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http://www.CompanyNameSucks.com: The Horizontal Effect of Fundamental Rights on 'Private Parties' within Autonomous Internet Law

I. Easy Cases - Hard Cases

1. Easy Case: 'oil-of-elf.de'

In previous conflicts about domain names within the global address system, German judges only had to answer relatively simply legal questions. Under which conditions does a domain name, which is easily confused with another name, infringe the rights of the name owner? Pervious decisions have identified infringement in the following cases:

- The name and domain name are, to a significant degree, identical or may be easily confused with one another,
- The user of the domain name possesses no personal right to the name, and
- The name usage is likely to promote mistakes about the origin of the web-site.[1]

Apart from cases of identical names[2] and of the use of generic concepts,[3] which demanded more differentiated juridical treatment, more complex, underlying

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[1] *Cf.*, Patrick Mayer, *'Marke oder Meinungsfreiheit? Warum Greenpeace zu Recht die Domain „oil-of-elf" benutzt hat, available at* http://www.freedomforlinks.de/Pages/oil-of-elf.html.

[2] *Cf.*, BGHZ 149, 191 – „shell.de" and the commentary of Dietrich C. Becker, *Von Namen und Nummern – Zur Behandlung von Kollisionen unerträglicher Rechtsmassen im Internet, in* RECHTSVERFASSUNGSRECHT, (Gunther Teubner/Christian Joerges eds., forthcoming); Jörg Dittrich, *Namensverletzung gem. § 12 BGB durch eine Domain trotz Gleichnamigkeit*, JurPC: INTERNET-ZEITSCHRIFT FÜR RECHTSINFORMATIK, Web-Dok. 144/2002, *available at* http://www.jurpc.de; M.

considerations have rarely played a role, since rights could only ever be asserted in very clear cases, for example, where the domain name user neither possessed a right to the domain name, nor could make a justified case for its use.

The case of 'oil-of-elf.de' was to prove otherwise.[4] The environmental protection organisation, Greenpeace, had published comments critical of the environmental policies of the TotalFinaElf oil company on a web-site with the domain name, 'oil-of-oil-elf.de'. The company successfully requested an injunction from the Berlin High Court (*Landgericht*).[5] The Court gave its usual grounds for the decision. The domain, 'oil-of-elf.de', included the protected name, Elf, and so infringed upon the rights of the oil company. The Berlin Appeal Court (*Kammergericht*), by contrast, found for Greenpeace and lifted the injunction.[6] The Court made it clear that consideration of the immediate questions of name theft or potential confusion about name origin, would not suffice for judgment. Instead, the primary question was one of whether, in case of political conflict, an environmental organisation would be to use a domain name incorporating targeted elements of the trademark of the oil company under critical fire. In detail, the Appeal Court had to ascertain whether:

Körner, *Gleichnamigkeitskonflikte bei Internet-Domain-Namen – Die „shell.de" Entscheidung des BGH*, NJW 3442 (2002).

[3] *Cf.*, on the use of generic concepts as domain names, 'Mitwohnzentrale.de', BGH, Judgment of 17.05.2001 – I ZR 251/99 – , BGHZ 148, 13; for case notations, *cf.*, Dietrich C. Becker, *supra* note 2; Peer Zumbansen, *Paving The Way For Cyberlaw: Two FCJ Decisions on Domain Names*, 2 GERMAN LAW JOURNAL (2001), *available at* www.germanlawjournal.com/printphp?id=28.

[4] *Cf.*, for a comprehensive review of the history of the case: http://archiv.greenpeace.de/GP_DOK_3P/BRENNPUN/F0011D.HTM.

[5] LG Berlin, Judgment of 18.01.2001 – 16.0.33/01, http://archiv.greenpeace.de/GP_DOK_3P/BRENNPUN/F0011C6.PDF.

[6] Kammergericht, Judgment of 23.10.2001 – 5 U 101/01, JurPC: INTERNET-ZEITSCHRIFT FÜR RECHTSINFORMATIK, Web-Dok. 130/2002, http//www.jurpc.de.

- the domain name ‘oil-of-elf.de’ infringed upon TotalFinaElf’s name right at all;
- and, where this was so, whether the critical usage of the Domain ‘oil-of-elf.de’ would not in this case be protected by free speech rights; as well as,
- whether, in such conflicts, fundamental rights take precedence over simple trading name and name rights (in other words, the underlying fundamental rights of TotalFinaElf).

The Appeal Court concluded that there had been no infringement of the oil company’s trading name, since both the wording and purpose of §15 *MarkenG* (Trademark Law) were predicated upon abusive usage ‘within (normal) business relations’. Greenpeace, by contrast, had acted within the remit of its associational status, and with solely idealistic aims.

Neither did the name right provisions of §12 *BGB* (Civil Code) furnish increased protection for trading names ‘outside’ the normal course of business. No damage to interests was proven, since there was no confusion as to the origins of the web-site. Even where search engines were used, the contents of the page were so incontrovertible and clear as to dismiss any possible doubt as to their origins. Informed web-users would naturally be aware of the large choice of search engines available, such that they would also not be discouraged from undertaking further searches for the web-site of the oil company, should their first search have led to the Greenpeace web-site. In the opinion of the Court, the same would hold true for ‘Meta-Tags’ (e.g., Company key words) which facilitate web-site searches by search engines.

A notable feature of the case, was the Court’s argument upon the application of fundamental free speech rights to private actors within the Internet. This was the first explicit application within Germany of fundamental rights to a private conflict on domain names. In relation to the question of whether the oil company’s name had been used ‘without authorisation’ under the terms of §12 *BGB*, the Appeal Court brought the application of free speech rights to private parties within the Internet into play. In this concrete case, the balancing of the free speech rights of an environmental organisation (Art.5, para.1 *GG* [German Constitution]) against the fundamental economic rights of an oil company (Art.12, para.1; Art.14, paea.1 *GG*) was resolved

in favour of the precedence of freedom of opinion. The core purpose of the registration of the provocative domain name 'oil-of-elf' was to ensure greater public awareness about environmental conflict and was thus, in the opinion of the Court, protected by Art.5, para.1 *GG*.

American literature addresses such cases under the title SLAPP (Strategic Lawsuit Against Public Participation).[7] Powerful economic actors deploy their trademark rights, their name rights or copyright law in an effort to undermine potential political critique.[8] In this manner, political conflict on environmental protection and the responsibility of German producers and consumers for environmental scandals in (seemingly) faraway countries might yet find itself bogged down in the marshes of German trademark and name law.[9] Nonetheless, thanks to the Appeal Court, Greenpeace was able to enforce its fundamental free speech rights in its attempts to publicise the economic interests of Elf.

2. Hard Case: 'oil-of-elf.com'

Now, however, for a small variation. What would the case have looked like had Greenpeace Germany not registered the name, 'oil-of-elf', under the country specific Top Level Domain (country code TLD), 'de.', but under the generic Top Level Domain (generic TLD), 'com.', only then to be confronted with a claim by the French Oil Company for dissolution or transference of the domain under the ICANN Uniform Dispute Resolution Policy (in the following, UDRP)?

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[7] *See* Patrick Mayer, *supra* note 1.

