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LAW AND INFORMATION QUALITY - SOME SKEPTICAL OBSERVATIONS

Information quality is a subject best to be avoided by law.

But it cannot: As primarily an information and communication system, law's procedures, law's products, and law's issues to be decided all painfully evoke questions of information quality: What is it, how is it to be measured, and how can it be ensured?

Procedure, product and issue are the three relations of law to information quality I will look at in this contribution. I will call these relations the pragmatic relation (information quality in the context of law's procedures), the syntactic relation (information quality in the context of law's products) and the semantic relation (information quality in the context of issues law has to decide upon). All three relations, I will try to show, are dominated by strategies of avoidance; however, the pressure on law to hold its stand in the last one, the semantic one, is on the increase, but with doubtful success. How doubtful, I will argue, is going to be part of a research program for information law.

Keywords: information quality, legal strategies, information law approach.

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1. Relations

1.1. The pragmatic relation

Law is an information processing system for decision-making purposes. This is, of course, not the entire truth. Law is also very much an information system to avoid decision making. Law has to be economic with its resources. One of the great social performances (and also paradoxes) of law is its capability to decide economically on what not to decide. Among those limiting resources, time is perhaps the most crucial, as the many time-related rules in law suggest (Luhmann 1981: 143-164). Time - as the statutes of limitation show – may even triumph over justice.

As an information processing system, law is painfully aware of its dependency on the quality of the information its processes, and as a *social* information system, law is also aware of the complexities of information quality in social communication. Law answers with self-restraint by procedure.[1] Contrary to other social information systems, such as science, law does not strive for truth; law strives for - restrained - justice. Justice – and this is how far I shall dare to move towards the abyss of definitions - relies among other elements on a fair and equal treatment which in turn relies on memory which in turn relies on the informational quality of previous decisions. But this point is more about law's products and will therefore be revisited when dealing with the *syntactic relation*. Justice also depends on the knowledgeable handling of its memory and on an adequate understanding of what the lawyers call facts, but which are only those facts which have made it through the decisions on what not to decide. Knowledgeable decision making and the adequate evaluation of facts, indeed, both call for information quality: "the right information, in the right form (...), at the right moment, at the right costs at the right place or for the right person" (Eppler 2004: 324, quotation translated by HB).[2] Above all it must be information quality *efficiently* provided under the restraints of law in operation. This means – in particular – that the time which can be allocated to strive for information quality is *limited.* There is no time for experiment; experiments cannot be repeated. All

[1] It was also Luhmann who consistently pointed to and further elaborated on the systemic necessities of procedure for law's social performance. See Luhmann (1969), and Luhmann (1993: 208 et seq.).
[2] See also in more detail Eppler (2003).

there is is a limited time for a procedure that would have to show an equal *distribution of chances* of knowledgeable input of past knowledge and adequate understanding of facts. The procedural answers are adequate procedural rules (due process) and a (limited) system of judicial review. It is the assumption of law that if these rules are observed and a review system is established, decision-making procedure will by itself produce the *best available quality of information* necessary for the decision.

At this stage some may feel tempted to read a market model into such an observation, a model not so different from that magic model according to which a market of free opinions would eventually generate truth. This again is a door we had better keep closed for the sake of the economical use of space available for this contribution.

Rather, I will reframe my observation more pointedly in view of the social expectations law is faced with: The observance of procedural rules will assure - as much as possible at least which is already very much - the likely *acceptance* of a decision. This adds a socio-psychological value to the economic assumption of law's self-restraint: Scientific theories have a hard time living on within science once they have been falsified. But law has to continue living with false decisions. Life has to go on after a court case has been lost.[3] Law wisely provides a rational pattern to cope with losing *exactly because* of its own limitations: Against the obvious limitations of its procedure, losing does not mean I am wrong - it could mean that I just could not be seen to be right within the given restraints of that procedure. It has to be immediately added, though, that in spite of this insight, law does not hesitate to produce decisions with irreversible consequences, and for some of them such rationalizations will sound rather hollow. Again, a door better kept closed, although reluctantly so.

We have now arrived at a somewhat cynical view on legal procedure: If the procedure is duly followed it will produce an acceptable decision. Information quality is no longer an issue. Or, the procedure is deemed to produce that much information quality as it is necessary, giving all participants in the procedure the opportunity to maintain their own assumptions on the quality of the information.

