

# BOOK REVIEW

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**Margaret Radin, John Rothchild and Gregory  
Silverman, *Internet Commerce: The Emerging Legal  
Framework* (Foundation Press New York, 2002)  
1,266pp**

## I INTRODUCTION

The challenge to conventional law and commerce in cyberspace was pithily stated by Net founder John Perry Barlow:

The enigma is this: if our property can be infinitely reproduced and instantaneously distributed all over the planet without cost, without our knowledge, without its even leaving our possession, how can we protect it? How are we going to get paid for the work we do with our minds? And, if we can't get paid, what will assure the continued creation and distribution of such work?<sup>1</sup>

At the time of writing this review three university students face criminal charges under s 132(2) of the Australian *Copyright Act 1968*. These charges are the culmination of investigations into an Internet website located in Australia and known as 'MP3 WMA land'.<sup>2</sup> It is alleged that the 'Downing Street Three' are connected to the site and exchanged MP3 and other digital files globally. It is also alleged they made available several hundred music products belonging to major music companies for the purpose of trade and prejudicially affected the rights of the copyright owners.

Such charges reflect issues that are the subject of the materials compiled in *Internet Commerce* by its three authors. These students allegedly engaged in the exchange of digital property over the Internet. Other click-and-mortar sites utilise the Net to exchange traditional property based on the notion of atoms. Whether a user is purchasing a click-wrap licence to use music or the latest BMW convertible via the Web, modern businesses continue to adopt internet commerce.

The authors point out that such commerce comes in diverse forms. It can include use of email to negotiate a deal, online catalogues, the use of a marketing web site and

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<sup>1</sup> J P Barlow, 'The Economy of Ideas: A framework for patents and copyrights in the Digital Age (Everything you know about intellectual property is wrong)' 2.03 *Wired* (March 1994) 84, cited in Note 4, 281.

<sup>2</sup> Australian Federal Police, 'Federal Police arrest three in \$60 million music piracy operation', Press Release, 24 April, 2003 <<http://www.afp.gov.au/page.asp?ref=/Media/2003/0424Music.xml>>.

transactions that are enabled by interactive e-commerce sites.<sup>3</sup> The authors have a clear aim:

Given the substantial and expanding role that the Internet plays in everyday commercial activities, any lawyer who advises businesses or litigates on their behalf must be conversant with the new legal issues that arise from commercial use of online communications. The goal of this book is to supply that knowledge.<sup>4</sup>

## II ABOUT THE AUTHORS

The authors have extensive experience in teaching and writing cyberlaw as well as commercial practise. This experience amply qualifies them to create such a book.

Professor Margaret Radin is Director of the Stanford Program in *Law, Science and Technology*. She has published numerous articles on property and contract in the digital environment. An earlier comment on emerging problems for internet commerce highlighted the need for individual autonomy in order to create trust:

... we would need to fulfill a background condition...so that the choice whether or not to buy will count as an autonomous choice...But this is the background condition that modern commerce cannot often fulfill. Even if purveyors of products-plus-terms tell the truth about them, even if all the fine print is on the website for all to peruse and download if they wish, it is not efficient or even possible for buyers to take the time to understand all this information.<sup>5</sup>

John Rothchild is Associate Professor of Law at Wayne State University Law School. Prior to 2001 he gained practical regulatory experience at the Federal Trade Commission's Bureau of Consumer Protection where he specialised in enforcement procedures relating to Internet-based fraud.<sup>6</sup> His non-digital law experience includes representing labour unions and pension plans.

Gregory Silverman, an enrolled member of the Mohegan Tribe of Indians of Connecticut, is Assistant Professor of Law at Seattle University School of Law. He has been a managing partner in a law firm where he practised in diverse areas including admiralty, defence, corporate, intellectual property, estate planning and civil litigation. He played a significant role in the largest fisheries fraud litigation in American history.

## III THE AUTHORS' APPROACH

Cyberlaw books suffer from the fact that the speed of case law and legislative developments makes them redundant by the time they reach their atom-based publication. These authors 'walk the talk' in cyberspace by maintaining the currency of their materials on a web site at <http://www.ecommercecasebook.com/>. The site shows how recent developments relate to specific materials in the casebook and gives page references. For example, the recent Australian High Court decision on defamation is

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<sup>3</sup> *Internet Commerce*, v.

