Introduction

The freedom of information is a core value in a democratic society. But information is also a commodity. Finding the right balance between maintaining fundamental freedoms and ensuring rights which are necessary to protect privacy or to allocate resources in order to avoid market failure is a major challenge for policymakers, legislators and courts around the world. Traditionally, this trade-off has been addressed through a multitude of different areas of the law, including but not limited to intellectual property (IP) law, trade secrecy law, unfair competition law and the law of privacy. However, information that is created, collected, or maintained by businesses is not so easily segregated, given that many more than one area of law will often be applicable to such information or data.

In a globalized digital world, which is characterized by the convergence of media and by a rapid development of new business models, it is increasingly difficult to squeeze cases into the established doctrinal pigeon-holes. A more holistic perspective is called for. Along with a growing tendency in academic research, we attempt to adopt this perspective, and to look at “information law and governance” in its entirety. This is by no means a purely theoretical approach, but also reflects commercial reality: information owners and users that wish to comply with applicable law and manage their information effectively will have to look at information governance as a whole rather than at distinct legal fields.

Rather than focusing on one area of information or IP law, the chapters of this book (when read collectively rather than individually) provide a rich overview of the areas of law and business practice that are increasingly being labeled “information law and governance.” In so doing, it provides a basis for considering how the various areas of information laws (including IP laws) overlap and intersect, both from a policy and practical perspective. The 17 chapters included in this book are presented in four parts.

Part I provides general perspectives on information law, including critical examinations of the appropriate scope and purpose of legal protection for information and the benefits of information diffusion.

Exclusive rights in data, to which the second part of this book is dedicated, are examples of why a holistic perspective makes sense. On the one hand, data privacy laws govern the use of personal data. At least in the EU and in Japan, this field of law has its roots in public law. Its main concern is privacy protection, whereas, arguably, the commercial interest in developing, refining, and trading data is underestimated. On the other hand, IP and unfair competition law provide for some legal entitlements in data. Copyright laws around the world may protect databases, and collections of data may constitute trade secrets. Both regimes focus on the commercial elements of data governance while largely neglecting the privacy aspect. Some have recommended the introduction of a novel intellectual property right in encoded data, whereas others stress the need for access to data and think that allowing property rights is the wrong approach. The second part of this book analyses rights in data from an information law perspective. It takes stock of the existing exclusive rights, looks at database protection, at novel provisions protecting big data in Japanese unfair competition law, and discusses tort law liability for the loss of data.

Trade secrecy law, which is the focus of the following third part of this book, has always been difficult to classify. There has been a long and controversial academic discussion on both sides of the Atlantic about whether trade secrets are property. But this question may be overrated. While trade secrecy law is a hybrid which combines property, unfair competition and contract law elements, it is certainly at the heart of information law. The central trade-off between the freedom of information and commercial entitlements in information is also a fundamental issue of trade secret law. Some chapters in the trade secrecy part of this book focus on the conflict between the trade secret holder's interest in protection and countervailing interests such as the freedom of information or employee mobility. Other chapters analyze the role of national trade secret law and international convergence in a globalized world.

Finally, another obvious area to look at in the framework of information law and governance is privacy law. The chapters in the fourth part of the book juxtapose US, European and Japanese perspectives. The regime set up by the EU General Data Protection Directive is seen as a model by some, whereas others regard it as over-protective. In the US, California has passed comparatively strict legislation, which is analysed critically in one of the chapters. Finally, data protection is closely related to cybersecurity, to which another comparative chapter is dedicated.

As a research guide, this book provides academic analysis as well as basic information and citations to key resources that should enable scholars and policymakers to better understand how overlapping legal protections for information may conflict and hamper both the diffusion of information and competition. While information and data protection is important in many contexts, we believe it is also important that such protections be properly balanced in order to ensure that the very creativity, innovation, and competition that many societies seek to foster are not destroyed.

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