

Tomáš GONGOL

BASIC PRINCIPLES OF THE LEGAL REGULATION OF THE INTERNET

PODSTAWOWE ZASADY REGULACJI PRAWNYCH DOTYCZĄCYCH INTERNETU

School of Business Administration, Silesian University
Univerzitni nam. 1934/3, 733 40 Karvina, Czechia, e-mail: gongol@opf.slu.cz

Streszczenie. Regulacja prawna w internecie stała się bardzo istotnym tematem w kontekście umasowienia i komercjalizacji globalnej sieci. Artykuł koncentruje się na teoretycznych podstawach regulacji prawnej w internecie, na których można budować różne modele zarządzania. Problem regulacji prawnej w internecie jest tylko częścią bardziej ogólnych problemów. Przede wszystkim tego, w jaki sposób organizować i zarządzać internetem, i kto faktycznie powinien się tego podjąć. Ponadto, ze względu na globalny zasięg internetu, występuje problem szczególnego statusu prawnego cyberprzestrzeni. Artykuł porusza również wiele zagadnień naruszenia praw autorskich w internecie, które powinnny podlegać jurysdykcji sądów.

Key words: Internet regulation, cyberspace, Internet Society, Internet control.

Słowa kluczowe: regulacje dotyczące internetu, cyberprzestrzeni, społeczeństwo w internecie, kontrola internetu.

INTRODUCTION

The law must respect the state of information and communication technologies (ICT), its continuous development and, in particular, safeguard their users. This view was expressed by Knapp (1988): „[...] law can and should support the overall development of automation of social life and, in particular, the development of the national economy. The law also has to deal with adverse effects of automation according to its possibilities. Its possibilities in this respect are, however, very limited” (p. 10). In this context, we should pose a basic question: Do we need special legal regulations on any new communication or information technology? The paper aims to answer this question by presenting different approaches to Internet regulation laws. It will contribute to the interdisciplinary discussion of the status and place of law in modern day society.

Massive expansion of the Internet into a global network is a natural result of the human desire to increase the level of awareness in society. So people tend to reduce entropy, the universal tendency to disintegration. Polčák (2012) remarks that law was also constructed for this reason, to let the organizing tendencies prevail over the disorganizing tendencies, and in terms of information theory its purpose is to protect the natural capacity to resist entropy. The destructive tendency of entropy was examined by Wiener (1961), considered to be the founder of cybernetics, who claimed that society can only be understood through a study of messages and communication facilities which belong to it. Entropy, the physical phenomenon, can be

applied to human society, which like nature, tends spontaneously to decay. The decomposition is prevented by our ability to process and use information. Information is also understood, in the broader context of legal doctrine, as information about what is (i.e. verdict) and information what has to be (i.e. instruction). Thus this theory underlines, among others, the difference between constitutive decisions (what should be) and declaratory decisions (what is).

From this perspective, the Internet can be used in two ways: to distribute information and to help organize the system, thus preventing entropy and disinformation, which lead to information chaos.. Informative nature of law and its impact on the organization of the system cannot be reliably determined (Polčák 2012), but if a particular rule is used, e.g., to protect the trade mark's information function which ultimately leads to reduced costs of consumer information search, we can at least talk about achieving a specific, partial aim of the law.

The preceding rationale underlines the traditional justification of the legitimacy of Internet regulation. From the perspective of information, just the mere fact of reducing entropy and higher degree of organization justifies the legitimacy of cyberspace regulation. A similarly traditionalistic approach, in the spirit of the aforementioned Knapp's theory, is understanding Cyberlaw as a tool which should promote further technological development and deal with all adverse effects associated with this development. The legitimacy of Internet law does not equal its smooth implementation. The interaction of rights take occurs in the cyberspace is a collision of conflicting principles, especially territorial limitations of rights and the global nature of the Internet. This clash is particularly evident in the case of interference with trademark rights.

