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EDITORIAL

DIGITAL LAW: THE PURSUIT OF CERTAINTY

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Abstract

The article deals with the development of digital law as an instrument for regulating the digital economy. It is proved that, within the academic environment, the concept of "Internet law" is still more well-established than the concept of "digital law". It is in this manner that the legal sphere responds to the challenges of the digital revolution and reflects the digital economy. The debate as to whether "Internet law" can be considered either as a separate branch of law or as a branch of legislation has not yet subsided. Nevertheless, "Internet law" is undoubtedly an independent academic discipline, textbooks on which are published in Russia. However, Russia needs to develop a digital economy; this is why the national project "Digital Economy of the Russian Federation" was adopted in 2018, regulatory support for which forms the basis of digital law in Russia. At the same time, the extensive experience of digital economy regulation in both its neighbouring countries and beyond is taken into account. Especially attractive is the national strategic model, which assumes the most rapid procedure for adopting changes and consequently adapting digital legislation, is aimed at the long-term perspective, and lets popular opinion — as well as the opinions of public organizations, the business community, and government representatives — be taken into account. In addition to foreign experience in regulating the digital economy, we should also use the best practices of domestic and foreign legal science.

Keywords

digital law, Internet law, digital economy, industrial revolution, national program

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ОТ РЕДАКЦИИ

ЦИФРОВОЕ ПРАВО: В ПОИСКАХ ОПРЕДЕЛЕННОСТИ

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Аннотация

В статье рассматривается вопрос развития цифрового права как инструмента нормативного регулирования цифровой экономики. Доказывается, что пока более устоявшимся, нежели понятие «цифровое право», в академической среде является понятие «интернет-право». Именно в такой форме правовая сфера отвечает на вызовы цифровой революции и является отражением цифровой экономики. До сих пор не утихли споры, можно ли рассматривать «интернет-право» в качестве отдельной отрасли права или отрасли законодательства. Тем не менее это несомненно самостоятельная академическая дисциплина, учебники по которой издаются уже и в России. Необходимость развития цифровой экономики остро стоит и перед Россией, в этих целях в 2018 г. был принят национальный проект «Цифровая экономика РФ». Нормативное обеспечение реализации данного проекта формирует основу цифрового права в России. При этом учитывается обширный опыт нормативного регулирования цифровой экономики в странах ближнего и дальнего зарубежья. Особенно привлекательной выглядит общенациональная стратегическая модель, которая предполагает наиболее оперативный порядок принятия изменений, следовательно, и адаптации цифрового законодательства, нацелена на долгосрочную перспективу, позволяет учитывать мнение населения, общественных организаций, бизнес-сообщества, представителей власти. Помимо зарубежного опыта нормативного регулирования цифровой экономики необходимо также использовать наработки отечественной и зарубежной правовой науки.

Ключевые слова

цифровое право, интернет-право, цифровая экономика, промышленная революция, национальная программа

Конфликт интересов	Авторы сообщают об отсутствии конфликта интересов.
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Object of Investigation

The digital economy and information society inevitably require “digital law” as a tool for regulating public relations online, as well as public relations concerning digital objects in the form of data and knowledge. The specific character of the digital sphere makes it impossible to automatically

apply the existing norms and legal institutions to it. At the same time, the answer to the question of how to adapt the existing legal norms to the digital environment is not obvious and requires scientific reflection by the international legal community.

This task is also complicated by the fact that modern social relations are often hybrid in nature and can be observed simultaneously in two areas: physical and digital. These spheres are deeply embedded within each other, but they are not interchangeable. Digital space rather complements physical space, forming an "augmented reality". However, when describing this interaction, researchers are often tempted to see a zero-sum game: they either declare that the "figure" has completely changed social relations, or that the influence is primarily quantitative, not qualitative, even though the digital sphere itself is formatted by social relations that had developed before it appeared. Attempts to neutralize the relationship between these two spheres and the influence that this interaction has on various aspects of social relations are performed extremely rarely.

