

Bodo P. Bützler

Lex Digitalis Intermedia

Transnational Law and Legal Legitimacy

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Introduction: Intermediation on the internet

When examining the evolution of the internet between the years 2010 and 2022, one may get the impression that the internet is becoming increasingly fragmented, de-globalized, and re-localized.¹ Some nation states employ internet filters in an attempt to (re-)link the ever-growing transnational digital sphere back with physical-territorial boundaries. Media companies may limit access to their content for specific users, namely those who are accessing the internet from geolocations where necessary licenses were not (or could not be) obtained. Internet platforms may selectively block particular content in regions where courts have deemed such content unlawful. These *prima facie* impressions clash with the very design idea of the internet. The internet is a piece of technology that is meant to facilitate the effective transmission of information by splitting up data into various packets to be transmitted decentrally through a network and reassembled at the receiver's end.

Secunda facie, a contrary picture emerges; not one of decentralization but one of consolidation. The economic winners of the internet are internet intermediaries, i.e. those service providers who have created global platforms on which demand for a particular service or product is successfully and efficiently matched to respective supply.² There exist several categories of internet intermediaries, most notably the following:

- 1 For a critical examination see Mueller, *Will the Internet Fragment?* (2017).
- 2 One may speculate whether we are about to enter a new era of economic transactions that is no longer based on the *exclusivity* dimension of property rights but rather on the *sharing* of services and information. In such an era, participants would no longer hold and transfer respective property rights, and certain services and information would be in the public domain to begin with. Numerous immaterial goods already address this new paradigm, e.g. open-source software such as Linux or the Creative Commons License. However, material goods may be similarly affected in the future. Already, an increasing number of material goods (especially costly ones) are no longer owned but leased, whereby the lessee can be granted levels of competence and responsibility typically only reserved for the owner and the lessor retains a more »naked« property right. When such practices become collectivized amongst many sharers, the normative rules governing the *de facto* usage and maintenance of the good may be fully abstracted from the formal property right holder who remains in the normative background. Further, once material goods can be readily produced in a cheap, sustainable, recyclable and need-based manner, for instance via 3D-printing, the very purpose of property rights as exclusivity rights may radically diminish, forcing a reconceptualization of property rights as access rights, cf. Rifkin, *The Third Industrial Revolution* (2011).

internet service providers (e.g. AT&T and T-Mobile), domain name registrars (e.g. Domain.com and IONOS), file sharing services (e.g. Dropbox and Google Drive), search engines (e.g. Google Search and Microsoft Bing), e-commerce platforms (e.g. Amazon and eBay), internet payments systems (e.g. VISA and PayPal), and social network platforms (e.g. Facebook and Twitter).³

The winners amongst the winners, in turn, have been those intermediaries who have capitalized most effectively on the two central and most widely used functions of the internet, namely the accessibility of data (the information aspect) and the facilitation of reactive social exchanges (the communications aspect).⁴ They have turned into *incumbent* internet intermediaries in their respective digital sector. Just to name three: Google Search has become the incumbent for intermediating information, Facebook has become the incumbent for social networking, and Amazon has become the incumbent for intermediating e-commerce.

These have also been called »gatekeepers« of the internet. Gates are in-or-out decision points between the environment and particular gateways (also called channels) at which gatekeepers determine what may pass through the gate in accordance with a particular decision rule controlled by the gatekeeper (also called the gatekeeping mechanism⁵).⁶ Those subjected to gatekeeping forces, in turn, are called the gated.⁷

Gatekeeping theory was primarily developed in applied mass communication research to characterize the bottleneck through which

- 3 Cf. Perset, »The Economic and Social Role of Internet Intermediaries«, *OECD Digital Economy Papers*, No. 171 (2010), p. 9.
- 4 A yearly telephone interview survey conducted in Germany since 1997 (among German-speaking internet users aged fourteen and older) consistently indicates that the two categories of services most used – by a wide margin – are communication services and information obtainment services. The full archive is available at <https://www.ard-zdf-onlinestudie.de/archiv-1997-2022>. Similar observations have already been made among U. S. college students in the past, cf. Fortson et al., »Internet Use, Abuse, and Dependence Among Students at a Southeastern Regional University«, *Journal of American College Health* 56(2) (2007): 137–144; Odell et al., »Internet Use Among Female and Male College Students«, *CyberPsychology & Behavior* 3(5) (2000): 855–862.
- 5 Barzilai-Nahon, »Toward a Theory of Network Gatekeeping: A Framework for Exploring Information Control«, *Journal of the American Society for Information Science and Technology* 59(9) (2008): 1493–1512, p. 1496.
- 6 On this see Lewin, »Frontiers in Group Dynamics: II. Channels of Group Life; Social Planning and Action Research«, *Human Relations* 1(2): 143–153, p. 145; Shoemaker & Vos, *Gatekeeping Theory* (2009), pp. 13ff., 40.
- 7 Barzilai-Nahon, »Toward a Theory of Network Gatekeeping: A Framework for Exploring Information Control«, *Journal of the American Society for Information Science and Technology* 59(9) (2008): 1493–1512, p. 1496.

