

Summary

zum Referat von Prof. Dr. Josef Drexl, München

1. The Internet is not a new phenomenon. The question of how to regulate it has been discussed from a legal perspective for approximately 20 years.
2. From the very beginning there was a conflict between promoting the new freedoms of doing business and information and the need to guarantee the rights and values already accepted for the analogue world in the digital environment as well.
3. Rules for the regulation of the Internet that were adopted at the very beginning have proven to be very stable. Yet there are new technological and economic challenges that may argue in favour of reforming existing rules and devising new ones.
4. On the international level the law of the WTO constitutes the basis for cross-border economic transactions on the Internet, although the WTO agreements were adopted too early to specifically address the challenges of the digital age.
5. Binding international obligations that specifically react to the problems of the Internet were first drafted in the field of copyright. Through EU directives, these rules have also been implemented in the national law of the EU Member States. Due to the digitisation of works and emerging new possibilities of using works, there is a constant need to examine and reassess the balance of interests in copyright law.
6. The Internet also creates challenges for trademark law. Internationally, it is most important to enable firms to use their signs on the Internet without the imminent risk of infringing rights in other states. To address this problem, WIPO has adopted a Recommendation that is taken account of by national courts.
7. As regards intellectual property law, the biggest problem however concerns the enforcement of rights against infringements on the Internet. However, there is also a particular risk that countries will enter into agreements on enforcement that do not take sufficient account of the substantive and procedural rights of alleged infringers. With its refusal to ratify the Anti-Counterfeiting Trade Agreement (ACTA) the European Parliament has clearly set the limits to what can be accepted in this regard.
8. Outside of intellectual property law there are hardly any binding international agreements that specifically react to the challenges of the Internet. An exception is the UN Convention on the Use of Electronic Communications in International Transactions of 2005, which has however only been ratified by six states.
9. Yet the UNCITRAL Model Law on Electronic Commerce of 1996 and the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce of 1999 led to the adoption of harmonised legal standards on the national level.
10. Apart from this, international self-regulation also plays an important role in form of the centralised administration of generic Internet domain names through ICANN and the dispute settlement regime linked to it. The latter was able to prove its effectiveness in most recent years. However, this example also shows that self-regulation of the Internet in the field of non-contractual obligations and torts can only work under very specific conditions.

11. There is also a need for adequate dispute settlement mechanisms and special judicial procedures for the solution of cross-border consumer disputes. In this regard, the EU has taken important steps towards online dispute resolution for conflicts relating to online consumer contracts by adopting the ADR Directive and the ODR Regulation in 2013. Judicial protection for consumers in the cross-border context is further facilitated by the European Small Claims Regulation.

12. Yet most legal issues on the Internet are regulated by national law. Therefore, private international law plays a major role in Internet-related cases. To some extent, namely, as regards consumer contracts, there has also been a need to adjust existing conflict rules to the situation of electronic commerce.

13. The Internet also presents challenges in the field of international jurisdiction. As regards infringements of personality rights, the CJEU, based on the jurisdiction of the courts in the country of infringement under the Brussels I Regulation, has empowered victims to claim full compensation without territorial restriction before the national courts of the plaintiff's residence. In contrast, as regards infringements of intellectual property rights, the right-holder can only claim damages in the country of residence based on this jurisdiction for the harm that the right-holder has suffered in this country.

14. Use of works on the Internet can lead to parallel infringement of the copyrights in a great number of jurisdictions. Accordingly, there is the challenge that courts seized by the plaintiff may have to apply the law of a multitude of states (so-called mosaic approach). This is why, in cases of ubiquitous infringements of IP rights on the Internet, some scholars nowadays propose to replace the application of the different laws of the country of protection by the application of the law of the closest connection.

15. The need to take into account a multitude of national laws also arises in the context of licensing copyrights for worldwide digital use of works on the Internet, for instance, in the form of music webcasting by Internet radio stations. Since the rights are typically administered by national collective rights management organisations (CMOs), it would be for these CMOs to organise a system for the grant of multi-state licences. To promote such a system, the EU legislature has most recently adopted new rules as part of the Collective Rights Management Directive 2014/26, which, however, still need to prove that they will be sufficiently effective.

16. On the EU level, the Electronic Commerce Directive of 2000 pursues a balance between promoting the new freedoms of doing business and of information and the need to protect specific rights and interests in the digital environment. For this purpose, the Directive liberalises cross-border economic commerce based on the country-of-origin principle. Yet the Directive also exempts important fields of regulation from this principle; these fields of law are only harmonised to some degree by other directives. Hence, it is still national law of the country of access to the Internet that applies in such fields. In addition, the Electronic Commerce Directive promotes new business models on the Internet by limiting or even excluding liability in favour of certain groups of Internet service providers.

