What is Information Law – and what could it be?

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Content

I. Introduction

Muslim men are able lawfully to divorce their wives by repeating three times the form of words „I disown you". The court in Dubai responsible for family matters recently had to rule on an unusual divorce petition – a so-called *talak* – at the request of a young woman who had received a momentous text message (SMS) from her husband on her mobile phone. The message was: „Why are you so late? I disown you." The wife wanted the judges to say whether electronic expression of the *talak* formula via SMS could also lead to a legally binding divorce.[1]

Here the matter of family law truly turns out to be a genuine question of *Information Law*. The fact is, the court ruled that even divorce petitions sent by

1 See Frankfurter Allgemeine Zeitung, Friday 29, 2001, Nr. 148, p. 10.

SMS are legally binding, provided that the husband is the sender, the words are unambiguous, the husband is acting with intent to divorce, and the message actually appears on the screen of his wife's mobile phone. The court also said which words, given the small number of characters available in SMS, will be recognised in addition to the said formula. With these considerations (perhaps surprisingly, at first glance), core questions of Information Law are touched on such as the problems associated with identifying the sender and authenticating the message, the attributability of information, the quality of information (lack of ambiguity), protection of expectation (what happens, for example, in the case of a joke transmission?), etc. – We shall be returning to some of these aspects later. But first, the question of definition.

II. The concept and object of Information Law

1. Technology-related beginnings

The debate about what falls within the concept of Information Law is not new; it goes back to the 1970s.[2] Historically, the term Information Law has a markedly *technology-related cast*: FIEDLER, who (so far as one can tell) first explicitly used the term Information Law as a separate legal discipline, subsumes to it the legal regulation of information technology that had become necessary in connection with the development of electronic data-processing.[3] STEINMÜLLER, too, employing the term Information Law in the mid-1970s, is mainly interested in the phenomenon of automation-assisted data-processing and in the problems of social control of information associated with the altered distribution of information in society.[4] Subsequently, however, as regarded the debate about the

2 See, e.g., EGLOFF WILLI/WERCKMEISTER GEORG, Kritik und Vorüberlegungen zum Gegenstandsbereich von Informationsrecht, in: Steinmüller (Hrsg.), Informationsrecht und Informationspolitik, München/Wien 1976, p. 280 ff. Cf. LUTTERBECK BERND, Harmonisierung des Europäischen Informationsrechts? – Zum Aufbau der Wissensordnung, in: Heymann (Hrsg.), Informationsmarkt und Informationsschutz in Europa, Köln 1995, p. 127 ff.; MAYER-SCHÖNBERGER VIKTOR, Information und Recht, Vom Datenschutz bis zum Urheberrecht, Wien/New York 2001, p. 8 ff.

3 See FIEDLER HERBERT, Automatisierung im Recht und juristische Informatik, 1.-5. Teil, in: Jus 1970, p. 432 ff., p. 552 ff., p. 603 ff.; Jus 1971, p. 67 ff., p. 228 ff.

4 Cf. STEINMÜLLER WILHELM, Quo vadis Computer – Vermutungen über Alternativen künftiger sozio-ökonomischer Entwicklungen, in: Hoffmann/Tietze/Podlech (Hrsg.), Numerierte Bürger, Wuppertal 1975, p. 139 ff.

area of relevance of Information Law, it was possible to diagnose a gradual retreat from the concrete occasion of electronic data-processing technology. The emphasis thus shifted in successive stages from informatics to the science of information.[5]

2. A broader understanding of Information Law

This *turning away from the technology-related view of Information Law* later finds clear expression in BULL, who defines Information Law not as the law of information technology but as the law of informational relations, to be conceived from the standpoint of the interests concerned.[6] SIEBER likewise draws an analytical distinction between a law of information technology and Information Law, which deals with the problems of principle encountered in connection with information.[7] Viewed from this angle, Information Law is defined as the sum total of the legal norms that relate to information (mainly from the standpoint of its processing by modern information technology) and that particularly concern the classification and distribution of the economic, cultural, and constitutional asset information as well as the potential threat posed thereby.[8] SIEBER describes as constituent questions of fact[9] rights of disposal of information, entitlement to information, protection of secrecy, and liability for data and items of information.[10] DOMMERING, too, defines the area of concern of Information Law in a comprehensive way, placing the emphasis not on information technology but on the *process of communication.*[11] According to him, Information Law

5 See also EGLOFF/WERCKMEISTER, *supra* note 2, at p. 283.

6 BULL HANS-PETER, Vom Datenschutz zum Informationsrecht – Hoffnungen und Enttäuschungen, in: Hohmann (Hrsg.), Freiheitssicherung durch Datenschutz, Frankfurt a.M. 1987, p. 173 ff.

