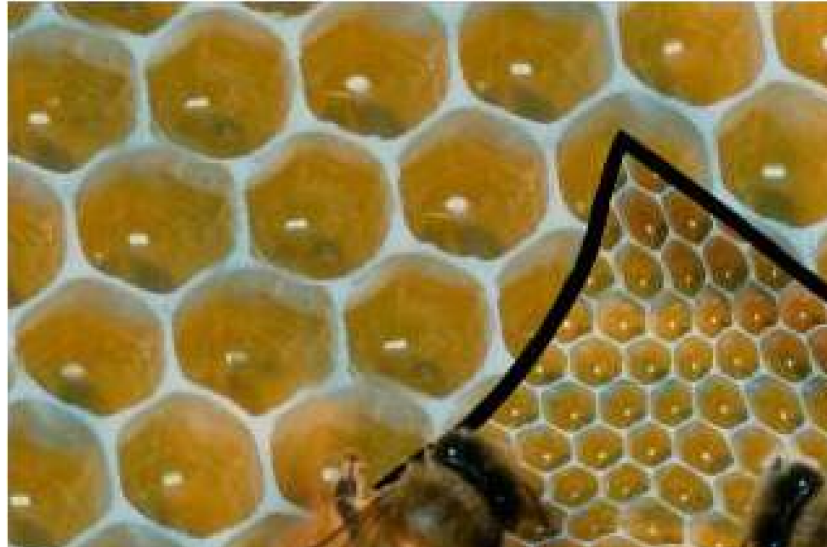


IP Enforcement: Policy Implications

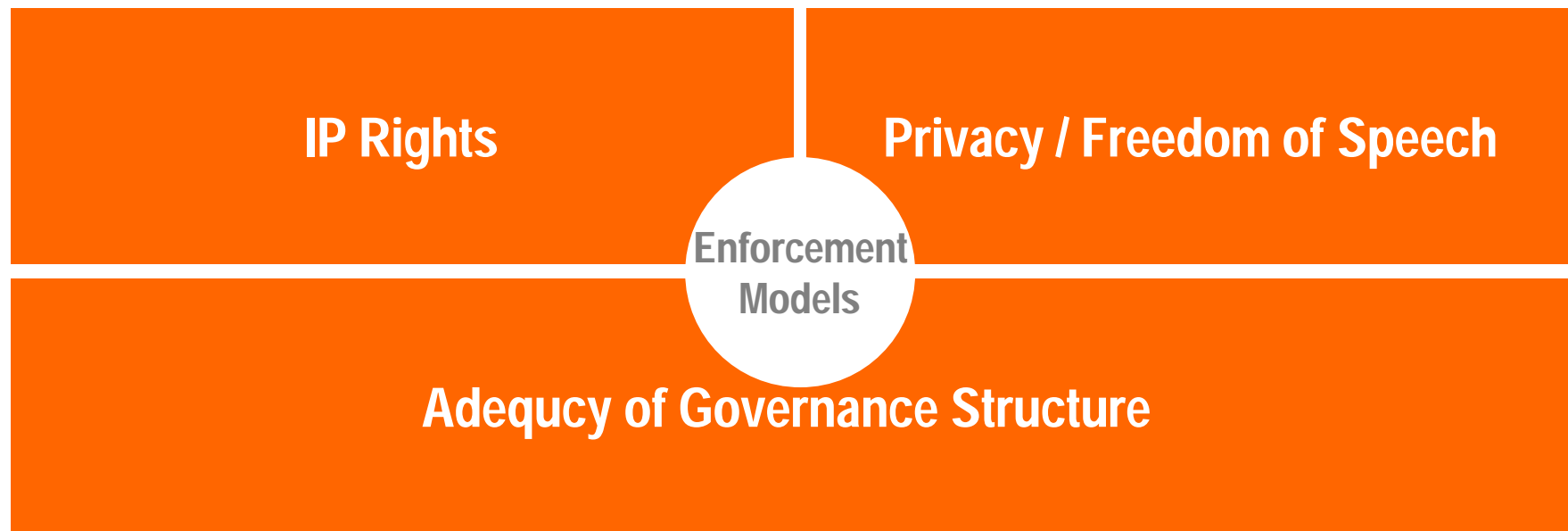
Wolfgang Schulz



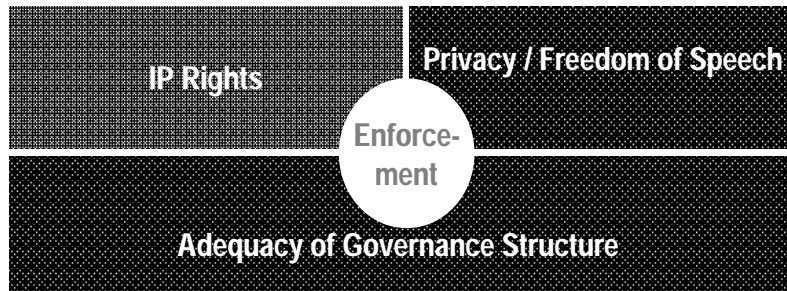
Normative Framework



Normative Framework

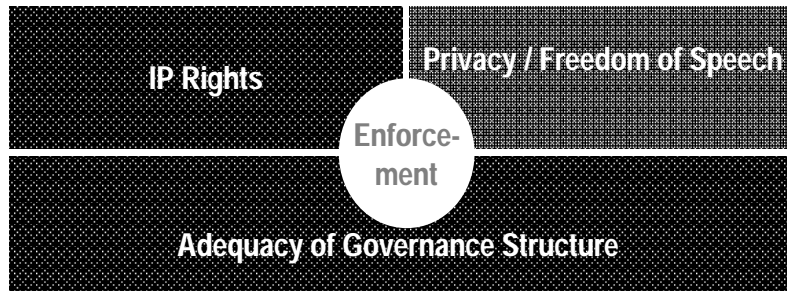


Normative Framework



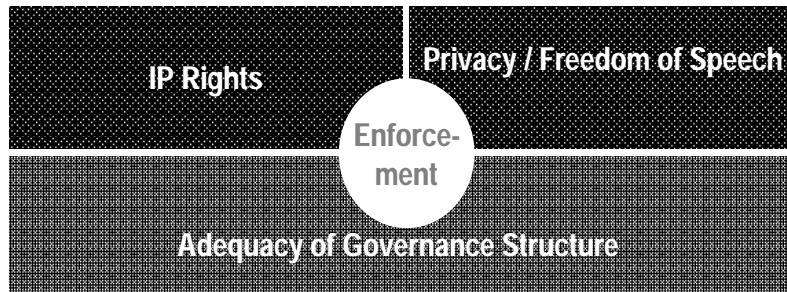
- Fundamental differences in the theoretical framework of intellectual property rights:
 - Copyright vs. droit d'auteur
 - Utilitarian approach possibly more open for further development
- Current academic endeavours to really harmonise copyright (<http://www.copyrightcode.eu/>)
