



**INSTITUTE FOR INFORMATION LAW
UNIVERSITY OF AMSTERDAM**

RESEARCH PROGRAMME 2005-2010

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1 THE MISSION OF THE INSTITUTE FOR INFORMATION LAW

Founded in 1989 at the law faculty of the University of Amsterdam, the Institute for Information Law (*Instituut voor Informatierecht*, IViR) has since developed into the Netherlands' centre of excellence for legal research in information law. At the national level, the institute ranks first in its field (and in the top ten of all legal research disciplines combined). The IViR has a strong presence in European and international academic networks, through a broad array of activities. Staff members routinely co-author publications with foreign academia, and are on the editorial board of various journals and book series. Each year we host a number of international conferences and other meetings for high level discussions on current research projects. Our academics are regularly invited as (keynote) speakers at conferences at home and abroad, and are executive members of various national and international associations (such as *ALAI*, *LDIC*).

The institute's mission is to further the development of information law into a balanced framework that accommodates the needs and interests of the information society. To this end, IViR brings together all the legal disciplines necessary to study the regulatory framework for the production, dissemination and use of information. Information law is a discipline where many areas of law meet, notably: intellectual property law, fundamental rights of communication (notably privacy and freedom of expression), regulation of government information and commercial information and the market regulation of information networks (telecommunications, broadcasting and other media). Information law is not restricted to one particular type of information technology, but applies the principles developed for old ('analogous') media to electronic media, reassessing them where necessary. The institute has played a pioneering role in this approach which has been followed home and abroad.

IViR research particularly focuses on the convergence processes between the different media and distribution functions and their repercussions on law and policy. Information law is a normative concept, which means that it is to contribute to a normative framework for a well balanced organisation of the information society.

2 PERSPECTIVES ON THE INFORMATION SOCIETY

The information society can be characterised using different perspectives:

- *The cultural perspective.* The information society consists of the free exchange of opinions and free access to the public domain of knowledge. A key feature of this perspective is the organisation of the public debate and the limits thereto. Points of particular legal interest are: the role of freedom of expression and intellectual property rights for culture; the organisation of media and the organisation and access to the media market; the role of the government in information supply; the accessibility in the public domain and the definition of this notion; the role of the market in producing and distributing information.
- *The economic perspective.* In the information society, knowledge is the most valuable economic good. Points of particular legal interest are: rights to intellectual property (e.g. industrial property, copyright, related rights), the relation between the different intellectual property rights and the relation between property rights and fundamental freedoms; new property rights or quasi property rights in information; the legal and

economic analysis of old and new intellectual property rights; the commodification and marketing of information in all forms of aggregation.

- *The perspective of regulation and control.* In the information society, persons and objects are increasingly regulated and controlled by information and communication technologies (ICTs). Points of particular legal interest are: privacy and freedom of communication; (personal) data collection for commercial and public control and policy purposes; databases of personal data; control of private communication; regulation by means of ICTs.
- *The perspective of the network society.* Points of particular legal interest are the organisation of the (tele)communication market; the convergence of content and distribution; the role of old and new 'gatekeepers' in the communication process; horizontal and vertical integration in the chains of distribution; the disappearance of the national state as the sole enforcement and regulatory authority; new regulatory mechanisms.

3 THE CORE OF THE RESEARCH PROGRAMME

Information law can be defined as the body of law governing the production, the storage, the distribution and the use of information. It is therefore present in each of the perspectives on the information society mentioned above. Information law finds itself in a multidisciplinary field of tension, in which cultural, economic, technical and administrative aspects meet. There are a number of clear tendencies which traverse the perspectives and call for a review of the regulatory framework: Changes in the value chain, convergence of media and telecommunication, changing communication patterns, changes in the public domain versus the commercial domain, and the internationalisation and privatisation of (regulatory) authority.

Changes in the value chain

Before the digital revolution, production, storage, distribution and use were clearly distinguishable links in the value chain. An author or editor produced, a database producer stored, a carrier carried, a user consumed. The exploitation schemes of the intellectual property right are based upon this. In the current environment of digital production, storage, distribution and use, these links are not so easily distinguishable. Accordingly the role and the mutual relation between the links deserve new attention in a network society. This is for instance the case with the changed relationship between the producer and the consumer of information. The consumer of music settles his bill directly with the 'content provider' (producer or database) without regard to links in-between. Music databases become operators and play a role of their own next to producers.

