



HANS-BREDOW-INSTITUT

for Media Research at the University of Hamburg

Copyright in a Digital Environment Governance Perspective

(信息环境下的版权问题
政府性视角)

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CO-REACH **PROJECT IPRNME**

(IPRNME欧中协调机制项目)

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Outline

(概述)



HANS-BREDOW-INSTITUT
for Media Research at the University of Hamburg

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(机构背景: Hans-Bredow机构)

I. Salient Issues (突出的问题)

II. The German Legislative Development (德国的法制发展)

III. Research Questions Regarding Governance (和政府有关的研究话题)

The Hans-Bredow-Institut

(Hans-Bredow机构)



- Non-profit media research institute (非盈利性的媒体研究机构)
- Named after Hans Bredow, an electronic engineer, who is called the “father of German broadcasting (radio)”; as the Secretary of State in the Ministry of Postal Services he was responsible for the introduction of radio in the 1920s; in 1933 he had to leave all functions; from 1945 into the early 1950s he contributed to the development of the public broadcasting system in Germany (以Hans Bredow命名. Hans Bredow是一位电子工程师, 被称为“德国(无线电)广播传媒之父”; 作为在邮政服务部的国务卿, 他负责在20世纪19年代的无线电的引进和传播; 在1933年他不得不辞去所有职务; 从1945年到同世纪的50年代, 他为德国的公众性的广播传媒系统作出了很大的贡献).
- Funding based on a) subsidies of PSB, broadcasting authorities, and the City of Hamburg, and b) commissioned research projects for governments, authorities, media companies, EU, etc. (研究基金来自于两方面. 一、PSB,政府广播传媒和汉堡市政府的津贴; 二、从为政府机构, 媒体公司, 欧共体等研究中得到的研究资金).
- Continuous staff of about 7 researchers with a disciplinary focus on communications, media law, sociology, economy, media education (大约7位长期性的研究人员, 主要研究传播、媒体法、社会学、经济学、媒体教育).
- See: www.hans-bredow-institut.de (具体信息可见于: www.hans-bredow-institut.de)

The Hans-Bredow-Institut

(Hans-Bredow机构)



Selected recent projects (摘选的近期的研究工程)

- Governance in Social Media (社会媒体的政府性管理)
- Host of the Hamburg Innovation Project on IP (workshop series with academics and practitioners) (主办了“汉堡IP创新工程” (一系列有学术与实践研究人员参与的专题讨论会议))
- Editorial Responsibility in the Directive on Audiovisual Media Services (编辑“视听媒体行业指南”)
- Co-Regulation in the EU Media Sector (在欧共同体传媒部门参与条约控制和管理)

Salient Issues in German Copyright Law

...probably not all that different to others

(德国版权法中的突出问题)

...可能和其他（国家的版权法的突出问题）的区别不是太大)

Salient Issues

(突出问题)

Scope of protection and new types of work (保护范围和新类型的工作)

Adjustment of limits to copyright protection (对版权保护限制的调整)

- Adequacy of traditional limitations on exclusive rights (给传统的对专有权的保护以足够的限制)
- Scope for new limitations on exclusive rights: (新增的对专有权的保护的范围):
 - New limitations on exclusive rights are determined by EU Directive on the harmonization of certain aspects of copyright and related rights in the information society (新增的对专有权的限制是被欧共体的,有关协调版权的某些方面及其相关的在信息社会中的权利的这一过程,所决定的)
 - German constitution: Author must be participated in the exploitation of his work (德国宪法规定: (版权)拥有者必须参与其工作的研发)

Role of collecting societies and compensation

Salient Issues

(突出问题)

Problems with specific services (在某些特殊行业出现的问题)

- Search Engines (搜索引擎)
 - Pictures (图片)

use of copyrighted pictures sentenced unlawful by courts (使用被版权保护的图片是被法庭判为违法的)
 - News (新闻)

publishing houses claim for protection against use of their articles (出版社有权申请得到对其出版的文章的版权保护)
 - Books (书籍)