information is filtered.⁸ This model was well-suited to describe control-communication infrastructures that feature designated sender-receiver roles and a clear source-destination direction, as was the case with traditional newspapers.⁹ With the rise of digital information networks, however, traditional gatekeeping theory became ill-suited to describe the dissemination of information on internet intermediaries, in particular on social networking platforms. Gatekeeping content creators on these platforms can themselves act as information sources and the gatewayed information can be redistributed through interconnected gateways even at a later stage.¹⁰ An updated version of gatekeeping theory, informed by computer science, accounts for this.¹¹ It models how, once a network reaches a certain size and complexity, the role of gatekeepers diminishes such that the gatekeeper may even vanish into just a variant of a gateway.¹²

However, this modification of gatekeeping theory accurately describes only the role of content creators operating on an internet intermediary's platform. Incumbent internet intermediaries *themselves*, by contrast, have acquired gatekeeping status. Gatekeeping dynamics can arise even on a decentralized multi-pathway network such as the internet. Within decentralized networks, incumbent internet intermediaries have the discretion to exercise gatekeeping through network-based gatekeeping mechanisms.¹³ They acquire this discretionary power due to a particular

- 8 On this see Bastos, Raimundo & Travitzki, »Gatekeeping Twitter: message diffusion in political hashtags«, *Media, Culture & Society* 35(2) (2013): 260–270, p. 261 with further references. Historically, Lewin first introduced the term, »Frontiers in Group Dynamics: II. Channels of Group Life; Social Planning and Action Research«, *Human Relations* 1(2): 143–153, p. 145.
- 9 On this see Bastos, Raimundo & Travitzki, »Gatekeeping Twitter: message diffusion in political hashtags«, *Media, Culture & Society* 35(2) (2013): 260–270, p. 261.
- 10 For an analysis of gatekeepers on Twitter see Bastos, Raimundo & Travitzki, »Gatekeeping Twitter: message diffusion in political hashtags«, *Media, Culture & Society* 35(2) (2013): 260–270, pp. 261ff. For an analysis of gatekeepers on Facebook see Welbers & Opgenhaffen, »Social media gatekeeping: An analysis of the gatekeeping influence of newspapers' public Facebook pages«, *new media & society* 20(12) (2018): 4728–4747, pp. 4730ff.
- 11 Bastos, Raimundo & Travitzki, »Gatekeeping Twitter: message diffusion in political hashtags«, *Media, Culture & Society* 35(2) (2013): 260–270, p. 262.
- 12 Bastos, Raimundo & Travitzki, »Gatekeeping Twitter: message diffusion in political hashtags«, *Media, Culture & Society* 35(2) (2013): 260–270, p. 262.
- 13 Barzilai-Nahon, »Toward a Theory of Network Gatekeeping: A Framework for Exploring Information Control«, *Journal of the American Society for Information Science and Technology* 59(9) (2008): 1493–1512, p. 1497.

authoritative status they have acquired and a particular *societal function* they fulfill. These two dimensions can be outlined as follows.

Along the authority-based dimension, incumbent internet intermediaries can be classified as inhabiting an authoritative status somewhere between the industry regulation level and the quasi-government level.¹⁴ Incumbent internet intermediaries no longer just set regulatory standards for the gated with regard to permitted and prohibited content and behavior.¹⁵ They also increasingly perform quasi-legislative, quasi-executive, and quasi-judicial functions due to ongoing policy decisions of state institutions aimed at proceduralizing intermediaries' private governance regimes.¹⁶

Along the functional dimension, incumbent internet intermediaries can be classified somewhere between authority sites and infrastructure providers.¹⁷ The incumbent internet intermediaries provide, first and foremost, an authoritative intermediation service. For example, Google Search allows users to effectively navigate the internet by providing relevant search results to search queries. The speed at which users can acquire information on the internet would be dramatically reduced if they had to resort to traditional forms of glossaries and other forms of look-up tables. Facebook allows users to effectively conduct multiple types of virtual social interactions (in particular, to communicate, to »like«, to share content, and to receive personally relevant updates via a feed¹⁸) on a single platform. The speed of such social interactions would be dramatically reduced if they were not standardized and if users were scattered across multiple service providers. Additionally, Google Search is owned by Google LLC (formerly Google, Inc.), itself now a wholly-owned subsidiary of the holding company Alphabet Inc. founded by the Google co-founders in 2015.¹⁹ Facebook is owned by Meta Platforms, Inc., formerly Facebook, Inc. Both of these parent companies provide a multitude of interwoven digital services, including the provision of infrastructure services.