Information technology and proprietary rights influence one other. Information technology affects the formation of law, its interpretation and application (it should be noted, that the judicial interpretation of law heavily outweighs creation of the law by relevant legislative bodies). Major impact of information technology on the creation of law is described by Murray (2010) who talks about moving from a "world of atoms" to a "world of bits", its nature manifesting through new kind of distribution and use of music or movies. However, these changes themselves do not justify the creation of a new legal order, designed exclusively for the cyberspace (see below). Vice versa, the law influences existing technologies, and the development of new information and communication technologies (NICTs) that must observe laws associated with, i.a., intellectual property rights and Internet privacy protection rights. Among many access control technologies that are used to restrict usage of copyrighted works and ensure that content complies with the copyright law is DRM scheme (Digital Rights Management).

INTERNATIONAL CONTEXT

The international community believes that the global reach of the Internet has the potential to strengthen human individuality, human freedoms and rights, consolidate democratic processes and improve the quality of life worldwide. This is echoed by the message of the Geneva Declaration of the World Summit on the Information Society (WSIS) held on 12 December 2003. The Declaration expresses a common vision of the information society based on people-centered, inclusive and development-oriented principles. Its goal is to harness information technology to eradicate extreme poverty and hunger in the world, provide access to primary education for everyone, promote gender equality, empower women, reduce child mortality, and more. This seems to be a very high aspiring goal, bearing in mind the

relatively short existence of the Internet, however the Declaration was made some time ago and expressed concern of a small community of academics. From the perspective of general legal regulations of the Internet, a direct reference to the Universal Declaration of Human Rights of 1948, specifically Article 19, is quite interesting: „Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless frontiers”.

The central idea of the information society is communication; it's understood as a fundamental social process, a basic human need and the foundation of every organized society. It is appropriate to mention here the impact of the Internet on the development of fundamental human rights and freedoms in some countries that do not follow these democratic principles, and their efforts to impose internet censorship and more regulation. China's example shows that the hopes placed in communication technology can be easily thwarted due to government regulation of technology and the communication in itself, see e.g. Zheng (2013) or Goldsmith and Wu (2008).

The Declaration also refers to the role of the state, international organizations and private corporations, as well as civil society, in terms of responsibility for the development of the information society. The implementation of this responsibility must respect fundamental human rights, specifically Article 29 of the Universal Declaration of Human Rights: “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”. Given the above, it is expected that the state plays a significant role in regulating the Internet and it is obvious that, just with regard to human rights protection, it should act decisively, yet at the same time the extent of this intervention is generally determined by the moral sense and public order. However, let's put aside the debate over the generality and vagueness of these terms, which can lead to doubts about specific interventions.

The need to legally regulate the cyberspace grew parallel to the expansion of Internet, its gradual commercialization and massification. A good example here is development of eBay that built an online person-to-person trading community on the Internet, described by Goldsmith and Wu (2008). Initially the website relied on mutual trust between a small number of people, and any disputes between the users were solved by the administrator on discussion forums (known as „Uncle Griff”).

After several months, however, it was obvious that neither the Evaluation Forum, nor its manager will manage to handle such cases, as more and more frauds occurred. The eBay alone currently employs a specialised team of people that prevent fraud and their activities are based on the legislation of the country where it operates. It is obvious that without a stable legal environment, provided by the state, companies like eBay could not perform as efficiently as they do today.

THEORETICAL BASIS

The conclusions of the Summit of the WSIS, held in Tunis in 2005, went even further and introduced among other principles, the so-called Interactive governments. According to the document, international management of the Internet should be based on the principle of multilateralism, transparency and democracy, and with the full involvement of governments

and international organizations, as well as the private sector and civil society. Its aim should be to ensure fair distribution "of resources" (The Internet is seen as a public resource), facilitate Internet access for all and ensure its functionality. The issue of legal and regulatory framework is only part of some larger issues of how to organize and manage the Internet. Who should actually take on this job? Does it make sense, given the global reach of the Internet, to talk about special legal status of cyberspace, such as is the case in marine law or space? In this context a number of issues arise, also with regard to the jurisdiction of courts which have to deal with cases of Internet law infringement. An example of that is placing information on the Web which can harm someone in another state.

The role of law or more precisely, the regulation of the Internet and the existence of the ICT law provoked many discussions in the past, from which several theoretical approaches sprang up on how to regulate both, the Internet and relationships that occur in its environment.

By reviewing Internet management models (e.g. Soluma 2008; Bing and Bygrave 2009; Rustad 2009), we can identify three basic theoretical concepts (Murray 2010):

- cyber-libertarianism,
- cyber-paternalism,
- network communitarianism.