The law should take this hybrid into account, considering it not as two separate spheres each with its own logic but as systemic integrity formed by social relations. Khabrieva notes that "it is clearly not enough to state the emergence of a kind of "cross-industry" legal norms that ensure "reinstalling the legal software" to meet the goals and objectives of the digital economy. It is important to understand not only how they will affect public relations, people's will and consciousness, the development and spread of digital technologies, but also how they will work within the legal system, what kind of connections these norms create and enter into, what place they will occupy in the legal system" (Khabriyeva & Chernogor, 2018). The formation of digital law should develop together with the entire legal system, without conflicting with it, and be its "augmented reality".

Internet Law

In European countries and the US, "Internet law" has already become an academic discipline. It first appeared in 1991 (Goldman, 2008), although most of the relevant legal regulation was created much later (Edwards & Waelde, 2009). Legal science gradually mastered a new sphere of public relations, which was being formed in the Internet space, along with the development of this space itself. Therefore, the most authoritative scientific publications on general issues of the digital challenge date back to the 1990s (Marsden, 2000). Of course, there have been more recent publications on individual digital innovations that appeared in the 2000s.

At the same time, various aspects of public relations and branches of the law were actively integrated from the physical environment into the digital one; these include intellectual property, telecommunications, privacy, cybercrime, and media content regulation. Despite its global nature, the Internet has a specific place of birth — the United States — so, initially, the legal research of Internet communications was based on American legal norms (Kahin & Nesson, 1997). Moreover, this trend is supported by the American scientific community, which occupies a leading position globally both in terms of the number of journals and the number of publications in the relevant field. Recently, the study of "Internet law" in the European Union has come to the forefront — Brussels has become a pioneer in legislation in many areas: combating cybercrime (cyberattacks, cybersecurity, Internet fraud, incitement to hostility and hatred, child pornography) (KjØrven, 2020); in the field of electronic commerce (Anagnostopoulou, 2018) and smart contracts (Seidel et al., 2020) with additional focus on consumer protection (Havu, 2017); in copyright (Colomo, 2017); in data protection (Zoboli, 2020); in banking (Langenbucher, 2020) and insurance services (Manes, 2020); and other such areas of the Internet. Of the most recent EU initiatives related to Internet law, it is worth noting the General Data

Protection Regulation (eng.), as well as a new Directive on Copyright in the Digital Single Market. When discussing the Directive on Copyright, the obvious contradictions between Internet corporations (sometimes called GAFA: Google, Amazon, Facebook, Apple) or activists (such as the Electronic Frontier Foundation[1]) fighting for free Internet, on the one hand, and copyright holders and content creators, on the other hand, became apparent. The Digital Markets Act and the Digital Services Act are at the first reading stage in the Council of the European Union, the significance of which, if approved and put into effect, is extremely difficult to overestimate. These regulations emerged due to the need to create a secure digital space in which the basic rights of users of digital services are protected and equal conditions are guaranteed to stimulate innovation, growth, and competitiveness.

Since the mid-1990s, the academic community has been extensively discussing the subject area of "Internet law" (Lessig, 1999). Many researchers believed that the digitalization of public relations would inevitably affect all branches of law, but would especially concern contract, antitrust, and constitutional law (Easterbrook, 1996; Sommer, 2000). Others have argued that Internet law is a short-term product generated by technological innovations and will inevitably be co-opted into existing legal institutions and branches of law (Larouche, 2008; Kerr, 2003).

Some authors consider Internet law as a branch of law, while others call it a branch of legislation; finally, Internet law can also be considered as a special kind of complex legal institution. From a doctrinal point of view, the authors agree that Internet law can be assigned its own separate place.

In Russia, the term "Internet law" did not catch on immediately. Rassolov, having made a decent review of the Russian literature, concluded that some scientists (Bachilo (2001a, 2001b, 2001c), Prosvirnin[2], Morozov (1999), Kopylov (1997, 2001)) do not specifically use the concept of Internet law, but instead — without giving clear and strict definitions of new categories and entities for the theory of law — simply pose and analyze some general methodological aspects of law and the Internet, legal problems of constructing the electronic environment and virtual space, and their functioning.

Other scientists (Rassolov[3], Soldatov (2002), Shagiyeva (2005)) differentiate the concept of "Internet law", although they do not disclose its essence and content. In doing so, they consider this concept as an independent research area in the structure of such branches as international private law and information law: i. e. as a kind of complex education within these branches.