7 See SIEBER ULRICH, Informationsrecht und Recht der Informationstechnik, NJW 1989, p. 2569 ff. and SIEBER, Rechtsinformatik und Informationsrecht, Jura 1993, p. 561 ff.

8 SIEBER, *supra* note 7 (NJW), at p. 2574.

9 For a helpful review of the different approaches, see WEBER ROLF H., Informations- und Kommunikationsrecht, Allgemeiner Überblick, in: Weber (Hrsg.), Schweizerisches Bundesverwaltungsrecht, Basel/Frankfurt a.M. 1996, N 52 ff.

10 SIEBER, *supra* note 7 (NJW), p. 2574 ff.

11 DOMMERING EGBERT J., An Introduction to Information Law, Works of Fact at the Crossroads of Freedom and Protection, in: Dommering/Hugenholtz (eds.), Protecting Works of Fact, Deventer/Boston 1991, insb. 11 und 20 f.

covers the production and processing of information, its storage, conversion, transfer, and reproduction, and the use and consultation of information.[12] MAYER-SCHÖNBERGER sees the really central question as lying in what he calls the *Beziehungen zwischen Menschen und Informationen* [„Relations between People and Information"], a question that as a result of the altered function of information (henceforth a primarily economic asset) is becoming acute. Viewed from this angle, Information Law is concerned with the legal apprehension of people's information relations, or to put it more precisely: the comprehensive regulation of subjective rights to information and their enforcement.[13] In connection with enforceability, it is particularly Americans who, in the light of modern information technologies (notably the Internet), are increasingly arguing for a revival of the technology-oriented approach („Code is law").[14]

3. Information and knowledge order

What ZÖLLNER is looking for, under the title *Informationsordnung* [„Information Order"], are fundamental ideas for regulation that will govern the traffic in information. He specifies as problem areas the generation, accessing, storage, and transmission of information.[15] Committed to a guide programme for the third basic order of the information age (alongside the economic and legal orders) is the *Wissensordnung* [„Knowledge Order"] put forward by SPINNER, which embraces the totality of constituent guide provisions, superimposed normative regulations, and empirically given marginal conditions.[16] As a legal framework for the knowledge order GARSTKA launched the idea of an *Informationsgesetzbuch* [„(Legal) Code of Information"].[17]

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12 DOMMERING, *supra* note 11, at p. 20.

13 MAYER-SCHÖNBERGER, *supra* note 2, at p. 9 and 19 ff.

14 Exemplary LESSIG LAWRENCE, Code and other Laws of Cyberspace, New York 1999. Cf. MAYER-SCHÖNBERGER, *supra* note 2, p. 21 f. with further references.

15 ZÖLLNER WOLFGANG, Informationsordnung und Recht, Berlin/New York 1990, p. 7 ff.

16 SPINNER HELMUT F., Die Wissensordnung, Ein Leitkonzept für die dritte Grundordnung des Informationszeitalters, Opladen 1994, p. 33 f.

17 For a survey, see SPINNER, *supra* note 16, p. 142 f. The idea of a Legal Code of Information was supported by KLOEPFER MICHAEL, Gutachten D zum 62. Deutschen Jursitentag, in: DJT, Verhandlungen des 62. Deutschen Juristentages in Bremen 1998, Band I, Gutachten, München 1998, p. D 90 ff.

4. Broad range of topics

Topics associated with the „information society" are many and various, and this variety is also reflected in the law. A glance down the list of publications and the tables of contents of the journals reveals that under the heading of Information Law a great many different questions of principle and individual problems are discussed. In short, Information Law covers a *broad range of topics*.[18] That makes it hard to establish where the main points of emphasis lie. Nevertheless, there is a recognisable tendency for discourse in this area to stress the legal problems associated with global *communication networks*.[19] In this connection particular importance clearly attaches to the difficult relationship between the *Internet* and the law.[20] In essence, with BURKERT, the following current topics may be distinguished:[21]

- The *infrastructure debate* concerns the market-friendly ordering of communications-infrastructure networks (keyword: liberalisation).
- The *content debate* covers illegal and injurious Internet content and the appropriate mechanisms of control.
- The *ownership debate* is directed at the future of property rights and similar material claims in the light of the networking, compression, and digitalisation of information.

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18 For further discussion, see BURKERT HERBERT, Von künftigen Aufgaben des Informationsrechts, in: Meier-Schatz/Schweizer (Hrsg.), Recht und Internationalisierung, Zürich, p. 157.

