

# Internet Law - An Attempt At A Polemic Retrospective

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Everything seems to be calmer now; we no longer haste from conference to conference. The few stray subjects like "jurisdiction issues in e-commerce" are lovingly embraced by their old traditional legal disciplines, here of Private International Law, and guided back safely to join the others where cyber crime is already settling cozily with its mother Criminal Law and e-Government issues are being welcomed back like the prodigal son by Administrative Law. All these terms like "Internetrecht"<sup>2</sup>, "Internet e diritto"<sup>3</sup>, "Diritto de la Rete"<sup>4</sup>, "Nätets Juridik"<sup>5</sup>, "Cyberdroit"<sup>6</sup>, "Cyberlaw"<sup>7</sup> have become fading picture postcards from places visited a long time ago.

What was so remarkable about that time we had witnessed? What tales to tell by the legal nomads around the campfires of academia? What did we learn for the future? Yes - for a short while a new and flourishing legal service industry had been created; advice had been given; conferences had been attended, new journals had been launched, numerous books had been published, articles had been written, old research institutes had been renamed, new institutes had been founded<sup>8</sup>, although - but this may just be a projection - many of these institutes now seem to carry their name not without some embarrassment, like children once named, in a sweep of parental enthusiasm, after a political hero now long forgotten.

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<sup>2</sup> See: FRITJOF BÖRNER/STEPHAN HEITMANN/MARKUS SENGPIEL/ GÜNTHER STRUNK/ YORK ZÖLLKAU: *Der Internet-Rechtsberater*. 2.Aufl., Köln 2002; GERHARD HOHLOCH (Hrsg.), *Recht und Internet*, Baden-Baden 2001; THOMAS HOEREN, *Grundzüge des Internetrechts. E-commerce, Domains, Urheberrecht*, München 2000; CHRISTOPH SPAHR, *Internet und Recht*, 2.Aufl. Zürich 2000; DETLEF KRÖGER/ MARC A. GIMMY (Hrsg.), *Handbuch zum Internetrecht*, Berlin/Heidelberg 2000; MARKUS KÖHLER/ HANS-WOLFGANG ARNDT, *Recht des Internet, Eine Einführung*, Karlsruhe 1999; TOBIAS H. STRÖMER, *Online-recht, Rechtsfragen im Internet und in Mailboxen*. Heidelberg 1997.

<sup>3</sup> See: ORSOLA TORRANI/SARA PARISE, *Internet e diritto*, 2. edizione, Milano 1998.

<sup>4</sup> See: ANDREA SIROTTI GAUDENZI (ed.), *Tratto breve di diritto della rete - Le regole de Internet*, Rimini 2001.

<sup>5</sup> See: ARI KOIVUMAA (ed.), *Nätets juridik*, Stockolm 2000.

<sup>6</sup> See. CHRISTIANE FÉRAL-SCHUHL, *Cyberdroit*, 3e éd.,Paris 2002.

<sup>7</sup> See: GERALD R. FERRERA/ STEPHEN D. LICHTENSTEIN/MARGO E.K. REDER/ RAY AUGUST/WILLIAM T.SCHIANO, *Cyberlaw*, Cincinnati 2001.

<sup>8</sup> See e.g. the Oxford Internet Institute [<http://www.oii.ox.ac.uk>].

Looking back through a European lens (there was still such a thing as a European perspective then) it was a period not without achievements.

## **1 Looking at Achievements**

Which achievements? - We may at least say that the period of Internet Law has added to our understanding of law, has provided us with insight into the mechanisms with which law digests technological change, and has led us through an optimistic period of promises. Not all of that is unique to Internet Law, nor can all these experiences be unequivocally linked back to Internet Law; but Internet Law will remain associated with these experiences.

### *New Perspectives on Law*

First of all Internet Law has been an achievement of promoting a new perspective on law in general.

While at its beginnings Internet Law was suspiciously regarded as yet another example of law as a barrier to growth, it became clear very soon that technological changes (i.e. the sum of technical, economic, social and political change or - equally potent - the expectation of such changes) were creating anxieties and uncertainties, if only conceptual ones, so that in order to achieve acceptance trust had to be created and maintained, and the best way to do this was to use law as an infrastructural tool to master change.