In contrast, some researchers (in particular Yakushev[4]) advocate the development of Internet legislation, which will allow Internet relations to be regulated and will develop a new, vitally important terminology for the theory of law, namely: "Internet", "global network", "website", "domain address", "Internet relation", "subject of Internet relations", "information as a special object of civil law", "protection of intellectual property on the Internet", "judicial dispute on the Internet", and many others.

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1 Electronic Frontier Foundation (eng. *EFF*) is a non-profit human rights organization founded in July 1990 in the United States to protect the rights enshrined in the Constitution and the Declaration of Independence in connection with the emergence of new communication technologies.

2 Prosvirnin, Y. G. (2002). Teoretiko-pravovyye aspekty informatizatsii v sovremennom Rossiyskom gosudarstve [Theoretical and legal aspects of informatization in the modern Russian state] [unpublished abstract of the doctoral dissertation]. Academy of Informatics, Economics and Law of the Moscow State Social University.

3 Rassolov, M. M. (2002). *Sbornik metodicheskikh materialov po kursam "Teoriya gosudarstva i prava" i "Problemy teorii gosudarstva i prava"* [*Collection of methodological materials on the courses "Theory of state and law" and "Problems of the theory of state and law"*]. Russian Law Academy of the Ministry of Justice of the Russian Federation; Rassolov, M. M. (2007). *Problemy teorii gosudarstva i prava* [*Problems of the theory of state and law*]. Yunii-Dana.

4 Yakushev, M. V. (2000). Internet i pravo: Novyye problemy, podkhody, resheniya [Internet and law: New problems, approaches, solutions]. *The Second All-Russian Conference "Law and the Internet: Theory and Practice"*. https://ifap.ru/pi/02/r03.htm

Finally, a number of authors (Gribanov (in Rassolov, 2009), Radchenko, Gorbunov[5] (2000), Naumov (2002), Goloskokov (2006)) discuss the further development of the legal theory in connection with the study of the global problems of virtual space (i. e., the Internet). For example, Radchenko and Gorbunov[6] distinguish the following elements of digital law: the right of digital state construction and public administration, copyright on digital entities, software law, the right of digital money, transactions, disputes, etc. Goloskokov wrote about network law, and Gribanov touched upon "the law of cybernetic space" (Rassolov, 2009).

Rassolov (2009) writes, in the conclusion to his literature review, that "at present, Internet law is a new independent area of legal science, and primarily information law".

Thus, in the Russian scientific discourse, a whole cloud of related concepts has formed around "Internet law": network law, information law, digital law, cybernetic space law. However, gradually "Internet law" has taken a dominant position. Several textbooks on Internet law[7] have been published.

Arkhipov, in his textbook "Internet Law", considers this term as conditional:

First of all, it refers to a set of legal norms aimed at regulating legal relations arising in connection with and about the Internet. Within the framework of the adopted methodological approach, it should be noted that this set of norms, in one way or another, should be aimed at directly or indirectly solving the systemic legal problems of Internet law. At the same time, on the one hand, this set of norms has a substantive unity due to this fact, on the other hand, there is no independent method of legal regulation in Internet law, although relations on the Internet from a broader point of view have a significant difference from all other public relations, since they can actually be regulated at the code level. Accordingly — since, according to the common point of view in the theory of law and the state, an independent branch of law is qualified simultaneously by the criteria of the subject and method, and Internet law has only a special subject unity — this set of legal norms cannot be considered an independent branch of law. At the same time, it should be noted that since the doctrine of Internet law (in comparison with other branches in the historical context) is generally only at the initial development stage, it is impossible to exclude changes in this scientific position in the future.[8]

On the other hand, Danilenkov notes in his textbook that Internet law has its own specific method:

The specificity of Internet law is that the above-mentioned scope of its norms — due to the extraterritoriality of individual segments of the Internet and the differences in the legal personalities of participants in network relations given the subordination of their personal status or corporate legal capacity to different jurisdictions — sometimes become entwined in a real tangle of contradictions and problems. All this sometimes requires the use of special methods and methodologies to determine the jurisdiction of the dispute, as well as the applicable law in order to resolve legal conflicts and disputes, in particular based on the principle of close connection (the concept of "genuine link") between the Internet relationship (complicated by its foreign element) with the law of the relevant country, while observing the requirements of international reciprocity, politeness, etc. (Danilenkov, 2014).

