Preface

The Handbook which we present is an attempt to throw light on the latest developments in EU Internet law. There are many reasons for wanting to do so. The Internet has brought about unprecedented changes to modern lives, creating a connected society, building opportunities and spurring innovation but also radically opening up the question of how to design and apply legal rules in a connected world. More obviously, this means choosing whether to legislate or not. Indirectly, but perhaps more importantly, it means choosing the right kind of rule-making, relying on soft law and reflexive law or even replacing the regulation with governance.

It makes sense to talk about EU Internet law because a very significant percentage of laws and regulations that apply to the Internet come from the EU. This is true both on the telecommunications (infrastructure) level and at content production and consumption level. In many cases, the EU intervention comes in the form of minimum harmonization combined with the need for mutual recognition of other Member States’ laws, as is the case with the E-Commerce and Copyright Directives. In other cases, this intervention is full harmonization which pre-empts further national law-making, as is the case with the proposed Connected Continent Regulation or the Unfair Commercial Practices Directive.

The reality of a separate EU body of laws (irrespective of whether we call it Internet, E-Commerce or IT law) applying to the Internet world has at least two significant consequences. The first is that the EU has an opportunity to create a coherent model for Internet regulation – a model which it can offer as an alternative to regulatory efforts in the United States. The second is that the EU has the ability to bring coherence to a market connecting over 500 million people. As will be seen in the contributions in this volume, neither of these two aims have always been successfully fulfilled.

If a common thread connecting all the contributions in this volume is to be found, then it must be the fact that they all question the extent to which the Internet forces us to rethink the existing legal concepts and institutions. The sections in this volume as well as individual articles have not been selected for theoretical reasons. Often, there are no common doctrinal denominators that connect them. On the contrary,
topics like trade mark law and hate speech may appear to stand far apart to a traditional lawyer. Nevertheless, the areas and the topics chosen are guided not only by practical matters (because the issues discussed are simply the ones courts are invited to decide on) but also, and possibly primarily, because these particular areas demonstrate most vividly the need to rethink traditional non-Internet law. Thus, we do want to know whether we can download and re-use content found on the Internet but we also want to know whether the bases on which our copyright laws rest are sound. We do want to know whether the courts will take jurisdiction for cases where defendants are remotely operated websites but that also forces us to think about the basics of the civil court system. We may want to know whether there is a legal obligation to make websites accessible to the disabled but that also means rethinking access in general. The Internet may open up unprecedented possibilities for privacy violation but that also means that regular privacy is becoming a subject of importance. And thus, talking about Internet regulation inevitably opens up difficult questions concerning production and design of legal rules in a modern world.

In the EU, different aspects of law as they apply to the Internet are subject to both official review and intense public scrutiny, while being influenced by dynamic case law at national or EU level. These are tell-tale signs of regulatory turmoil. In some cases, the legal reviews are a result of the dramatic directions which modern life has taken. Nowhere is this clearer than in the area of privacy and data protection where Edward Snowden’s startling revelations of surveillance prompted calls for a fundamental overhaul of the way in which the EU protects privacy. More often, however, the reviews are an integral part of the directives and regulations in question which sometimes even have built-in mechanisms that trigger such reviews at regular intervals. The Copyright Directive, for example, in recognition of the speed with which changes are brought to the area, calls for reports on the application of the Directive every three years. Such mechanisms should not come as a surprise and are to be taken as recognition of the dynamics of Internet development.

The topics presented in this Handbook concentrate on what the authors believe are the five big focal points of modern Internet regulation. Part I looks at general EU policy-making in Internet law, including the currently disputed net neutrality and the ever-diminishing gap between telecoms and media law. Part II on intellectual property law looks at copyright, trade mark and patents and their role in enabling (or hindering) Internet development. Part III on jurisdiction and choice-of-law looks at how the lawmakers and courts solve the ever-present problem of global content in local courts. Part IV on Internal Market and electronic
commerce looks at a cluster of issues concerning sales on the Internet, including marketing, consumers and the role of social media. Finally, Part V on citizens and the Internet highlights those problems which are closest to ordinary and vulnerable users, including free speech, accessibility and privacy.

PART I: POLICY AND GOVERNANCE

Formulating Internet policy is a task that involves thorough understanding of the Internet as a legal space. This, in turn, means knowing Internet architecture and its regulatory potential, appreciating the limits of the current international law framework and, as is particularly the case in the EU, knowing the role of individual nations and the boundaries of their ability and ambition. Europe needs policy leadership in the digital age. A look at the modern EU can document a desire for a regulatory reform but seldom proper leadership. The rules inherited from other activities hinder policy formulation. In Europe, telecommunications, electronic commerce, intellectual property and privacy regulations have all arisen separately, diminishing coherence and increasing confusion.