CYBER-LIBERTARIANISM

In the early stage of the Internet era, the Web was seen as an environment beyond the reach of the law; terms such as *terra nullius* were used. Perhaps this is best expressed in „Declaration of the Independence of Cyberspace” formulated by Barlow (1996). Barlow saw in this new technology the possibility to establish a new society beyond all borders, and therefore, beyond control of regulators. The starting point for these considerations is the fact that traditional lawmakers may enforce law only within certain territorial boundaries, so if anyone enters cyberspace, it crosses a virtual boundary of a new sovereign state where these laws do not apply and the traditional states have no power to enforce them.

Barlow's utopian vision was reassessed and today is considered archaic as cyberspace is not anymore perceived as distinct new space separate from the physical world, and state authorities proved (though often with considerable difficulty) their power to regulate Internet communications the way it takes place in the physical world. Reed (2004) calls this utopian vision the „cyber-space fallacy” and points out that all those involved in any internet transactions have a real-world existence and fall under one or more jurisdictions in the physical world. Starting from the traditional concept of the legitimacy of law, this original vision is feasible only if there are no adverse consequences (see: Knapp 1988) while using the technology or if the company (by its own mechanisms) manages to solve emerging conflicts and their negative consequences by itself, which is impossible today, and the negation of boundaries between the real world and cyberspace is legitimate. An example of how this utopia of absolute freedom from state control wore off might be the changes that were implemented by eBay with regard to dispute resolution. The trading site moved from initial informal ways of settling disputes between members of the Internet community to zero tolerance policy for counterfeit goods and cooperation with state authority.

Another legal definition of cyberspace based on cyber-libertarian theory defines it as a space in which traditional means of sovereign states, their laws and legal systems cannot be used, and therefore it is necessary to create an entirely new legal system distinct from the old territorial approach. Among the main representatives of this school of thought belong Johnson and Post (1996) who point out that subjects in cyberspace, by passing over the electronic boundary move through different legal regimes, and it is almost impossible to effectively regulate their activity based on territorial jurisdiction (For example, data whose publication is prohibited in one country, can still be accessed via a web interface on a server in another country, where their disclosure is not prohibited). In effect, according to the cyber-libertarian theory this means that individuals have the freedom to move in the cyberspace, and choose a legal system that they consider best in the real world (more about it Froomkin 1997). Johnson and Post (1996) in accordance with the concept of cyberspace as a sovereign state (in a literal translation of the New Kingdom) propose that the internet be regulated by completely new, independent, decentralized and extraterritorial system of law, the rules of which are formed by common agreement of cyberspace participants who will acquire a new digital identity through different user accounts or domain names (Johnson and Post 1996).

Even this concept contains a number of ambiguities, e.g. the question of who will organise these „participants” and act on their behalf, or how the conflicts of different groups, often having contradictory interests, will be resolved, etc. In practice, such model could not succeed, particularly in view of the fact that the requirements of many online transactions, which are implemented in the real world (e.g. the delivery of ordered goods to specific physical address of the purchaser), come under state regulations. However, we must admit that to some aspects of Internet management, especially with regard to Internet’s technical conditions or Internet access, some self-government and self-regulation should apply (see below, esp. Lessig). In this spirit, according to Solum (2008) a number of multinational institutions (independent of national governments) operate in this way such as ICANN (ICANN), the Internet Assigned Numbers Authority (IANA), etc.

An example of a specific regulatory system is resolving conflicts that arise while registering domain names. The system of registration of domain names based on a contractual basis is properly completed by non-governmental mandatory rules and private dispute resolution.

CYBER-PATERNALISM

Cyber-paternalism does not consider Internet as a space completely separated from the real world and that is also why it is not immune to its regulation. It is based on the idea that territorial borders and regulations in place can be replaced limits of a different kind, associated with the nature and architecture of the Internet. Lessig (1999) notes that the Cyber-libertarian approach based on the assumption that cyberspace is an uncontrollable environment, does not originate from inherent libertarian nature of the Web, but is determined by a selected way of encoding, in other words, its technical architecture. Legislation, which aspires to real enforceability, must respect this architecture. According to Lessig (2006), *the technical architecture* (code) together with the law, the market *and social norms* creates social and legal control in the cyberspace. The law here are the rules created by the legislator (here, in