“Google book settlement”: government filed Amicus Curiae letter (“Google书籍的协议”: 政府方面的法庭之友信)
- Electronic press reviews (电子出版社的评论)
- Creation of abstracts (文献摘要的创作)
- Online video recording (网上录象的录制)
- Provider liability, in particular for user generated content (提供商的责任, 特别是在对用户生成的内容这一方面)

Salient Issues

(突出问题)



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Access to information, archives, orphan works (对信息, 文献 和 孤儿作品的访问)

New business models (新行业的模型)

open access, open content, open source (可公开访问, 内容公开, 资料共享)

but: funding of costs? (但是这些信息的成本如何得到赞助?)

Enforcement (实施)

- In particular transboundary enforcement (特别是跨区域的实施)
- Concepts (概念)
- vs. Data Protection (数据保护)
- Need for a differentiated view: Sometimes tracking piracy can prove to be the better business model (对看问题新方法的需求: 有时对盗版的追踪是被证实为更好的一个行业模型)

The German Legislative Development

... a tale of baskets for the information society

(德国的法制性发展

... 一个对信息社会的一篮子的故事)

The German Legislative Development

(德国的法制性发展)

1997 (amended in 2001/2007): Limitation of provider liability (1997 (修订于2001/2007): 对供应商责任的限制)

2003: First Act to Regulate Copyright Law in the Information Society (so-called “First Basket”) (2003: 第一项有关在信息社会中版权法的调控的法案 (被称作 “第一个篮子”))

- Implementation of the compulsory requirements of the EU Directive on the harmonization of certain aspects of copyright and related rights in the information society (履行欧共体对协调版权的有关方面及其相关的在信息社会中的权利的这一过程的强制性要求)
- Implementation of the right to make available to the public (对这一权利的实施从而使其被大众所接受)
- Prohibition of circumvention of copyright protection systems, private copying is not permitted where copy protection measures are implemented (禁止传播版权保护系统, 个人的拷贝在有版权保护条例的实施范围里是不被允许的)

The German Legislative Development

(德国的法制性发展)

2008: Second Act to Regulate Copyright Law in the Information Society (so-called "Second Basket") (2008:第二项有关在信息社会中版权法的调控的法案(被称作“第二个篮子”))

- Implementation of some optional requirements of the EU Directive on the harmonization of certain aspects of copyright and related rights in the information **society** (履行欧共体对协调版权的有关方面及其相关的在信息社会中的权利的这一过程的一些非强制性要求)
- Law further adapted to the digital age and new technical potentialities (法案是对数字时代和新科技潜力的进一步的适应)
- Private copying even in digital form continued to be permitted, but now it is prohibited to copy material that is unlawfully offered on the internet if it is obvious to the user (个人的拷贝, 即使是用电子形式的, 还会继续被允许; 但是对拷贝那些对用户而言显而易见的、非法的、在网上提供的资料的行为则是被禁止的)
- Ability to dispose contractually of rights with respect to unknown forms of use (有能力凭借合同来处理关于不明形式的使用而产生的权利(纠纷))
- ... see next page (见下页)

The German Legislative Development

(德国的法制性发展)

2008: Second Act to Regulate Copyright Law in the Information Society (so-called "Second Basket") (2008:第二项有关在信息社会中版权法的调控的法案 (被称作“第二个篮子”))

- ...
- Implementation of new limitations on exclusive rights in favour of science and research: (新的对专有权的限制的实施是对科研有益的)
 - Right of public libraries, museums and archives to provide access to their collections via electronic reading stations (but, in principle, linked to the number of copies in a particular institution's collection) (公众图书馆、博物馆和档案馆有通过电子阅读站来提供它们收藏的资料的权利 (但是,在原则上,这是和一个特殊机构里面的诸多电子副本的连接))
 - Libraries are permitted to make and send copies of copyrighted works upon request (but only via letter, fax, read-only electronic document) (在面对有对被版权保护的作品的请求是,公众图书馆是被允许制作和传递副本的 (但是这仅局限于信件,传真,只读电子版本))