Thus, the peculiarity of the Internet law method lies in the specifics of resolving issues of conflict of jurisdictions and conflict of laws in the Internet space.

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5 Radchenko, M. Y., & Gorbunov, V. P. (2000). Digital law of the future [Digital law of the future]. *The Second All-Russian Conference "Law and the Internet: Theory and Practice"*. https://ifap.ru/pi/02/r03.htm

6 Radchenko & Gorbunov, 2000.

7 Arkhipov, V. V. (2016). *Internet-pravo: Uchebnik i praktikum dlya bakalavriata i magistratury* [*Internet Law: A textbook and a practical course for bachelor's and master's degrees*]. Yurayt Publishing House.

8 Arkhipov, 2016.

Digital Law

Unlike Internet law, Russian digital law is only beginning to be understood and established as a tool for legal regulation, as well as for laying the foundations for the digital economy's development. In 2018, the national project "Digital Economy" was launched in Russia, which will end in 2024. During this time, it is intended to achieve the following goals:

1. To increase domestic spending on the development of the digital economy from all sources (as a share of GDP) by at least 3 times compared to 2017.
2. To create a stable and secure information and telecommunications infrastructure for transmitting, processing, and storing large amounts of data, accessible to all organizations and households.
3. To enable state bodies, local governments, and Russia-based organizations to use mainly domestic software.[9]

This national project includes six others: "Digital environment regulation"; "Information Infrastructure"; "Personnel for the digital economy"; "Information Security"; "Digital Technologies"; "Digital Public Administration". The federal project "Digital Environment regulation" essentially forms the Russian digital law.

The passport[10] of this project outlines an idea of the main directions of digital law development. There are nine such directions:

1. Creating legal preconditions for a single digital environment of trust.
2. Creating legal preconditions for electronic civil turnover.
3. Ensuring a facilitating legal environment for collecting, storing, and processing data.
4. Ensuring legal conditions for introducing and using innovative technologies in the financial market.
5. Creating regulatory incentives for developing the digital economy.
6. Forming legal conditions in the field of legal proceedings and notaries in connection with the development of the digital economy.
7. Regulating the business-state digital interaction.
8. Comprehensively developing the legislation regulating relations in the field of the digital economy, as well as creating a mechanism for managing changes and competencies (knowledge) in the field of digital economy regulation.
9. "Other measures", a section which mentions the development of the digital economy in the EAEU.

The "Concept of Complex Legal Regulation of Relations Arising in Connection with the Digital Economy Development" (hereinafter referred to as the Concept), proposed by the Institute of Legislation and Comparative Law under the Government of the Russian Federation, provides an overview of the current state of legal regulation experienced by the digital economy all over the world. The regulation of international digital technologies originates in the documents of international

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[9] The Russian Government. (2019, February 11). *Opublikovan passport natsional'noy programmy "Tsifrovaya ekonomika Rossiyskoy Federatsii"* [*The passport of the national program "Digital Economy of the Russian Federation" has been published*] [Infographic. Information materials about the national program "Digital Economy of the Russian Federation"]. http://government.ru/info/35568/

[10] The Russian Government. (2019, February 11). *Opublikovan passport natsional'noy programmy "Tsifrovaya ekonomika Rossiyskoy Federatsii"* [*The passport of the national program "Digital Economy of the Russian Federation" has been published*] [Document. Passport of the national program "Digital Economy of the Russian Federation"]. http://government.ru/info/35568/

organizations: these include the G20 Initiative for Development and Cooperation in the Field of Digital Economy 2016 as well as the OECD Cancun Declaration on the Digital Economy 2016, amongst others. The provisions of these documents were developed and specified by many acts of the Group of Twenty, the Financial Stability Board, the OECD, the FATF, the International Monetary Fund, the Bank for International Settlements, and the International Organization of Securities Commissions, as well as other global standard-setters and European regulators.[11]

The Concept identifies the following four key approaches to the legal regulation of the digital economy at the national level: legislative, subordinate, national strategic, and regional strategic.

The Concept analyzes these models of legally regulating the digital economy, highlighting the strengths and weaknesses of each of them.