Taking into consideration the authoritative and functional dimension of internet intermediation, incumbent intermediaries are most accurately characterized as *network gatekeepers*. While incumbent intermediaries

14 Cf. Barzilai-Nahon, »Toward a Theory of Network Gatekeeping: A Framework for Exploring Information Control«, *Journal of the American Society for Information Science and Technology* 59(9) (2008): 1493–1512, p. 1499.

15 See subchapter A.3.1 below.

16 See subchapter A.3.4.2.2 below.

17 Cf. Barzilai-Nahon, »Toward a Theory of Network Gatekeeping: A Framework for Exploring Information Control«, *Journal of the American Society for Information Science and Technology* 59(9) (2008): 1493–1512, p. 1499.

18 Feeds are a stream of frequently updated content displayed (typically vertically) to users.

19 See subchapter A.3.1 below.

cannot uniquely control in-or-out decision points in the traditional sense of gatekeeping, they control the relevant *intermediation* gates between the digital environment on the one hand and the information and communication gateways users are most likely to pass through on the other hand. Thus, it is no surprise that the term »gatekeeper« has recently found its way into legislation aimed at governing the sphere of internet intermediation.²⁰

This book pursues an interdisciplinary investigation into the normativity of internet gatekeeping. Its theoretic approach sits at the intersection of legal theory, legal philosophy, and political philosophy. This investigation comprises two distinct explorations:

- Part A. will explore the normative structure of internet intermediation and illustrate the rise of an emergent transnational *lex digitalis intermedia* that is largely driven by private rather than public actors;
- Part B. will critically evaluate this normative structure by analyzing and applying the concept of *legal legitimacy* onto *lex digitalis intermedia*.

I have taken the dialectical liberty to summarize all relevant findings here, at the beginning, rather than at the end. The epilogue will be but an epilogue. My investigation is structured as follows and has produced the following results:

Part A. An emerging *lex digitalis intermedia*

In chapter A.1., I will analyze the economically driven, system-inherent rationalities that steer the behavior of all platform-based, profit-driven internet intermediaries and their participants. What makes internet intermediaries so distinct is that they do not operate in one-sided markets but, instead, facilitate multi-sided markets. Such multi-sided markets feature strong economic forces that near-inevitably give rise to monopoly gatekeepers. I will argue that, within such multi-sided markets, effective competitive forces are best induced through paradigm-changing innovators rather than mere incremental innovators.

In chapter A.2., I will undertake a synecdochal case study of the single most important information intermediary on the internet, namely the incumbent search engine Google Search. I will illustrate the history of the company behind Google Search and summarize the core services and features provided by their search engine.

In chapter A.3., I will analyze the normative structure of information intermediation. I will show how Google has created an elaborate

20 See subchapter A.3.4.1.4 below.

normative network containing recommendations, guidelines, policies, and contractual obligations that is driven by an inherent incentive to (re-)establish and maintain a sufficient degree of uniformity on the internet. This incentive is distinctly opposed to the incentive driving other types of intermediation services. A social networking platform, as I will illustrate, is driven by the incentive to govern a maximum level of multiplicity. Furthermore, I will explicate how Google's normative network is only one part of an overall normative architecture that governs information intermediation. The other part of that architecture consists of normative reactions of territorially bound legal systems. These reactions materialize in the shape of (supra-)national legislation and an evolving canon of court decisions as well as administrative acts.

In chapter A.4., I will further classify the normative architecture of internet intermediation. I will contend that this normative architecture cannot simply be reduced to the sum of all relevant and applicable (supra-)national legislation, administrative acts, and state court decisions. Such a top-down approach does not capture the normative force of emergent legal phenomena. Instead, one must holistically consider all applicable state law *in conjunction* with the private law normative networks created by incumbent intermediaries. Considered holistically, they jointly constitute an emergent *lex digitalis intermedia*, i.e. the transnational law of internet intermediation. The networks of rules created by private actors are not of a second-tier, subordinate nature. Rather, *lex digitalis intermedia* is more accurately described as a legal order whose normative trajectory is driven to a substantial extent by the interactions of *private* – not state – actors.