Gerald Spindler gives a comprehensive overview of the EU policy-making efforts in Internet regulation. Starting from the Digital Agenda 2020 as a basis, he analyses complicated European efforts in each of the seven policy areas. Although the EU law-making exercise began with the effort to achieve a Single Market in the digital world, it also concentrated on other important areas, such as interoperability, cybercrime, investment and research and innovation. Particularly important are the efforts in areas not traditionally thought of as falling within regulatory competence – digital literacy and skills and Internet-related societal changes. In the latter, topics such as energy, ecology, health or e-government have been the target of vigorous law-making activity encompassing both soft and hard law.

It is a fundamental feature of the Internet that it does not have centralized governance. This is true both for the underlying technology and for policies for access and usage. The seemingly unregulated nature of the early Internet has resulted in its success but has in more recent years been replaced by a combination of approaches and assertions of competence. Calls for a globally governed Internet are heard with increasing frequency and governance issues of importance, such as the preservation of net neutrality, are becoming the focus of public attention.

Christopher Marsden explores European and American policy issues concerning network neutrality which is a growing policy controversy
relating to traffic management techniques used by Internet Service Providers (ISPs), and which affects all Internet content and user rights. Network neutrality relates to the manner in which access providers employ Quality of Service (QoS) across their networks, and how this in turn improves or degrades the end-user’s experience. In the absence of regulatory oversight, ISPs could use Deep Packet Inspection (DPI) to block some content altogether, if they decide it is not to the benefit of ISPs, copyright holders, select users or the government. On 11 September 2013, the European Commission adopted a proposed regulation that would substantially impact and harmonize net neutrality, allowing priority to ‘specialized services’ and generally preventing ISPs from blocking or throttling third-party content. While both European and US proposals affecting network neutrality are being fiercely debated in 2014, the adoption of legislation in many advanced consumer broadband-adopting nations suggests that net neutrality is a permanent feature of the Internet law landscape in the future, and that European legal scholars need to pay close attention to this debate as it proceeds through its second decade of development.

The fragmented nature of Internet policy-making and governance in the EU is also apparent in the way transport and content layers are regulated. The regulatory framework for telecommunications is made up of directives and other instruments adopted and revised under the telecommunication framework. The electronic commerce, intellectual property, civil jurisdiction, consumer protection, privacy and other ‘content’-related issues are adopted under different frameworks. The existence of the multiple layers complicates matters logistically but also on a more fundamental level as convergence of technologies makes applying different regulatory layers increasingly difficult.

Søren Sandfeld Jakobsen discusses the legal concepts of information society services, electronic communications services and audiovisual media services in the light of the convergence between IT, telecoms, and media technologies and markets. The three concepts are regulated in three different regulations: the E-Commerce Directive, the Telecoms Directive Package and the Audiovisual Media Service Directive. It is concluded that the regulatory regime ‘most likely’ still makes sense due to fundamental differences between the characteristics of telecoms, media and Internet services. It is, however, found that the three different sets of rules and the rapid technological development create a number of delineation problems, legal uncertainties, and inconsistencies.
PART II: INTELLECTUAL PROPERTY LAW

The European Commission engaged in a comprehensive intellectual property law harmonization project about 20 years ago. In spite of this, intellectual property regulation in the EU continues to be fragmented. Although current harmonization remains functional, modern digital society places significant challenges before IP regulators. Put in simple terms, the question is whether the present framework provides a sound protection for creativity and innovation while balancing other societal interests. The issues have often been portrayed in black and white in the public debate, with the colourful images of users and rightholders each attributing malice or opportunistic intent to the other side. In reality, this vibrant debate underlines the deeper dilemmas which the EU regulators face and which go to the very nature of original IP regulation and its purpose in society.

Tatiana-Eleni Synodinou explores how copyright’s history plays a role in current efforts to regulate copyright. She points out that technology forms part of regulation itself and that copyright law initially reacts to new technologies by resisting them and only later by embracing them. She warns that technology has spurred additional protection in terms of scope, content, and duration but not in respect of limitations and exceptions. The copyright regulation’s historic roots must be understood if we are to respond to the challenge of regulating modern technologies. Any future codification, in whatsoever form and by whatever forum, must recognize these roots as well as the multiplicity of interests, particularly those interests that did not exist at the time when fundamental copyright concepts were formed.