[8] *Cf.*, from American jurisprudence, the 'Scientology-case', *Religious Tech. Ctr.* v. *Netcom On-Line Communications Servs., Inc.*, 923, F. Supp. 1231, (N. D. Ca. 1995); *cf.*, on conflict between copyright and free speech with regard to the aforementioned case, Yochai Benklar, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999), at 356.

[9] *See* Patrick Mayer, *supra* note 1.

Intuition tells us that the case would have been decided in the same manner. This, however, is far from a given. In the first case, the decision falls to a State court, which is bound by national law. In the second, the case would be heard by an Administrative Panel of a private Dispute Resolution Organisation, such as the WIPO-Arbitration Center, which is accredited by ICANN and which is obliged to adjudicate according to UDRP and its explanatory rules, rather than in line with national law. Furthermore, our case is far from being a hypothetical one. Administrative Panels have often been called upon to adjudicate in cases similar to that of 'oil-of-elf'; cases in which the names of known concerns have been deployed, together with the affix 'sucks', on web-sites, in an attempt to parody and/or critique the companies and their original web-sites. To date, 35 'CompanyNameSucks' cases have appeared before ICANN Panels.

UDRP does not deal with country-specific domains and only allows complaints against generic Top Level Domains (TLDs), such as '.com', '.net' and '.org'.[10] UDRP applies only to those domain conflicts in which a trademark owner claims the existence of an abusive domain registration. In our particular case then, the Oil Company TotalFinaElf would need to prove under §4a UDRP:

(i) that the domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights;

(ii) that the respondent has no rights or legitimate interests in the domain name; and

(iii) that the domain name has been registered and is being used in bad faith .

The UDRP conditions are cumulative.

ICANN Panel' decisions on the danger of confusion are highly variable. The so-called 'CompanyNameSucks' cases are exemplary in this regard. In part, the Panels have

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[10] Currently, UDRP has no application to domain names in the country-specific Top-Level-Domains (ccTLDs), with the exception of the country-specific Top Level Domains of individual States (e.g., Tuvalu).

grounded their findings of a danger of confusion in the argument that non-English speaking internet-users will not understand the word ‘sucks’ as a critique or parody, but as a word associated with the trademark or service mark of the complainant’s domain.[11] By contrast, other cases have seen the rejection of a danger of confusion since use of the word ‘sucks’ makes the critical content of the web-site immediately apparent.[12] In our case, the similarity of the domain name ‘oil-of-elf’ to the complainant firm’s trademark, ‘Elf-Oil’, is so great that a Panel might well find in favour of a danger of confusion.

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[11] *Cf.*, for example, Société Accor contre M. Philippe Hartmann (D2001-0007): ‘under French law, whether a trademark may be freely used for a parody is controversial ... in the case of a public not speaking English, or even speaking some English but being unfamiliar with the slang, the meaning of the word ‘sucks’ may not be understood, nor its use in order to designate Web sites aimed at ‘cyberprotest’; Diageo plc v. John Zuccarini, Individually and t/a Cupcake Patrol (D2000 – 0996): ‘As the Internet extends far beyond the Anglophone world, a more difficult question arises as to whether non-English speaking users of the Internet would be confused into believing that such a site is owned and/or controlled by the Complainant. Because the word ‘sucks’ is a slang word with which all English speakers may not be familiar, this Administrative Panel concludes that there may well be circumstances where Internet users are not aware of the abusive connotations of the word and consequently associate the domain name with the owner of the trademark’; National Westminster Bank PLC v. Purge I.T. and Purge I.T. Ltd (D2000 – 0636); Caixa d’Estalvis y Pensions de Barcelona ("La Caixa") v. Namezero.com (D2001-0360): ‘Although converting "c"s into "k"s is a way of expressing feelings similar to those expressed by the word "sucks" in English, this practice is part of a countercultural Latin jargon and is unlikely to be understood by most Internet users throughout the world. They would not understand LAKAIXA as a political parody of LA CAIXA, but as something phonetically identical, and graphically confusingly similar, with respect to Complainant’s world-famous trademark LA CAIXA.’

[12] Lockheed Martin Corporation v. Dan Parisi (D2000-1015); McLane Company, Inc. v. Fred Craig (D2000-1455).

The issue would therefore be one of whether the domain was registered in bad faith. According to §4b UDRP, this decision is to be taken in line with the following non-exhaustive list of indicators:

(i) the respondent has registered or acquired the domain name primarily for purposes of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of the respondent's documented out-of-pocket costs directly related to the domain name; or

(ii) the respondent has registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that the respondent has engaged in a pattern of such conduct; or

(iii) the respondent has registered the domain name primarily for the purpose of disrupting the business of a competitor; or

(iv) the respondent has intentionally used the domain name to attract, for commercial use, Internet users to the respondent's web site or other on-line location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of the respondent's web site or location or of a product or service on the respondent's web site or location.

§4c UDRP states that registration and use of the domain name (§4a (iii) UDRP) will not be found to have been in bad faith where the domain name user possesses its own rights in the name, or can show a justified interest in the domain name. This is the case when:

(i) before any notice of the dispute, the respondent has used or made demonstrable preparations to use the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services; or

(ii) the respondent has been commonly known by the domain name, even if he has acquired no trademark or service mark rights; or

(iii) the respondent is making a legitimate non-commercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

Do critical and protest sites fall under the jurisdiction of the UDRP? And must ICANN Panels pay due regard to fundamental free speech rights? If this were the case, the horizontal effects of fundamental rights would also apply against the firm, Elf. It is often stated that ICANN Panels are not suitable fora for the consideration of fundamental rights, and that the jurisdictional reach of the UDRP is restricted to cases of abusive registration. However, and all such fevered critique notwithstanding, ICANN Panels have concerned themselves with hot topics such as the conflict between trademarks and freedom of opinion, and, in so doing, have noticeably increased the jurisdictional reach of the UDRP; quite possibly since supposed exceptions are more commonly the rule, while cases of cybersquatting are rare.

In some cases, ICANN panels have made explicit recourse to the term 'free speech', albeit in vague and, legally-speaking, ineffective form, and have declared the management of a domain name in the pursuit of political free speech to be legitimate. In other cases, however, they have held critique and parody to be legitimate, but have nonetheless banned individual critical domains.

3. Unanswered Questions

Which fundamental rights and which national legal order might the ICANN Panel in our case call upon however? The argument that ICANN panels are not courts with an adjudicative function, but mere administrative panels with a duty to oversee and implement proceedings, does little to clarify matters.[13] The so-called 'Administrative Panels' do currently give final decision in the majority of legal disputes. Even though there may yet be a possibility to involve a national court, this is seldom the case, and

[13] *Cf.*, for example, Thorsten Bettinger, *ICANN's Uniform Domain Name Dispute Resolution Policy*, CR 234 (2000), at 235.

the decisions of the Panels are also quickly and effectively implemented by electronic means. Panel decisions are implemented by web-site' registration and accreditation providers (host providers), who contractually oblige themselves to abide by UDRP provisions and also include them within their contracts with domain users. In line with UDRP provisions, host providers transfer or dissolve a disputed site upon receipt of a Panel Decision from an ICANN accredited Dispute Resolution Provider.