The German Legislative Development

(德国的法制性发展)



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2008: Act on the Enforcement of intellectual property rights (2008: 关于强制实施知识产权的权的法案)

- Implementation of the EU Directive on the enforcement of intellectual property rights (实施欧共体关于强制实施知识产权的权的条例)
- e. g. Right of information: information on the origin and distribution networks of the goods or services which infringe an intellectual property right must also be provided by persons providing - on a commercial scale - services used in infringing activities (in particular internet service providers) (比如说, 信息权利: 关于违反知识产权的权的, 在原创和传递过程中的, 商品和服务的信息也必须被提供 - 在商业化的程度上 - 假如这些商品和服务被使用于违反(知识产权的权性)活动)

The German Legislative Development

(德国的法制性发展)



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The “Third Basket” (“第三个篮子”)

- Immediately after the “Second Basket” had been enacted, the German parliament called for a speedy commencement of work on a “Third Basket” (紧随“第二个篮子”在通过后,德国议会呼吁对“第三个篮子”的工作的快速开始)
- Issues still open for discussion: (仍有待讨论的问题)
 - Private copying: Restriction to copying originals, no copying using third parties (个人的拷贝: 对原创作品的拷贝的限制, 没有对第三方使用拷贝)
 - Prohibition of so-called intelligent recording software (对那些所谓的智力录音软件的限制)
 - Dealing with second-hand software (处理二手软件)
 - Right of secondary exploitation for authors of scientific works which are financed by public funds (对那些接受非私人科研基金的科学工作者的二次开发的权利)
 - Open access (公开访问)
 - Orphan works (孤儿作品)

Research Questions Regarding Governance

...away with the baskets, new tools out of the governance box?

(和政府有关的研究话题)

... 和'篮子'无关的,在政府这个'盒子'里面取出的'新工具'?)

Research Questions Regarding Governance

(关于政府治理的研究话题)



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Our Thesis (我们的主题)

The structural changes lead to a change in perspectives in *droit d'auteur* based countries: From an ownership centered understanding to copyrights as part of the system governing the information society (结构的改变引起在以版权为基的国家的看法的改变: 从一个以所有权为中心的理解转变到以版权作为控制信息社会的部分系统的理解)

► Applying tools of governance research might be fruitful to optimize the system (应用政府治理的研究工具或许会使得优化系统变的有成果)

Research Questions Regarding Governance

(关于政府治理的研究话题)



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- A. Our understanding of governance (incl. "Excursion") (我们对政府治理的理解 (包括一些'涉猎'信息))
- B. Governance structures in copyright protection (政府治理在版权保护上的结构)
- C. Governance research (政府治理的研究)