<sup>4</sup> Ibid.

<sup>5</sup> M J Radin, 'Humans, Computers, and Binding Commitment' (1999) 75 *Indiana Law Journal* 1125.

<sup>6</sup> J Rothchild, 'Protecting the Digital Consumer: The Limits of Cyberspace Utopianism' (1999) 74 *Indiana Law Journal* 893.

included.<sup>7</sup> This found that defamation occurs at the point where the harm to a person's reputation takes place rather than where material is uploaded to the Internet. The web site relates this case to the casebook material on the 'effects test'. In this US test, due process may be satisfied on the basis of the effects that the out-of-state conduct has in the forum state.<sup>8</sup>

#### IV WHO SHOULD USE THIS BOOK

Lawyers stumping their way through a magistrate's court to the next crash and bash may have some doubts about the usefulness of this book. Practitioners who deal in property that is increasingly made up of assignments and licenses derived from intellectual property rights would find it indispensable. The book is also directly tailored to the student and academic market in this relatively nascent area. Chapters include discussion points and activities for users. One can see in-house counsel and those in technical positions such as system operators, chief information officers and IT managers looking to this casebook for an examination of their common law and legislative duties and rights.

#### V WHAT'S INSIDE

The book is presented in seventeen chapters that I have broken into five main parts. These are:

1. Paradigms for regulation and jurisdiction.
2. Protecting informational value.
3. Online Contracting.
4. Consumer protection and controlling digital property.
5. Various issues including spam, ISP liability, ADR, payment systems and taxation.

##### A *Paradigms for Regulation and Jurisdiction*

As the amount of case law and legislation in the area grows the casebook reminds us of another assertion of John Perry Barlow in his Declaration of Independence in Cyberspace:

Your legal concepts of property, expressions, identity, government and context do not apply to us. They are all based on matter, and there is no matter here.<sup>9</sup>

Another extract questions this Utopian hyperlinking to a non-legal Eden. It argues Utopians overstate the difficulties that online characteristics create for existing regulatory regimes. Many of the characteristics of cyberspace have already been addressed by regulation of other media. The Utopians do not make enough of an effort to adapt existing regulation to cyberspace. Lastly they underestimate the ability of users to counter deceptive online practices.<sup>10</sup>

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<sup>7</sup> *Dow Jones & Company Inc v Gutnick* (2002) 194 ALR 433.

<sup>8</sup> *Internet Commerce*, 489-500, 513-514.

<sup>9</sup> *Ibid* 2

<sup>10</sup> J Rothschild, 'Protecting the Digital Consumer: The Limits of Cyberspace Utopianism' (1999) 74 *Indiana Law Journal* 893 (cited in *Internet Commerce*, 14).

Materials examine the issue of regulatory reach in a borderless world. How can domestic law be applied in a global commercial framework? The *Yahoo Case*<sup>11</sup> demonstrates that a clash of US and French cultures can occur not only in relation to waging war on Iraq. It can also occur in relation to selling Nazi memorabilia. Different jurisdictions express different sensitivities in different laws. The director of the Wisenthal Centre remarked, 'I don't think one society should be able to impose its values on another'.<sup>12</sup>

### B *Protecting Informational Value*

How does one protect their identity in a world without physical location? While physical propinquity may not matter to a consumer, location of a transaction is of vital importance to taxing and regulatory authorities. What is critical is the ability to be able to protect one's brand and commercial identity in order to create trust. Judicial and non-judicial disputes that take place at the intersection of trademark and domain name registration and rights are covered in the materials. The issue of bad faith registration of domain names is covered in case interpretation of the Anticybersquatting Consumer Protection Act. In US law, the intent to profit is a clear element to be found in any bad faith attempt to register. One can also register a domain name as a trade mark under the Lanham Act. The domain name must be registrable subject matter. To be registrable a mark must act as a source identifier and not merely as an address to access a site. One applicant who used his domain name on letterhead and other stationary was advised to make the name of his firm the same as his domain name.<sup>13</sup>

### C *Online Contracting*

The authors' approach contracting issues by examining binding commitment, contract authentication and the limits to contractual ordering.