Although ICANN Panels apply UDRP provisions rather than State legal norms, they often refer to US law. As a consequence, the First Amendment of the US Constitution would be relevant to this case. In other words, the issue would be one of the extraterritorial impacts of the US legal order upon the Internet. Following decades dominated by the real-world cultural imperialism of the 'American way of life', are we now witnessing a new expansion of the *lex americana* into the virtual world?[14] The horizontal effects of fundamental rights on private actors would then be governed by the 'state action doctrine' of the American Constitution.[15]

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[14] *Cf.*, Samuel P. Huntington, *Transnational Organizations in World Politics*, 25 WORLD POLITICS 333 (1973), at 344: 'Transnationalism is the American way of expansion'.

[15] *Cf.*, for the general discussion of the application of the 'state action doctrine' to the Internet: Paul S. Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation*, 71 U. COL. L. REV. 1263 (2000); Irene Dmitrieva, *Will Tomorrow Be Free? Application of State Action Doctrine to Private Internet Providers*, *in* THE INTERNET UPHEAVAL 3 (Vogelsang/Compaine eds., 2000); Steven Gey, *Reopening the Public Forum – From Sidewalks to Cyberspace*, 58 OHIO ST. L. J. 1535 (1998); David Goldstone, *A Funny Thing Happened on the Way to the Cyber Forum: Public vs. Private in Cyberspace Speech*, 69 U. COLOR. L. REV. 1 (1998); Noah D. Zatz, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Enviroment*, 12 HARV. J. L. & TECH. 149 (1998). By contrast, the problem of the horizontal effect of fundamental rights within the Internet seems to have troubled German doctrinal thought very little at all, *cf.*, the supplementary remarks of Karl H. Ladeur, *Ausschluss von Teilnehmern an Diskussionsforen im Internet*, MMR 787 (2001); with regard to the blocking of content by the host provider, *cf.*, Rufus Pichler, *Meinungsfreiheit, Kunstfreiheit und neue Medien: Zwischen interessengerechter Auflösung von Rechtsgutkollisionen und*

As an alternative, however, the private international law principle that the relevant national law 'that the panel determines to be appropriate in the light of all of the relevant circumstances', as explicitly stated in the WIPO Final report (as well as §15 of the ICANN Rules[16]), might prevail. In such a case, the question would be one of whether, in line with the applicable national conflicts rule, French private law, and indirectly the French Constitution, or German private law together with the German doctrine of horizontal direct effect would apply.[17]

There is also a third way, which might prove of particular interest with regard to the Internet: are we seeing the development of an autonomous *lex digitalis* analogous to the *lex mercatoria*, with its own autonomous *ordre public transnational*, in line with which courts of arbitration would be required to develop internet-specific decisions on fundamental rights and their horizontal effects within the Internet?

Our small variation from '.de' to '.com' has thus muddied the waters considerably. We are potentially concerned here with a national fragmentation of Internet law, which will allow for the application of national law to nationally defined TLDs. As the press has reported, Google has already secretly begun to apply different fundamental rights standards, at least to the degree that it has filtered out radical political pages in French and German TLDs ('.de' and '.fr') from its Google.de search machine results, but still shows these contents on Google.com.[18] But this is only the start of our difficulties. The question in relation both to the non-nationally defined TLDs, '.com' etc. and, although to a lesser degree, to the national domains, such as

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"Zensur", AfP 429 (1999), at 433; and Franz C. Mayer, *Recht und Cyberspace*, NJW 1782 (1996), at 1787.

[16] § 15 (a) ICANN Rules: 'A Panel shall decide a complaint on the basis of the statements and documents submitted and in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable.'

[17] On the problem of the law applicable to trademark conflicts in the Internet, *cf.*, Annette Kur, *Territorialität versus Globalität – Kennzeichenkonflikte im Internet*, WRB 935 (2000).

[18] *Frankfurter Allgemeinen Zeitung*, 28.10.2002, at 46: '.com, .de oder .fr?'.

'.de', is thus not simply one of whether horizontal direct effect is also applicable within the virtual realm of the Internet. Instead, it is similarly one of which particular national fundamental rights will be applicable in the light of collision of law provisions. Even more troublesome, the issue is likewise one of whether the transnational nature of the subject matter excludes application of the rules of private international law altogether, such that conflict of laws provisions will demand the development of autonomous, internet-specific, material norms on the horizontal effects of fundamental rights.[19] Additionally, problems arise with regard to the exact legal status of those remarkable hybrid bodies of public and private law, the ICANN Panels;[20] as do final doubts about the legal quality of the rules that they apply to fundamental rights issues within Cyberspace.

4. Theses

(1) Internet Appropriate Horizontal Effect

Under German law at least the digital horizontal effect of fundamental rights is uncontested. But what impact does the term 'indirect' horizontal effect have in such a context? We are not merely concerned here with the transmission of fundamental rights through the general clauses of private law. Instead, the issue is one of the autonomous reproduction of fundamental rights within the independent logic of the social system of the Internet.

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[19] *Cf.*, on the development of material norms in private international law *see generally* Gerhard Kegel/Klaus Schurig, INTERNATIONALES PRIVATRECHT, (6th Edition), First Section, §8 III4, *Materiellprivatrechtliche Lösungen im IPR*, at 269; E. Steindorff, SACHNORMEN IM INTERNATIONALEN PRIVATRECHT (1958).

[20] *Cf.*, on this question, Michael Froomkin, *Semi-Private International Rulemaking: Lessons Learned from the WIPO Domain Name Process, in REGULATING THE GLOBAL INFORMATION SOCIETY* 211 (C. T. Mardsen ed. 2000); *see* with regard to ICANN, Jonathan Zittrain, *ICANN: Between the Public and the Private, Comments Before Congress*, 14 BERKLEY TECH. L. J. (1999), *available at* http://www.law.berkeley.edu/journals/btlj/articles/vol14/Zittrain/html/reader.html.

(2) Applicability of Fundamental Rights within Autonomous Internet Law

The question of whether ICANN Panels should or, indeed, 'may', also enforce fundamental rights against private parties within the realm of the semi-autonomous legal order of ICANN-policy is, however, a highly contentious one. The thesis on this point is as follows: ICANN Panels concretise fundamental rights within Cyberspace on the basis of a fiction. They draw upon the fiction of a 'common core' of globally applicable principles of law, which include fundamental and human rights, and with their help concretise internet-specific fundamental rights within the reaches of a 'common law' of the Internet.