- Limited leeway for national particularities when implementing European Directives (Enforcement; E-Commerce)
- Enforcement Problems lead to debate about the very nature of IP

Normative Framework



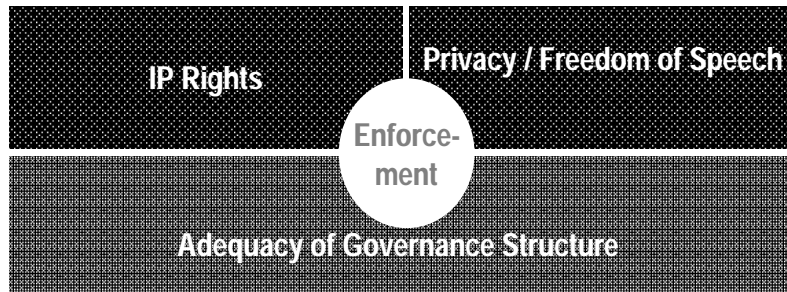
- Limits to enforcement by (other) European Directives (such as new Framework Directive art. 1 para. 3a)
- Fundamental human rights
 - Art. 8 ECHR
 - National constitutional framework, e.g. Art. 10 German Grundgesetz (when it comes to mandatory access provider filtering – recent Hamburg Regional Court case)
 - Art. 10 ECHR: (Special) Value of anonymous communication?
 - Again: National constitutional framework
- Proportionality