Such an approach was particularly important for the European Union; having defined itself primarily as a "community of law" it could prove its ability to act when challenged and it could do so by what it knew best: by passing regulations. The Union's regulatory output in terms of quantity and speed was impressive. The period of 1995 to 2001 alone saw the (general) data protection directive<sup>9</sup> in 1995, 1996 the database directive<sup>10</sup>, 1997 the directive on the protection of consumers in respect of distance contracts<sup>11</sup> and the telecommunications privacy directive<sup>12</sup>, 1998 the directive on consumer protection in the indication of the prices of products offered to consumers<sup>13</sup>, the directive on injunctions for the protection of consumers' interests<sup>14</sup>, the directive laying down a procedure for the provision of information in the field of technical standards and regulations<sup>15</sup> and the directive

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<sup>9</sup> Official Journal L 281/31 of 23.11.1995.

<sup>10</sup> Official Journal L 77/20 of 27.3.1996.

<sup>11</sup> Official Journal L 144/19 of 4.6.1997.

<sup>12</sup> Official Journal L 24/1 of 30.1.1998.

<sup>13</sup> Official Journal L 80/27 of 18.3.1998.

<sup>14</sup> Official Journal L 166/51 of 11.6.1998.

<sup>15</sup> Official Journal L 204/37 of 21.7.1998.

on the legal protection of services based on, or consisting of, conditional access<sup>16</sup>, 1999 the directive on certain aspects of the sale of consumer goods and associated guarantees<sup>17</sup> and the directive on a Community framework for electronic signatures<sup>18</sup>, 2000 the directive on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)<sup>19</sup>, and 2001 the directive on the harmonisation of certain aspects of copyright and related rights in the information society<sup>20</sup> and the directive on general product safety.<sup>21</sup>

Not all these regulatory activities referred directly to the Internet, and generally the European Union had always preferred the term "Information Society", by this alluding at least by linguistic association to inclusiveness, and contrasting itself, again more by allusion than by explicit statement, from the approaches in the United States. But still these regulatory packages were meant to establish the Internet friendly environment on which the Union had put so much hope for economic growth.

#### *Insight into the Mechanics of "Innovation Law"*

The period of Internet Law has been a relatively compact time space in which an international community of people involved and interested in law making could watch internal developments very closely, and exchange their views internationally, all this because the object of their observations was also an excellent medium for their discourse. These people would form what BRAITHWAITE and DRAHOS<sup>22</sup> in their impressive analysis of global regulatory processes have called an "epistemic community". While this community may not have been as closely knit as for example the data protection community<sup>23</sup> and may even have shown strong disagreements on basic philosophies it still succeeded in influencing government politics, legal discourse and occasionally even court decisions.

And, indeed, the courts were in the frontline; they had to respond; they could not help it. And courts tend to take the path they have always taken: They seek to

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<sup>16</sup> Official Journal L 320/54 of 28.11.1998.

<sup>17</sup> Official Journal L 171/12 of 7.7.1999.

<sup>18</sup> Official Journal L 93/13 of 19.1.2000.

<sup>19</sup> Official Journal L 178/1 of 17.7.2000.

<sup>20</sup> Official Journal L 167/10 of 22.6.2001 (corrected in Official Journal L6/71 of 10.1.2002).

<sup>21</sup> Official Journal L 11/4 of 15.1.2002.

<sup>22</sup> JOHN BRAITHWAITE; PETER DRAHOS: *Global Business Regulation*. Cambridge 2000, 622f.

<sup>23</sup> COLIN J. BENNETT, *Different Processes, One Result: The Convergence of Data Protection Policy in Europe and the United States*, in: *Governance: An International Journal of Policy and Administration*, Vol. 1, No. 4, Oct. 1988, 415 - 441.

understand technical processes and their economic and social implications, compare them to processes they have already understood, and then interpret the law using the traditional hermeneutic toolbox. The result tends to be, not surprisingly, conservative; in comparing the "new" to the "old" the courts detect more often the familiar than the unfamiliar. A classical example in this context has become the appraisal of domain names which - as the courts quickly thought to recognize - were nothing else but what such courts dealing with telecommunications law had known as "numbers", those courts dealing with intellectual property law had known as "trademarks", and those courts familiar with classical civil law cases had known as "names", although in each of these cases a different outcome would also have been possible, and - as certainly the trademark approach would show soon - such traditional subsumptions would create far more new problems than one would have expected after such a conservative approach.