19 For more detailed discussion of globalization and Information Law, see, e.g., GASSER URS, Delokalisierung des Wissens – Internationalisierung des Informationsrechts?, in: Meier-Schatz/Schweizer (Hrsg.), Recht und Internationalisierung, Zürich 2000, p. 175 ff. with further references.

20 For a recent and helpful account, see BURKERT HERBERT, Internet und Recht – Einige Beobachtungen zu einer schwierigen Beziehung, in: Klein/Loebbecke (Hrsg.), Interdisziplinäre Managementforschung und -lehre, Herausforderungen und Chancen, Wiesbaden 2001, pp. 199-218.

21 For further discussion, see BURKERT, *supra* note 18, p. 157 ff. with additional references. See also KLOPEFER MICHAEL/NEUN ANDREAS, Rechtsfragen der europäischen Informationsgesellschaft, EuR 2000, p. 512 ff. with an survey of the legal questions in the European Community.

- The *identity debate* takes as its central theme the legal acknowledgement of identity in complex technologically-mediated communications situations.
- The *data-protection debate* comprises a broad spectrum of questions, notably to do with the law of personality and with informational self- and co-determination.
- The *debate about e-democracy.*
- Finally, the *ethical debate* concerns the question of the relationship between the law and non-legal rules of conduct.

Interestingly, in many areas questions that were once included under the heading of Information Law are now reverting to their „traditional parent disciplines":[22] the law of obligations, international private law, administrative law, etc. Although at European and national level, for example, provisions concerning *e-commerce* are grouped together for separate enactment, it can be shown that the instruments actually implemented (e.g. duties of information, rights of withdrawal, etc.) are *only partly new in kind* and often tried-and-tested answers are given to new questions.[23]

III. The „St. Gallen Research Approach" in outline

1. Information Law as looking at a phenomenon

My remarks so far make clear how these vast technical developments have not only brought about a change in social awareness; they are also having an *effect on the law*. The beginnings of the emergence of something called „Information Law" can be seen as the law reacting to this state of affairs.

In addition to the problem areas already mentioned, there are also more fundamental but *less easily visible questions* in connection with Information Law. They arise from the way in which the law is confronting the information phenomenon as such. DRUEY in particular points out that, underlying the

22 BURKERT, *supra* note 18, at p. 167.

23 With regard to the Swiss Contract Law, see GASSER URS, E-Commerce: Innovation im (Vertrags-)Recht?, SJZ 2001, p. 386 ff. with further references. For further discussion of the main responses of the Law, see BURKERT, *supra* note 20, p. 199 ff.

individual areas of Information Law (e.g. legal questions about e-commerce, e-government, e-mail use, etc.), the fundamental question of the *possibilities of the legal coverage of information and communication* is up for discussion.[24] Thematically, this discussion is not confined to the new legal questions thrown up by technological developments but extends to many other familiar life situations that are in some way connected with information and/or communications.

Viewed from this angle, the object of consideration of Information Law *must be inferred from the phenomenon of information.* Information law is concerned essentially with identifying and processing so-called „informationelle Sachverhalte" (*informational sets of circumstances)*, regardless of how they manifest themselves. When the law, which is itself information, targets information as something to be regulated, the first question to arise is: what should we understand by the *term information* with its close relationship to „communication"?[25] Information is a concept with many meanings and many layers; it almost shimmers, indeed.[26] Its definition is always determined by the choice of perspective, which in turn depends on what the particular discipline concerned is fundamentally interested in finding out. According to the view represented here, the law does not have to define its own concept of information but rather needs to ensure that it is *permeable* as regards the specific understanding of information inherent in the particular context in which the facts of the case to be decided find concrete expression. To put it simply, depending on the context and on the questions being asked Information Law can thus comprehend information as „bits and bytes", i.e. focus on the syntactical dimension of the concept of information, or it can look at the significance of a piece of information and its effect, i.e. concentrate on the semantic or pragmatic aspect. However, given the mechanisation of information and its treatment as a commodity, what matters so far as Information Law is concerned is the understanding of information associated with conferring significance and

24 Cf. DRUEY JEAN NICOLAS, Information als Gegenstand des Rechts, Zürich/Baden-Baden 1995/6.

25 See DRUEY, *supra* note 24, p. 26 ff.

26 Cf. GASSER URS, Kausalität und Zurechnung von Information als Rechtsproblem, München 2002, p. 39 ff.

meaning.[27] If the law wishes to regulate informational relationships between subjects, it cannot turn its back on the significance of that information for the subject concerned.[28] So the intellectual nature of the phenomenon turns out to be the chief difficulty in the law's dealings with information.[29] According to DRUEY, what distinguishes information so far as the law is concerned is the problem that a subjective set of circumstances or process situated in a person's inner life is to be comprehended by an objective order such as the law with its dependence on externally visible criteria.[30]