The book considers the role of Article 2B in the *Uniform Computer Information Transactions Act* ('UCITA') and the *Uniform Electronic Transactions Act* ('UETA'). In this section the extent to which e-contracts should have equivalence with paper-based contract law is examined. UETA was formed to give a national coverage to electronic transactions and provides that 'electronic records produced in the execution of a digital contract shall not be denied legal effect solely because they are electronic in nature'.<sup>14</sup> Shrinkwrap and clickwrap agreements are compared. Courts have found that both agreements are enforceable but it is important for clickwrap agreements to create some form of explicit manifestation of assent:

To be sure, shrinkwrap and clickwrap license agreements share the defect of any standardized contract – they are susceptible to the inclusion of terms that border on the unconscionable – but that is not the issue in this case. The only issue before the Court is whether clickwrap license agreements are an appropriate way to form contracts, and the

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<sup>11</sup> *The League Against Racism and Anti-Semitism (LICRA) & The French Students Union (UEJF) v Yahoo! Inc (Yahoo Case)* (20/11/2000 Unreported)

<sup>12</sup> B Fowler, C Franklin and B Hyde, 'Can You Yahoo!? The Internet's Digital Fences' (2001) *Duke Law and Technology Review* 12.

<sup>13</sup> US Patent and Trademark Office, Examination Guide No. 2-99, Marks Composed, in Whole or in Part, of Domain Names September 29, 1999 (cited in *Internet Commerce*, 267).

<sup>14</sup> *Internet Commerce*, 280.

Court holds they are. In short, i.LAN explicitly accepted the clickwrap license agreement when it clicked on the box stating, 'I agree'.<sup>15</sup>

Interestingly, the court made no mention of an additional architectural requirement that assures assent even more clearly. Many sites are designed to prevent a transaction from proceeding to the next screen if the 'I agree' button has not been selected. The impact of the growth of adhesion 'take-it-or-leave-it' contracts is questioned. Why is technology not developed to allow more customised transactions by consumers? They could use drop-down menus to set negotiable terms on a site for a particular purchase. The patchwork approach to authentication by use of digital signatures is the subject of many materials and the role of public key encryption technology critically evaluated.

Internet commerce is trans-global. Jurisdiction with regard to transactions is a fundamental issue. In particular, the case materials pose the question as to how operation of a web site by someone outside a state forum can constitute transaction of business within a forum state. Making sales to members of a forum state via an interactive site constitutes transaction of business. It matters little whether the sale resulted directly from a specific Web activity:

Ultimately, it does not matter for jurisdictional purposes whether these sales were made because a computer user clicked while accessing [the] Web-site, or by calling a toll-free number, or by answering mail.<sup>16</sup>

Foreign companies also fall within US long arm statutes, an issue not well canvassed in the updated materials for the casebook. In *Metro-Goldwyn-Mayer Studios v Grokster*, the court found jurisdiction existed in California for the Australian company Sherman Networks that operates the Kazaa sites enabling seamless file exchange:

Here, there is little question that Sharman has knowingly and purposefully availed itself of the privilege of doing business in California. First, Sharman essentially does not dispute that a significant number of its users - perhaps as many as two million - are California residents. Indeed, given that Sharman's KMD software has been downloaded more than 143 million times, it would be mere cavil to deny that Sharman engages in a significant amount of contact with California residents.<sup>17</sup>

#### D Consumer Protection and Controlling Digital Property

These sections cover the protection of the consumer and the protections that intellectual property rights convey to owners of digital property.

The information consumers give up when they engage in internet commerce is a commodity of considerable value in itself. Online privacy models for doing commerce are compared, particularly the high benchmark of European standards and the US safe harbour concessions. There is a special need to protect children from marketing intrusions.<sup>18</sup> Case law has shown that some commercial organisations have a strong disregard for a child's privacy. Nothing comes for free and children have been

<sup>15</sup> *I Lan Systems In. v Netscout Service Level Corp* 183 F Supp 2d 328 (D.Mass 2002) (cited in *Internet Commerce*, 319).

<sup>16</sup> *Internet Commerce*, 518.

<sup>17</sup> 2003 US Dist LEXIS 6994 at [34].