But this is, once again, not the whole story: Within its economic limitations legal procedure does use information quality assurance methods but always with an eye to their effects on *acceptance* rather than on *qual-*

[3] Lost cases still contribute to law's knowledge. It may even be that law develops a great deal of its argumentative structure over lost cases (Lobel 2003).

ity itself. This is why such information quality assurance methods in legal procedure share so closely the information quality concepts, if not vices and prejudices, of its time: Legal procedures borrow heavily from what is en vogue in other social systems at the time they operate, such as invoking the signs of the gods, or more generally borrowing from religion. Of course, today law seems to be more inclined to borrow from science. The emphasis is on borrowing from *contemporary systems*. Law's interest is not so much focused on improving the quality of information but on the probability of acceptance. Of course, relicts remain. Law is very much like a cliff, with several layers of time visibly packed over each other: Under each "current approach" to achieve acceptance past approaches remain visible, such as when the scientific expert gives his scientifically reasoned testimony under oath, synchronizing the asynchronous.

This somewhat instrumental way to handle information quality, in my view, deserves the term "pragmatic."

1.2. The syntactic relation

But there is another relation between law and information quality which I have briefly mentioned above: Law's decision *making* relies on past decisions, made by courts or legislators. As regards its own output, law is not just a social information system, it is a largely autolystic information system: it feeds itself on its products. This approach to its own production is again a response to the social expectations it is faced with: Justice, as already indicated above, requires equality, equality involves comparing, comparing over time requires remembering, remembering breeds precedent, and precedents require the recording of past decisions. Thus, law has to remember its own decisions with some authenticity and consistency. Consequently law has to invest its (limited) resources not only in decision *making* but also in decision *recording* and *retrieval* – including resources for such "decisions" which are made by legislators in the form of new laws. This is why law seems somewhat obsessed with the quality of information *recording*, rather than with the quality of the information recorded. This is also what makes law such an ideal customer for the offers of today's information and communication technology.

Law and information quality, in this case, is not so much a relation between the sign and the signified, or between "reality" and its "representation," but rather a formal relation between information produced in the past and information currently presented. While this may still be seen

as being part of a broader concept of information quality, I would prefer to call it a merely syntactic understanding of information quality.

1.3. The semantic relationship

But that is not yet all there is. Law has yet another relation to information quality. This relation is not so much concerned with decision *making*, nor with information *recording,* nor even with information *communication.* It seems to have something to do with what we may call the *meaning* of information, with its substance: Law has to face information quality proper. This is why I call this the *semantic* relation to information quality.

This is not a totally new phenomenon. Information quality as such has previously been an issue for law to decide upon, for example, "false" advice/information was the issue to be decided. One way to deal with such questions has been to fall back on the pragmatic procedural solution described above. One might even question in principle law's capabilities to handle as fluid and as complex an issue as information - at least comprehensively (see, e.g., Druey 1995). Since information quality issues affect such "deep" questions as causation or contextual interpretation and understanding, law has taken refuge to procedural rules. Rather then deciding on causation, it has distributed the burden of providing evidence and the burden of what happens when such evidence cannot be produced (see in detail Gasser 2002).

Another approach seems to be more substantial. Truthful to its own tradition to seek economically for solutions, law has largely relied on typologies of behavior, including informational behavior, provided from the outside by the relevant professions. When judging the informational behavior of a medical doctor, for example, law would invite evidence from those representing the medical profession and its code. This approach may be a step closer to information quality proper - but it is still a solution provided from outside by a prefabricated code with its own views on causation.

2. Changes

In our "information attentive" societies such dealings with information quality are deemed to be insufficient. The "professional standard" approach loses its grip: The demarcation lines between professions are becoming blurred when one focuses on the informational contributions of these professions. I remember with fondness the touching but largely

unsuccessful attempts of computer professionals to arrive at a code of ethics without overlap with codes of other professions using computers (Burkert 1986). Information is commoditized and mobilized, and in this process it has to be detached from personal reputation, professional roles, and guild frameworks. The functions of these settings are taken over by the brand. The brand replaces personal expertise and responsibility, and the question of the informational integrity of a professional service is turning into issues of trademark and consumer law.

This is just one small example of ongoing transformation processes. The "discovery of information" and the background noise of information and communication technologies create increasing pressures on social systems, including law, to adapt. Highly complex decision systems such as governments and economies require – because of this very complexity – precautionary measures. Part of these measures implies switching the attention from the decision to the informational input of such decisions. Law is following suit: Information per se is becoming the object of regulation and litigation. For example in administrative law, the right to demand and contest information was bound to contest the decision which had built on that information. Increasingly, however, an independent right to demand and even contest information is developing (Schweizer and Burkert 1996). In civil law we observe similar tendencies to supplement concepts of secondary information rights attached to primary legal positions (like ownership) by independent primary information rights (as in the context of data protection rights).

In such a climate, law's tendency to approach information quality issues with pragmatic and syntactic strategies is viewed with discontent. Pressure is increasing on law to become more "semantically" oriented. "Information conscious" legislation increases – data protection has been mentioned, access laws should be mentioned, information declaration laws in the context of consumer protection may been added, and information quality assurance laws have recently be added (I will come back to this gem of "information law.) Information-related litigation follows suit.