These attempts at stabilization or rather continuous re-stabilization do not seem to be unique to Internet Law; BRIAN WINSTON e.g. had detected similar patterns in dealing with other "new" technologies referring to these processes as the workings of the (social) "law of the suppression of the radical potential."<sup>24</sup>

While the courts have to react and while they have only limited possibilities to postpone making a decision, parliaments and governments have more leeway. With the courts moving in first, law makers are also saved from a dilemma: Past laws are political compromises; going back to these laws, renewing them, altering them, questions these compromises and carries new (political) risks. And then there is also the hope much cherished by those involved in daily policy making that a problem might just go away if you just wait long enough. Putting it more positively, such periods of indecision provide the opportunity for a moratorium - an authorization to suspend action and invite reflection.

There are, however, exemptions; and the art of politics is to know when to follow the rule and when to opt for the exemption: In times of "promising" change, i.e. change which if seized would help to achieve issues already on the political agenda the reliance on courts may turn out to invite risks; while one can always rely on at least one court contradicting another court and thus on gaining time, courts may, in their predisposition to conservative interpretation, arrive at a common line too fast and create a legitimacy problem for future change. Also, if there is too much controversy among courts, stabilization might be seen as being in need of too much time. In both cases the law maker has to intervene.

Examples for both cases - in the broader context of Internet Law - have been the issue of liability of internet access providers and the role of the digital signature.

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<sup>24</sup> BRIAN WINSTON, *Misunderstanding Media*, Cambridge Mass. 1986, 23ff.

In the first case courts were creating precedents which endangered the basic economic role of internet access providers as mass gateways to electronic commerce. So legislators had to clear the path for this essential service industry on which the economic use of the Internet was depending. The second case is more complex. There had been, indeed, and certainly in Europe contradicting court decisions, on to what extent the uses of information and communication technology would meet the exigencies of legal formalities - where such formalities were a pre-condition for legal validity. But the technology - through its cryptographic implications - had also introduced a new opportunity to provide new levels of legal certainty. Law makers had felt that they could address the formality problem and seize the technological opportunity at the same time. The European Union in particular sensing a competitive advantage pressed for change. While the EU could not regulate legal formalities of its member states per se, it addressed (the yet non-existing - and some would say the still non-existing) *market* for digital signatures in its directive. And, of course, in order to maintain a free market for digital signature services, the directive, as a by-product, stated that the digital signature - with quite a few exemptions by the way to honor the formalities of member states - could not to be discriminated against the hand written signature. But - while thus providing an elegant legal solution to a competence problem (the details, in particular, the different "degrees" of electronic signature were less elegant), and while also preempting unfavorable market developments, surprisingly - but then again perhaps only to the regulators - the broad use of the digital signature by consumers in electronic commerce (in contrast to intra-organizational applications) has not yet happened. A rare case of premature regulation?

There is another area where legislators are eager to correct or even to intervene before courts develop an opinion: Criminal Law. Law making in the area of criminal law is seen as the "grand response": It is media attractive, it is politically powerful, it is cheap (costs either turn up later or at different places and in a different currency, usually as social costs). Criminal law is highly symbolic - and in some cases changes are even necessary since the *nulla poena* principle excludes extensions of norms by analogy to the detriment of the accused.

Looking at the actual responses by law makers when they take over from the courts is usually sobering, however: In most cases legislators pick up directions into which courts had been moving anyway. Very rarely, as in the case of the liability of access providers law makers intervene against what might otherwise have developed as the leading opinion of the courts. But even then lawmakers can usually make use of a set of legal opinions which already had gained considerable momentum in the legal discourse. If they do walk on a new path, it should at least already be paved.

To predict in which cases law makers would go with the "leading courts" and paraphrase them, and in which cases they would go with those opinions which contradict them, should not be too difficult an exercise. Taking again the liability issue as an example, it seems safe to assume that law makers tend to decide in favor of what they see as the greater economic potential at the time of their decision provided that the interests behind that appreciation are sufficiently well organized politically.

Very rare are those cases in which legislators really become innovative in order to support innovation. One example is the directive (and subsequent legal measures) paving the way for the digital signature already introduced above - as a case of premature regulation.