17. In addition, the EU promotes the digital sector through the Public Sector Information (PSI) Directive, which, in its revised version, creates an obligation of the Member States to license the commercial re-use of publicly held information to private firms that intend to provide added-value information services to customers.

18. In the field of copyright law, the Information Society Directive has not led to sufficient harmonisation as regards the Internet. The most important deficiency relates to the lack of full harmonisation of the exceptions and limitations.

19. Moreover, harmonisation in the field of data protection also remains unsatisfactory. The new firms of the Internet economy that heavily rely on the use of personal data are only under an obligation to respect the rules of the Data Protection Directive of 1995, which could not yet take account of such new business models.

20. In general, European regulation of the Internet runs the risk of addressing issues of a global dimension from a perspective of the internal market of the EU. Yet it is perfectly legitimate to request firms of the Internet economy based in third states such as the US to respect European legal standards such as in the field of data protection. But the Eurocentric approach fails where European firms are, as in the case of multi-territorial licencing of copyrights for online use of works, in need of solutions that enable them to act globally.

21. New challenges for cross-border liberalisation of electronic commerce arise from the fact that firms are nowadays able to “re-nationalise” the Internet by means of geoblocking. However, geoblocking is not per se illegitimate. It can even be very useful as a means to help firms to limit the implementation of territorially limited injunctions in cases where conduct on the Internet only violates the law of some countries but not of others.

22. The Internet leads to a change of paradigm from the industrial society to the information society. Further technological developments continue to change the way we use the Internet and, thereby, also change the information society. Whereas the Internet was first used as a private and commercial communication platform and was then also used as a channel for the distribution of digital goods, in the near future, it will evolve into an “Internet of things”.

23. Since this evolution of the Internet will lead to an explosion of the volume of data to be processed over the Internet, it will be of utmost importance to provide society with high-performance telecommunications networks. This corresponds to the need to maintain competitiveness of the domestic economy in the digital era and the desire of citizens to have powerful Internet access from wherever they are. However, building up broadband landline networks as well as mobile phone networks on the basis of the most recent generation of mobile phone technology requires considerable investments.

24. In parallel with ubiquitous availability of mobile Internet access, society claims unrestricted access to all legal content that is available on the Internet. Such a claim would be implemented by regulation that follows the principle of net neutrality, which guarantees non-discriminatory transmission of all data with a view to safeguarding freedom of information on the Internet. The principle of net neutrality would prevent the operators of networks from charging content providers for privileged transmission. Accordingly, the principle of net neutrality may well conflict with the interest in rapid expansion and development of broadband networks based on private investment.

25. Another new technological development relates to the phenomenon of cloud computing. Cloud computing allows for the outsourcing of hardware and software to service providers on the Internet. The development of cloud computing promotes the interconnection of networks by enabling the user to access her data from any place and

from any end device. Yet cloud computing also increases the volume of data transported over the Internet and presents new challenges as regards the protection of personal data on the Internet across borders, since it is by no means foreseeable in which country the data will be stored. Hence, key to the economic success of cloud computing services will be the guarantee of a sufficient level of international protection of personal data and data security.

26. The “Internet of things” will bring about full network integration of intelligent products used in daily life and, thereby, lead to the emergence of many new business models that can hardly be foreseen at this moment. In particular, the Internet of things will constitute the backbone infrastructure for operating autonomous, i.e. driverless, vehicles.

27. New digital business models such as for the operation of search engines, auction platforms and social networks have led to the emergence of internationally active firms of considerable size and financial and market power. Many of these business models rely on the use of personal data, which is provided by the user in the context of using the service. Such services, such as Google’s search engine, are typically financed by income from advertising. Direct and indirect network effects explain why in such new markets the firm that manages to generate most attraction for users will typically prevail over competitors. Accordingly, these new digital markets demonstrate a tendency towards monopolisation.

28. The abovementioned current challenges cannot exclusively be addressed from an economic perspective. Rather, there may be conflicts with non-economic goals and values such as the guarantee of the freedom of information, the guarantee of a sufficient degree of data protection or security policy concerns. However, when it comes to the justification of regulatory measures in the digital sector, an economic analysis should be conducted as a first step. This analysis may well reveal that the results of the economic analysis will not conflict with other concerns and that, consequently, an additional balancing will not even be needed.

29. As regards selecting the appropriate measure for regulating the Internet, measures of different intensity of intervention are to be distinguished. On the lowest level, measures that promote economic business activity on the Internet will always be acceptable. On the next level, we can identify measures of intervention that react to a particular market failure. Such measures include those that protect competition on the Internet. On the last level, if it is not possible to find an economic justification for intervention, the question remains whether conflicting non-economic policy goals can justify intervention.