3. Responses

3.1. Traditional

It is, first of all, difficult to state if law is now called upon to decide on information issues proper really more frequently than before.

Information issues may just have been dressed up differently in the past. Nor is it easy to say whether indeed all new information legislation contains challenges for dealing more directly with the semantic side of information quality. Access laws so far have only required new patterns of information distribution and - as control mechanisms - even reacted adversely to "improving the quality" of the information before it is handed over to the requester. All that has been required was syntactical quality. And even if law were now more frequently in the service of exploring the semantic side of information quality, it is not clear whether law is changing its approaches. It may be assumed, since the social resource allocation for law does not seem to have changed much, that law will not change much either. So it comes as no surprise that law seems to dodge the challenges of change. This process may be observed, for example, in what had been called "internet law" or "cyberspace law": After some upheaval, the "new" issues are at the brink of being absorbed into law's traditional disciplines. Law seems to be successfully falling back into its traditional problem solving modes unperturbed by any claims for the special-ness of information or information quality in particular. The pragmatic and syntactic modes seem to prevail.

3.2. Indications of Something New?

There are, however, in my view, some tendencies which call for further attention: Two phenomena will have to suffice to indicate why such attention is called for.

3.2.1. The extra-legal phenomenon

The first phenomenon brings us back to internet law which I had sweepingly discarded as now being absorbed into the law as we had known it. Internet law has at least brought one - as it seems - successful institutional change: the rise of domain name dispute resolution outside the established institutions of law.[4] Indeed, while dispute resolution explicitly keeps open the door to traditional dispute resolution, and while its pro-

[4] See, e.g., the domain name dispute resolution process offered by the World Intellectual Property Organization (WIPO) applying its Uniform Domain Name Dispute Resolution Policy (UDRP) and the administration of disputes through the WIPO Arbitration and Mediation Center (http://arbiter.wipo.int/domains/guide/index.html - 30 August 2004).

cedures mimic law's procedures, the success of this institution lies in its own economy, which prevails over the pragmatic economy of law's procedures. While this sort of dispute resolution may not be called a process for resolving information quality issues per se, it at least touches upon them where the procedure asks about the informational potentiality of a domain name to mislead users.[5] This institutional success, however, indicates a search for social solutions to handle information (quality) issues outside the proper institutions of law. Whether these solutions will finally bring about a better assessment of semantic issues, or whether they are favored only precisely because they are even more effective in leaving out semantic issues than law's pragmatic procedures, is an open question.

3.2.2. The hijacking phenomenon

The second phenomenon may be a singular observation or the beginning of a trend among dealing with information quality. We see the legislator responding to information attentiveness with legislation in which information quality plays an explicit role. I have already argued that in the long run such approaches would increase the pressure on law to become more "semantically" inclined implying, however, at the same time that law would continue to avoid dealing with semantics directly.

Now we see the legislator almost doing the same thing: borrowing from the pragmatic approach of law while pretending to solve semantic problems of information quality. The example in question is the US federal Information Quality Act of 2001.[6] This act has already received an intensive analysis elsewhere (Gasser 2004) and continues to be the focus of controversy as to its actual impact.[7] In the context of this contribution it is sufficient to state that the act requires the Office of Management and

[5] The Uniform Domain Name Dispute Resolution Policy (UDRP) requires as one condition of a complaint to describe " the manner in which the domain name(s) is/are identical or confusingly similar to a trademark or service mark in which the Complainant has rights;" (UDRP 3 b) XI (1)) - UDRP at http://www.icann.org/dndr/udrp/uniform-rules.htm#5 - 30 August 2004).

[6] Section 515 to Public Law 106-554.

[7] See, e.g., Office of Management and Budget, Office of Information and Regulatory Affairs, Information Quality: A Report to Congress. Fiscal Year 2003, at http://www.whitehouse.gov/omb/inforeg/fy03_info_quality_rpt.pdf - 30 August 2004, and a critique in: OMB Watch, The Reality of Data Quality Act's First Year. A Correction of OMB's Report to Congress, at http://www.ombwatch.org/info/dataqualityreport.pdf - 30 August 2004.

Budget (OMB) to set guidelines for agencies to in turn set guidelines for their own operations to ensure the information quality of their output. In addition these agencies are required to establish procedures which allow challenging the output if it does not seem to comply with these guidelines.

At first sight, this regulation may indeed be read as an attempt to finally tackle the semantic dimensions of information produced by administrative agencies. Looking more closely, however, at the way in which to ensure information quality, we find the same avoidance strategies: Agencies are invited to borrow from or to involve directly external systems of information quality assurance, namely scientific review processes (i.e. peer review). If conflict persists information quality issues are channeled into the typical administrative appeal procedure, eventually to be handed over to the courts.[8] So, in essence, the new legislation does not ensure a substantive debate of information quality within the administrative system, but contains the invitation to externalize it. The new legislation, however, does produce possibilities of time management but again outside the administrative system: It gives those "affected" by regulation the opportunity to delay the regulative impact by retransferring issues to the scientific system for reproduction at that system's own pace effectively slowing down adverse regulation.