The changes in the value chain also lead to a shift in the markets in which information producers, distributors and collectors each operate. They enter each other's markets and become competitors, which inevitably has legal consequences.

Convergence of media and telecommunications

Information services, carriers and infrastructures that were formerly separated now grow into one another both horizontally and vertically. In a network society, the distribution and production of information cannot be studied separately anymore; media law and telecommunication law merge into one another. Distributors attract media responsibilities and media dissociate themselves from distribution platforms. Distribution platforms, such as 'portals' and electronic guides, are taking over functions

of the traditional media. The difference between press and electronic media, as well the difference between individual access and access to public use of information controlled by media, fades away. This has consequences for regulation and control. The question thus arises under what circumstances content can be regulated and controlled in the underlying distribution layer: for instance censorship of information services delivered through the internet by means of software.

Changing communication patterns

Communication patterns can be presented according to the following model:

Service Schedule	Information Supply	
	Individual	Central
Individual	1. Conversation (Example: a telephone conversation)	2. Consultation (Example: an individual search path in a database)
Central	3. Registration (Example: registration and control of personal data)	4. Allocation (Example: broadcasting)

Registration and consultation are gradually becoming the most important forms of communication. This leads to a reconsideration of what communication pattern is 'public' and of what rules apply. Conversation and allocation remain, but are accompanied by –and sometimes even replaced by– consultation and registration. The internet is only one example of a general trend: an individual participates in a public discussion by means of a discussion group; his act of communication is registered. The same applies to actual exploitation covered by the right to intellectual property. Consequently, every act of communication is an act that is traceable to the individual. New common ground between the right to privacy (guidance and control) and other sectors (accessibility and exclusive use of information) arises. Regulation and control become closely tied up with a field that until recently was characterised by the cultural perspective.

Public domain v. commercial domain

The sharp distinction between a domain of information allowing access to all citizens for free or at low cost (the public domain) on the one hand and a domain exclusively protected by property rights on the other hand is fading away. This changes the economy of the information society. In the area of intellectual property law, this blurs the borderline between ideas and laws of nature that are freely accessible and protected processing and applications. In the area of freedom of information law (access), public data produced by the state and some commercial parties serve as a basis for providers of 'value-added services' who exploit these unprocessed data in a refined form. These data are indispensable for public (scientific) and commercial (industrial) applications. More and more data have a price attached, which reduces the free accessibility of information.

Internationalisation and horizontalisation of authority

In information law the national and the international legal order are more and more intertwined. National legislators gradually become final stages of international decision-

making processes. Furthermore, new international forms of authority with a public/private character arise, as is evident from the organisation of the internet.

4 THE RESEARCH PROGRAMME IN DETAIL

The developments set out above are reflected in each area of information law. IViR's research programme consists of seven parts, that may somewhat overlap. These correspond largely to (Dutch and continental European) statute law. Our research focuses on all those areas characterised by new developments that are mostly inspired by digitalisation, without losing sight of 'analogue' information law.

4.1 GENERAL DEVELOPMENT OF INFORMATION LAW THEORY

The convergence between information services, carriers and infrastructures has far-reaching implications for all areas of information law. The traditional distinctions between areas of information law based on medium or technique disappear or fade away. This phenomenon calls for new legal definitions.

Furthermore, the organisation of new information transactions plays a central role in information law theory. Both traditional fundamental rights and intellectual property law start from the communication patterns 'conversation' (from individual to individual) and 'allocution' (from a central point to a homogenous public), upon which notions such as 'disclosure' and 'public communication' are based. They also start from a dichotomy between immaterial disclosure and distribution of information on tangible carriers, which however seems to be superseded. Finally, information relations that were governed by rules of public law protecting values such as property, freedom and privacy are increasingly regulated by contractual relationships.