II. Digital Horizontal Effect in German Law

1. 'Indirect' Horizontal Effect within the Internet

In our first case of 'oil-of-elf.de', where the application of German Law is not contested, conventional horizontal effect doctrines seem to present few problems: the notion of the 'indirect' horizontal effect of fundamental rights in private law is surely founded on firm doctrinal ground. Nonetheless, recent, and ever more trenchant criticism of this doctrine, in particular, private law critiques, might require us to cast our 'easy case' in a different light, especially if horizontal effect against third parties is to be included within the 'new-type' jurisdiction of the Internet. But what is the meaning of 'indirect' horizontal effect in this context? The currently predominant view, which rejects the 'direct' transformation of fundamental into subjective private legal rights, and which instead seeks 'indirect' transposition through the general clauses of private law is, simply-stated, inadequate.[21] Concerned only with the

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[21] *Cf.*, for a small representative overview of the, by now inaccessibly bulky, literature on the horizontal effect of fundamental rights, Hans D. Jarass, *Die Grundrechte: Abwehrrechte und objektive Grundsatznormen. Objektive Grundrechtsgehalte, insbes. Schutzpflichten und privatrechtsgestaltende Wirkung, in* FESTSCHRIFT 50 JAHRE BUNDESVERFASSUNGSGERICHT 35 (Badura/Horst Dreier eds., 2001); Claus W. Canaris, GRUNDRECHTE UND PRIVATRECHT: EINE ZWISCHENBILANZ (1999); Uwe Diederichsen, *Das Bundesverfassungsgericht als oberstes Zivilgericht,* AcP 171 (1998); *ibidem, Die Selbstbehauptung des Privatrechts*

integrity of private law doctrine, such a view fails even to notice the two questions which are determinative for horizontal effect in non-statal social spheres: (1) which particular risks do the internal dynamics of each social sphere pose to autonomy; and (2), in which consequent manner must fundamental rights be reconstructed within each social sphere, such that they might act as effective foil to that sphere's internal

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gegenüber dem Grundgesetz, JA 57 (1997); Dieter Medicus, DER GRUNDSATZ DER VERHÄLTNISMÄSSIGKEIT IM DEUTSCHEN PRIVATRECHT (1997); Eike Schmidt, *Verfassungsgerichtliche Einwirkungen auf zivilistische Grundprinzipien und Institutionen*, KritV 424 (1995); Johannes Hager, *Grundrechte im Privatrecht*, JZ 373 (1994); Stephan Oeter, *Drittwirkung der Grundrechte und die Autonomie des Privatrechts*, AöR 529 (1994); Konrad Hesse, VERFASSUNGSRECHT UND PRIVATRECHT (1988); Robert Alexy, THEORIE DER GRUNDRECHTE 475 (1985); Walter Leisner, GRUNDRECHTE UND PRIVATRECHT (1960); Guenther Dürig, *Grundrechte und Zivilrechtssprechung*, *in* VOM BONNER GRUNDGESETZ ZUR GESAMTDEUTSCHEN VERFASSUNG, FS. H. NAWIASKY 157 (1956). Newer theories on fundamental rights doctrine which approach the problem of the horizontal effect of fundamental rights as a 'multi-polar legal relationship' (*mehrpolige Grundrechtsverhältnis*), or seek to re-interpret the issue as a triangular relationship between State (State, Administration, Justice System) and the two parties in conflict, are nonetheless inappropriate, deriving as they do from the narrow public law perspective of the transposition of the political constitution to society. *Cf*., with particular regard to this point, Christian Calliess, RECHTSSTAAT UND UMWELTSTAAT – ZUGLEICH EIN BEITRAG ZUR GRUNDRECHTSDOGMATIK IM RAHMEN MEHRPOLIGER VERFASSUNGSRECHTSVERHÄLTNISSE (2001) and Matthias Ruffert, VORRANG DER VERFASSUNG UND EIGENSTÄNDIGKEIT DES PRIVATRECHTS – EINE VERFASSUNGSRECHTLICHE UNTERSUCHUNG ZUR PRIVATRECHTSWIRKUNG DES GRUNDGESETZES (2001). For a systems theory informed critique, *cf.*, Gunther Teubner, *Ein Fall von struktureller Korruption? Die Familienbürgschaft in der Kollision unverträglicher Handlungslogiken*, KritV 388 (2000); from the perspective of democracy theory, Oliver Gerstenberg, *Verfassung und die Grenzen judizieller Sozialregulierung*, in VERANTWORTUNG IN RECHT UND MORAL 141 (Ulrich Neumann/Lorenz Schulz eds., 2000).

dynamics? The extension of the statally-conceived fundamental rights relationship to the context of private governance regimes, cannot simply be based upon 'private-law-appropriate' formulations, but must instead be founded within 'social-system-appropriate' reformulation of *all* of the elements of the classical fundamental rights model: individual-state-power-subjective law.[22] This is an issue tackled in more detail elsewhere.[23] With regard to the social sphere of the economy, however, such a transformation of fundamental rights is already far advanced since endeavours have been made to respond to the dangers posed to fundamental rights by market processes through the 'market-appropriate' reformulation of fundamental rights. The same holds true for fundamental rights risks in formally organised social spheres, which doctrine has sought to combat through the 'organisation-appropriate' proceduralisation of fundamental rights.

Within the social sphere of the Internet, by contrast, such questions—a necessary pre-condition for the 'internet-specific' constituting of fundamental rights—have yet to be posed. Here, the famously touted 'Internet Code', the digitalised embodiment of norms of conduct within the architecture of Cyberspace, becomes the central focus for

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[22] Christoph Graber and Gunther Teubner attempt such an approach in the private context of artistic freedom, *cf*., *Art and Money: Constitutional Rights in the Private Sphere*, OXFORD JOURNAL OF LEGAL STUDIES 61 (1998). *Cf.*, for the English debate on fundamental rights in the private context, Andrew Clapham, HUMAN RIGHTS IN THE PRIVATE SPHERE (1996); Hugh Collins, JUSTICE IN DISMISSAL (1992); Joseph Raz, THE MORALITY OF FREEDOM (1986); W. N. Nelson, *Human Rights and Human Obligations*, 23 NOMOS 281 (1981).

[23] Gunther Teubner, *Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie*, ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (2003); *ibidem*, *Vertragswelten: Das Recht in der Fragmentierung von Private Governance Regimes*, RECHTSHISTORISCHES JOURNAL 234 (1998), at 257; Christoph Graber/Gunther Teubner, *see supra*, note 22.

attention.[24] Initially, the question is one of the specific risks inherent to fundamental rights within the Internet: which particular dangers do the Code's rules of conduct pose to individual autonomy? Further, how does the Code perceive of the autonomy of economic institutions? Then comes the question of how it is best to reconstruct fundamental rights in a manner appropriate to the network: what subject matter and which procedural codes must be read into the Code in order to ensure that individual fundamental rights and institutional spheres of autonomy are adequately protected against digital manifestations of legal norms?

This is not primarily a matter of the misuse of digital power positions. Rather, the issue is one of the consequences for fundamental rights of the structural differences between 'Code' and 'law'. The effort to reformulate the horizontal effect doctrine must take the basic structures of the Internet into account. Within its borders, the Code founds a new basis for the normative ordering of the symbolic realm of the Internet, because the conduct of network participants is regulated by the electronic constraints of Network Protocols rather than by legal norms. What impact does the reorientation from 'legal norms' to 'Network Protocols' have upon the Internet Communication Constitution (decisions and forms of argument) and on individual and institutional autonomy (fundamental rights)? What dangers does the 'digital embodiment of law' pose to fundamental rights?

