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Information law will never be the same

One cannot fail to be impressed by Egbert Dommering's long and rich list of contributions during his tenure as Professor for Information Law at the University of Amsterdam. He built the Institute for Information Law (IViR) into one of the leading institutes of the world in this area. This author cannot but add his voice to the chorus of praise, respect and admiration for Egbert Dommering's achievements.

Yet as Dommering steps down from his chair, it is perhaps interesting to look not into the past, but rather into the future. Could Dommering be the last great professor of classical Information Law? Will his successors – at the University of Amsterdam but also elsewhere – have to re-invent their field of law? This essay argues that, for a number of reasons – in addition to Dommering's impact – information law will never be the same. The object of information law has mutated. The scope for public intervention has been rolled back. The implementation of any form of public intervention has been made more difficult. Last but not least, information law has seen its main topics expropriated. The future information law is thus likely to look quite different from what we know now.

The object of information law has mutated

At first sight, the object of information law is simply information, but a closer look reveals a more complex picture.

Indeed, information law is primarily concerned with the issues arising from the use of information within a specific technological context. In his inaugural lecture, Dommering went through all of them: the written press, television and radio broadcasting, post as well as telecommunications. Each of them used to represent a stand-alone, autonomous and complete technological system. Jumping back 30 years in time, we would have found the following situation.

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The written press had its own technological chain, from authors producing manuscripts, to editing (including translating), typesetting, printing and distributing.
Television comprised a system where a number of players (actors, writers, producers, technicians, et cetera) collaborate to produce some content which is packaged by a broadcaster into a general programme (with its own flavour), which is then broadcast using a specific dedicated infrastructure (terrestrial antennas or cable) and received using dedicated terminals (tv sets). The radio broadcasting system was similar, with its own infrastructure (save for shared antenna masts) and terminals (radio sets).
Postal services constituted yet another system, where users generate postal items, which are entrusted to a service provider, which takes care of sorting and distributing these items. Here as well, the medium (paper), the infrastructure (personnel, sorting machines, vehicles) and the terminals (mailboxes) are dedicated.
Finally, telecommunications, while often associated with post on the Continent, were also conducted on a dedicated, autonomous system, where users used terminals (telephones) to access a network (made up of lines and switches), whereby they could connect to other users.

Of course, it is possible for legal scholarship to deal with these systems in a more conceptual fashion. In fact, it is even necessary, or otherwise the law would have to deal with wires, electromagnetic waves, et cetera. Concepts such as emitter/receiver, content, signal, et cetera allow the law to abstract from the actual physical elements of these various systems. The law can then deal with these systems in a way which intuitively appears more adequate, in that the concepts distil the essential characteristics of the technology, as far as society is concerned, for the purposes of legislating and regulating. Nevertheless, these concepts remain tightly associated with their respective technological system, which is why we could speak of the law of the press, postal law, telecommunications law and media/broadcasting law. Each of these systems was fully comprehended by its own area of law. Each of these areas of law was perceived as highly specialized and distinct – if not autonomous – within the broader legal order. Hence information law was concerned with information as it is generated, processed and circulated within a given technological system.

Convergence

Now the underlying technology is changing, a phenomenon usually referred to as convergence. Convergence has been ongoing since the 1990s, and it has been described in detail elsewhere.[1] For the purposes of this contribution, the most

important implication of convergence is that these stand-alone technological systems are merged into, and replaced by, an integrated whole.[2] That integrated whole[3] is more general and more complex. It is also much more dynamic, with a higher rate and a quicker pace of innovation. It cannot easily be comprehended as one massive system; rather, for various reasons,[4] it has come to be conceived as a set of functionalities (or layers) interacting with one another.

The impact of convergence is compounded by the contemporaneous liberalization process. Not only is the technology more complex, but a larger number of firms are operating it, in competition but also very often in cooperation with one another. The object of the law is no longer a real and discrete system, but rather the virtual 'network of networks' resulting from the operations of these various firms.