General theory of information law primarily deals with the institutional organisation of the information supply process. It investigates the shift of traditional functions, such as the production and distribution of information in new communication structures (like the internet) as well as the role of new functions, such as search and structuring functions in sizeable databases. Moreover, it focuses on the consequences for the commercial organisation of the information market and the role of the government. Finally, it should lead to a reassessment of the concepts used in all areas of information law.

In the following paragraphs the field of research is still divided in traditional areas, which is inevitable in the case of historically shaped rules of positive law (statute and case-law alike). The spearhead of research in general development of theories in the coming years is cross-border conceptualisation, going more and more beyond the different areas of positive law.

Key research topics: the development of new notions going beyond positive law and relating to access, control and exclusivity of information and to the organisation of information supply *processes*.

4.2 FREEDOM OF EXPRESSION AND OTHER COMMUNICATION FREEDOMS

The traditional values of freedom of expression and its relation with other freedoms (privacy, political organisation, freedom of religion) remain high on the research agenda. The coming decades, Europe will go through a new phase of seemingly contradictory

cultural and religious life styles and beliefs, partly due to continuing migration. Cross-border information flows and further internationalisation of legal relationships strengthen this process, which will put the fundamental right of freedom of expression to the test.

The individualisation of communication patterns and the disintegration of the public render it necessary to reconsider notions such as publicity, disclosure, public, right to access, freedom of reception, etc. The independence of government and commercial power however remains an important research topic. Research on the legal freedom of the public debate in a new electronic and cultural environment forms the spearhead in the coming years.

Government transparency and public accessibility of information are increasingly important research topics in a society characterised by commodification of information. This means that facts and (semi) processed data are increasingly excluded from the public domain. Given the serious expansion of this new cross-border topic, it will be described separately as a new research area.

Positive obligations are considered to be the state's obligations to promote the aims targeted by fundamental rights. Mainly under the influence of European standards, national governments have received more and more responsibilities in this sphere. In the field of the right to freedom of expression, these obligations were traditionally embedded in broadcasting regulation and freedom of information legislation. Because of the said convergence processes, these points of departure have faded. Consequently, research should aim at formulating the government's new role in this respect.

The clash of privacy and public disclosure in a society that is more and more driven by electronic media, as well as the growing call for public accountability of persons in public or commercial functions, prompt the relationship between privacy and public communication about persons and institutions to be further deepened.

With the growing importance of the internet, the use of media and information has been further individualised. Because of this gradual move towards a demand-orientated use, existing concepts of media regulation are no longer suitable. Furthermore, new media functions arise in the field of searching and selecting information, which raises questions on how information values such as objectivity, independence and transparency can be upheld. Parties that formerly belonged to the telecommunication or other sectors have now joined this playing field.

Now that they are not tied to territorial boundaries anymore, the supply and use of information adds a new dimension to the research of international regulation of information flows.

Key research topics: the public debate in a new electronic and cultural environment; a non-media specific government information policy, new intermediaries in information supply policy.

4.3 PROTECTION OF PRIVACY

In a society of regulation and control the right to privacy and the confidentiality of communications (as a part of privacy) have become key concepts. The horizontalisation of power relationships combined with the individualisation of communication patterns, poses problems to the enforceability of constitutionally protected rights to privacy. This fundamental right is put under pressure by the fact that the state's interest no longer is solely in the protection of its the territory, but increasingly also in the protection of its citizens and institutions against international crime committed individually or in groups.

The developing technique of individual guidance and control is another factor of importance. The analysis of the limits and possibilities of constitutional protection of privacy has thus become a central research subject.

Another central point of attention is the storage and processing of personal data and effective legal control of these activities. The interaction between consumers and businesses and between citizens and the public sector provides important economic and democratic benefits. However, the balance between the necessary processing of personal data and the protection of privacy is extremely difficult to maintain. This is in part the result of increasing individualisation in the commercial sphere. Another factor is the increased need for central processing of data for scientific research, for administration purposes and for the enforcement of criminal law and commercial exploitation rights (such as intellectual property). Especially in the latter field intermediaries play a crucial role. Consumers and citizens, as well as businesses and governments consider the processing of personal data for commercial and government purposes to be necessary in order to meet their respective needs. However, the processing of personal data is not transparent, in spite of the rights allocated to the consumer in this respect. Further analysis of the need for and the scope of information obligations in this field is necessary.