Excursion

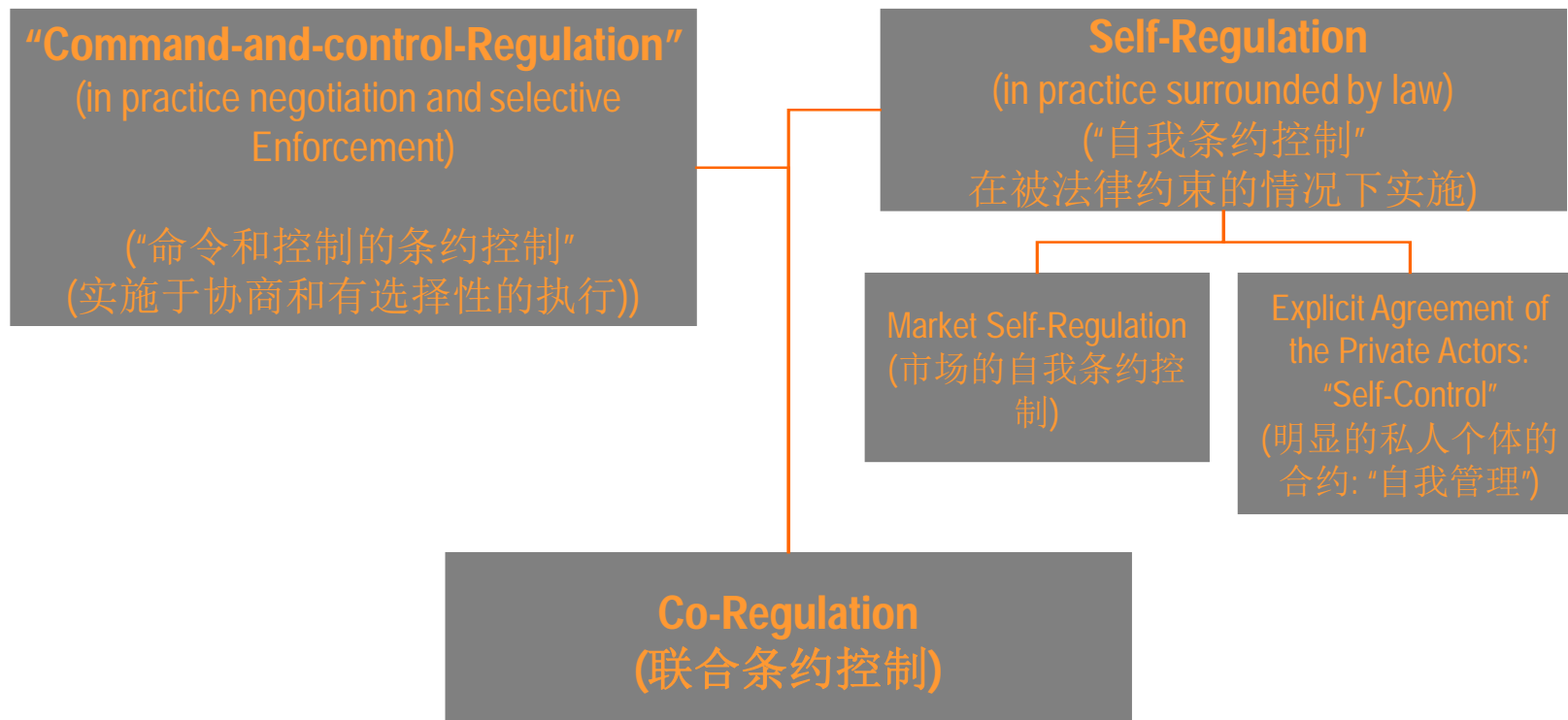
(涉猎)

Excursion: Some insights from our recent studies on co- and self-regulation

(涉猎: 从我们对联合条约控制和自我条约控制的研究上得到的一些洞察性见解)

Types of Regulation

(条约控制的类型)



Command-and-control Regulation

(命令和控制的条约控制)



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Structural Weaknesses: (体系的缺点)

- Ignores the interests of the objects (companies) it regulates, and this may generate resistance rather than co-operation (忽略被其控制的客体(公司的利益, 这会引起抵制而不是合作)
- Growing knowledge gap of the state (国家的逐渐增长的信息差)
- State has monopoly on *power*, not on necessary *information* (国家在权力上有专断权,但是并不一定在信息上也有专断权)
- "Theory of autonomous social systems" → certain gaps of understanding cannot be overcome ("社会系统的自主理论" → 一些理解的差异不能被跨越)
- Regulation does not seem to stimulate creative activities effectively. Initiatives, innovation and commitment cannot be imposed by law (条约控制并不能有效刺激创新性活动. 主动性、创新性和个人的投入是不能被法律所强加的)
- Tendency towards case-by-case regulation as opposed to a process-orientated manner (有倾向于对个案的而不是对以过程为导向的条约控制)
- Actors can evade regulation by forum shopping (个体不能通过择地行诉)