From a legal perspective, it is tempting to treat convergence as an evolution rather than a revolution. Dealing with convergence would then imply that the legal conceptual apparatus mentioned above evolves to a greater level of sophistication in order to tackle a more complex technological object. Indeed a number of authors, including Dommering himself,[5] have presented complex models, usually centred on production chains or layers, upon which to base the law and regulation of the converged sector.[6] In my opinion, this approach is misguided, both statically and dynamically. From a static perspective, it fails to acknowledge that convergence changes both the structure of the sector and the way in which it operates. For policymakers and academics to continue expanding resources to try to encompass the whole sector in a legal and regulatory framework is inefficient, especially if the public policy objectives underpinning legal or regulatory intervention are already partly or wholly met. From a dynamic perspective and perhaps more fundamentally, innovation can be affected – most likely adversely – if it is constrained by an all-encompassing legal and regulatory framework.

Of course, information lawyers must remain abreast of technological developments in order to understand what they are working on. Nevertheless, the object of information law has changed.

The remit of public authorities is reduced

Beyond the fact that its object of study (information) is mutating, the 'law' in information law is also changing. More precisely, the mandate of the public authorities is reduced as a consequence of liberalization,[7] in ways which some-

times do not receive the attention they deserve. A key element of all liberalization processes is the separation of regulatory and operational functions.[8] This implies of course institutional separation, in that a regulatory authority is created, separate from and independent of any firm, including the incumbent (former monopolist). Beyond that, once they are established as separate institutions, the incumbent and the regulatory authority must also concentrate on their respective functions. Just like incumbents had to learn (sometimes painfully) to leave regulation to the authority, regulatory authorities must also learn to focus on regulation and to let go of operational matters. This is part and parcel of the choice for liberalization of the market.

Once a policy choice in favour of liberalization has been made, the only logical starting point must be that the operation of the information sector escapes the legislative and regulatory remit. In other words, operations[9] are primarily a matter for the market to decide, according to what customers demand and what firms can supply. It follows that public intervention must be subject to a prior finding that the market has failed to deliver – the so-called 'market failure' test – which can be more or less stringent.[10] Public authorities then work bottom-up instead of top-down: they only step in when the market is not adequately functioning, in line with proportionality and other principles of good governance. It was seen above that the object of information law has changed, which makes the use of all-encompassing models inadequate. The change in the remit of public authorities only strengthens this conclusion.

Unfortunately, much policymaking and academic work concerning the need to introduce new technologies, to carry out investments, to make services available to everyone, et cetera, still reads as if policymaking flowed seamlessly into operations, themselves still in the hands of the incumbent.[11]

Yet a paradox looms: whilst lawmakers and regulators must let go and let markets evolve on their own motion, they must also be able to judge whether market performance meets expectations when they carry out a market-failure test. In order to do that, they must therefore have a benchmark of how the electronic communications sector should evolve, so as to be able to make an assessment.

Research in information law can contribute to solving this apparent paradox by working out the theoretical underpinnings of current regulatory trends. If for the purposes of discussion it is assumed that the regulatory framework for electronic communications represents the state of the art, the answer lies in its

two most important design principles, namely (i) reliance on economic analysis (as evidenced by a substantive alignment with competition law) and (ii) technological neutrality. The former implies that the law moves away from technological concepts,[12] towards economic and functional concepts. This can be seen most clearly in the regulation of market power (the so-called 'SMP regime'), but universal service regulation has also been cast mostly in economic terms.[13] Accordingly, information law and regulation can be formulated in economic/functional terms (no bottlenecks, no network externalities, adequate market performance, etc.). The latter principle is still a work in progress.[14]

Amongst possible interpretations of technological neutrality, the most powerful and most meaningful would entail that public authorities do not interfere with technological choices which properly belong to the marketplace.[15] This would dictate that the action of public authorities be carried out at a certain level of abstraction and avoid as much as possible to rely on technological categories which would imply a choice in favour or against a certain technology. The two principles (reliance on economic analysis and technological neutrality) point in the same direction.

