• Prager v. Google LLC: public function test (2018)

• MNN v. Halleck (non-state actor) but: dissenting opinion of Justice Sotomayor (2019)

• Knight First Amendment Institute at Columbia University v. Trump (2019)
Germany
Public law in private spaces

- Users have a claim to have their Facebook/Twitter account reinstated
  - When platforms have not fulfilled their contractual duties in good faith
  - When users have not continuously violated terms of services
  - When users have only once posted illegal content (but content could be deleted)
  - after considering proportionate fundamental rights protection and balancing
Germany
Public law in private spaces

- As a "non interchangeable medium of paramount importance" Facebook has "considerable market power" and must treat users equally (Third-party-applicate of the right to equality/Drittwirkung des Gleichheitssatzes).

- May differ according to degree of dominance and orientation of the platform

- degree of dependence of users on any one platform

- which interests of users are affected and how reinstatement would impact platform operator
Towards a Private Order of Public Communication?
Which way is the US jurisprudential bus going?

Knight First Amendment Institute at Columbia University v. Trump (No. 18-1691 (2d Cir. 2019))

• First Amendment does not permit a public official who utilizes a social media account for all manner of official purposes to exclude persons from an otherwise-open online dialogue because they expressed views with which the official disagrees.

• Trump's Twitter Feed has turned into a „designated public forum“, like a public park ...

• Problems:
  • Is the 'designated public forum‘ determined by individual, institution or topic?
  • Platforms‘ rights under the First Amendment are restricted.
And Germany?

German Federal Constitutional Court (BVerfG)

- *FRAPORT*, Judgment of 22 February 2011
- *Stadion Ban*, Decision of 11 April 2018
- *The III. Weg (Third Way)*, Decision of 22 May 2019
- Not quite so important, but to nice not to mention: the *Beer Bottles Flash Mob* case (yes, it’s Germany)
So ... a public-forum-based right to back-up?
And a slow evolution to a more nuanced understanding of the interaction of public and private normative orders, including the crystallization of conditions under which private spaces can gain some publicness and concomittant obligations?
Caveats and perspectives

Any “horizontal” application of human rights/recognition of third party effects of human rights

- must acknowledge the private ownership of the communicative space (individual rights) and the way commercial content governance is administered (factual constraints)

- while also considering its impact on societal cohesion; and in doing so

- must reconcile the clashes between private and public orders, between public law and private law (e.g. through the evolution of one normative order of the Internet)

- Must consider the larger picture of the necessity for a new media order that recognizes the roles and responsibilities of different actors (POPCO)
Open questions

- Where does the “online” public end? With jurisdictional spheres?
- How will courts cooperate? Do we need a new notion of judicial comity for the Internet?
- What will be the impact of diversified (and more legitimated) internal dispute-settlement mechanisms for content decisions (FB Oversight Board)?
- Where is the ideal forum to develop normative approaches on how to integrate the notion of publicness into transnational content governance frameworks?
- Gatekeepers will continue to exist ... And Habermas is neither happy nor surprised.