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[24] Debate on the code almost has a natural law quality about it, *cf*., Emile Brousseau, *Internet Regulation: Does Self Regulation Require an Institutional Framework*, Conference Paper (2001), *available at* http://www.isnie.org/ISNIE01/Papers01/broussaeu.pdf; Lawrence Lessig, *CODE AND OTHER LAWS OF CYBERSPACE* (1999); Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEXAS L. REV. 553 (1998), *available at* http://reidenberg.home.sprynet.com/lex_informatica.pdf; James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hard-Wired Censors*, (1997), *available at* www.wcl.american.edu/pub/faculty/boyle/foucault.htm.

2. Code-Specific Risks to Fundamental Rights and Code-Specific Fundamental Rights Protection

An initial answer is derived from the 'self-enforcing' character of the code. Predominantly instrumentalist-interventionist Internet lawyers, might well view this as being the great advantage of the Code;[25] it is nonetheless the bugbear of the traditional rule-of-law-based State (*Rechtsstaat*). Traditional law is founded in correct procedures and clear distinctions between law production, the application of law and its coercive enforcement. This is also to a large part true for law making processes in the private sector. Digitalisation, however, appears to have effected a form of fission between law-making, application and enforcement. With this, the constitutional division of powers within legal processes evaporates, taking with it an important guarantee for individual and institutional spheres of autonomy.

A second indicator derives from the 'conduct-control, expectation-building and conflict-resolution' triad.[26] Traditional law cannot be limited to any one of these functions, but effects all three, albeit in a disassociated form, with each function served by its own institutions, own legal culture and own form of rule of law. This division likewise embodies a (secret) constitutional guarantee for social autonomy. Higher normative prescriptions that facilitate conflict resolution, do not necessarily require institutionalisation as socially effective expectations; nor yet must they always be translated into real world conduct. However, the Code's digital embodiment of legal norms nonetheless reduces this triad to a single function of electronic conduct control, and so dissolves the autonomy securing buffer zones between conflict norms, expectation norms and conduct norms. The Internet Code dispenses with the civilising

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[25] Seen from this instrumentalist point of view, the differences beween the two protagonists of the Internet Constitution are few indeed: Lawrence Lessig, *see supra*, note 24; David Post, *Anarchy, State, and the Internet: An Essay on Law-Making in Cyberspace*, J. ONLINE L. (1995), *available at* http://warthog.cc.wm.edu/law/publications/jol/post.html.

[26] *Cf*, for this legal functional triad, *cf*., Niklas Luhmann, DAS RECHT DER GESELLSCHAFT (1993), at 156.

achievement of disassociation and with the constitutional/rule-of-law based securing of each of the three functions within the triad.

A further aspect of the Code that has potential relevance to fundamental rights is its exact mode of calculating normativity. Traditionally speaking, much vaunted legal formalism was only ever partially possible. The—either much admired or much feared by lawyers—impact of conventional legal formalism is, however, as nothing when compared to the extent of digitalisation achieved by the code, which has per force given rise to an as yet unheard of degree of norm formality. The strict binary formulation, 0-1, which is only relevant to a real world legal code in the systems theoretical sense of the distinction between 'legal' and 'non-legal', extends, in a virtual world of legal programmes, to inform legal decision-making in its entirety. This precludes any room for interpretational manoeuvre within the programmes throughout the entire jurisdiction of the Code. Normative conduct expectations, which could always be interpreted, adapted, manipulated or bent, are becoming rigid cognitive expectations of factual circumstances (inclusion/exclusion). The esoteric forms of learning, which were always to be found in the permanent microvarations of law in the face of new facts or new social values, are excluded from the Code. Even legal arguments are excluded from the jurisdiction of the Code. Arguments can only be made at the time of the Code's promulgation or its official amendment, and no longer influence the day-to-day legal task of the interpretation, application and implementation of norms. At core, this means that all informality is excluded from the jurisdictional reach of the Code. The Code has no room for those functions that were always allowed within traditional law: the making of exemptions, the application of equitable principles, the non-application of law, or, the simple recourse to non-legal forms of communication. Digitalisation precludes the informal non-application of the Code. Given the demise of 'useful illegality', it is no wonder that the figure of the Hacker who endeavours to break the Code has become the modern embodiment of the Robin Hood myth.

If this is a true impression of the dangers that the Code poses to autonomy, then the constitutional character of various legal policy demands made of the code is undeniable. The Open-Source-Movement, which demands publication of the Source Code in software marketing materials so that programme control structures can

always be checked, should not simply be dismissed as a bunch of 'nice' idealists.[27] Equally, Lessing's demand that the Code's digitalised conduct control mechanisms be subject to the principle of 'narrow tailoring', entails a parallel demand for intensified application of the principle of constitutional proportionality to the Code, in order to bring it in line with legal norms that must also be respected by private actors. In this context, Judicial control, as well as other forms of public control over the meta-norms of the Code are far more important than comparable oversight of standard contract terms or the terms used by private associations in the real world. The same holds true for internet competition law, which not only secures open markets, but also impacts upon the continued openness of alternative Code regulations.

To return to our original case: naturally, not all of these Code-specific risks to autonomy are relevant to the 'oil-of-elf' conflict. Instead, other issues, in particular, access to Internet Providers and the selectivity of search machines, to name but two, must also be considered. Nonetheless, we can identify some internet-specific risks to fundamental rights and internet-adequate reactions within the *CompanyNameSucks* cases, which do have an influence on conflict resolution. The intensity of the conflict between name and trade name owner and its opponent is particularly marked within the Internet. The domain name system does not allow for the same degree of name-usage flexibility as does a real world, in which the legitimate use of trademarks and names can be differentiated along product, market and regional lines, such that multiple name-usage is often conflict free. The Internet, can only provide one global address in the Top Level Domain. Equally, differentiation between different TLDs is inadequate compensation for this deficit. In addition, such Code-specific monopoly effects are only intensified by the widespread practice of 'reverse domain hijacking', against which there is no judicial recourse. In addition to registering their own *companyname*, concerns also register *companynamesucks*, *companynamereallysucks*, *companynamereallyreallysucks*, etc. in the effort fully to secure both the core and periphery of the semantic reach of their name. The social cushioning effects of 'useful

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[27] *Cf*., Yochai Benkler, *Looking Trough the Glass: Alice and the Constitutional Foundations of thePublic Domain* , Conference Paper (2001), *available at* http://james-boyle.com; Lawrence Lessig, THE FUTURE OF IDEAS (2001), at 13.

illegality' cannot be relied upon in this context. Once ICANN approved host providers have authorised IP Addresses or domain names, or, once the decisions of the ICANN Panels have been electronically implemented, there follows an automatic process within the Internet, which no longer tolerates a grey zone between 'illegal' yet, pragmatically-speaking, 'allowable' name-usage.

In addition to risks to fundamental rights, our introductory case also raises internet-specific questions in relation to the content of fundamental rights protection. The question is one of how a public sphere can be created within the decentralised realm of the Internet at all. How can critique of FinaTotalElf's company policy be transmitted to the appropriate audience? The search is on for internet-specific equivalents to the mass media, on the one hand, and to those local protest movements, on the other, who can enforce fundamental rights protection for their criticisms of trade-practice against the company's place of business. In principle, the company's web-site is the equivalent of the company's place of business in the real world, and the domain name, the determinative locus for the creation of a public sphere of political debate on the company. This is the primary argument in support of the extension of fundamental rights protection to parodies or critiques of the company's trademark.