2. Specifics of a way of looking at things on the basis of Information Law

What has been said up to now makes it clear that there is not just one „Information Law". As I have shown, we are dealing not so much with a self-contained theoretical construct as with a many-layered, thematically wide-ranging *discourse* based on a *specific, phenomenon-stamped way of looking and arguing*. Despite the variety of approaches, it is possible to distinguish at least five characteristics of this way of looking at things on the basis of Information Law:

1. Information Law is a *cross-sectional matter*.[31] In other words, the subject-matter of information-law investigations embraces areas of administrative law as well as of criminal law and civil law;[32] it covers substantive law and procedural law alike. In (almost) all areas of the law there are norms

27 See, with examples and further references, GASSER URS, Entgrenzung der Information – Grenzen des Rechts?, in: Immenhauser/Wichtermann (Hrsg.), Jahrbuch Junger Zivilrechtswissenschaftler 1998, Vernetzte Welt – Globales Recht, Stuttgart/München/Hannover et. al, 1999, p. 115 f.; GASSER URS, Zu den Möglichkeiten einer rechtlichen Erfassung von Medien- und Informationsqualität, ZSR 2000 I, p. 380 f.; see also ZÖLLNER, *supra* note 15, at p. 18; SIEBER, *supra* note 7 (NJW), at p. 2573.

28 See also DRUEY JEAN NICOLAS, Kommunikation als Gegenstand des Rechts, in: Kloepfer (Hrsg.), Kommunikation – Technik – Recht, Berlin 2001.

29 For more detailed discussion of this question, see GASSER, *supra* note 26, p. 88 ff.

30 DRUEY, *supra* note 24, at p. 77.

31 See, e.g., SIEBER, *supra* note 7 (NJW), at p. 2579; MAYER-SCHÖNBERGER, *supra* note 3, p. 23 f.

32 For a survey, see WEBER, *supra* note 9, n 50 ff. and n 123 ff.

governing the content of information, informational relations, or information structures or the area of application of which also includes sets of circumstances having to do with information. It is therefore typical of matters of Information Law that legislative provisions, judicial decisions, publications, etc. from various disciplines are brought into play and provide useful tools for processing questions of Information Law.[33]

2. Information Law is an *interdisciplinary way of looking at things*.[34] Anyone interested in legal questions to do with the information society is operating where law, technology, business, and politics intersect. Legal investigations of the Internet make this connection between the said social systems particularly clear in an exemplary fashion.

3. Information Law is a *blend of legal and phenomenological ways of looking at things*. It follows that dealing with problems of Information Law by its very nature presupposes interaction, adapted to the multiform phenomenon of information, with the disciplines that are (also) concerned with that phenomenon (e.g. with information sciences, communications sciences, linguistics, the philosophy of language, physics, cybernetics, etc.).[35] However, these non-legal approaches need to be aligned with the knowledge-bringing questions asked by Information Law and harnessed in the service of answering them.

4. Information Law is *part of the legal system*. Informational facts are the area of application of legal norms. However, legal institutions and such basic concepts as contract, torts, good faith, personality, ownership, etc. are challenged by the new actual phenomena – in other words, by the change in legal awareness with regard to information.[36] This is a (further)

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33 See, e.g., DRUEY JEAN NICOLAS, Information als Gegenstand des Rechts, Zürich/ Baden-Baden 1995/6; MAYER-SCHÖNBERGER VIKTOR, Information und Recht, Wien/ New York 2001; WEBER ROLF H., Informations- und Kommunikationsrecht, Allgemeiner Überblick, in: Weber (Hrsg.), Schweizerisches Bundesverwaltungsrecht, Basel/ Frankfurt a.M. 1996; GASSER URS, Kausalität und Zurechnung von Information als Rechtsproblem, München 2002.

34 See, e.g., SIEBER, *supra* note 7 (NJW), p. 2569 ff.; BURKERT, *supra* note 18, at p. 156.

35 See, e.g., GASSER, *supra* note 26, 44-72.

36 Sensu DRUEY, *supra* note 28.

peculiarity of Information Law: between information and the law there is no priority.[37] The reason for this is that the law is itself information.

5. Information law is law in *fields of tension*. Information Law, above all as regards the legal regulations governing means of communication, is a markedly internationalised law.[38] At the same time, however, locality and context are of key importance for Information Law.[39] Other fields of tension exist for example with regard to whether communication is legally binding or not. At the legal-political level (e.g. Internet regulation), Information Law fluctuates between decentralisation and hierarchy, between order and open development.[40]

3. Concrete examples and illustration

The foregoing abstract description calls for examples and illustration. What follows will serve to give greater precision to and illustrate the phenomenon-stamped understanding of Information Law put forward here, using a few *examples*. In the process, it should become clear what type of knowledge-gain this approach can lead to. I am also concerned to present *selected groups of problems* with which information-law research is currently concerning itself.