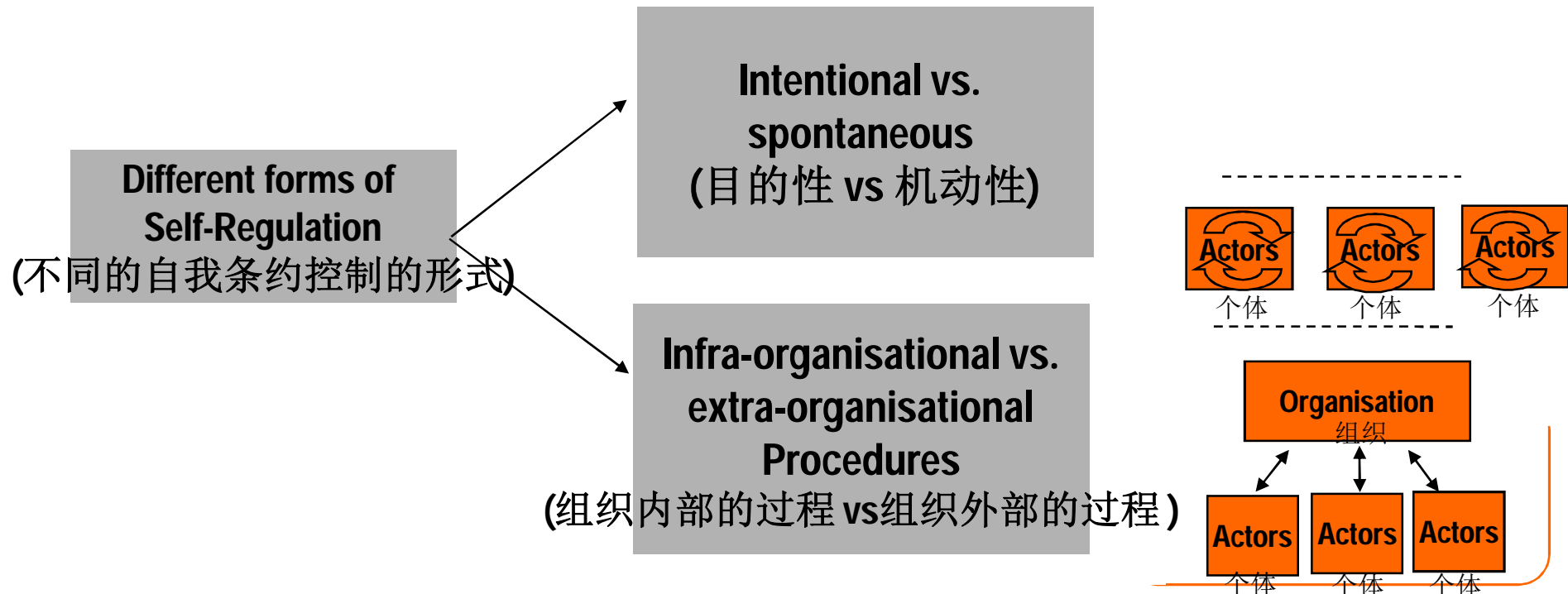
State
(国家)

Actors
(个体)

Self-Regulation

(自我条约控制)

Definition: State refrains from interfering with a process assuming that social processes will lead to a result which will achieve the objectives of regulation on its own (国家控制对这一过程的干扰,它认为社会的这一系列的过程会引起国家对其治理的目的的实现)



Self-Regulation

(自我条约控制)



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General Advantages: (一般性的优点)

- Expertise (专家性)
- Efficiency (高效性)
- Problem-orientation (目标导向性)
- Flexibility (弹性) +
- Acceptance (可接受性)

(Potential) Disadvantages: ((潜在的)缺点)