Yet another example of regulatory innovation - if the price is right - should not go unmentioned, even if its place in Internet law might be somewhat marginal: It is the invention of a new, hitherto unheard of intellectual property right the "data base right" introduced by the EU database directive. It simply had to be invented to divert the course some courts had been taking totally unaware that their conservative course would endanger a whole industry, even if some critics would still call the result investment protection dressed up as an intellectual property right.<sup>25</sup>

The data base directive is also of special interest in yet another context of law making in times of technological change: In the European regulatory environment much of the political risks associated with law making had been (and to a lesser extent still is) taken off the back of national law makers by the law making devices of the European Union. These mechanisms of the European Union have invited "policy laundering": Policies too difficult to implement nationally could be put into the European Union regulatory process from which they would return "laundered" as a "European" regulation which - as national regulators could then argue - they regrettably had to follow as it was coming "from Brussels".

To the extent that hitherto "under-organized" national interests have understood to organize themselves at least on a European level, however, these processes have become politically less easy, as recent attempts at a software patent directive have shown. Changes also occur with the new role of the European Parliament and its rising self-consciousness. With the European Parliament as it is now and with the

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<sup>25</sup> Although it is not without irony to see how the courts - in this case the European Court of Justice - regained territory and "rebalanced" the enthusiasm of the lawmakers by continuing their conservative interpretations now of the Database Directive. - For an excellent analysis see: MARK J. DAVISON AND P. BERNT HUGENHOLTZ, Football fixtures, horse races and spin-offs: the ECJ domesticates the database right, at [http://www.ivir.nl/publications/hughenoltz/EIPR\\_2005\\_3\\_databaseright.pdf](http://www.ivir.nl/publications/hughenoltz/EIPR_2005_3_databaseright.pdf).

international attention its actions are receiving now from the member states and the international community it would no longer be that easy to rush through a directive like e.g. the copyright directive.<sup>26</sup>

### *The Promises of Internet Law*

But Internet Law was not only an abstract mechanism for stability and acceptance in a world being changed by technology. Just like the term "Internet" the term "Internet Law" was meant to be a carrier of a symbolic meaning: By its very name it took position against those who spoke of the Internet as a law-free zone reminding them of law's ubiquitous reach. "Internet Law" also emphasized that it was as very special kind of law not too easily subjugated under traditional legal disciplines - in Europe least, and even if that position was ridiculed across the Atlantic as a "law of the horse", it would still remain a special kind of horse.<sup>27</sup> Internet Law would acknowledge special responsibilities stemming from the international if not global reach of the underlying communication technology. It would learn from the collaborative spirit of those which kept the net running by emphasizing the importance of self-regulation. It would - with its emphasis on open architecture - ensure that the door was kept open to future social, economic and technological innovation.

Internationalization, self-regulation and open architecture - what is now left of these promises?

### *The Promise of Internationalization*

Internationalization or now - even more ambitiously - globalization are phenomena not restricted to Internet Law, nor are those phenomena foreign to law in principle: Maritime Law, Trade Law, Private and Public International Law all have long traditions of dealing with the "International".

But with the Internet Private International Law e.g. suddenly had new potential customers and plenty of them, customers unaccustomed to its filigree procedures and structures: the international consumers. Private International Law had, of course, in its national representations and international agreements, some built-in protective structures for consumers already in place for those rare cases where consumers dared to shop across national borders, but its basic assumption was the key understanding of classical contract law: Equal parties negotiating on equal footing, each party accountable for the negotiated outcome.

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<sup>26</sup> Details of this particular case can be found at Johansson, Jan Å.; Sjöstedt, Jonas: Voting Procedure in the European Parliament 2001. An empirical analysis. Brussels 2001. [[http://www.vguengl.org/medialibrary/files/1\\_472933ENv2.pdf](http://www.vguengl.org/medialibrary/files/1_472933ENv2.pdf)].

<sup>27</sup> See: FRANK H. EASTERBROOK Cyberspace and the Law of the Horse, 1996 *U Chi Legal F* 207, edited version at <http://www.law.upenn.edu/law619/f2001/week15/easterbrook.pdf>.

