THE PUZZLING NATURE OF SOCIAL MEDIA: LEGAL PERSPECTIVES

A number of definitions can be applied to social media so that the features of which can be subsumed under different media phenomena. Contemplating on the US and the European legal approaches, Andrea Kovács discusses various theories that can be used to define social media in her manuscript "Legal analogies for social media and the liability connected to them".

Public forum

In his article "Censorship and Freedom of Expression in the Age of Facebook," Benjamin F. Jackson argues that social media is actually the public forum of the postmodern era. Social media can be related to the notion of public forum or those physically existing places where the political discourse occurs. Providing public fora was traditionally and exclusively a state 'service' so that providing social media platforms qualifies as state action. Therefore it must be scrutinized in accordance with the First Amendment and must be under due judicial control as well. (Jackson, Benjamin. F. (2014). Censorship and Freedom of Expression in the Age of Facebook. *New Mexico Law Review* (44), p. 150)

The counter argument to this is that such **a** view is contrary to §230 c) (1) paragraph of the Communication Decency Act of 1996 (hereinafter: CDA), which exempts the service provider from liability for "good Samaritan blocking and filtering".

Although Jackson's article missed direct legal basis in case law, the Supreme Court has analogized social media to "traditional" public fora in a new decision of the Fourth Circuit that decided on the *Davison v. Randall Case* (*Davison v. Randall, No. 17-2002 (4th Cir. 2019*).The United States District Court (Southern District of New York) has also found that President Trump's Twitter account is a designated public forum, as it is generally accessible to everyone and anyone can follow it if the specific account is not blocked. The applicability of the *Forum Doctrine* is based on the fact that the 'space' is owned or controlled by the government. Classifying President Trump's Twitter account as public forum is not affected by the fact that he created the account before he entered into office.

New phenomenon between common carriers and broadcasters/cable providers

This approach has no basis in the case law of the Unite States but Kovács cites Kevin Park who states that social media is actually a new phenomenon subjected to a liability regime poised between common carriers' and broadcasters'/cable providers' liability regimes. In accordance with his argumentation, social media sites are common carriers because they are accessible to anyone if they own an e-mail address and the content is transmitted (published) in that moment when the user 'posts' it.

According to Park, the liability of the social media provider is more or less the same as the broadcasters'/cable providers' regarding content editing and censoring with one crucial difference: there is no legitimation behind it. Park argues that social media platforms are not public fora and he stresses that the First Amendment is not directly applicable. He suggests, as an alternative, the use of a consumer protection framework with regard to the contract between the service provider and the user.

Live broadcast is almost analogous to the immediate publishing on social media platforms. To avoid liability, in the case of live broadcasts, delaying technology is available that grants time to the broadcaster to edit the questionable content to conform with the law. This delaying technology can be applied to social media in such a way, that the service providers' can use algorithms to filter content at the moment of publication. The algorithms turn the refusals of publication into automatized decisions, which on the one hand can censor speech protected by the First Amendment, and on the other can make wrong decisions. In addition, perfect decisions cannot be ensured in case of human action, particularly with regard to the shortness of time granted by the delaying technology.

Kevin Park suggests how censorship can be prevented if social media is handled as a common carrier. Using the analogy of net neutrality, this means that every content is transmitted to the users without discrimination. In case of damage caused to third parties, this approach is in line with the already cited CDA § 230 c): (1) which immunizes the service provider from liability in every case, whether the provider censors the content or not. At the same time, Park emphasizes that until the current text of CDA § 230 is in force, censorship cannot be abolished completely because the provider cannot be found liable even if the disabled content is a speech protected by the First Amendment.

Social media as intermediary

In social media literature social media appear as a type of intermediary (in Article 19's document on intermediary liability, for instance). For the European Court of Human Rights (ECtHR), it seems unequivocal that social media qualifies as an intermediary, but the Court also refers to them as publisher. The two concepts cannot be separated clearly, as the Court only examines whether a certain decision violates the European Convention on Human Rights (ECHR). Regarding intermediary liability, the ECtHR has reached the following decisions in four cases: in the *Delfi case*, in the *Index case*, in the *Pihl* case and in the *Tamiz case,* among which the most famous is the *Delfi case.* In this case the ECtHR differentiated between active and passive intermediaries. While the former have to provide a comment section to the content and, therefore it falls within the scope of their professional activity and thus the service provider is liable for the content appearing there, even as a publisher, the latter do not provide content. The Court

judgement also contains an exemption referring to "[…] other fora on the Internet, where third-party comments can be disseminated […]".