- Lower visibility and credibility (可视性和可信性低)
- Less likelihood of rigorous standards being developed (严格标准的发展性的低可能)
- Integration of free riders (给搭便车者提供机会)
- Lack of democratic and legal legitimacy (缺乏民主性和法律的合法性)
- Circumvention of mechanisms to protect basic freedoms (private censorship) (规避机制的采取来保护基本的自由(个人审查制度))
- Legal uncertainty / fragmentation of the law (法律的不确定性 / 法律的非延续性)

Co-Regulation

(联合条约控制)

HBI/EMR study definition: (HBI/EMR 研究对此的定义)

Co-Regulation means combining non-state regulation and state regulation in such a way that a non-state regulatory system links up with state regulation. (联合条约控制是指通过无国家的条约控制系统和国家的条约控制相联系,从而把无国家的条约控制和国家的条约控制联合起来)



Defining Co-Regulation

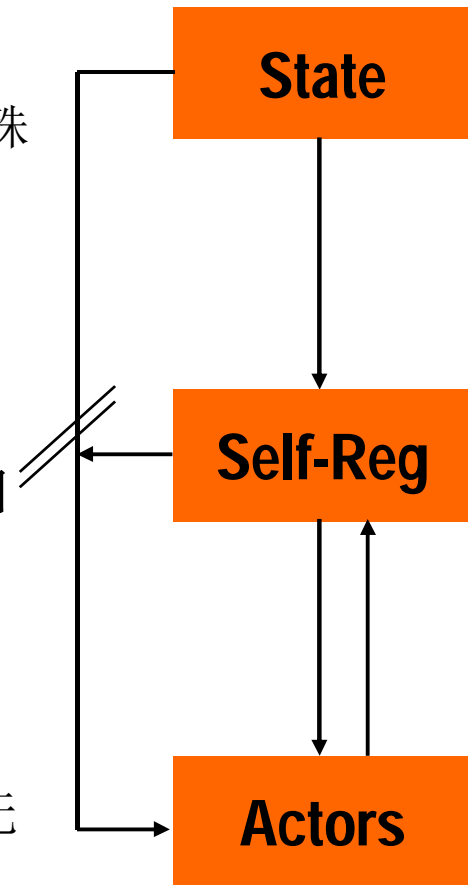
(定义联合条约控制)

I. Non-state element: (非国家因素)

- Creation of specific organisations, rules or processes (特殊的组织,制度和过程的新建)
- in order to influence decisions (从而来影响决策)
- performed by the addresses themselves

II. Link between non-state and state regulation: (把有/无国家的条约控制相联系)

- Achievement of public policy goals (公众政治目的的实现)
- Legal connection (法律的连接)
- Discretionary power of the non-state regulatory system (无国家的条约控制系统的自主决定权)
- State uses regulatory resources (国家运用监管资源)



Co-Regulation

(联合条约控制)



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General Advantages: (一般性的优点)

- Expertise (专家性)
- Efficiency (高效性)
- Problem-orientation (目标导向性)
- Flexibility (弹性)
- Acceptance (可接受性)
- Fall-back responsibility (退一步责任)

+

Potential Risks (潜在的威胁)

- Lack of democratic and legal legitimacy (缺乏民主性和法律的合法性)
- Circumvention of mechanisms to protect basic freedoms (enforced private censorship) (规避机制的采取来保护基本的自由(强制实行的个人审查制度))
- Lack of Accountability (缺乏问责能力)
- Lack of Transparency (缺乏透明性)
- Legal uncertainty / fragmentation of the law (法律的不确定性 / 法律的非延续性)

Conditions for the Success of Co-Regulatory Systems

(联合条约控制系统的成功的前提条件)

1st

Regula-
tory
Culture
(第一,条约控制
的文化)

2nd

Incentives
and
Enforce-
ment
(第二, 激励和
控制)

3rd

State
Resources
to Influence
Outcome of
Regulatory
Process
(第三, 能用于影响
条约控制的过程
的国家的资源)