As a result of the streamlining of government services and of the fight against terrorism and other forms of crime, personal data are increasingly processed on a central level and investigation services are required from intermediaries. Guarantees for citizens, whether through administrative or criminal law, are considered of relatively little importance. This calls for research into the effects of the need for guidance and control in the information society on the rights safeguarded by the traditional rule of law.

The type of regulatory model of data protection chosen on the European and national level, appears to suffer from overregulation, while at the same time it (too) easily provides for exceptions to the protection of personal data. Data protection law should be made to safeguard the core value(s) of privacy, and overregulation must be recognised as such. The function of technology as a means for regulation and protection must be examined as regards its proportionality.

It is hardly possible to have a complete view of the international flow of personal data. The difference in importance attached to the protection of personal data in different parts of the world, makes equivalent protection of personal data across borders a tricky problem, also in the enlarged European Union.

Key research topics: protection of privacy in a society driven by technology and control, effectiveness of protection levels, effectiveness of regulation of use and exploitation of personal data, international traffic of personal data, privacy as a connecting element in all information transactions.

4.4 INTELLECTUAL PROPERTY

The right to intellectual property traditionally provides the legal basis for property claims in information products and services. Cultural expressions are protected by copyright law, technical inventions by patent law, industrial design by design law, etcetera. In addition, trademark law protects signs that designate products or services. The key questions in intellectual property concern the proper delineation of the various subfields, the scope of protection and the range of the legal restrictions. The distinction of the rights to intellectual property from each other (accumulation or ‘negative reflex effect?’) and the relation with freedom of competition and ‘freedom of imitation’ are

important sub-topics. Finally the development of new exclusive rights and their position in the closed system of intellectual property rights is another point of interest.

The passage from an industrial society to an information society, which is taking place at high pace since the eighties of the last century, has been accompanied by a strong proliferation of intellectual property rights: existing rights are extended to new subject matter (e.g. patent law), the term of protection is lengthened (in particular copyright) and new rights (right of database) are introduced. As a result, the preservation of a solid public domain of information, also based on the freedom of expression and information, has become an important research topic. In addition attention is also given to contractual self-regulation, like Open Source and Creative Commons.

On the international level too, the right of intellectual property was strengthened substantially during the last decades, especially under pressure from the developed countries. In the European Union this process took place within the framework of harmonisation, but it is questionable whether the intended uniformity of intellectual property law has actually been achieved. The question also arises whether in international law of intellectual property there is need for a special statute for developing countries. More generally the place of intellectual property in international trade law will be a subject for research.

As a result of the change in communication patterns, especially on the internet, a move towards contractual relations between authors, producers, intermediaries and end users is gradually taking place in the sphere of intellectual property. This contractual autonomy could enter in conflict with the rights of use that are based on freedom of expression and the right of privacy, and which have received recognition in the right of intellectual property. At the same time, this move offers a new dimension to the traditional contractual relation between author and operator/user (copyright contract law).

Shifts in the value chain, whereby traditional actors are playing new roles and new intermediaries (like ISP's and portals and search engine providers) are emerging, raise important questions on the allocation of rights and on civil liability for infringement of rights. In this context the institution of collective rights management and the existing system of levies deserve further examination, also in the light of the development of the Digital Rights Management (DRM). However, DRM also evokes the scenario of a world in which information users are tied hand and foot to producers of information. The question to what extent consumer law can play a role in this field is a further subject for research.

Key research topics: new international information transactions; the changing role of intermediaries; allocation of rights; consistency of the system of intellectual property rights; new definition of the public domain; consumer protection in information transactions; copyright contract law.

4.5 COMMERCIAL COMMUNICATIONS

Commercialisation and individualisation are the key words in this field, which covers advertising and all other forms of promotion of products and services. The traditional division of commercial and editorial information flows seems to be less considered as the ideal type in the media, also by other information providers, like government bodies and societal groups. The collective approach to consumers makes way for the registration of individual personal profiles. More than in the past, consumers have an

independent, individual search behaviour. These developments are taking place in traditional audio-visual media and in the press, but pre-eminently on the internet. The national legal framework is mainly of European descent.