Implementation is made more difficult

In addition to the above, information law must pay more attention to implementation issues than had traditionally been the case. In earlier times, the law was implemented in a command-and-control fashion, especially where the object was a self-contained autonomous system controlled by the State or by a tightly-regulated private monopoly. Under these circumstances, it was understandably more interesting for academics to focus on substantive law than on implementation issues.

Now proper implementation is no longer a given. Accordingly implementation issues take centre stage, as a result partly of the two phenomena already discussed. Firstly, due to convergence, the object of information law mutates into a complex 'network of networks' involving a multitude of firms. It is much harder to implement information law without giving rise to some unintended effects (or externalities) on one part or another of this virtual 'network of networks'. Secondly, liberalization reduces the substantive remit of information law and hence turns these firms into participants in the legal and regulatory process, into stakeholders, together with consumers, interest groups, et cetera. Yet other factors also play a role, first and foremost market integration and globalization. National borders no longer provide a convenient and stable bound-

ary for information law to be implemented. Rather, factor mobility across borders reduces the ability of public authorities to exert their power.

In practice, as implementation becomes a central issue, public authorities have developed a number of sophisticated devices to enable substantive policy choices to be implemented in this more difficult context. First and foremost, a regulatory model was adopted,[16] whereby specialized regulatory authorities monitor and, when needed, intervene in a given sector, against the backdrop of an open competitive market, by trying to affect the incentives of market players. Secondly, public authorities began to rely on non-traditional instruments such as soft law (communications, notices, guidelines, et cetera) and self- or co-regulation. Thirdly, authorities began to collaborate across borders, giving rise to innovative institutions such as networks of regulatory authorities.

These developments affect not only the practice of information law, but also its academic pursuit. Information law therefore must encompass all the topics related to implementation, such as regulatory theory and institutional law (EC and national) and theory.

The topics of information law are expropriated

The last and perhaps most fundamental reason why information law must change is that its main research topics find themselves expropriated.

Traditionally, economic regulation – including market access, market structure, relationships between market parties and relationships with end-users – has been a central topic of information law, in sectors such as telecommunications, post and broadcasting, with specific solutions reached in each sector. With the opening of markets, it became generally acknowledged that any sector-specific economic regulation should be based on sound economic analysis.[17] It was then only natural that sector-specific regulation should gravitate towards competition law, the general area of law which seeks to apply economic analysis to the resolution of market regulation issues. Whether sector-specific regulation must be aligned with, or ultimately abandoned in favour of, competition law can stay open;[18] it remains that, at the academic level, the part of information law dealing with economic regulation is firmly in the intellectual orbit of competition law.

Similarly, the more social aspects of economic regulation, including the provision of various information services to all citizens – by way of service public,

'Daseinsversorgung' or however legal systems conceive this – have ceased to be specific problems of electronic communications law or media law. In fact, the introduction of universal service in the early days of telecommunications liberalization[19] led to a more general discussion on the place of services of general economic interest in the architecture of EC law.[20] Similarly, the intense struggle around the financing of public broadcasting cleared the way for the general debate on the financing of public services, including the famous *Altmark* decision[21] and its policy offspring.[22]

Pluralism and freedom of expression have also been taken outside of the circle of information law specialists, where Dommering and IViR play a prominent role. To a certain extent, the classical approach allowed for a solution such as European content rules, so deeply wed to a specific technology, to flourish and become its own area of study.[23] Similarly, the press – written as well as audiovisual press – enjoyed by and large a different freedom of expression than the rest of us,[24] which also gave a specific flavour to information law.
In both cases, the specificity of information law has been severely eroded, first and foremost by convergence. Convergence heralds the fragmentation of broadcasting and the rise of narrowcasting, rendering content rules untenable. It also opens a space between the press and the general public, for hybrid phenomena such as blogging and social networking. At the same time, pluralism and freedom of expression rank high on the general political agenda as cultural identities are being re-invented.