Internationalization by Internet Law would have meant to reconcile the new demands of international mass e-markets with this traditional perceptual approach by creating a more practical International Consumer Law. But such attempts had already proven difficult in national consumer law. So rather than continuously developing a structure on which international consumer markets would flourish the development of adequate legal structures seemed to have come to a standstill, a standstill which coincided with the economic rebalancing of Internet markets.<sup>28</sup>

Since this paper intends to be merely a historical account - even if a biased one - it will not lament the failures of Internet Law and pull culprits into the open. I would suspect, however, that the credit card and its regulatory environment had provided consumers, also international consumers, already with a fairly potent instrument of international consumer protection.<sup>29</sup>

### *The Promise of "Self-regulation"*

The concept of the Internet as - finally - a "law-free" or at least "lawyer-free" zone was, of course, heavily influenced by a mixture of US-American ideological understanding of the role of government, the rhetoric of regulatory restraint and pockets of anarchistic dreams of yet another frontier. The European approach was more restrained, but it was not free from its own rhetoric fallacies: Self-regulation had been the key-concept here in Europe as well; it became the key-concept for internet contents regulation by the European union; the European union had paved the way for self-regulation by differentiating between illegal content (which was left to "traditional" regulation) and (possibly) harmful or objectionable content which was seen to be open to "self-regulation" by provider associations or semi-private bodies.

The term "self-regulation" proved to be a misnomer, however; while borrowing from the mental association with the democratic process it applied rules generated by interest groups and applied them with effects not limited to the "self" - creating regulatory overspill: Self-regulation in the context of internet content has been regulation of the informational behavior of users by standards set by providers or hybrid organizations.

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<sup>28</sup> The last conference on e-commerce issues organized by the Hague Conference on Private International Law - once the hot bed of legal and political controversies - in October 2004 merely saw itself as a "showcase." [[http://www.hcch.net/upload/wop/e-comm\\_intro\\_e.html](http://www.hcch.net/upload/wop/e-comm_intro_e.html)]. Even its most recent product, the Convention on Choice of Court Agreements (concluded 30 June 2005) is expressly not applicable to consumers (Art. 2 of that convention).

<sup>29</sup> As to the the cultural and economic importance of the credit card see: HERBERT BURKERT (1991), Systemvertrauen: Ein Versuch über einige Zusammenhänge zwischen Karte und Datenschutz. In: à la Card Euro-Journal. Heft 1. 1991, 52-66.

It is solely the terminology, however, and not the concept which is misleading. The concepts of law and regulation are indeed undergoing some fundamental changes. And it is in this context that private regulatory authority - a much clearer term than self-regulation - gains in importance.<sup>30</sup> Whether and to what extent these changes in law have been caused by phenomena like the Internet is open to discussion, and we will take up this discussion again below.

### *The Promise of Architecture*

In more recent years, notably since the term "code" had gained prominence,<sup>31</sup> another regulatory concept has become fashionable: The innocents who wanted to get away from conflicting interests, influence seeking, compromise building, the aficionados of the technical who had more confidence in wiring than in relationship building, the aestheticians who were attracted by the beauty of structure rather than the grime of details had found their grail in "architecture". As architects they would be able to establish those structures that would survive the legal bickering, political influence peddling and economic tactics for market dominance.

The underlying basic idea of this approach has been borrowed from the basic insights of technology assessment some thirty years ago: The critical phase for influencing outcome is the early design phase of social, economic and technical systems. This attention shift on the time scale, however, it had been emphasized then, was only that: a time shift. It meant that the political processes, the steering of social dynamics, the legal battles were not obsolete because of the importance of design, but they only had to start earlier. The problem, had been and still is to know when that crucial period of "early design" is about to begin, or, in ongoing processes, like the changing of the information and communication infrastructures of our society, when and how to intervene at least when windows of opportunity are open later and whom to involve how when if one did come that late. The architects remained rather vague in their answers to these questions, and where they attempted to become more precise they ended up in a mimicry of the old world they intended to transform into a new one.<sup>32</sup>

The architecture approach has also nourished the belief that there is such a thing as technology neutral regulation (by architecture) to remain open for

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<sup>30</sup> CLAIRE CUTLER, VIRGINIA HAUFLE, TONY PORTER, *Private Authority and International Affairs*. State University of New York Press: Albany 1999.

<sup>31</sup> LAWRENCE LESSIG (1999), *Code and Other Laws of Cyberspace.*, New York: Basic Books.