So while indeed this type of legislation seems to meet the criteria of information quality conscious legislation, its main effect still seems to be political. The legal solutions provided remain the same: a pragmatic procedural approach to a semantic problem. But still a step has been made.

4. Systematizing Curiosity: the Information Law Approach

The question of information quality has led us to touch upon general mechanisms of law to deal with "new" problems. Judging from what has been said there seems to be a tendency in law to purposely slow down processes of change or at least to absorb change, and, in the case of information quality, to reduce complex semantic issues - almost like a Turing

[8] Section III.3.ii: of the OMB-Gudielines "If the person who requested the correction does not agree with the agency's decision (including the corrective action, if any), the person may file for reconsideration within the agency. The agency shall establish an administrative appeal process to review the agency's initial decision, and specify appropriate time limits in which to resolve such requests for reconsideration."

machine - to syntactic (and pragmatic) issues. However, I have also pointed to some phenomena which may indicate change and information quality issues may indeed serve as a titer for indicating "antibodies" at work.

Under the non-exclusive name of "information law," a number of investigations are currently being bundled which seek to approach the relations between information and law more systematically. It does not seem to have been merely by accident that several proponents of such an approach had started their joint reflections on the issue of information quality (see, e.g., Gasser 2004).

Information law stands, in my understanding, for a specific manner of looking at phenomena which appear at the intersection of the social subsystems of law, technology, economy and politics, and combines legal methods and broad social, economic and political communication analysis (the approach is described in greater detail by Burkert 2004). Although technology itself is not its main interest, the approach takes place at a moment when the impact of information technology can be well-observed. There is an opportunity therefore to arrive at insights not only into the bi-polar relations between information and law, but also into the triangular relations among law, information, and technology.

This approach will also have to show - not least with regard to information quality - whether it is capable of developing substantive normative notions on the handling of information in our societies (including reflections on the desirability of such notions). Law may perhaps perform far more flexibly and adequately if it keeps to the pragmatic and syntactic handling of semantic issues. The information law approach will not - and perhaps should not - come up with axioms of a "Natural Law of Information Handling" but it might finally get involved in an iterative process to better clarify its functions in an Information Society.

References

BURKERT, H. (1986). Ethik der Informationsverarbeitung. In: SCHULZ, A. (ed.). Die Zukunft der Informationssysteme. Lehren der 80er Jahre. Berlin: Springer: 654-669.

BURKERT, H. (2004). The Information Law Approach: An Exemplification. In: GASSER, U. (ed.). Information Quality Regulation: Foundations, Perspectives and Applications. Baden-Baden: Nomos: 75-90.

DRUEY, J.N. (1995). Information als Gegenstand des Rechts, Baden-Baden: Nomos.

EPPLER, M. (2003). Managing Information Quality. Increasing the Value of Information in knowledge-intensive Products and Services, Berlin, Heidelberg, New York: Springer.

EPPLER, M. (2004). Das Management der Informationsqualität in Neuen Medien. In: STANOEVSKA-SLABEVA, K. (ed.). The Digital Economy – Anspruch und Wirklichkeit. Festschrift für Beat Schmid. Berlin, Heidelberg, New York: Springer: 323-338.

GASSER, U. (2002). Kausalität und Zurechnung von Information als Rechtsproblem, München: C.H. Beck.

GASSER, U. (ed.) (2004). Information Quality and the Law, or, How to Catch a Difficult Horse. Some Observations on the Emergence of U.S. Information Quality Law. In: GASSER, U. (ed.). Information Quality Regulation: Foundations, Perspectives and Applications, Baden-Baden: Nomos: 209-242.

LOBEL, J. (2003). Success without Victory: Lost legal battles and the long road to justice in America, New York:New York University Press

LUHMANN, N. (1969). Legitimation durch Verfahren, Neuwied/Berlin: Luchterhand.

LUHMANN, N. (1981). Die Knappheit der Zeit und die Vordringlichkeit des Befristeten. In: LUHMANN, N. (ed.). Politische Planung. Opladen: Westdeutscher Verlag.

LUHMANN, N. (1993). Das Recht der Gesellschaft, Frankfurt am Main: Suhrkamp.

SCHWEIZER, R.J & BURKERT, H. (1996). Verwaltungsinformationsrecht. In: WEBER, R. H. (ed.). Informations- und Kommunikationsrecht, 2th ed., Basel: Helbing und Lichtenhahn: 1-45.