Although this author feels much less at home in these topics, a similar story could be told about privacy and security. Privacy law started as the preserve of a relatively small community of specialists around the world, among whom here as well IViR researchers under the leadership of Dommering are leaders. Similarly, network security was a relatively esoteric and technical topic. Today, these issues have been thrust to the foreground, as information and communication came to assume an ever-increasing significance in our lives. We depend on information and communication (especially in digital and electronic form) to an extent which we sometimes forget or fail to appreciate (until we are deprived of them due to a failure), and our lives are also caught by information and communication facilities to a greater extent than we often believe. Privacy and security issues have been further highlighted following the tragic terrorist attacks of this decade.

The first three headings of this essay essentially chronicled how information

law is coming into the mainstream: its object mutates into a complex 'network of networks' not unlike many other economic sectors (financial sector, transport, etc.), the role of public authorities is aligned with what is customary in other economic sectors and implementation issues can no longer be ignored.

As the present heading indicates, this cannot but have consequences for information law as such. For all the main topics briefly outlined above, a similar pattern emerges. Topics which were central to information law, mastered and controlled by the information law community, become less specific to information law, start to matter beyond information systems and are appropriated by larger policy and academic communities.[25] Under these circumstances, it will be increasingly difficult for information law and its community to retain their specificity and their autonomy.

This creates both opportunities and threats for the information law community. On the one hand, information law specialists typically have a head start on each of these main topics, with which they have been busy for decades already. As these topics spill over the boundaries of information law and become part of a more general policy and academic topic, information law specialists have the opportunity to leverage their expertise into these broader topical communities. On the other hand, if information law specialists remain focused on specific technological systems, their technological focus will obscure the link between their work and these more general topics, much to their disadvantage.

Conclusion

In the light of the above, the future of information law could be much different from what we have seen so far.

In the eyes of this author, the phenomena described in the previous paragraphs pose a serious challenge to the specificity of information law as a field of law and of academic research. Because its object mutates, information law must move to a higher level of abstraction, away from the technical specificities of stand-alone technological systems. It must also accommodate a rollback in the role of public authorities, which also leads to a higher level of abstraction when moving to economic and functional categories. Implementation issues gain more importance, which requires expanding into general issues of institutional law, regulatory theory, et cetera. Finally and more crucially, the core topics which made information law specific are expropriated to the benefit of a larger community.

How can this challenge be addressed, especially as regards academic research? A first step could certainly be to expand the scientific base by emphasizing inter-disciplinarity, so as to achieve a deeper understanding of the central topics of information law. Armed with knowledge from economics, communications science, psychology or sociology, information law specialists can more easily apply their expertise beyond the classical boundaries of information law. In this respect, in this author's main research area, competition law and economic regulation, the ability to understand, work with and even exploit economic science is indispensable.

Beyond that, it might be advisable to shift the articulation of information law away from technological systems (media law, telecommunications law, law of the press, postal law, et cetera) and towards topics such as those outlined above (economic regulation, privacy, security, freedom of expression, culture and pluralism). In so doing, information law specialists are forced to move to a more abstract level and will be better able to share their knowledge and expertise with the rest of the legal academic community.

1 A useful starting point is the Commission Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation Towards an Information Society Approach, COM(97)623 (3 December 1997), which contains a good description of the phenomenon.

2 Even 'physical' systems such as the written press or post are part of this integrated whole, if not technically, then certainly from the perspective of businesses and consumers.

3 Of which the internet is perhaps the most representative part.

4 Having to do with technical engineering but also with industry structure and business models: the converged sector is not in the hands of a single firm, but rather it functions and evolves as a result of the interaction between a large number of firms, each of which focuses on a more or less narrow range of functionalities.