III. Digital Horizontal Effect within the UDRP?

> Once again, we American panellists have tended to assume that American jurisprudence and American Constitutional protections should be given precedence on the Internet.[28]
>
> Scott Donahey, Panellist

So, what is the situation as regards the digital horizontal effect of fundamental rights within the UDRP?[29] A case decided by an ICANN Panel provides us with an initial

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[28] *Cf.*, Scott M. Donahey, *Divergence in the UDRP and the Need for Appellate Review*, (2002), *available at* http://udrplaw.net/DonaheyPaper.htm.

picture of the problem. In the precedent-setting case, Bridgestone Firestone et al v. Jack Myers (D2000-0190), the Panel stated:

> [A]lthough free speech is not listed as one of the Policy's examples of a right or legitimate interest in a domain name, the list is not exclusive, and the panel concludes that the exercise of free speech for criticism and commentary also demonstrates a right or legitimate interest in the domain name under Paragraph 4 (c)(iii). The Internet is above all a framework for global communication, and the right to free speech should be one of the foundations of internet law.

This is an explicit acceptance by the ICANN Panel of the digital jurisdiction of fundamental rights. But what are such often reproduced professions of the creed of fundamental rights founded upon? On which legal basis do they rest? The *obiter* of the ICANN Panels remains opaque and vague on this point. To be sure, there is clarity that the use of a domain name in pursuit of the right to free speech is a legitimate and founded interest under Paragraph 4(c)(iii). However, there is no indication of the legal wellspring of the free speech rights to which the Panels refer.

Is the First Amendment of the American Constitution the source of decisions that make use of such formulas as, 'free speech doctrines', 'inalienable freedom of speech and expression', or simply, 'free speech'? Certainly, ICANN Panels do orient

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[29] *Cf*, on the issue of the horizontal direct effect of fundamental rights within the UDRP, Adam Goldstein, *ICANNSucks.biz (And Why You Can't Say That): How Fair Use of Trademarks in domain names is Being Restrained*, 12 FORDHAM INTEL. PROP., MED. & ENTER. L. J. 1151 (2002); Milton Mueller, RULING THE ROOT – INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE (2002), at 245; Keith Blackman, *The Uniform Domain Name Dispute Resolution Policy: A Cheaper Way to Hijack Names and Supress Critics*, 15 HARV. J. L. & TECH. 211 (2001); David C. Najarian, *Internet Domains and Trademarks Claims: First Amendment Considerations*, 41 J. L. & TECH. 127 (2001), also *available at* http://www.idea.piercelaw.edu/articles/41/41_1/5.Najarian.pdf; Rebecca S. Sorgen, *Trademark Confronts Free Speech on the Information Superhighway: "Cybergripers" Face a Constitutional Collision*, 22 LOYOLA L. A. ENTER. L. REV. 115 (2001).

themselves in line with US jurisprudence and legislation. This is often the case when the conflict is strongly connected with the US legal order. Thus, the Panel in the foregoing case noted that:

> in applying the definition of abusive registration ... in the administrative procedure, the panel of decision-makers appointed in the procedure shall, to the extent necessary, make reference to the law or rule of laws that it determines to be applicable in view of the circumstances of the case. Thus, for example, if the parties to the procedure were resident in one country, the domain name was registered through a registrar in that country and the evidence of bad faith registration and use of the domain name related to activity in the same country, it would be appropriate for the decision-maker to refer to the law of the country concerned in applying the definition.

The panel interpretation seems also to comply with the provisions of the WIPO 'Final Report'. The WIPO 'Final Report' states that:

> the consequence of this would be that people in countries with strong protection for freedom of expression would have greater protection in the WIPO alternative dispute resolution than would people from, for example, North Korea.30

It might nonetheless be doubted whether the division of the Internet into distinct spheres of influence for national protection standards is at all desirable, at least in the case of generic TLDs. In addition, solutions founded in conflicts rules would also greatly overwhelm the information processing capacities of the ICANN Panels.[31]

Can we accordingly argue that ICANN Panels are wholly inappropriate fora for cases entailing fundamental rights issues? This, for example is the opinion of Blackman, who accepts that fundamental rights must be given horizontal effect in such contexts,

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[30] Michael A. Froomkin, *ICANN's Uniform Dispute Resolution Policy - Causes and (Partial) Cures,* BROOKLIN L. REV. 637 (2002), at 640.

[31] *See* Michael A. Froomkin, *supra* note 30, at 643.

but argues that ICANN Panels are institutionally unsuited to such decisions.[32] He furthermore suggests that jurisdiction should be refused for 'hard cases' and the complainant directed to national courts: 'the court system is the only viable institution that can resolve these questions'.[33] Blackman's approach is, in large part, justified. He nonetheless pays insufficient regard to the foundations upon which such a transnational system of arbitration must be built. The division between 'easy cases' and 'hard cases' would lead, in the vast majority of conflicts—very few of which are clear cases of 'cybersquatting'—to full-scale withdrawal of the ICANN-Panel jurisdiction, fatally undermining the advantages of this alternative dispute resolution system. Accordingly, we must look to wholly different mechanisms of effective control over ICANN Panel' decisions.

IV. 'Ordre public transnational' of the 'lex mercatoria' *and of the* 'lex digitalis'*?*

1. An Autonomous Legal Order?

Brief consideration of the paradigmatic case of a non-statal autonomous legal order with a transnational jurisdiction, the famous *lex mercatoria*, proves valuable here. Can comparison with the *ordre public transnational* of international economic law furnish us with hooks upon which to hang our solution to the problem of the horizontal effect of fundamental rights in the private sphere of the Internet? In order to avoid all misunderstandings from the very outset: in neither case are we concerned with autarky, or a self-sufficient legal order which is isolated from political regulation and rests solely upon self-regulation. Both the *lex digitalis* and the *lex mercatoria* are clearly hybrid rule-systems, each with their own particular portions of autonomous law, national law and international law.[34] Not even a global Bukowina can fully free

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[32] *See* Keith Blackman, *supra* note 29.

[33] *See* Keith Blackman, *supra* note 29, at 241.

[34] Systems theory argues that this plurality was always a part of the *lex mercatoria*. 'Our definitive question would be: where are norms actually produced. In national politics and in international political relations? Or in global economic and other social

itself from the influences of the metropolis, but is instead, to use a popular metaphor, a 'semi autonomous social field'.[35]

In addition, however, the *lex mercatoria* has historically been long acquainted with passionate doctrinal and legal theoretical debate on its 'legal quality' and has built up extensive experience of international dispute resolution. In rebuff to all statist critiques, which once dismissed the *lex mercatoria* as a 'phantom of theorising Sorbonne professors' and held the existence of elements of a non-statal, and at the same time 'a-national' law to be wholly inconceivable, not least the current economic success of the *lex mercatoria* has now surely secured its recognition as an autonomous legal order.[36] Are the most advanced definitions of the *lex mercatoria* now applicable to the *lex digitalis*? Can the following four characteristics be identified within ICANN Panel practice?