30. A most important current challenge concerning the regulation of the Internet relates to the recognition of the principle of net neutrality. Economic considerations seem to argue against net neutrality and leaving the regulation of the transmission of data to the price mechanism of the market. But there are also economic arguments that can support a decision in favour of net neutrality. Of course, charging a price for the transmission of data would lead to a co-financing of the broadband telecommunication infrastructure by the big, financially very strong firms that benefit most from the Internet. But this would even more increase their market power as compared to financially weaker competitors that would not be able to pay comparable prices. Moreover, the prohibition of discrimination also seems to make economic sense in the light of a dy-

dynamic competition policy based on evolutionary economics. The Internet is to a large extent used for the distribution of cultural goods that are often protected by copyright. With regard to such products, net neutrality would guarantee equal access of all works to the Internet as a distribution channel and thereby promote cultural diversity.

31. As regards the expansion and development of mobile Internet access, the issue of access to standard-essential patents (SEPs) is of utmost importance. In the Huawei case, the CJEU has just decided on the conditions under which, pursuant to EU competition law, a firm may use SEPs after a declaration of the SEPs owner's willingness towards the relevant standard-setting organisation to license at fair, reasonable and non-discriminatory (FRAND) terms. If patent courts provide too much protection to such SEPs, the expansion and development of mobile phone networks based on the most advanced mobile phone technology might become more expensive and might be delayed. Since such technological standards are implemented internationally, this issue is one of global regulation, which nevertheless has to be addressed based on the rules of national patent and competition law. Moreover, the concrete conflict in Huawei, involving two Chinese firms that started as state-owned enterprises and that are nowadays among the five globally most important telecommunication equipment providers, also raises data protection and security policy concerns that go beyond a typical competition law assessment.

32. As regards the competition law assessment of the business models of Internet platforms, the question arises whether particular attention should be given to the use of private data. Indeed, an assessment that only focuses on the protection of competition in the advertising market based on the argument that only advertising customers are engaged in an economic transaction by paying for the service they receive, appears too short-sighted. Since advertising customers have no interest whatsoever in higher standards of data protection, the fact that users of the service on the other side of the platform "pay" with personal data would not be taken into account by focusing the analysis of such cases only on the advertising market. From a competition law perspective, the challenge consists in protecting competition by higher standards of data protection. But operators of Internet platforms usually do not rely on data protection as a parameter of competition. This leads to the question whether the users of such platforms are able to act rationally as regards the disclosure of private data when making use of the relevant platform services.

33. Market power of firms of the Internet economy can also arise from the accumulation of large stocks of personal and other data (so-called "big data"). In this regard it still remains rather unclear which role big data has to play in the framework of applying competition law. To take account of the accumulation of large stocks of data seems most needed in the context of merger control.

34. Furthermore, as part of the project of establishing a "Digital Single Market", the EU seems to move towards a paradigm shift as regards its approach to harmonising the law of the Member States. The Commission strives to guarantee equal access of all citizens to the same content on the Internet from any place within the EU. To achieve this it will not suffice to implement a prohibition on roaming fees and illegitimate geoblocking. The question is also whether existing harmonisation of national laws through directives will need to be replaced by uniform legal standards based on regulations. In the fields of data protection and consumer contract law the Commission already submitted

respective proposals some years ago. Whether the Commission will move in the same direction in the field of copyright law, namely, by adopting a system of unitary copyright protection, still needs to be seen. In the upcoming years, the Commission will at least have to face the challenge to further harmonise the exceptions and limitations to copyright protection in order to move closer to the ideal of the Digital Single Market.

35. The European project of a Digital Single Market also raises the question of whether, in the light of the global character of the Internet, more harmonisation is also needed internationally. As regards data protection, an agreement on higher standards of protection with the United States is most needed, but at the same time extremely difficult to achieve. In the field of copyright law as well, additional advances are needed. Most importantly, international copyright law should move away from only fixing minimum standards of protection to including mandatory exceptions and limitations. The conclusion of the Marrakesh Agreement to Facilitate Access to Published Works for Visually Impaired People in 2013 indicates that such a development is not totally unrealistic. Another important international issue relates to cross-border liability of Internet intermediaries for copyright infringements. In order to prevent the most restrictive national approach from determining the availability of the business models of Internet intermediaries, a discussion is needed on a departure from the application of the different laws of the country of protection in favour of the law of the country with which the business model has the closest connection.

36. In sum, it is to be noted that the dynamic development of the Internet constantly produces new challenges on all levels of international, supranational (European) and national regulation. Regulation cannot and should not only follow an economic rationale. Quite the contrary, diverse policy goals are closely intertwined when it comes to identifying regulatory responses to these new challenges. It is above all the democratic claim for equal access to all legal content available on the Internet both in the United States and the EU that concurs with the economic approach to regulation. Yet, in the light of exploding data on the Internet, this claim may also encounter insurmountable technological capacity constraints in the future. Moreover, most of the current challenges demonstrate a close connection with the issue of data protection. If it is not possible to guarantee sufficient international protection of personal data, this may well impair future acceptance and effective functioning of the Internet as well as the further development of the digital economy.