Normative Framework



- Delicate system of IP rights and liability
- Fair sharing of burdens
- Democratic representation
- Costs of enforcement
- Adequate mixture of enforcement by software design and by law
- “Acceptability” – social norms on copyright compliance
 - How do different concepts of enforcement influence social norms?
 - Knowledge about social norms on use of protected works
 - Taking different cultures into account.

Normative Framework



IViR 2006 (The recasting of copyright & related rights for the knowledge economy):

- These surveys make clear that unauthorised use and distribution is the norm for **approximately 50 per cent of the populations concerned**. However, a much larger share of the European public does recognise the equitability of and the need for copyright protection.
- However, in such **circles as student communities** as well as the 'virtual communities' that are p2p networks, the **prevailing ethical norm is not so much one of complying with copyright, but rather one of sharing**. It was furthermore found that consumer behaviour is also informed by a weighing of the advantages and disadvantages of file sharing versus legally purchasing copies.
- If a commercial content provider offers the consumer a **'bad bargain'** in terms of limited availability, high prices or restrictive use conditions (e.g. portability), then the consumer is **not likely to find it unethical to opt for p2p file sharing** instead.

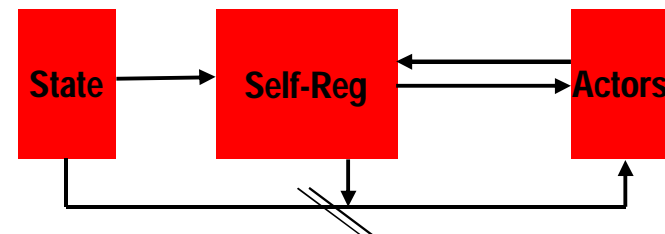
Conceivable models and their pros and cons



Starting points and models

- Access Provider Filtering

- Self- and Co-Regulation



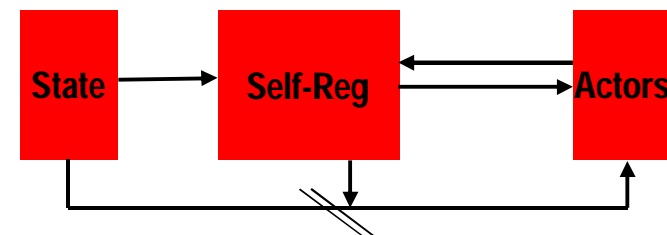
- Criminal Law?

Access Provider Filtering

- **Considering different technical models**
- **Freedom of speech and overblocking**
- **Privacy issues**
- **Fairness (Access providers to solve all third party problems, because they *can* do it?)**

Self- and Co-Regulation

- (Lack of) Legal certainty
- Hypercomplexity / lack of transparency
- Opportunity to build social norms by provider self-regulation?
- Democratic grounding (giving all relevant parties a say)
- Free rider problem makes pure self-regulation unlikely
- Options for state involvement (just moderating, creating incentives for co-operation)



Criminal Law?

- **Always the last resort: severe publicly enforced sanctions call for very good reasons**
- **Fairness: Socialising enforcement costs**
- **Specific link to social norms**

Some conclusions



Solutions?

■ Procedural (when it comes to finding best practice solutions):

- Change of perspective: From „all-or-nothing“ to risk management
- State as a moderator
- More expertise in the policy process (Ongoing innovation workshop)
- Multidisciplinary research on interaction of social norms and formal law

■ Substantial:

- Fair and balanced system of provider liability
 - Either providers accept liability themselves and protect their users or the other way around
- Access provider filtering as disproportionate measure
- Technical measures / software design