(i) '[a] third-level autonomous legal system beyond municipal and public international law' with a claim to global validity;

(ii) which is 'created and developed by the law-making forces of an emerging global civil society';

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processes? The hypothesis also seems to be well founded in legal experience that a global economic law is developing along all three dimensions. Of course, this presupposes a pluralistic theory of norm production which treats political, legal and social law production on an equal footing', *cf*., Gunther Teubner, *Globale Bukowina: Legal Pluralism in the World Society, in* GLOBAL LAW WITHOUT A STATE 3, (Gunther Teubner ed., 1997), at 11.

[35] Sally F. Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 LAW AND SOCIETY REVIEW 719 (1973).

[36] For an informative discussion of the theoretical debates on the *lex mercatoria* and its legal quality, *cf*., Peer Zumbansen, *Piercing the Legal Veil: Commercial Arbitration and Transnational Law*, 8 EUR. L. J. 400 (2002); Klaus P. Berger, *The Law Merchant and the New Market Place: A 21st Century View of Transnational Commercial Law*, INTER'L ARB. L. REV. 91 (2000).

(iii) which is 'founded on general principles of law as well as social usages'; and

(iv) which is 'administered by private dispute resolution service providers and codifies (if at all) by private norm formulating agencies'.[37]

Rather than open up a discussion at this point on the fundamental issue of whether a 'global Bukowina' is also to be found in Cyberspace, the analysis moves on to compare the legal quality each rule system. The question to be clarified is one of whether the jurisdiction of the far more problematic *lex digitalis* is more or less closely related to traditional legal phenomena that the, in the meanwhile, far more firmly established *lex mercatoria*.

Both systems are concerned with a process of conflict resolution to which both parties have given their consent. Both are distinguished from simple arbitration systems in that a third party gives binding decisions. In contrast to 'equitable arbitration', decisions are neither taken on equitable grounds alone, nor are they given on no grounds at all. Rather, ICANN Panels apply, *lege artis*, the norms of the UDRP, which in content and method appears identical to the application of 'real' legal norms. Just as in international economic conflict resolution, an elaborated process of norm application gives final judgment on the legality/illegality of the desired conduct. Findings regularly include the requisite elements of factual analysis, interpretation of norms and the subsuming of facts under norms.

Each case concerns a non-statal and 'a-national' system of rule application. The jurisdiction of the *lex mercatoria* includes contracts, business practices, standard contract terms, restatements of law (*unidroit* principles of international economic law, the Lando 'common core' principles of European contract law) and the decisions taken by courts of arbitration. The *lex digitalis* is likewise founded within the private autonomous acts of internet-users, the explicit rules of the UDRP, the 'Rules for Uniform Dispute Resolution Policy' as well as the individual 'Supplementary Rules'

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[37] Gralf P. Calliess, *Reflexive Transnational Law: The Privatisation of Civil Law and the Civilisation of Private Law*, ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 185 (2002), at 188.

of ICANN accredited 'Dispute Resolution Providers', and, finally, the Decisions of ICANN Panels.

Each web of rules has a far stronger affinity with common law than with continental codified law. They expand incrementally through individual decisions and precedent. Neither system plays host to a uniform hierarchy of decisional instances, but both display a prominent reliance upon heterarchical references to other courts of arbitration, as is common in the courts of countries applying 'common law'. International economic law plays host to mutual inter-citation between courts of arbitration and, in particular between the 'Big Three' (New York, Paris, Tehran); a process which is strengthened by the endeavours of legal science to distil uniform legal principles and norms from the decisions of the different courts of arbitration.

Here, however, the first real differences between the systems can be identified. While the smooth development of the *lex mercatoria* into a genuine common law is hampered by the fact that cases cannot be decided publicly and by the fact that very few are published in case reports or journals, and then only in summary form, ICANN Panel practice presents us with far stronger indicators of its evolution to a proper case-law.[38] Many Panel decisions are published on the Internet and can be referred to in legal debate on practice and doctrine. ICANN Panels themselves make explicit reference to decided cases and strictly follow, though without formally pre-empting their decisions, *stare decisis* in cases of precedent. They also distinguish facts and overrule case-law norms.

To be sure, the practice of the *lex digitalis* gives rise to the same high degree of decisional inconsistency that has long been notorious within national courtrooms when the *lex mercatoria* has made an appearance.[39] However, although it is, currently

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[38] *Cf.*, for the relevant suggestions of Gralf P. Calliess, note 37, at 201.

[39] Despite high degrees of inconstency between the decisions of ICANN-Panels, we can identify the emergence of a global 'common law' in relation to the abusive registration of domain names, *cf.*, Robert Badgley, *Internet Domain Names and ICANN Arbitration: The Emerging "Law" of Domain Name Custody Disputes*, 5 TEXAS REV. OF LAW AND POLITICS 343 (2001).

at least, unrealistic to hope for a hierarchy of courts and for more decisional consistency within international economic arbitration, the Internet has far greater potential in this regard. Legal debates have already suggested that an important step in the evolution of this hybrid legal order would be the establishment of an appeal instance within the ICANN arbitration jurisdiction, which would seek to create consistency out of the many diverging decisions to be found in practice.[40]

The legal quality of the *lex digitialis* is also far stronger than that of the *lex mercatoria* in a further respect. The legal nature of international economic arbitration is often doubted since it does not apply sufficiently precise decisional norms and instead resorts to insufficiently transcribed rules, vague directions and general principles. By contrast—a requirement of the Code—the decisional norms of ICANN Judges are characterised by their highly explicit nature, their careful transcription and their factual precision. This is true both for UDRP rules and for the decisions of the Panels themselves.

Political legitimacy is undoubtedly the Achilles heal of both autonomous legal systems. In principle, neither can claim to be linked into the usual legitimation chain of democratic will creation—though this is also true for large parts of the national legal order whose legal character is nonetheless not doubted. At best, traces of political legitimation can be found within the *lex mercatoria*. The New York Convention provides for a degree of legitimation for international arbitration in international law. Ironically, however, this does not increase, but instead restricts the potential for public democratic control over autonomous law-making. By contrast, the *lex digitalis* can lay claim to a far stronger chain of political legitimation in the character of periodically renewed agreements between ICANN and the US Department of Economics.[41] Further political legitimation can be derived from the process whereby the rules of the UDRP are laid down. At the behest of the US Government, the World Intellectual Property Organisation (WIPO) organised an

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[40] *Cf.*, on this point, the suggestion of Scott M. Donahey, *supra* note 28.

[41] *Cf.*, for the history of the establishment of ICANN and its relationship with the American Government, *cf*, Milton Mueller, *supra* note 29.

extensive international consultation process, whose preliminary findings were then, in large part, used by the non-profit organisation, ICANN, as the basis for its own private norm production.