Christophe Geiger and Franciska Schönherr explore limitations to copyright in the digital age. Limitations, they point out, are not only an incidental part of the copyright system but a critical element that enables access to culture and stimulates creation of new works. The present EU system of copyright exceptions is territorially fragmented and ill-equipped to serve the needs of the digital environment. The limitations in the present EU Copyright Directive are largely optional in nature but are also presented in the form of an exhaustive list, both factors limiting potential uses in the digital world. Adapting the limitations for the digital world may take place through more extensive interpretation or the changes in which the three-step-test is applied and interpreted. In addition to this, however, legal certainty must be obtained, possibly through making the exhaustion list mandatory or introducing a fair-use-type clause. Finally, the authors suggest that an increased focus on
remuneration through legalising certain statutory uses and enhanced collective rights management may be part of the answer.

Ilanah Simon Fhima’s chapter looks into the main ‘testing ground’ for trade mark law’s operation on the Internet – the CJEU’s recent case law on trade marks used in advertising keywords. She emphasizes that the Court is keen to insulate both search engines and online marketplaces from liability while holding purchasers of keywords liable. The motivation for such a position may come from the desire to stimulate innovation but has lead to significantly less regulation than in the United States. Simon Fhima points out that the true impact of the advertising keywords cases will not be known until they are tested in detail in national courts.

Philip Leith discusses the controversial subject of software patents in Europe, which have existed for a long time under the European Patent Convention. Although the Convention excludes software patents ‘as such’, they could be granted as long as there is sufficient ‘technical contribution’. The present examiner-led system effectively monitored by the Boards of Appeal of the European Patent Office failed to be threatened by the abortive EU Directive on Computer Implemented Inventions but will have to be revisited under the lawyer-dominated Unified Patent Court.

PART III: JURISDICTION AND CHOICE-OF-LAW

The modern Internet operates globally, opening up the question of suitable forums and appropriate applicable laws. Corporate clients face exposure in multiple unfamiliar fora while users face the need to efficiently resolve disputes over goods and services provided on the Web. The EU has harmonised a significant proportion of private international law, with civil jurisdiction and choice of law in contract and tort both being covered. Recent years have seen a rise in the number of CJEU cases attempting to resolve the question of how EU private international law applies to the Internet.

Jane Ginsburg’s chapter discusses the important problem of ‘making available’ to the public in the context of civil jurisdiction and the applicable law. Suing for copyright infringement when works have been distributed over the Internet and accessed in multiple jurisdictions depends on the approach to localization of the act of ‘making available’ and on an answer to the question of what is the ‘efficient’ localization of the wrongful act’s impact? In the USA, in some instances at least, courts have been prepared to act if the economic harm is felt in their
jurisdiction, rather than because the act that initiated the infringement was there. In the EU, the CJEU’s decision in Football Dataco suggests a similar approach. There, the court concentrated on the markets to which the defendant corporation was directing its services, rather than on the state where the servers were located.

Ulf Maunsbach discusses the concept of party autonomy which is an intrinsic part of private international law that allows, as a starting point, the parties to choose jurisdiction and applicable law. With examples concerning intellectual property rights and consumer contracts, the author concludes that both Member State and weak-party interests need to be revised and transformed into a modern context. It is questioned whether the weakness of a party is to be measured today by similar means as it had been before the emergence of the information society. The author suggests that the extent to which intellectual property rights still are to be perceived as national rights should be reconsidered.

Sandrine Brachotte and Arnaud Nuyts analyse jurisdiction over cyber torts in the EU. They point out that the CJEU has devised a new jurisdictional framework for cyber torts under art. 5(3) of the Brussels I Regulation. The framework is a result of a series of recent cases involving online infringements of personality rights, trade mark, databases and copyright. The novelty lies in the enhanced guidance the Court gives in respect of how websites affect the availability of forums in civil litigation. In personality rights infringement cases, for example, the court suggests that, in addition to the usual places, proceedings may also be brought in the courts where the claimants have their centre of interest. In trade mark infringement cases, the approach is that jurisdiction should also exist in cases where the defendant advertiser is established. Although the Court will further contribute to this matter, the existing interpretation of art. 5(3) has acquired decidedly new outlines.

Zheng Sophia Tang takes a look at private international law mechanisms for consumer protection. The EU protects consumers extensively, by providing for the jurisdiction of the courts and applicable law of countries familiar to them. These solutions have been criticized in the past for potentially exposing businesses to litigation in unknown forums, but the author emphasizes the low frequency and consequently diminished importance of such disputes. Moreover, protective provisions do not get activated without a degree of ‘targeting’ in the consumer’s state. This targeting, however, is never mere ‘accessibility’ to a website and businesses have the option of limiting their exposure through careful design.
PART IV: INTERNAL MARKET AND ELECTRONIC COMMERCE

The Internal Market is a cornerstone in the European Union. Electronic commerce, supported by harmonization, plays an important role in realizing the idea of one single market for more than half a billion people. The focus in this part is on the (harmonized) legal framework for cross-border activities in the Internal Market – even though one must realize that cultural and linguistic differences often present more significant barriers to cross-border trade.