37 Compare, e.g., with Business Law. For further discussion DRUEY JEAN NICOLAS, Wirtschaftsrecht – leben und lehren, ZSR 2001 I, p. 2 f.

38 See, e.g., LUTTERBECK BERND, Globalisierung des Rechts – am Beginn einer neuen Rechtskultur?, CR 2000, p. 52 ff.; GREWLICH KLAUS W., Governance im Cyberspace – Regulierung globaler Netze im Systemwettbewerb?, RIW 2000, p. 337 ff.; MAYER FRANZ C., Recht und Cyberspace, NJW 1996, p. 1789 ff.; HOEREN THOMAS, Internet und Recht – Neue Paradigmen des Informationsrechts, NJW 1998, p. 2849 ff.; WEBER ROLF H., Global Village – Perspektiven der Informationsgesellschaft, in: Forstmoser/von der Crone/Weber/Zobl (Hrsg.), Der Einfluss des europäischen Rechts auf die Schweiz, Festschrift Zäch, Zürich 1999, p. 157 ff.; WEBER ROLF H., Neue Medien – Neues Regulierungsregime?, in: Weber (Hrsg.), Symposium Schluep, Querbezüge zwischen Kommunikations- und Wettbewerbsrecht, Zürich 1998, p. 37 ff.; WEBER ROLF H., Visionen über die Kommunikationsgesellschaft: Die rechtliche Dimension, sic! 1997, p. 430 ff.; FUCHS GERHARD, Globalisierung in der Telekommunikation, in: Voigt (Hrsg.), Globalisierung des Rechts, Baden-Baden 2000, p. 183 ff.

39 See, e.g., GASSER, *supra* note 19, p. 175 ff. with further references.

40 See, e.g., BURKERT, *supra* note 18, at p. 166.

a) The problem of causation

The following set of circumstances (familiar in one form or another regardless of jurisdiction) may serve by way of introduction:

> A patient undergoes an operation that, statistically speaking, for the medical layman, is very risky. The operation fails, whereupon the injured patient pleads before the court that he had not been warned of the risks by the doctor treating him. The doctor for his part raises the objection of hypothetical consent and asserts that the patient would have consented to the operation even if the risks had been explained to him.

This case throws up a multitude of complex questions having to do with a fundamental problem of Information Law, namely with the question of the *causality* of information.[41] The information-liability case cited turns essentially on how the patient would have acted had he had the risks of the operation adequately explained to him. For various reasons this is a difficult question to answer, being a hypothetical question of the type of „what would have happened if...?" As one knows from one's own experience, it makes little sense to ask such questions after the event; and the fact that, in court, *evidence* has to be shown only increases the problems.

However, the uncertainty surrounding the effect of the withheld explanation does not in essence rest on the hypothetical nature of the question but arises out of the phenomenon of information as such, because information, in terms of its significance and effect, is an *intellectual phenomenon*. Part of that intellectuality is the fact that the processing of information is always related to a concrete individual and depends on contexts. This *individual and contextual nature of the causality of information* makes it something that, as research stands at present, is impossible to prove strictly and directly.

Given this phenomenological approach, one wonders how the uncertainty here diagnosed can be overcome in terms of Information Law. The law is able to pursue various strategies to deal with uncertain causalities. For example, it can specifically employ *instruments derived from trial and evidential law* – such instruments as obligations to take part in a trial and explain oneself, the principle of „freie Beweiswürdigung" (free evaluation of evidence), prima facie-evidence,

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41 For more detailed discussion of causality of and responsibility for information as a legal problem GASSER, *supra* note 26.

reduction of the quantity of evidence, presumtion of causation, reversal of the burden of proof, etc. However, examination of the suitability of these instruments in terms of Information Law shows that they are not able to solve the problems of ascertainment associated with the causality of information „at a stroke"; their suitability is at best *partial* and *subject to specific prerequisites*.[42]

The search for a way of overcoming the problem of causality through Information Law leads to the finding that informational causality as a legal category is *normative* in nature, and in certain areas it can be justified argumentatively by weighing influence factors.[43] Here common-sense considerations as well as specialist empirical propositions play an important part in justifying liability.[44] But there are limits even to this strategy. In complex information cases the question of evaluation becomes acute in the sense that the *information norm* occupies centre-stage and the question of how the information takes effect recedes into the background.[45]

These insights gained from the information-law approach are not without *importance for legal practice*. Just three examples here:[46]

- The causal link between a misleading piece of information from the bank regarding the credit-worthiness of a potential business partner and the supplying of goods on credit by the businessman seeking the information is not susceptible of strict proof because of the intellectual nature of the facts of the case but can at best be evidenced by degrees of probability.
- The question of whether a couple used contraception, knowing the risk of failure following sterilisation, cannot, because of the individual nature of the causality of the information, be decided on the basis of the empirically established statistics of a medical specialist alone but only after taking into account the concrete conditions of the case (context) and the actors involved.