<sup>32</sup> The rich variety of licensing schemes which the "Creative Commons" approach has generated is a good example here: These licenses try to reconcile the moral intentions to contribute with one's product to the collective richness of public knowledge with the fear to miss out on opportunities of individual richness once such a product does show its economic potential.

technological, social and economic innovation. One incarnation of this neutrality had been the slogan - particularly popular in cyber crime law - "What has been forbidden offline will remain forbidden online". Here again, the results of this approach are sobering. The tightening of the "copyright law grip" on users' behavior has been justified by the very specialties of information and communication technology, and not its "neutrality", in that case namely, to produce exact copies at very high speed with very low costs, a very special technological (and economic) advantage that was to remain, however, exclusively with producers and distributors. Now the world online seems to be regulated more tightly than the world offline. And, of course, already by their very structure and not only because of their economic effects information and communication technologies are more inviting to some social and political uses and practices than to others: Packet network technologies e.g. are by their very design predisposed to control and thereby surveillance structures: Such networks (in contrast to fixed line connections) have to continuously generate a larger amount of control information from the whole of the network to simply ensure transport.

These examples are meant not to argue for technological determinism, this is just to show that the promise of "technological neutrality" has been somewhat naive and that we by now should have learnt about certain technological predispositions, predispositions which apparently have made the development of some technologies more interesting than that of others precisely because these predispositions were valued highly by the societies developing them.

### *A Conclusion on Promises*

With the impetus of internationalization withered away, self-regulation unmasked as a rhetoric figure of speech, and regulating by architecture exposed as an ideological simplification, what does remain at the end of the day?

We would like to maintain that there have been significant changes. But we may have to look for them elsewhere.

## **2 Internet Law at a Time of Law Changing**

These changes may be difficult to connect to Internet Law directly, at least by a connection of cause and effect. All that can be said is that these changes have occurred at least simultaneously, and that Internet Law itself bears witness of such changes. These changes affect the way in which law is dealing with the time and place of regulation; they affect the processes of law making in general and the role of those involved in the law making process.

### *Time*

Law has increasingly become time conscious: Laws now proudly carry their "best consumed before" stamp, and disappear silently if not renewed expressly. As the examples from Internet Law have shown there are indications that law is changing its speed as well.<sup>33</sup>

### *Place*

Law has always been place conscious; place in law has become less predictable with the Internet, but this is a general experience in international law over the ages where place always implied a multiplicity of possible fora.

"Place" in our context, however, now refers to the place where regulations are being made. We have already mentioned the phenomenon of "policy laundering" in the European context which may also be seen as a strategic game with the place of regulation. In other areas we are observing a competition for the best place to regulate (or prepare regulations) among international fora, like the Council of Europe, the European Union, the OECD, ITU, WIPO, just to name a few "places".

### *Actors*

With international (and regional) fora gaining in importance for regulation the main actors are changing as well: National legislatures loose influence; they have to give negotiating power to their governments and remain restricted to a "yes" or "no" decision in the end, even if they seek to increase their influence on the negotiation process itself. International epistemic communities outside of traditional legislators but often deeply linked with non-governmental organizations<sup>34</sup> suggest and mutually support regulatory initiatives which they seek to introduce directly into regional and international organizations.

### *Procedures*

We have already referred to the increasing importance of "private authority" in regulation or at least in the process of operationalizing regulation and establishing hybrid regulatory institutions. But this is not a one-way process. A "publication" of the private seems to try to balance the privatization of the public: Obligations which were once almost exclusively associated with the public sector, as e.g. the concept of access to information without the need to show a legal interest, or the concept of telecommunication secrecy are slowly being transformed into genuine

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<sup>33</sup> It took the (general) data protection directive 59 months from the proposal by the Commission to its final acceptance; the digital signature directive needed 14 months for the same process.

<sup>34</sup> JOHN BRAITHWAITE; PETER DRAHOS: *Global Business Regulation*. Cambridge 2000, 622f.

obligations for private sector operators. "Public" and "private" have generally become diffuse categories offering no clear perspective as to what kind of obligations can be derived from them.

This "softening" of structures, these variations in regulatory procedures, the network approach to law making, however, do not eradicate underlying hegemonial structures; they only make them less visible. Over all these years e.g. - to return to Internet Law proper - ICANN underwent many changes in its internal set up but it essentially remained a non-for-profit corporation under Californian law.

