

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
- Ill. 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



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Online content governance between states and companies

01

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

02

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)
- PruneYard v. Robins: Public forum function of shopping-malls in small towns (1980)
- 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-application 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



03

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 Ill. 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.