42 See the discussion in: GASSER, *supra* note 26, p. 96 ff.

43 See GASSER, *supra* note 26, p. 146 ff.

44 GASSER, *supra* note 26, p. 163 ff.

45 For more detailed discussion, see GASSER, *supra* note 26, p. 227 ff.

46 For other examples, see GASSER, *supra* note 26, p. 283 ff.

– In reaching a legal judgement as to whether an official piece of information in connection with a threat to health caused by consuming a particular foodstuff leads to consequential damages for a drop in sales, it is ultimately not so much the individual effects of the information as regards purchasing and consumer behaviour that are decisive, more the question of whether the procedures for issuing information were adhered to by the authorities (explanation of risks, careful weighing-up of information, formulation suited to target audience, etc.).

b) The problem of information overload

In the information age, mainly as a result of the new technologies, information has received a massive positive charge.[47] This positive charge, the chief manifestation of which is economic,[48] also benefits the law if it increasingly sets up *duties of information and disclosure. Transparency* is the keyword, because „sunlight is said to be the best of all disinfectants". We find intensive legal efforts to bring about transparency (market transparency) in the US and in Europe – for instance, in the area of *capital-market law.*[49] In this connection one thinks particularly of the duty, also anchored in European law,[50] of the investor to disclose large shareholdings[51] or the duty of the company quoted on the stock exchange to inform the market of any price sensitive facts which have arisen in its sphere of activity and are not public knowledge (so-called „ad hoc publicity").[52]

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47 See DRUEY, *supra* note 24, p. 47 ff.

48 From an economic point of view, see, e.g., the contributions in: Fiedler/Ullrich (Hrsg.), Information als Wirtschaftsgut, Köln 1997.

49 For an Introduction to the Swiss Financial Market Law see, e.g., DAENIKER DANIEL, Swiss Securities Regulation, Zürich 1998.

50 Cf. Council Directive of 12 December 1988 on the informatino to be published when a major holding in a listed company is aquired or disposed of (88/627/EEC); Council Directive of 5 March 1979 coordinating the conditions for the admission of securities to official stock exchange listing (79/279/EEC).

51 See, e.g., RÖTHLISBERGER ALAIN P., Disclosure of interests in shares, A comparative analysis United Kingdom – Switzerland, Zurich 1998.

52 For the Swiss Law, see, e.g. BRUNNER CHRISTOPH, Liability of Publicly Held Corporations for a Violation of a Duty to Disclose, in Particular the „Ad Hoc Publicity", Bern 1998.

> Section 15.1 of the German Securities Trading Act[53] says in part: „An issuer of securities admitted to trading on a German stock exchange must immediately publish any information which comes within his sphere of activity and which is not publicly known if such information is likely because of the effect on the assets or financial position or the general trading position of the issuer to exert significant influence on the stock exchange price of the admitted securities or, in the case of listed bonds, might impair the issuer's ability to meet his liabilities."

Clearly, for capital markets to operate transparency is decisive. However, more information does not automatically mean additional transparency, as can be shown precisely in the context of the capital market.[54] To pursue the example, in 2000 the German federal authority that supervises securities trading issued the following statement:

> „Die Zahl der veröffentlichten Ad-hoc-Mitteilungen inländischer Emittenten ist [...] von 992 (im Gesamtjahr 1995) auf 3.219 im vergangenen Jahr gestiegen. Dieser Anstieg ist grundsätzlich zu begrüssen, er dürfte auf verschiedene Ursachen zurückzuführen sein: zum einen auf eine grössere Zahl börsennotierter Unternehmen, zum anderen aber auch auf eine erhöhte Publizitätsfreude vieler Gesellschaften. Die gesteigerte Publizität bedeutet jedoch nicht in allen Fällen einen Gewinn an Transparenz für den Kapitalmarkt. Beginnend im vorletzten und verstärkt im letzten Jahr war zu beobachten, dass bei einer nicht geringen Zahl von Mitteilungen die Tatbestandsvoraussetzungen des §15 WpHG nicht vollumfänglich oder gar nicht vorlagen. Einige Emittenten setzten das Instrument der Ad-hoc-Publizität primär für Zwecke der Öffentlichkeitsarbeit ein [...]. Durch ein derartiges Publizitätsverhalten wird es der (Bereichs-)Öffentlichkeit zunehmend erschwert, die wirklich bedeutsamen Informationen schnell erkennen und verarbeiten zu können."[55]
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> *(Translation*: The number of ad hoc announcements by domestic issuers [...] has risen from 992 (in the whole of 1995) to 3,219 in the past year. This basically welcome rise is probably due to a variety of causes [...] However, greater publicity does not in every case mean a gain in transparency for the capital market. Starting the year before last and to an increasing extent last year, it was observable that in the case of a substantial number of announcements the conditions of § 15 paragraph 1 WpHG were either not present in full or not at all. Some issuers are using the instrument of ad hoc publicity mainly for purposes of public relations [...] Such a publicity stance makes it more difficult