particular by the state) and enforced through sanctions. Here, we should mention the ongoing debate on whether the cyberspace needs specific legislation or just general norms and sanctions that regulate the real world. In this context an analogy made by American judge Frank Easterbrook (1996) is often brought up saying that cyberlaw „is no more of a study than the „law of the horse””, meaning that the general rule of law should be applied. Other disputes, e.g. The reaction Lessig (1999), relate to the need for the development of the legal conscience, with regard to the ever expanding and evolving Internet environment, and favour regulations of particular aspects of Internet communication. Legal issues pertaining to the cyberspace are regulated partially by special legal norms governing electronic communications (e.g. spam protection, electronic commerce, electronic signature), however, despite supranational cooperation and state regulatory efforts, many areas of the the cyberspace remain unregulated.

According to the author's opinion, there is no pure cyberspace legal system, whose subject would be Internet governance in isolation from other social phenomena. On the contrary, in many cases of intellectual property rights (including trademark law), unfair competition, contracting, etc., rights are applied that reach beyond the "material" world. Special legal regulations were applied to these areas of Internet which are connected to its technical structure and functionality. There is a development in the understanding of the conception of law, which isn't only the Internet law codified by the state authority, but also rights resulting largely from the self-regulation of the Internet (i.e. soft law). Also in the Czech Republic a different view of the law on the Internet can be seen. While Polčák (2012) used in this context the term *lex informatica* as an expression for a special legal system of the Internet society, an autonomous body of law evolved on the Net that meets the legal needs of the Internet community, Telec (2015) comes to a contrary conclusion of general applicability of existing legal tools.

The actual effectiveness of law enforcement in this area, however, is still debatable considering the possibility of downloading e.g. music (esp. in mp3 format) from illegal sources. The other modalities, indicated by Lessig, as elements of Internet regulation can be of help here. After the start of web development services the Internet massively expanded thanks to investments from the private sector and became an environment to a large extent also regulated by market mechanisms. An example of the application of market mechanisms is the distribution of domain names, which takes place through the offers of competing businesses, so-called registrars. Domain names become property values which are traded, and subjected to competition, e.g. for first registration, or unfair competition law in case of violations of law, esp. the intellectual property of third parties. Strong competition prevails in many other areas, e.g. among Internet providers, providers of search engines, streaming service providers etc. Market regulation is evident exemplifying case of music. With the arrival of affordable devices (smartphones, tablets, iPod) and services (Spotify, iTunes, Netflix, Napster) it is possible either to download or to play music legally from the Internet, which in turn leads to reduced downloading from illegal sources (IFPI 2015).

This concept is illustrated by the Fig.1 below in which an individual is shown as a dot whose behaviour is limited by the four control mechanisms – modalities – indicated by Lessig (2006).

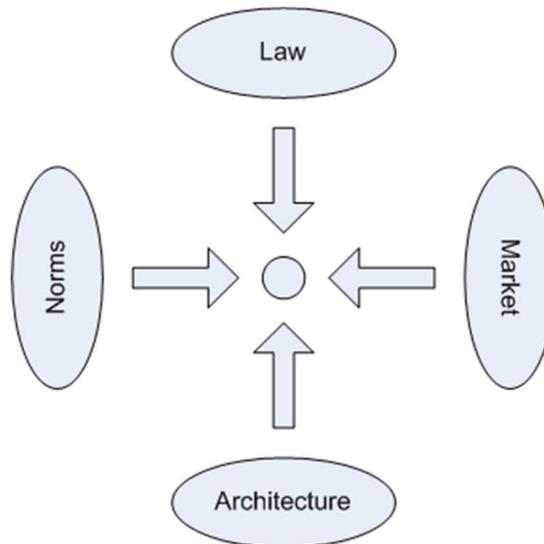


Fig. 1. The control the behaviour of individuals in cyberspace by Lessig
Source: Lessig (2006).