Much attention has been directed towards creating a legal framework that supports consumers’ confidence in cross-border trade. This is, however, a legal framework that on some points is too rigid in its focus on information requirements and that places a burden on traders without equivalent benefits for consumers. Several contributions revisit discussions concerning the regulatory framework for telecommunication services and content services but this includes the contributions dealing with intermediary liability and social media.

Andrej Savin talks about the Digital Single Market, which seems to be invoked in almost all Internet-related EU documents but is, in fact, a complex and confusing concept developed in different individual contexts by different Directorates General. He points out that the Digital Single Market-dimension in the EU is split between the telecommunications framework and the content/services framework, but that the reality of Internet use increasingly requires convergence. The paradox is that the Digital Single Market, by the EU’s own admission, remains an unachieved goal while at the same time it functions relatively smoothly in a number of areas. The truth may very well be that other paradigms will be more useful in the future development of an Internet-based society.

Andrés Guadamuz analyses intermediary liability in modern EU Internet law. He emphasises the importance of intermediaries in their role as hosts and carriers of information but also the threats presented by increased surveillance and the large companies’ desire to access user data. Guadamuz looks at the recent efforts to erode the general insulation from liability which the EU law provides. Among these, particularly significant are attempts to force intermediaries to introduce blocking or filtering of certain types of content. The Court of Justice has robustly protected this liability insulation, and in particular the lack of obligation to monitor, thus setting the future boundaries of EU filtering.
Hans-W. Micklitz writes about the concept of European regulation of B2C Internet sales. The Internet sale represents the nearly complete Europeanization of a field of contract law, in which only the key questions of contract making (offer and acceptance) remain based on national private law, whereas ‘everything that is practically relevant to the consumer’ is regulated by EU law. However, the EU Directives on Internet sales do not provide a self-contained set of rules which can be integrated coherently into the national systems. The author discusses relevant directives and case law with regard to market access, market behaviour, contracting, including rights and obligations, and remedies. It is noted that in a holistic perspective, ‘enforcement’ forms an integral part of the regulation of Internet sales – and this subject is also treated in the chapter.

Arno Lodder gives a comparative overview of EU information requirements in electronic commerce. These requirements are meant to instill the feeling of trust in both consumers and businesses, each of which are meant to be able to understand who they are dealing with in electronic commerce and under what circumstances and conditions. The author demonstrates, however, that the information requirements really put a burden on the service provider while not necessarily helping the consumer. In other words, the required formality is onerous but not helpful. Instead of quantity, the advent of mobile technology should make us focus on quality and the essential information that can substantively influence the consumer.

Christine Riefa and Christiana Markou write about online marketing with particular focus on keyword advertising and behavioural advertising. In the context of keyword advertising, the case law is discussed with emphasis on the CJEU decision in Google France where it is found that trademark infringement will be constituted where the ‘average internet user’ is likely to have difficulty ascertaining the origin of the goods or services (where ‘the essential function of the trademark is adversely affected’). Behavioural advertising utilizes various forms of cookies to track and profile users in order to target advertising. A recent move to opt-in policies for cookies is welcomed by the authors, but it is found that the law needs to be backed by further tools, including, for example, the use of compulsory default browser settings that block tracking cookies.

Jan Trzaskowski discusses legal aspects of businesses’ use of social media services for commercial purposes, taking Facebook to illustrate and discuss some of the major points. The focus is on identification of commercial intent, individual communication, and the (ab)use of private individuals as a means of promoting brands or products. He also
discusses the role of terms of use as part of the contractual basis for using social media services. It is found that the identification of commercial intent must be clearer in situations where consumers are not likely to expect commercial content (for example, in the timeline on Facebook). It is also found that the European ban on unsolicited electronic mail is not likely to apply to individual messages in social media services, but that the businesses must respect the users’ wish not to receive such messages (opt out) – and of course respect the terms of use which are likely to require consent before sending.