53 Gesetz über den Wertpapierhandel/Wertpapierhandelsgesetz – WpHG.

54 See, e.g., THOMAS BEHRENS, Informationsnutzen im Aktienrecht, Frankfurt a.M./Berlin/Bern et al. 1997, p. 49 ff.

55 Schreiben des Bundesamtes für den Wertpapierhandel vom 22. März 2000 betr. Missbrauch der Ad-hoc-Publizität nach §15 Wertpapierhandelsgesetz (WpHG).

for the public concerned rapidly to identify and process information that really matters.)

This addresses a state of affairs that, particularly with regard to the capital market,[56] Information Law discusses as *the problem of information overload.*[57] The starting-point for this debate is the fact that the quantity of information available in present-day society (partly because of the law, as our example shows) is increasing dramatically, whereas the human capacity for processing information remains constant. So there is an increasing need to select. Paradoxically, an excess of information can evoke the same feeling as an information deficit. Because a person cannot be sure what information is relevant to him or her, that person feels insufficiently informed.[58]

The same applies in respect of the example of stock-exchange law cited: a rise in the quantity of data does not necessarily itself lead to transparency. Transparency means what it says. It implies a clarity of vision; it presupposes a cognitive effort, namely the perception, selection, and processing of data. Messages in the sense of ad hoc publicity cannot on their own create transparency. For the market participant, disclosure of facts initially means only *access* to information; it is an *opportunity* for transparency. Whether the opportunity will be realised, however, depends not only on the subject but also on the context. In the example chosen here it depends mainly on economic conditions, notably on the degree of efficiency of the capital market, on the media used, and on the form in which the media present the information. As regards the question of effect, we have come full circle and are back with the question of causality we looked at earlier.

The problem of *„data smog"* becomes more difficult where not only the quantity of offers of information increases but an additional *problem of quality* becomes

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56 See, e.g., DRUEY JEAN NICOLAS, Die Meldepflicht, SZW Sondernummer 1997, p. 36 ff. See also GASSER URS, Ausnahmen von der Meldepflicht: Blick auf die Praxis der Offenlegungsstelle SWX, AJP 2000, p. 39 ff. and GASSER, *supra* note 27, p. 108 f.

57 See DRUEY, *supra* note 24, p. 68 ff. and p. 136 f.; see further DRUEY JEAN NICOLAS, „Daten-Schmutz" – Rechtliche Ansatzpunkte zum Problem der Überinformation, FS Mario Pedrazzini, Bern 1990, p. 379 ff.; GASSER, *supra* note 27, p. 105 ff. with examples and further references.

58 See, e.g., MERTEN KLAUS, Chancen und Risiken der Informationsgesellschaft, in: Tauss/Kollbeck/Mönikes (Hrsg.), Deutschlands Weg in die Informationsgesellschaft, Bonn 1996, at p. 87.

acute in that the information brought to market reveals defects of quality – in other words, when it is unclear, for instance, or misleading, or wrong, or inappropriate, or late, or (as in the example quoted) not what the law requires. This question of the quality of information is another central problem on the agenda for Information Law that needs to be clarified. A particularly interesting question in this connection is whether and how conveyors of information (i.e. the media) can contribute towards solving the problems of selection and quality.

c) *The problem of law-making and its limits*

The exchange of information creates expectations. If I ask my doctor about the investigation of my state of health, I expect him to give me truthful information. In the event of disappointment, such expectations are in part revised but in part retained. Despite the occasional disappointment, I expect the doctor to answer questions truthfully. In this case *normative expectations* emerge that are resistant to disappointment. Accordingly *norms*, to stay with the jargon of legal sociologists, are „kontrafaktisch stabilisierte Verhaltenserwartungen" (contra-actually stabilised expectations of behaviour).[59] This idea of the norm created out of interaction[60] that achieves binding force through becoming involved in communication („Einlassung")[61] is of central importance for the constitution of Information Law. Information Law in this sense is crucially a law born of interaction.