4th

Clear Legal
Basis and
Task
Sharing
(第四,明确的法律
基础和工作分配)

Conditions for the Success of Co-Regulatory Systems

(联合条约控制系统的成功的前提条件)



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Conditions for the Success of Co-Regulatory Systems

(联合条约控制系统的成功的前提条件)



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Excursion

(涉猎)

End of the Excursion
(涉猎部分的讨论结束)



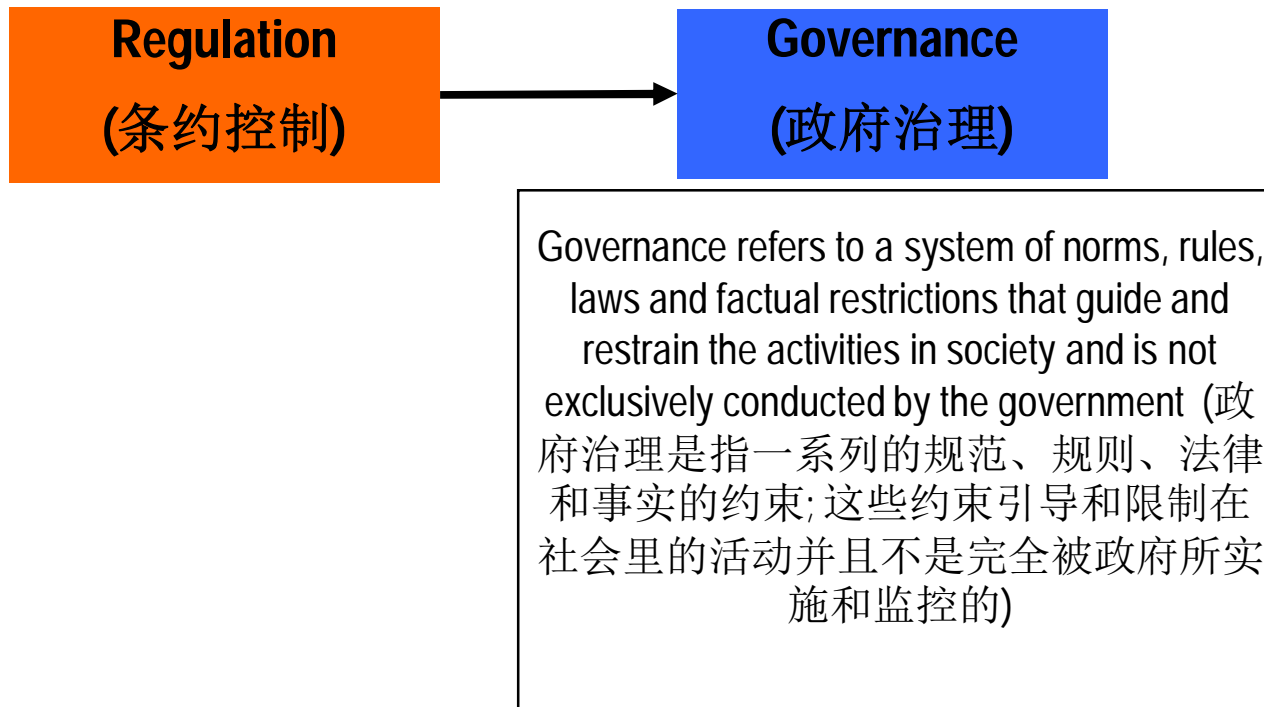
SH4

Irgendwo sollte dann auch das Exkursionsende definiert werden! Evtl. vor Folie 29?