NETWORK COMMUNITARIANISM

To get a complete overview of Internet regulation theories, let us move to the so-called communitarianism network, which extends the cyber-paternalistic concept by emphasizing the interaction between individuals, society and the environment (Murray 2010). It does not perceive individuals in cyberspace as isolated and passive (literally as “pathetic dot” to quote Lawrence Lessig), but always as active individuals interacting with others in the wider community that has influence on the law, social norms and the market. The law is made up of those who are elected by the community; the market is a reflection of supply and demand formed by community and the social norms reflect community values. It is necessary to replace the isolated individual from Lessig's model by the network community (Matrix) of individuals and regulation must be represented as a process and dialogue between the individual and society.

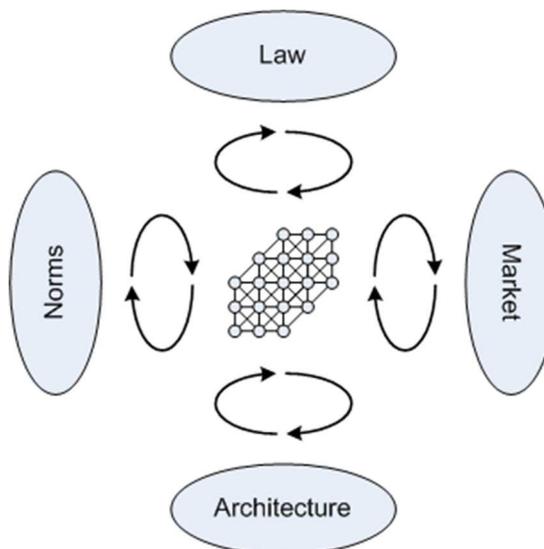


Fig. 2. Network communitarianism by Murray
Source: Murray (2010).

Many approaches to addressing the law on the Internet keep emerging, often combining elements of the theories presented above. One of them is the idea to regulate cyberspace by an international treaty along the lines of, for example, the Berne Convention. Similarly, there are proposals to create specialized international organizations modelled after the World Intellectual Property Organization (WIPO) or the World Trade Organization (WTO) that would deal with the regulation of the Internet. Berman (2002) is a proponent of such an approach to expand the traditional focus of international law, and he proposes the creation of Internet identification cards (passports) which would allow not only to identify the user but to locate him as well. This would allow or deny individual users access to a specific service. In contrast, Dinwoodie (2000) calls for a formation of a *special legal system* based on *the lex mercatoria* model, a body of commercial law which evolved from national laws to meet the legal needs of merchants.

All the different approaches to the law on the Internet and related issues are basically founded on the three theoretical concepts overviewed in this paper.

CONCLUSIONS

In the '90s, in the early days of the Internet, there was a widespread consent that the Net is beyond the reach of local laws, and that states do not even have appropriate tools to regulate it, especially in cases when transactions transcended national boundaries. At the time many shared a vision that cyberspace is completely independent of state authorities and that they are creating a new society without territorial restrictions, free from any state's interference. Massive expansion and commercialization of the Internet revealed, even to enthusiastic netizens, that state authorities can and must exercise their power in this area. One might even venture to say that the success of the Internet is subject to a state-guaranteed right to enforce laws in this environment. The information theory says that the law on the Internet, understood as a communications medium, must be applied, so the tendency to organise will prevail over the tendency too disorganise and thus help protect the natural ability of life to defy entropy.

If we overcome the two extremes, the approach that the Web is "no man's land", beyond the reach of law, on the one hand, and on the other, that a completely separate legal system to govern the cyberspace is required, we can conclude that in most cases the existing law may be applied to the legal reality of the Internet, and that eventually, certain issues will require specific legislation. An example of such applications is the legal regulation of trademarks and their protection on the Internet. This does not change the fact that the law is only one of the possibilities of this regulation. According to Lessig's compelling theory, Internet's architecture itself, and the "code" it is built on, has the potential of becoming a regulator.

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Summary. Legal regulation of the Internet has become a widely debated issue in the context of massification and commercialization of this global network. The paper focuses on the theoretical grounds of the Cyberlaw on which various Internet management models can be built. The problem of legal regulation of the Internet is only part of more general issues of how to organize and manage the Internet, and who should be responsible for that. Moreover, given the global reach of the Web, there is the question of the legal status of cyberspace in international law, reminding of the maritime law or the space law with regard to rights that cannot be claimed by any sovereign nation. The paper also raises a number of issues related to Internet copyright infringement cases, and enforcement of copyright online and EU-wide remedies under a single applicable law.