> In this connection, a judgement from the Swiss courts:[62] A Swiss bank responded to a query from a foreign bank by recommending the establishment of a business connection with a company with whom it had business relations. However, rather than answer the credit-worthiness question explicitly it noted

59 LUHMANN NIKLAS, Rechtssoziologie 1, Reinbek 1972, p. 40 ff.

60 The emergence of norms out of interaction is described in WEBER MAX, Rechtssoziologie, Neuwied 1960, p. 63 ff.; GEIGER THEODOR, Vorstudien zu einer Soziologie des Rechts, 4.A., Berlin 1987, p. 54 ff.; LUHMANN, *supra* note 59, p. 31 ff.; BERGER PETER L./ LUCKMANN THOMAS, Die gesellschaftliche Konstruktion der Wirklichkeit, 16.A., Frankfurt a.M. 1999, p. 21 ff. See also KÖNDGEN JOHANNES, Selbstbindung ohne Vertrag, Tübingen 1981, p. 167 ff.

61 See DRUEY, *supra* note 24, at p. 156. For further discussion see also DRUEY JEAN NICOLAS, Privatrecht als Kontaktrecht, in: Häberle (Hrsg.), Jahrbuch des öffentlichen Rechts, Neue Folge Band 40, Tübingen 1991/92, p. 159 ff.

62 Cf. BGE 111 II 471.

> that it had not had occasion to look more closely into the company's financial circumstances hitherto since its dealings with the company had been on a purely credit footing. On the basis of this information, a foreign limited-liability company sold the Swiss company textiles in exchange for bills that were never honoured. The Federal Appeal Court here acknowledges the binding nature (resulting from becoming involved) of expectation born of interaction when it states: Anyone who is asked about circumstances of which by virtue of his position he has special knowledge shall (if he undertakes to answer at all) give truthful information where he can see that this is or might be of potentially serious consequence for the addressee.[63]

Communication possesses an inner order and gives rise to expectations that are perceived as norms born of interaction and worthy of protection. The question now arises: how do those norms find *entry into law*? A possible vehicle for this, as described by DRUEY,[64] is the principle of acting *in good faith*[65] Typical duties of conduct made legally relevant through good faith are in practice duties of explanation, information, advice, and warning.

If as a general clause good faith offers a way in for norms born of interaction, with regard to liability for information there is the question of the *filter*. This has to provide protection against a total legal comprehension of communication, because *all* communication creates expectations.[66] The need for protection against legal coverage of all contacts ultimately arises out of the idea of *freedom of communication*.[67] As a rule (particularly in Germany and Switzerland, for instance) the limit is set by the fact that deriving duties of conduct from good faith requires a *special legal connection* (so-called „Sonderverhältnis"). The difficulty, clearly, lies in the question of what a special connection should be taken to mean. Various different concepts can be distinguished, including participation in legal business, typological approaches, qualified closeness of relationship, special relationship of trust, functional approach, etc. Most of these approaches are based on the *idea of trust* in one form or another. In essence, this means that for there to be a special legal connection there has to be a certain

63 BGE 111 II 474.

64 DRUEY, *supra* note 24, p. 315 ff.

65 See, e.g., Art. 2 Schweizerisches Zivilgesetzbuch, §242 dt. Bürgerliches Gesetzbuch.

66 For more detailed discussion of self-restriction of Law, see DRUEY, *supra* note 28, C.1.

67 Freedom of communication protects fundamental human needs, see MÜLLER JÖRG PAUL, Grundrechte in der Schweiz, Bern 1999, at p. 183. Cf. JASPERS KARL, Philosophie, Band II, Existenzerhellung, p. 50 ff.

level of trust between two or more persons. However, that does not dispose of all the difficulties. The emergence of trust is itself dependent on interactions, so that the reason for and limit on legal coverage are ultimately identical. This raises the question of the „third" criterion, as it were deciding between legal obligation and non-binding obligations. Here too there is a need for research.

IV. Conclusion

The aim of this introduction has been to provide a general survey of what is understood by the concept of Information Law. It has become clear that we are dealing not with a self-contained theoretical construct but with a many-faceted discourse open to many directions and having links with various disciplines (law, information, technology, economics, politics, and society). Subsequent talks and discussion will confirm this.

But we also asked what Information Law *could* be. In the widest sense Information Law can be understood as a specific *phenomenon-stamped legal way of thinking, of looking at things, and of arguing* that through its special lens makes latent *questions and problems* visible and suggests starting-points for tackling such questions in a *phenomenologically appropriate fashion.*

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