The *legislative regulation* of the digital economy has certain advantages: the regulatory consolidation of the elements of the digital economy allows them to hold an official status at the legislative level. As part of a comprehensive law, the elements of the digital economy are integrated into a hierarchical system of regulatory legal acts, becoming the next step after the basic law of the state.

This model also has disadvantages, the main one being related to the order of change. In order to change the text of the law, the necessary procedure for making such changes must be followed. These changes vary from one state to another, but this process is quite time-consuming and lengthy in absolutely all states. The next biggest drawback is that the elements of the digital economy are developing non-linearly and extremely rapidly, therefore the authorities may not have time to adapt the legislative system to the latest changes and, as a result, regulatory gaps may appear.

The *bylaw regulation of the digital economy* has the following advantages: an operational procedure for adopting regulations and great opportunities for adapting regulation to scientific and technological progress.

This model also has some disadvantages. For example, when placing the digital economy regulation under the aegis of the executive authorities and excluding the legislature from the law-making process, there is a risk of the people's opinion not being considered in completeness.

The *national strategic approach* is the most balanced. It has the following advantages: procedure for adoption and change, thus being the most rapid to adapt; long-term perspective (as a rule); and it can consider public opinion, as well as that of public organizations, the business community, and government representatives.

Despite this, the approach has one significant drawback — in the absence of an imperative, problems with its implementation may arise, especially if the strategy is designed for the long term. Competent, complete, and comprehensive implementation of the strategy requires the coordinated and harmonious approach of several actors involved. Failure of one "link" can jeopardize the entire strategy.

The *regional strategic* model has proven itself well in some federal states, but it can only be relied on in conditions of more or less the same position of the subjects of the federation (both in the organizational, legal sense and the economic sense). In other words, such a model can be successfully implemented in symmetric federations, in which all subjects are in the same position and have approximately equal opportunities. On the other hand, in asymmetric federations, it will most likely not be able to function normally due to the different capabilities of the subjects (states, lands, territories, cantons, provinces, etc.) of the federation.

[11] The international agenda is also covered in scientific works. Russian and foreign researchers are seriously discussing the prospects for the use of digital technologies and the development of digital law at the level of interstate associations to more effectively develop international cooperation, for example, in the field of criminal prosecution (Nikitin & Marius, 2020).

The Concept notes that the Russian Federation is moving towards building such a hybrid model, adding elements of each of the main models considered. No matter what, though, one of the models included in it will dominate. Russia is likely to follow the path of a nationwide strategic model, of which Estonia is a prime example. Its attractiveness is explained not only by the balance already noted but also by the fact that it is aimed at regulating the digital economy 2.0, which does not suggest direct human involvement in the system.

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Dear readers!

"Digital law" as a legal reflection of the digital economy is still in its infancy. The rapid development of public relations and the increasing complexity of trade pose several new questions to the international scientific community; answering these using the achievements of legal science of the 19th–20th centuries is not always possible. Instead it requires a modern conceptual framework, as well as a potential rethinking of traditional legal categories.

Digital Law Journal has been an important discussion platform for two years already. The current state of existing digital technologies, specific features, and the prospects for their full-scale implementation in the regulatory and legal field are analyzed in this journal from both scientific and practical points of view.

The magazine has achieved a lot during the years of its existence. Our editorial board includes exceptional scientists alongside representatives of scientific schools both in Russia and internationally, all of whom deal with the problems of digital law. The journal publishes the works of the authors whose research sets the tone for the modern "digital" debate. The legal regulation of smart contracts and telemedicine, the creation of "regulatory sandboxes", the place of artificial intelligence in the structure of legal relations, labor market digitalization, and the peculiarities of human rights, competition, and the tax system in the digital age are just some of the issues that have been discussed in our journal. Each submitted manuscript is invariably subject to a double-blind peer review, conducted anonymously by recognized experts in their field of research. The journal is published with a steady frequency.

Of course, all this would not have been possible without you, thoughtful and patient readers who are interested in the problems of digital law, methodological and substantive changes in traditional branches of law that are emerging in the era of the digital economy. Your interest in our project contributes to its continuous development, improving the quality of publications and attracting new readers, authors, and experts.

We are pleased to present to your attention the first issue of the second volume and hope that 2021 will bring only success to our common cause!

Kind regards,
Editor-in-Chief
Dr. Maxim Inozemtsev

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