In the *Tamiz case*, for instance, the issue is about a real, passive intermediary, as in the case of *Blooger.com.* In the latter Google does not provide content and the ECtHR accepted the trial court's argument that Google can only be liable for the comments appearing on the blog even in the most generous sense, i.e. if a reasonable time has passed from the notification and Google did not take care of the deleting or disabling of the comment, despite the fact that Google should have realized that it is unlawful. From this the conclusion can be drawn that the intermediary does not have any monitoring or checking obligation. After notification the intermediary is obliged to remove the notified content immediately in line with Article 14 of the e-Commerce directive. It seems that for instance, in case of hate speech it can be prescribed, thus the liability and censoring obligation becomes content-dependent.

Social Media as Publisher

The similarity between the American and the European case law is that both accept the option to classify intermediaries as publishers. The United States Court of Appeal for the Fourth Circuit explicitly stated in the *Zeran v. America Online case* that AOL as the provider of an online bulletin board is a publisher. However, because of §230 of CDA, it cannot be found liable.

According to the ECtHR finding a website to have the status of a publisher regarding third party content does not violate the ECHR, though it draws attention to the fact the online platform – and its operator – cannot be treated in the same way as a traditional medium. It first appeared in the *Delfi case* that Delfi, as the most famous news portal of Estonia, was classified as a publisher by the Estonian Supreme Court with regards to the comments appearing below its articles. Even though this approach was not explicitly adopted by the ECtHR, it stated that finding Delfi liable does not violate Article 10 of the ECHR.

In the case of *Magyar Tartalomszolgaltatók Egyesülete and Index.hu Zrt.* the Court decided that in cases of news portals creating a comment environment cannot create objective liability, because it would assume a censoring obligation and that does not comply with the ECHR. On a national basis, the Hungarian courts classified comments in the same category as readers' letters.

In the original judgment of the *Tamiz case,* the Court ruled that Google can be a publisher with regard to the comments and blog posts appearing on its platform, but only if it does not remove the problematic content.

As it can be seen from the examples, it is hard to apply by analogy the law and case law relating to previous technology or medium for social media.

Social Media as Service

This approach emphasizes content filtering through the consumer protection framework. The supporters of this approach, Guilherme Myalhaes Martins and Joao Victor Rozatti Longhi, argue that everyone has the right to not be a victim of damages. One of the most important steps of this is to disable the undesirable content, as it is the task of the creator and coordinator in the Brazilian law. The authors hold Article 14 of the e-Commerce directive the best solution. The application of this approach has great potential in the European Union, as it has already been used in the *Schrems v. Facebook case* in connection with data protection. This judgement stresses that the EU's consumer protection framework is applicable not only in case of the enforcement of informational self-determination but for personality rights as well.

Social Media as Subject of Private Property

In this situation, examining the platform's content policy from the constitutional law's point of view would definitely restrict the property rights. Moreover, in some cases it would be better if the operators could decide what kind of communication should be allowed on the site, as its community standards are public and accessible – contrary to the courts' uncertain and vague balancing. At the same time, this would ensure that the operators can protect their property with regard to their unique interests by shaping the content to make it acceptable for the majority of the public. If the service provider has decided to not remove any content from the site, the content which was either challenged or ordered to be removed by a court decision will be accessible. Such form of liability is not accepted by the ECtHR, because it would lead to the shutdown of these platforms and in the end the users' freedom of expression would be violated. Another difficulty is to determine how the property rights of the service provider and the user relate to each other: whether the property rights of the service provider are stronger or whether the contract is enough for the provider to enable it to make decisions over the individual accounts. By and large, the property status of social media accounts is unclear as well as the rights connected to it.

In conclusion, it can be stated that applying various approaches to social media results in legal uncertainty and provokes even wider debates.

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