Part B. Transnational law and legal legitimacy

In chapter B.1., I will frame the investigative direction of Part B, which is the following: To the extent that *lex digitalis intermedia* is significantly driven by a normative network created by private actors, there arises a question as to the legal legitimacy of *lex digitalis intermedia*. I will explain why this investigation into the legal legitimacy of *lex digitalis intermedia* is not value-neutral but value-charged. I will explicate, in particular, that the ensuing investigation presupposes the truth of three basic commitments to philosophical liberalism, namely toward ethical individualism, normative self-determination, and institutional conventionalism.

In chapter B.2., I will introduce the six prevailing legitimacy conceptions most discussed in contemporary scholarship, namely proceduralist conceptions, substantivist conceptions, epistemic conceptions, consent-based conceptions, impartiality-based conceptions, and authority-based conceptions of legal legitimacy. These legitimacy conceptions

are neither context-independent necessary conditions nor context-independent sufficient conditions for a norm, decision, or institutional setting to qualify as legitimate. They are, however, concrete first-order analyses of the concept of legitimacy. They are, furthermore, *traditional* legitimacy conceptions in the sense that they are regularly invoked by scholars when discussing the public justifiability of norms, decisions, and institutional settings in liberal democratic states. In fact, these traditional legitimacy conceptions are so fundamental that scholars utilize them even when analyzing post-Westphalian normative orders. I will present an abridged atlas of post-Westphalian normative orders that are of key interest to contemporary scholars, and I will show how these post-Westphalian normative orders continue to be analyzed using the very language of traditional legitimacy conceptions.

In chapter B.3., I will provide a second-order analysis of the concept of legitimacy by recapitulating various scholarly attempts at grounding the concept of legal legitimacy. Given that the six traditional legitimacy conceptions are mutually incommensurable with one another in nearly all practically interesting cases, scholars have attempted (some explicitly, others implicitly) to create a serial order via which one can definitively state when one particular legitimacy conception (or several) might enjoy normative primacy before the others. These attempts feature inclusive, exclusive, and hybrid approaches toward grounding legal legitimacy. I will conclude that these three approaches – so far – cannot convince because they all lack in explanatory power.

In chapter B.4., I will deliver a proposal of my own. Given that the emergence of transnational law poses distinctly practical problems, I will propose a genuinely *practical account* of the concept of legal legitimacy that I consider to be of higher explanatory power than current attempts at grounding legal legitimacy. This account is not meant to discourage future attempts at grounding the six traditional conceptions of legal legitimacy. This account merely proposes a way of properly conceptualizing, for the time being, the *concert* of six traditional legitimacy in our institutional practice, namely in the following sense: It would be a conceptual misunderstanding to think that talk of legitimacy in institutional practice serves merely to *settle* whether a particular normative order is publicly justifiable or not. From a functional perspective, this is only one function of legitimacy. Its other function lies in allowing us to repeatedly *put up for review* any existing normative order when societal background setting change, thereby requiring a reevaluation and retuning of our reflective equilibrium. Given its dual nature, the concept of legitimacy also allows us to continuously detect, retain, and confirm (or deny) the actual (or desirable) existence of collectivized power structures as proper bearers of agent-responsibility. In that sense, the institutional function of legitimacy discourse lies, first, in preserving the cognitive

and normative space necessary for law's self-reflexive potential and, second, in maintaining the possibility for ascribing collective responsibility to (emergent) collectives that either have decision-making powers within a normative order or ought to have them. Having distilled such a practical conception, I will then concretize three key *practical standards* that allow us to *sustain* the aforementioned concert of the six traditional legitimacy conceptions. These practical standards are transparency, reciprocity, and institutional entanglement. Such practical standards do not – and cannot – deliver any definitive, binary answer regarding the question whether *lex digitalis intermedia* is, indeed, a legitimate legal order. Rather, the three practical standards I propose allow us to formulate a properly *practical framework* for assessing whether a normative order is legitimate in virtue of one (or more) of the six traditional legitimacy standards, namely in the following sense: If we truly *value* the concert of the six traditional legitimacy standards, then we ought to observe further practical legitimacy standards that preserve societal conditions under which we can maintain self-reflexivity in law and ascribe collective responsibilities to emergent collectives. I will conclude by outlining the current evolutionary stage of *lex digitalis intermedia* and by identifying both promising and worrisome developments with regards to its potential legal legitimacy.