The greatest differences between the *lex digitalis* and the *lex mercatoria* are to be found in relation to the sanctions applied by them and the carrying through, enforcement and implementation of their decisions. Taking its key from authors as diverse as Austin, Weber and Kelsen, traditional legal theory measures legal character against the yardstick of sanctions. Here we find the strongest objection to the autonomous nature of the *lex mercatoria*: when it comes to it, the informal sanctions applied by the market are not sufficient and recognition must be given to decisions by national courts in order to ensure implementation through national jurisdictions. The very core of its legal quality is thus placed in doubt. The situation is wholly different as regards Internet enforcement. Following a ten-day period, during which the parties have the possibility to approach formal courts, the ICANN Panels give notice to the 'Registrar' directly to execute their decisions electronically. The Registrar either deletes the entry or transfers the domain name to the complainant with direct legal effect.

Comparison leads to a somewhat surprising conclusion. The practices of still adolescent ICANN Panels, the precedent system and the nature of the norms applied, taken together with their stronger degree of political legitimation and, above all, the mode in which their decisions are effectively enforced, furnish the *lex digitalis* with a far stronger degree of legal quality than that provided by the practices of a by now old and treasured *lex mercatoria*, whose recognition as an autonomous legal order by national courts and international legal doctrine, although not complete, is, at the very least, far more developed.

2. The Validity of Fundamental Rights in an Autonomous Legal Regime?

With this, the *lex digitalis* counts, together with the *lex mercatoria* and other autonomous legal regimes, as one of those legal phenomena, which have cast the globalisation of law in a light very different from the usual one. Globalisation is thus not simply a matter of the unification, harmonisation, or, at the very least, the convergence of legal orders, but is, instead, one of a dramatic change in the

differentiations made within the legal system itself. Traditionally, the global legal order is divided into relatively autonomous national legal orders. Today, such distinctions have not become redundant, but have instead been overlaid by a different principle of differentiation: the law is also divided into autonomous transnational legal regimes, which define their jurisdiction along 'issue-specific' rather than territorial lines, and which lay claim to global validity.[42] Regardless of whether they are founded within the private contractual relationships of transnational actors or whether they are hybrid in nature, such systems are genuine legal regimes (and not just political or economic compendiums, or a loose ensemble of social norms), since they possess their own constitutional institutions, which reflexively normatise their norm-making processes. In other words, their primary norm-making processes are subject to the autonomous procedures of secondary decision-making and normatising processes, which establish the legal quality of primary norms.[43]

It is this secondary, constitutional normatising process which decides the question of the validity of fundamental rights within autonomous Internet law. A comparative glance at the *lex mercatoria* is one again valuable. It is of course evident that the *lex mercatoria* is founded within private contractual relationships and that it is these *contrats sans loi* that form the basis both for its material norms and for the institutionalisation of international courts of arbitration. Nonetheless, this leaves the system facing a seemingly insoluble dilemma: if the *lex mercatoria* educes from a private contract, how can it enforce fundamental rights as mandatory law against the wishes of the parties to the contract? As a consequence of this, the existence of

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[42] With a particular emphasis upon the status of ICANN as a 'Global Regulatory Regime', *cf.*, the analyses of Dirk Lehmkuhl, *The Resolution of Domain Names vs. Trademark Conflicts: A Case Study on regulation Beyond the Nation State, and Related Problems*, ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 61 (2002), at 71; Milton Mueller, *supra* note 29, at 211; Christian Walter, *Constitutionalizing (Inter)national Governance – Possibilities for and Limits to the Development of an International Constitutional Law*, 44 GERMAN YEARBOOK OF INTERNATIONAL LAW 171 (2001), at 186.

[43] *Cf.*, Gunther Teubner (2003), *supra* note 23.

mandatory law within the *lex mercatoria* has been doubted. Wholly pragmatically, however, and without any consideration of underlying theoretical legal issues, courts of arbitration have evolved a practice, which might prove to be a future model for the *lex digitalis*:

> It is generally recognized that the arbitrator can, in the name of 'truly international public policy,' refuse to give effect to certain agreements of the parties. Likewise, if the object of a law is to guarantee the respect of principles the arbitral tribunal considers as forming a part of transnational or 'truly' international public policy, it must find that such law prevails over the will of the parties.
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> The content of transnational public policy is not well-defined. It is usually paraphrased as 'fundamental principles of civilized nations'. These principles may encompass ... basic procedural and conflict principles, prohibition of unlawful expropriations, and the refusal to recognize the effect of corporate personality in certain situations of abuse .... [and] violations of human rights, drug dealing, or terrorism as violations of transnational public policy.[44]

In this case, a secondary constitutional normatising process swings into action, looking beyond the traditional reach of contracts, business practices, standard terms, 'restatements of law' and guiding arbitration principles, to seek 'rules of recognition' for the *lex mercatoria* within the 'fundamental principles of civilised nations'; rules that then facilitate the identification of enforceable fundamental rights within the autonomous legal order.[45]

Of course, both we, and practitioners of the *lex mercatoria*, are wholly aware that recourse to the enforceable nature of the 'fundamental principles of civilised nations' is a fiction without firm foundation in either natural law or the universal or relativistic

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[44] Nathalie Voser, *Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration*, 7 THE AMER. REV. of INTER'L ARB. 319 (1996), at 349.

[45] Ursula Stein, LEX MERCATORIA – REALITÄT UND THEORIE (1995), at 170.

philosophies of human rights theory. Such fictions, however, are a necessary starting point for the case-law based concretisation of fundamental rights within each legal regime. In a more positive formulation: they furnish courts of arbitration with a semantic material which, although it possesses no real legal character of its own, allows for the concrete anchoring of fundamental rights within the *lex mercatoria* or the *lex digitalis*.

The enforceable nature of fundamental rights within the Internet educes from two sources: on the one hand, the fiction of a 'common core' of 'fundamental principles of civilised nations'; on the other, the norm concretising effects of arbitration decisions, which, much in the manner of common law, construct and constitute a catalogue of enforceable fundamental rights within the autonomous legal regime of the Internet, adapting rights created to suit conditions within national and statal orders, in order to combat specific digital dangers to autonomy and to take advantage of specific digital opportunities for fundamental rights development.

This provides us with indicators of how to resolve fundamental rights conflicts between national orders within the Internet. Such conflicts have been caused within the law of domain name recognition by the registration of names such as *bundesinnenministerium.com* (internalministry.com) and *verfassungsschutz.org* (constitutionalprotection.org) by Nazi organisations.[46] It is no longer appropriate to apportion such disputes to a conflicts law, which is required to identify the jurisdictional reach of each national set of fundamental rights criteria in order to find a solution within only one of the relevant legal orders. The arbitrary nature of the choice of only one national standard of fundamental rights protection within the Internet is clear. ICANN judges would be much better advised to seek and develop

[46] Bundesrepublik Deutschland (Federal Republic of Germany) v. RJG Engineering Inc.Case (D2001-1401); Bundesrepublik Deutschland (Republic of Germany) v. RJG Engineering Inc./Gerhard Lauck (D2002-0110).

their own, Internet-wide applicable, standards of rights protection in reflexive debate with their own epistemic community and general public opinion.[47]

[47] Empirical studies by social scientists such as Michael Geist, in particular, have kindled a lively debate on the decisional practice of ICANN-Panels, Michael Geist, *Fair.com? An Examination of the Allegations of Systemic Unfairness in ICANN UDRP*, (August 2001), *available at* http://aix1u0ttawy.ca/~geist/.