5 See among others J.C. Arnbak, J.J. van Cuilenburg & E.J. Dommering, *Verbinding en ontvlechting in de Communicatie,* Amsterdam: Cramwinckel 1990; C. Uyttendaele, Openbare informatie, *Het juridisch statuut in een convergerende mediaomgeving,* Antwerpen: Maklu 2002, p. 30; P. Valcke, *Digitale Diversiteit, Convergentie van Media-, Telecomunicatie- en Mededingingsrecht,* Gent: Larcier 2004, p. 86.

6 If a model were needed, post (snail mail) probably offers the most adequate model for the new converged technological environment (based on the Internet Protocol), and it is no coincidence that it is also and will likely remain the least regulated of the classical network industries.

7 Liberalization has affected all parts of 'classical' information law, including telecommunications, media and post. The written press was never as tightly regulated in any event.

8 Now set out at Article 3(2) of Directive 2002/21 (Framework Directive), OJ [2002] L 108/33.

9 Operations are not just static (running the system), but also dynamic (innovation and evolution, with new technologies, new methods, etc.).

10 See my inaugural lecture, *The role of the market in economic regulation* (Tilburg University, 2002, available at www.tilburg.edu/tilec), where it is argued that, while proper market analysis is required, the last word should ultimately lie with the polity.

11 In this respect, policymakers face a difficult juggling act when they must reconcile the very operational goals of the Lisbon agenda with the narrower legislative remit which follows from liberalization. The European Commission typically bridges the two by insisting that open competitive markets are most likely to lead to the fulfillment of the Lisbon agenda.

12 A change which is also dictated by the mutation in the object of information law, as seen *supra.*

13 Save perhaps for the central issue of which services are to be included in the universal service basket defined at EC level: see Article 15 of the Directive 2002/22 (Universal Service Directive), OJ [2002] L 108/51.

14 See Ilse van der Haar, 'Technological neutrality: what does it entail?', TILEC DR 2007-009, available at www.tilburg.edu/tilec.

15 A weaker interpretation which would also support the reasoning set out in the main text centers on sustainability: lawmaking and regulation should be so designed that they can withstand technological evolution and do not require updating (or perhaps better, upgrading) every year.

16 For a general introduction on regulatory theory, see among others R. Baldwin and M. Cave, *Understanding Regulation,* Oxford: OUP 1999, Chapters 2, 3 and 6.

17 As seen *supra* in the discussion on the market failure test.

18 See for instance P. Larouche, *Competition Law and Regulation in European Telecommunications* (Oxford: Hart 2000) for an overview of the discussion and a defence of the thesis that sector-specific regulation will not entirely give way to competition law.

19 In the discussion leading up to Directive 95/62 on the application of open network provision (ONP) to voice telephony, *OJ* [1995] L 321/6.

20 For the latest iteration, see the Commission Communication on Services of general interest, including social services of general interest: a new European commitment, COM(2007) 724 final (20 November 2007), which refers to previous documents and discussions.

21 EJC 24 July 2003, C-280/00, *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747. It will be noted that, contrary to statements made in the literature and in certain Commission documents, this case used the undefined notion of 'public services' to circumscribe the scope of State aids under Article 87(1) EC, and not the notion of services of general economic interest, which is specific to Article 86(2) EC.

22 See the package of measures adopted in 2005: Directive 2005/81 amending Directive 80/723/EEC, *OJ* L 312/47, Decision 2005/842 on the application of Article 86(2) EC to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, *OJ* L 312/67, and the Community framework for State aid in the form of public service compensation, *OJ* [2005] C 297/4.

23 These rules are found at Article 4 et s. of Directive 89/552 (Television Without Frontiers, now the Audiovisual Media Services Directive), *OJ* [1989] L 298/23, as amended.

24 See the case-law of the European Court of Human Rights under Article 10 ECHR, in particular the judgment of 22 September 1994, *Jersild v Denmark,* Series A, No. 298.

25 For instance economic regulation, human rights, culture, public law, privacy/private law and criminal law to follow the order of the topics above.