SH, 23/10/2009

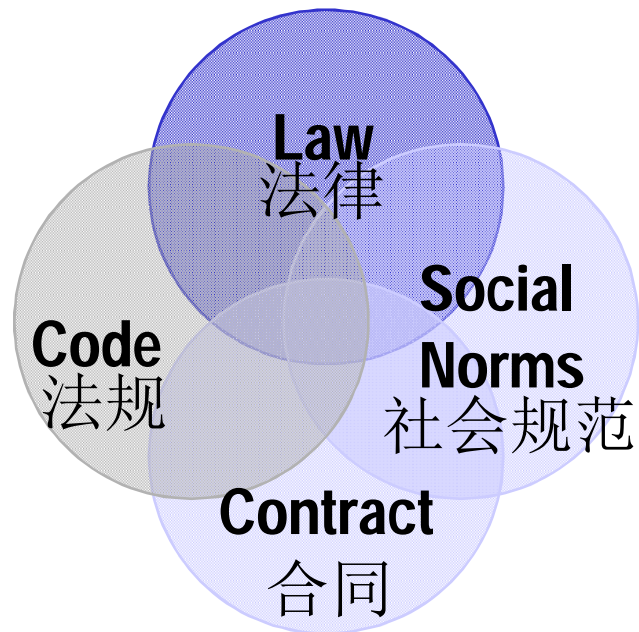
Paradigm shift

(形式的变化)



A. Our starting point: Four Factors of Governance

A. 我们的 (研究)出发点: 政府治理的4个因素



B. Current Governance structures in copyright in GER

B. 现今的在GER里的版权治理结构

- All deduced from a property-like absolute right of the creator (所有的都是从财产(的概念)中演绎得来 – 这就象创造者的绝对的权利一样(对后一句话的更好理解很大程度上依托于对西方宗教和政治经济的了解-译者评))
- Limited leeway for utilitaristic calibration of interests (有限的空间来对评定收益的使用标准)
- Courts deciding over business models (法庭决定经济模型)
- Two levels of legislation (EU/Member States) reduce flexibility (fixed set of limits) (两种程度的合法性降低了可调整性)
- Power of the provider as regards ownership (contract, code) (供应商对自己所有权的能
力)

C. Governance research

C. 政府治理的研究

- Need for **mapping of governance** structures in detail (有必要对政府治理的结构进行清晰的勾勒)
 - E.g. Who owns the content produced by end users in the social web environment? (比如说, 谁拥有那些在社会网络环境下的由最终用户提供的产品?)
 - Law: Rights and duties related to social web content as defined by IP laws (法律: 象被IP 法律规定的一样, (是)那些和社会网络环境相联系的权利和责任)
 - Contracts: Rights and duties of social web users as defined by contracts, often by standard Terms of Use (ToU). (合同: (是)那些被合同规定的, 常常是被使用标准条款 规定的,和社会网络环境相联系的权利和责任)
 - Code: Social web platforms are governing access by their architecture that determines which content could become available, who gets permission to access it and under what conditions. (法规: 社会网络平台被社会体系结构控制着(可被)访问权, 这个社会体系结构决定了哪些内容是可获取的,谁有权访问(这些内容), 和在哪些情况下(他们可以访问这些内容).)
 - Social Norms: Acceptance of ownership rules and attitude to piracy (社会规范: 对所有权的规范和私有权的态度的接受)
 - Project initiative by the University of Haifa, University of Hamburg and Hans-Bredow-Institut (这个工程是由University of Haifa, University of Hamburg and Hans-Bredow-Institut组织的)
 - Other possible fields for mapping: private copying (另外的可以进一步勾勒的领域: 个人拷贝)

C. Governance research

C. 政府治理的研究

- Ideal showcase for **functional comparison of law** since technology, business models and revenue streams tend to be the same all over the world (考虑到在世界范围内,科技,经济模型和收入来源都倾向于小规模,(这是) 对比较的法律功能性而言,一个理想的模型.)
- Applying the tools of **impact assessment** and **evaluation** on legal concepts in copyright (运用了影响评估和评价在版权问题上的法律概念的工具)



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Thank you for your attention!

Dr. Wolfgang Schulz, Stefan Heilmann