

Bodo P. Bützler

# Lex Digitalis Intermedia

Transnational Law and Legal Legitimacy

368 Seiten · broschiert · € 59,90  
ISBN 978-3-95832-358-2

© Velbrück Wissenschaft 2024

# Contents

Preface . . . . .	9
Introduction: Intermediation on the internet . . . . .	11

## PART A. AN EMERGING LEX DIGITALIS INTERMEDIA

1. System-inherent rationalities of internet intermediation . . . . .	23
1.1 Multi-sided markets and network effects . . . . .	24
1.2 Monopolistic forces and competition through disruption . . . . .	26
1.3 The effects of internet intermediation onto societal welfare . . . . .	30
2. The intermediation of information: Google Search . . . . .	37
2.1 From Google to Alphabet . . . . .	37
2.2 Information acquisition in the Information Age . . . . .	40
3. The normative structure of information intermediation . . . . .	52
3.1 Normative network: Guidelines, policies, and contractual web . . . . .	53
3.2 Normative paradigm: Maintaining uniformity . . . . .	60
3.3 Comparison to social networking platforms: Governing multiplicity . . . . .	68
3.4 The normative architecture of information intermediation . . . . .	73
3.4.1 Competition . . . . .	74
3.4.1.1 Situation in the U.S.: Search results ranking as free speech . . . . .	75
3.4.1.2 Situation in the EU: Abuse of dominant market position . . . . .	78
3.4.1.3 Transnational fragmentation of competition law . . . . .	82
3.4.1.4 The EU's Digital Markets Act: A way forward? . . . . .	82
3.4.2 Platform standards and user rights . . . . .	90
3.4.2.1 Situation in the U.S.: Search engines not public forums . . . . .	91

3.4.2.2	Situation in the EU: Proceduralization of private governance . . . . .	96	2.2.2	Transnational public(-private) regimes . . . . .	182
3.4.2.3	Transnational fragmentation of platforms standards and user rights . . . . .	107	2.2.2.1	Global security governance . . . . .	183
3.4.2.4	The EU's Digital Services Act: A way forward? . . . . .	110	2.2.2.1.1	The evolution of the global sanctions regime . . . . .	184
4.	Classifying the normative structure of internet intermediation: lex digitalis intermedia . . . . .	116	2.2.2.1.2	Legitimacy conceptions invoked by global security governance . . . . .	185
4.1	Against two dogmas of state-centrism . . . . .	117	2.2.2.2	Global economic governance . . . . .	187
4.1.1	Why the genealogical premise cannot convince . . . . .	117	2.2.2.2.1	Hybrid governance regimes . .	187
4.1.2	Why command theories of law cannot convince . . . . .	120	2.2.2.2.2	Legitimacy conceptions invoked by global economic governance . . . . .	190
4.2.	Emergent transnational legal order . . . . .	122	2.2.2.3	Global risk governance . . . . .	193
4.2.1	Primordial normative powers of incumbent intermediaries . . . . .	122	2.2.2.3.1	Chemical safety . . . . .	194
4.2.2	Assessing the primordial normative powers of incumbent intermediaries . . . . .	128	2.2.2.3.2	GMO regulation . . . . .	195
4.2.3	Toward lex digitalis intermedia . . . . .	133	2.2.2.3.3	Legitimacy conceptions invoked by global risk governance . . . . .	197
	<b>PART B. TRANSNATIONAL LAW AND LEGAL LEGITIMACY</b>		2.2.3	Transnational private(-public) regimes . . . . .	199
1.	Framing the question of legal legitimacy . . . . .	139	2.2.3.1	Lex mercatoria . . . . .	201
1.1	The three commitments to philosophical liberalism . . . . .	140	2.2.3.1.1	The evolution of merchant law . . . . .	202
1.2	Preliminary conceptual clarifications . . . . .	144	2.2.3.1.2	Legitimacy conceptions invoked by lex mercatoria . .	209
1.3	Roadmap . . . . .	147	2.2.3.2	Lex sportiva . . . . .	213
2.	Abridged atlas: Conceptions of legal legitimacy and where they surface . . . . .	149	2.2.3.2.1	The normative order of global professional sports . .	214
2.1	Liberal democratic nation states: Traditional legitimacy conceptions . . . . .	154	2.2.3.2.2	Legitimacy conceptions invoked by lex sportiva . . .	217
2.1.1	Proceduralist conceptions . . . . .	155	2.2.3.3	Jewish law . . . . .	220
2.1.2	Substantivist conceptions . . . . .	157	2.2.3.3.1	Parallels between the study of Jewish law and transnational law . . . . .	221
2.1.3	Epistemic conceptions . . . . .	160	2.2.3.3.2	Legitimacy conceptions invoked by Jewish law . . .	224
2.1.4	Consent-based conceptions . . . . .	164	3.	Grounding legal legitimacy: A meta-normative investigation . . . . .	226
2.1.5	Impartiality-based conceptions . . . . .	167	3.1	Why the inclusive approach cannot convince . . . . .	227
2.1.6	Authority-based conceptions . . . . .	172	3.2	Why the exclusive approach cannot convince . . . . .	234
2.2	Post-Westphalian regimes: In statu nascendi . . . . .	176	3.3	Why the hybrid approach cannot convince . . . . .	244
2.2.1	Between constitutionalism and global legal pluralism . . . . .	177	4.	Toward a practical account of legal legitimacy . . . . .	250
2.2.1.1	Constitutionalism . . . . .	178	4.1	What the practice approach entails . . . . .	252
	2.2.1.2 Global legal pluralism . . . . .	181			

4.1.1	Preserving law's self-reflexive potential . . . . .	253
4.1.1.1	From responsive law to self-reflexive law . . . . .	253
4.1.1.2	The dual justificatory function of legal legitimacy in public discourse . . . . .	256
4.1.2	The ascription of collective responsibility . . . . .	262
4.1.2.1	Intention and agent-responsibility . . . . .	264
4.1.2.2	Collective responsibility . . . . .	271
4.1.2.2.1	Established collectives . . . . .	272
4.1.2.2.2	Emergent collectives . . . . .	278
4.1.2.3	The ascriptive function of legal legitimacy in public discourse . . . . .	285
4.2	Practical standards for assessing the legitimacy of lex digitalis intermedia . . . . .	288
4.2.1	Transparency . . . . .	290
4.2.1.1	Our co-constitutive relationship with technology . . . . .	291
4.2.1.2	The opacity of the digital socio-technical domain . . . . .	293
4.2.1.3	A practical account of transparency measures for lex digitalis intermedia . . . . .	301
4.2.2	Reciprocity . . . . .	307
4.2.2.1	Why reciprocal normative attitudes matter for lex digitalis intermedia . . . . .	308
4.2.2.2	Promising developments . . . . .	309
4.2.2.3	Worrisome developments . . . . .	311
4.2.3	Institutional entanglement . . . . .	321
4.2.3.1	Checks and balances . . . . .	321
4.2.3.2	Institutional agency and institutional reasons . . . . .	325
4.2.3.3	Checks and balances for lex digitalis intermedia: Entangling normative paradigms . . . . .	328
	Epilogue . . . . .	337
	Table of Abbreviations . . . . .	342
	Bibliography . . . . .	344