The interplay of the production of editorial information and commercial and other forms of influencing information is a key research topic. This concerns primarily the problem of the decreasing quality of information as a result of a loss of editorial independence. There is also an increase in the quantity of commercial information. It seems that the European legislator accommodates this trend toward more possibilities for commercialising information indiscriminately. The traditional detailed broadcasting model aims to reconcile the interest in editorial independence with funding by commerce. This model is becoming untenable, partly because it cannot be transplanted to internet based individual communication relations. . So far, this has resulted in the liberalisation of advertising rules. The question arises how this liberalisation relates to another trend: that of the protection of the consumer against unfair commercial practices.

The above mentioned shift the models of communication, from allocution to conversation and consultation, leads to less clear standards for the reliability of commercial information. This is a second key topic of research. Individual communication relations simply are less easy to regulate. Also, the image is increasingly advanced of the well-informed information consumer who can independently make comparative assessments on the reliability of commercial information – which is necessary for a functioning (common) market. This antithesis gives rise to the question of the legal tenability of numbers of advertising bans that some label as paternalistic, notably in the field of medicines, sweets, alcohol, tobacco and professions. Of course the practical enforceability of such restrictions on commercial communications has been put into question for some time, also thanks to the internet.

In commercial communications, self-regulation is increasingly being replaced by legislation. However, a fundamental debate on the consistency and coherence of that legislation is lacking. This is a third research topic. Such debate should concern the question of the necessity of specific legislation, and on what points general (horizontal) legislation suffices. As regards the horizontalisation and verticalisation of rules, it should be noted that, , self- and co-regulation too, are characterised by a proliferation of rules, just like statutory substantive law. Especially in complex liberalised markets, like the telecommunication market and the energy market, one must consider the question of which legal instruments are best used to regulate the information avalanche and the information gap.

The European laws in the field of commercial information equally would benefit from a review on consistency and coherence. A particular point of interest is how much freedom remains at the level of individual member states.

The use of clear normative standards (e.g. the above-mentioned image of the information consumer) for the explanation of concepts of European and national law could contribute to the consistency of the law concerning commercial information. However, it seems that harmonisation is often merely nominal, as instruments used (directives) leave member states a wide measure of discretion. Nevertheless,; examination of the national legal practice might reveal that in effect many member states provide largely similar solutions. However, the fact that this is currently not the object of debate prevents progress in the discussion on the need for harmonisation of the rules regarding commercial communication in the internal market..

Key research topics: the relation between commercial and editorial responsibility for information supply; regulating the commercial information supply in new

communication relations; European harmonisation of regulation of commercial information supply.

4.6 GOVERNMENT INFORMATION

From a cultural and political point of view, access to government information is essential for the functioning of democracy and the rule of law. It enables the citizen to control the government and promotes the formation of political opinions and participation in the democratic decision-making process. Dutch freedom of information law contains an important distinction between active and passive dissemination of information by the public sector. Under the influence of information and communication technologies and related changes in communication patterns, this traditional distinction becomes blurred. Therefore the problem of the boundary between (objective) information dissemination and information aimed at (political) influencing is brought to the forefront once again.

Traditionally, the regulation regarding access to government information in the Netherlands is relatively strongly developed compared to a lot of other European countries. On the level of the European and international institutions there is an increasing interest in the improvement of transparency. The importance of the European legislation on the disclosure of information increases as the determination and execution of government policy moves to the European level in more fields. This causes the risk that in case information falls under several regulations, the more stringent European regulation regarding disclosure of information has priority over the broader Dutch regulation.

Another vital question concerns the role of internationally operating organisations (multinationals, non-governmental organisations), which have considerable political and social influence. What degree of transparency is appropriate here and how should it be regulated? This issue touches the more general question of how international information flows in the network society must and can be regulated.

Both on the national and international level the question arises of which public sector information must be accessible for everyone. Does it concern already generated information or also information which can be generated with little effort? Does it only concern information in the hands of public authorities and which also concerns the execution of a public task? Or must government information be defined more broadly, e.g. all information financed by public funds? This issue can also be approached from an economic point of view, given the tendency on European and national level to encourage commercial (re)use of government information. Commercial exploitation implies a certain degree of exclusive control, e.g. in the form of intellectual property rights. This can run counter to access on the basis of rules regarding freedom of information, which are essentially based on the principle of access to all at no costs or the costs of distribution.