<sup>18</sup> *Internet Commerce*, 623.

subjected to non-transparent collection of data. One site offering 'free' virtual communities 'sold, rented or otherwise marketed or disclosed [personal information], including information collected from children, to third parties who have used this information for purposes other than those for which members have given permission'.<sup>19</sup>

The casebook extensively covers the legislative measures that have been used to strengthen the proprietorial rights that software developers can code into their wares by use of technological protection measures. An examination of the extension of patents for business methods is also covered. These include one-click ordering patents and Cybergold's pay-per-view mechanism

#### E *Various Issues Including Spam, ISP Liability, ADR, Payment Systems and Taxation*

To mediate or litigate? The authors argue that alternative dispute resolution is a more appropriate mechanism for settling Internet commerce disputes. They refer to dispute resolution which uses 'the online medium as a tool to resolve disputes, whether they arise online or offline'.<sup>20</sup> Because parties are often far from each other and the value of transactions is relatively small, parties can use software based on negotiation algorithms. Web sites that engage in taking complaints from consumers and presenting these to the subject of the complaint are covered in the materials. One very contrite online distributor says: 'I really appreciate your feedback on your shopping experience with us and hope you will give us a chance to redeem ourselves'.<sup>21</sup> Case law dismisses a complaint because a party can show that a valid agreement existed between the parties to arbitrate.

Increasingly, many nations now base their tax systems on commercial transactions rather than the more traditional income based approach. As online transactions grow adequate taxation systems for calculating and collecting tax need to follow. 'This shift to online ecommerce may have a major impact on whether a transaction will result in tax revenues, and if so which taxing authority has the right to those revenues'.<sup>22</sup> Sales and use taxes in the US are applied to tangible personal property. This raises question with regard to software. Is it tangible? If it has no physical medium such as a CD or disk but is made available by digital download does that constitute tangibility? In one case it was argued that software was merely knowledge or intelligence and as such was not corporeal. The court disagreed:

The software itself, i.e. the physical copy, is not merely a right or an idea to be comprehended by the understanding. The purchaser of computer software neither desires nor receives mere knowledge, but rather receives certain arrangement of matter that will make his or her computer perform a desired function. This arrangement of matter, physically recorded on some tangible medium, constitutes a corporeal body.<sup>23</sup>

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<sup>19</sup> *In the Matter of Geocities* 1999 FTC Lexis 17, [14].

<sup>20</sup> *Internet Commerce*, 1073.

<sup>21</sup> *Ibid* 1081.

<sup>22</sup> *Ibid* 11139.

<sup>23</sup> *South Bell Telephone Company v Barthelemy* 643 So 2d 1240 (La 1994) (cited in *Internet Commerce*, 1175).

The court went on to add that the form of delivery of the software, even if by digital download, was of no relevance.

## VI CONCLUSIONS

This casebook is an extensive work in this nascent legal domain. It has examined privacy, taxation and alternative dispute resolution issues that are often ignored by similar publications. The selection of materials represents a sound balance between case law, legislation and comment for relevant authorities and academics.

Even though the authors were producing a book for the US market, *Internet Commerce* would benefit from a close examination of international statistics on the uptake of commerce on the Net. Such statistics might demonstrate a concentration on US centric regulation because that is where most commerce sites are originating. In *Dow Jones v Gutnick* one Australian High Court judge commented that such concentration could 'impose upon Australian residents for the purposes of this and many other cases, an American legal hegemony ...'.<sup>24</sup> The casebook would benefit from an examination of cross-cultural regulation of cyberspace, an issue better addressed in the support materials on the casebook Web site.

Regulation in cyberspace still needs articulation of a 'big picture' approach. New things are not easily explained within old models. Law's attempts to articulate any new paradigm are messy, incremental and incomplete. *Internet Commerce* plays an important role in creating a more complete regulatory picture. Nevertheless, we still search for answers to explain this new thing. As the pioneer of Netscape commented, authors such as these three who seek to articulate new approaches can not rest from their endeavours:

[the searcher for the new, new thing] chooses to live perpetually with that sweet tingling discomfort of not quite knowing what it is [s]he wants to say. It's one of the little ironies of economic progress that, while it often results in greater levels of comfort, it depends on people who prefer not to get too comfortable.<sup>25</sup>

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<sup>24</sup> (2002) 194 ALR 433, 483 (Callinan J).

<sup>25</sup> M Lewis, *The New New Thing* (W W Norton, 2000) xiii.