Jos Dumortier and Niels Vandezande write about legal evidence in a digital context and start out by noting that the impact of both electronic contracts and electronic signatures has been greatly overestimated. Contracts in the digital environment primarily consist of confirmation of intention and agreement with terms of sale by clicking on a button or entering a PIN code or a passphrase. As a result, there is not so much need for a documentary exchange as there is for a documentation of the underlying processes. The authors argue that the proposal for a regulation on electronic signatures, which largely maintains the legal framework set by the 1999 Electronic Signatures Directive, should seek a new approach that takes into account the inherent principles of the digital paradigm. The authors suggest a ‘black box’ solution, allowing parties to adopt and adapt the technologies needed in their particular situation.

PART V: CITIZENS AND THE INTERNET

The Internet and various forms of social media have enabled private individuals to communicate and collaborate in new and more influential ways. With these tools, citizens play a new creative role through crowdsourcing and they are empowered to speak out and act in unison. However, when the platforms are provided, frequently free of charge, the users are often a substantial part of the service provider’s product; the value of these tools being the users and (the result of) their behaviour. The rights retained by the platform providers are regulated in the terms of use, which may allow the provider a share of the creative outcome or the right to use information about the users and their behaviour with a view to sell and target advertising. This raises issues relating to, inter alia, the processing of personal data. Freedom of expression also plays an important role when people speak out publicly, in particular in instances of hate speech. In the previous part of this volume, the concept of vulnerable consumers is discussed. Individuals, however, may also be vulnerable in their capacity of being citizens – an issue relevant in the
context of ‘website accessibility’ which deals with, for example, impaired users’ access to benefits from electronic communication.

Emily Weitzenböck writes about crowdsourcing and user empowerment. Technology has played a crucial part in crowdsourcing which entails outsourcing of tasks to an undefined, generally large group of people in the form of an open call. Some crowdsourcing sites enable anyone who comes up with an idea for a new product or service to submit the idea to a large community for discussion, input and feedback. The author examines the underlying legal framework (terms of use) of six case studies of crowdsourcing platforms with particular attention to how new intellectual property created is regulated between the crowd participants who contributed to its creation, and the crowd platform. Often idea submitters have to either assign intellectual property rights or give extensive licensing rights to the platform, although not totally relinquishing all rights. There is thus a symbiotic relationship of mutual benefit and dependence between the crowd and the crowdsourcing platform.

Alisdair Gillespie discusses legal aspects of hate speech with particular focus on issues of racist and xenophobic material. It is noted that the number of websites that include hate speech appears to have increased in recent years including popular lexica where content is presented in a ‘positive’ rather than ‘negative’ way to ‘rebalance the debate’. The author presents and discusses various approaches to defining hate speech which in the EU is inextricably linked to human rights concepts with the Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law as its centrepiece – even though it is currently unenforceable and lacking detail.

Oreste Pollicino and Marco Bassini discuss how the coming of the Internet has affected the exercise and the judicial protection of the freedom of expression. They analyse freedom of expression in the US and the EU, that is, the First Amendment to the US Constitution and art. 10 of the European Convention on Human Rights and Fundamental Freedoms, respectively. It is found that the courts’ interpretation of art. 10 of the European Convention on Human Rights and art. 11 of the Charter falls short of considering the information society as the space of freedom of speech – the main reason being that other fundamental rights, including intellectual property rights, must be protected and balanced with freedom of expression.

Colette Cuijpers, Nadezhda Purtova and Eleni Kosta examine how the proposals for a Data Protection Regulation deal with the challenges of modern data processing. The chapter focuses on the proposed changes to
some key traditional data protection concepts and on some novelties, such as accountability, the right to be forgotten and data portability, introduced by the draft Regulation. Overall, the Parliament text is found to be more promising than the current regime, inter alia, because traditional concepts seem to strengthen the position of the data subject, due to more explicit obligations for data controllers and data processors.

Catherine Easton analyses the European Union’s law and policy relating to website accessibility, that is, an individual’s ability, once a connection to the Internet has been achieved, to access and interact with information. EU legislation relating to website accessibility can be found in its general non-discrimination supporting principles, internal market provisions, and in the wider protection of fundamental rights. In January 2011 the Commission announced proposals for a European Accessibility Act that is set to be complemented by a proposed Directive on the accessibility of the public sector bodies’ websites. It is found that previous initiatives have not brought about effective (and needed) change, particularly due to lack of effective monitoring and enforcement.

In this book, we have subjected practical issues to thorough academic analysis. The topics selected are simply the topics which appear in courts, on the lawmaker’s desk or in the public debate. The Internet is understood to mean the global system of interconnected networks that use a standard protocol to communicate irrespective of the actual means (broadband, mobile etc.) or content (government, corporate, user-generated data etc.). Our ambition is not to be comprehensive but to offer guidance to those wishing to pursue further research in the area.

The law is up to date as of 1 June 2014.