The method of hegemonial aspirations is changing as well: Legal systems as such, as carriers of beliefs and values, have become export products in competitive markets. They are being marketed not only by "helping to rebuild legal infrastructures" in devastated areas, but by offering competing opportunities of legal education in already well developed educational markets. The success of such exports, also depends of course, on the "market value" of the countries promoting such systems. Against this background it comes as no surprise that the European Union - again returning to examples from Internet law - has been introducing such foreign notions into its legal system as "frequently asked questions" by giving them regulatory status.<sup>35</sup>

### **3 Conclusion**

#### *More changes*

These observations then lead us to the fundamental question: Is law becoming more flexible in general to deal with the challenges of change, and if there is no causal connection with the Internet and its technologies can we at least look upon Internet Law as a successful example of this new flexibility?

As stated above, Internet Law as a discipline and Internet Law as a regulatory package - in spite of all rhetoric and symbolism to the contrary - seem to have taken the traditional path of law assimilating the new by strengthening those old interests which seemed to be most promising for stabilizing economic and social structures.

However, these processes were unfolding with the participation of more actors and on an international stage and in front of a larger and more differentiated audience. But the ability of these international if not global audiences have not

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<sup>35</sup> See the safe harbor privacy framework on data protection (issued by the United States and published in the Federal Register on July 24, 2000 and September 19, 2000, and by the European Commission on July 28, 2000). The safe harbor framework contains a set of seven privacy principles, 15 frequently asked questions and answers (FAQs) and other material.

changed much. In the European context, elections to the European Parliament and the new influence of this institution may be seen as - a limited - exemption. But in general these audiences still have but their communication and influence channels to local and national legislatures. It does not seem - if we look at recent developments in the European Union - that these audiences have fully understood these contradictions in the creation of legitimacy; for the time being these audiences seem to be preferring a regressive path back to the local rather than seeking to extend their international and global influence.

While there is this regressive attempt to cling to the traditional forms of law making, law, in its visualizations, in its symbols of representation seems to be strangely evaporating, again a process which cannot be linked directly to the Internet as such, but perhaps more generally to information and communication technology and its cultural impact: The "digital" allows for forms of "plasticization" which so far had been foreign to the traditional concept of a law acting in clear and unequivocal rites and formats. These changes are not restricted to the technological presentation of law but extend into all areas of its design, from court house and court room architecture, to the clothes of the "legal personnel" and the design and formats of legal documents. Signatures, stamps and juridical emblems are being simulated digitally; courts, lawyers and parties converse electronically. Law is slowly turning virtual, a quality it had always possessed as being present even where it was not so physically. With its new media it may have finally found its adequate form of representation, or, putting it more pointedly and returning to the beginning of our retrospective:

While we have been watching how law would handle the phenomena of the Internet with its "Internet law construct", law itself has become like the Internet, polymorphous, internationally linked, independent of time and place, a multi-level, multi-actor, multi-issue communication infrastructure, apparently open and inviting, but with strong centralizing hegemonial characteristics.

#### *A Final Observation: The Future of Internet Law as a Discipline*

Having participated in Internet Law from the academic sideline invites the questions where to go from here, and what to explore next?

The observations above have, of course, provided only a rough sketch and remain open to elaboration and eventually to falsification and thus open up many venues for what academics like best: "further research".

And there are still some issues which need more attention: The Internet is but a phenomenon of the longer and broader impact of information and communication technology, and in societies which like to be addressed as "Information Society", if not as "Knowledge Society", we still know surprisingly few things about the

essentialia "information" and "communication" having been captured by such accidentalia as the Internet.

Focusing on Information Law rather than on Internet Law then not only seems a useful academic survival strategy in times of a waning interest in the Internet but also a conceptually sound and viable approach to better understand the environment in which law is operating. We still wait for attempts e.g. to assemble and restructure the body of codified law - to present an example from the European research context - by information processes (structures, rules, institutions) in order to - at least tentatively - create a conceptually challenging imprint of the law of that Information Society we are constantly talking about; and although there are already first examples<sup>36</sup> we are still waiting for more comprehensive concepts of how to normatively redesign these information rules, information flows and information institutions to meet our understanding of how such an Information Society should work, which values it should cherish and which interests it should protect.

I have been emphasizing the "European context" here, because such expectations are still culturally bound to a Napoleonic optimism to catch the varieties of the real world in this time a textual code resembling those architects who had been so much criticized above. And may be the glimpse on Law as Internet as presented above should caution such a belief; but I admit that old beliefs do not die easily, they might just whiter away./--

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<sup>36</sup> See e.g. the contributions in: URS GASSER (ed.) (2004), *Information Quality Regulation: Foundations, Perspectives and Applications*. Baden-Baden: Nomos.