Key research topics: coexistence of national and international rules of access to government information; the area of tension between commercial (re)use and public access.

4.7 MEDIA AND TELECOMMUNICATIONS

Processes of convergence make the traditional distinctions in and between media law and telecommunication law more and more irrelevant. Content, transport and infrastructure become medium-independent. At the same time they are blending into

one another as a result of the developments in technology and markets. The fields of media law and telecommunication law can still be distinguished, but cannot be separated anymore.

Media law receives new impulses as a result of these changes, but also as a result of internationalisation, the arrival of the internet and a changed social context. What kind of law has to be applied to the media in such an environment? This question is further complicated by the growing role of European law as regulatory instrument, both in the field of the specific regulation of media and in the field of generic competition law, which raises new questions regarding e.g. plurality / pluralism / cross-ownership, state aid, jurisdiction and the regulation of content. The question of whether the existing (national and European) framework for the regulation of television broadcasting should be extended to other electronic media must be examined as well. Another question concerns the consequences of the future European constitution for national media law.

In this changing media environment, in which individual information transactions occur more and more, the traditional media –press and broadcasting– will continue to play an important role in information supply. Questions about the independence and the functioning of the media must therefore remain central just like the question of the proper role of government. Public funding and the degree of government intervention in the market are often still strongly media specific. Particular questions about freedom of expression, like the limits thereof, illegal publications and effective legal protection must also be given attention.

The internet offers an alternative distribution possibility for information products and services, upon which the traditional regulatory model has little grip as yet. This is partly due because new distribution models cut across traditional structures. But functional substitution is also taking place, and the internet is developing in different fields as a real alternative for press and broadcasting. This makes traditional institutional distinctions become vague and creates the need to reconsider the legal frameworks which are currently still often tailored to specific media.

Important changes in the field of telecommunication law result from the convergence in the sector. Old legal and social frameworks from the last century lapse, as these are based on technological/infrastructural distinctions which are no longer valid. The traditional legal link between infrastructure and media can no longer be maintained. Telecommunication and broadcasting services are blending into one another; the same applies to the used networks. Typical selection functions, which in their modern form appear for instance as electronic programme guides and search engines, not only go beyond the transport layer, but hardly fit in traditional views on telecommunication services (versus information services). This gives rise to a situation in which control of the content of communication, which would normally be considered as being part of media law, can take place in the realm of what is traditionally telecommunication law.

The distribution of scarce goods, notably frequencies and numbers, and in particular the distribution thereof by the government are traditional aspects of telecommunications. Digitalisation, usually in combination with convergence, leads to complex distribution questions in both fixed and mobile infrastructure. With regard to the internet, the lack of a(n) (inter)national framework is regularly considered as an impediment.

Regulation of the market appeared to be necessary to guarantee access and to further define the position of the interested parties (suppliers and end users). The influence of European law (sector-specific, but with an increasing move to generic competition law) is very important here, because the telecommunication sector is largely subject to European rules. As the situation of competing suppliers on the market stabilises, old questions of interoperability and access take on another character. New questions also

arise, for instance in the field of distribution and use of frequencies, consumer protection and universal service.

Key research topics: concentration of media ownership at the international and regional level; reassessment of the principles governing (the infrastructures for) information services as a result of notably convergence and the role of the government therein; effects of convergence in the telecommunication sector as well as its effects in the light of information supply; new regulatory frameworks for scarce communication goods (including infrastructure) and market regulation due to inadequacy of existing concepts and the rise of new issues.

5 REVIEW OF THE IVIR RESEARCH PROGRAMME

Every four to five years the research programme of the Institute of Information Law is reviewed in its entirety, and adapted to reflect new insights gained in past research and trends signalled for the future. Depending on technological, economic, social and cultural developments, interim changes may be made to individual parts of the programme.

For information on members of staff, ongoing and past research projects, publications and courses, please visit the Institute's website at: <http://www.ivir.nl>

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