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# EU INTERNET LAW

ANDREJ SAVIN



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*To Henriette*



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## Preface

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This book analyses Internet regulation in the European Union (EU). Frank Easterbrook, pointing out the danger of collecting different strands of study into a unified one, famously called Internet law ‘the Law of the Horse’.<sup>1</sup> His warning is still valid today. Assuming that Internet law is a unified field, we run the danger of forgetting that its regulation arises out of more general, older legal disciplines. Nevertheless, the Internet has been part of our reality for two decades. Today it penetrates our lives to an unprecedented extent and we can no longer be happy attempting to view it through the prism of other disciplines. Although it may have earlier been true to say that intellectual property or contract law was sufficient to explain the Internet, this is no longer true. There are two reasons for this. First, as a result of the digital revolution, rather than applying the inherited concepts to the digital world, the traditional phenomena such as property, privacy and identity need to be reconceptualized in a broader non-digital frame. Second, the ubiquitous new phenomena, such as user-generated content or social networks, bring new rules, a new language and a new social context which do not easily lend themselves to traditional legal classification.

In this book we understand the Internet to mean a world-wide web of interconnected computers which use the same language (protocol) to communicate. As such, we do not distinguish between the Internet provided through the regular broadband pipe and through other means (LAN networks, new generation 3G or 4G mobile networks, etc.) This approach inevitably means that a range of phenomena typically relevant in information technology (but which do not involve publicly accessible connected networks) are out of the scope of this book. In other words, this book is not about information technology systems in general but only those which operate on the publicly accessible World Wide Web.

Three other remarks about this book’s scope are in order.

First, a number of works have already been written on the subject of electronic commerce, both in the EU and abroad. Although it is tempting

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<sup>1</sup> Easterbrook, F.H., ‘Cyberspace and the Law of the Horse’ (1996) *University of Chicago Legal Forum* 207.

to view the Internet purely as an electronic commerce phenomenon, this would be both wrong and misleading. Although most activities on the World Wide Web have commercial aspects, only some of them take place in the purchase–sale form. A regular visit to a free news website, for instance, is commercial only in that the site generates revenue from advertising, but does not take place in the form of a purchase of a subscription and is outside the scope of a simple electronic sales contract. In other words, Internet regulation is wider than the regulation of sales transactions that take place on the Internet.

Second, excellent works exist on EU intellectual property, EU copyright, EU telecommunications, EU privacy or EU consumer protection. The work which we offer is meant neither to replace nor to compete with them. Instead, we attempt to provide an overview of how these disciplines fit together in situations concerning Internet regulation. As such, the work is not meant as a simple catalogue of disparate legal disciplines but as an attempt to understand their interaction. The chapters that follow represent a collection of what are typically encountered as legal problems in Member States' courts.

Third, the Internet has two components. The first is the infrastructure on which the content is transmitted. The second is the content itself. The former is subject to a separate and relatively complex legal discipline called telecommunications law. The second is the subject of various legal disciplines that are covered in this book. The decision not to talk about telecommunications regulation is a result of two factors. The first are space constraints. The second is the existence of a conceptual difference between the regulatory environment which applies to the wires as opposed to that which applies to the content. Although other media (such as television or radio) share many features with the Internet, they are, as a rule, non-interactive and distributed from the centre to the periphery and therefore subject to different principles.

This book is not an attempt to analyse the Internet as a Single Market phenomenon. Although the European Commission often uses Article 114 of the Treaty on the Functioning of the European Union (TFEU) as a legal basis when regulating the Internet, the main reason for harmonization is arguably not the fear that disparity between Member States' laws would slow the economic development but rather that a lack of a coherent vision would have a negative impact on such development in the EU. The EU lawmaker, in other words, acts not so much as a harmonizer as it acts as a policy-maker.

The EU's efforts in Internet regulation may at first appear confusing. Instruments are numerous, policies difficult to distinguish, court decisions conflicting, official statements contradictory, proposals incoherent.

But these problems can only partially be attributed to systemic or bureaucratic failures. Arguably, there are two reasons for this apparent failure. The first concerns the radical rethinking of the user/consumer's role. Few media have contributed to turning the world into McLuhan's 'global village'<sup>2</sup> as much as the Internet has. The reason why it surpassed newspapers, radio, television and other communication media is simple: it allows participation. It turns passive consumers into active players and contributors. The implications of such a new global village for the economy and society at large are as yet unknown. But some elements of the picture are already beginning to emerge. We know that participation increases the number of players (and therefore interests) on the board exponentially. This is the second reason for the apparent failure. We are aware that holders of vested rights are fighting innovation which they perceive is endangering their interests. We know that governments, corporations and other individuals all have their own interests in violating privacy. We are aware of the crucial role of consumers. These disparate interests are not easy to balance.

The Internet gives us the opportunity to rethink the world we live in. It is a thought experiment in developing legal rules for new social contexts. But the Internet also creates these new social contexts. The motivation for this book on EU Internet law comes from the desire to systematize many instruments that either apply to Internet regulation or have been specifically drafted for that purpose. Today, the United States stands at the forefront of Internet development. Most of what other jurisdictions do can be interpreted as a response or reaction to a trend that comes from the US. The European Union has answered most of these challenges. Sometimes, these answers are distinct, even original or unique. That is the case with at least the introduction of the country of origin principle in the Electronic Commerce Directive. On the other hand, occasionally, the solutions are questioned by businesses and the wider public alike. In any case, European regulation of the Internet is a reality.

\* \* \*

This book is a result of a long-lasting interest in Internet regulation. Thanks are due to many individuals and institutions with which the author was fortunate to interact over many years. The author wishes to specially thank the staff and colleagues at the Law Faculty, University of Cambridge, Emmanuel College and Kings College, Cambridge, where he

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<sup>2</sup> McLuhan, M., *The Gutenberg Galaxy: The Making of Typographic Man* (University of Toronto Press, Toronto 1962), p. 21.

lectured and was a fellow from 2001–07. I am grateful to my colleagues at the Law Department, Copenhagen Business School, where I have worked since 2007. Finally, I am greatly in debt to my family and in particular to my wife, Henriette, whose patience and support has been material to this work's completion.

\* \* \*

The law is up to date as of 1 June 2012.

## EU Internet Law

This timely and detailed book examines the EU's policy and governance of Internet law in the EU's legal framework which applies to the internet. At the same time it serves as a critical evaluation of the EU's policy and governance methods and as a comparative analysis, mainly contrasting American with EU solutions.

The book begins by examining the EU constitutional context within which the Internet is regulated and the various policy documents which informed the regulation over the years. It then continues to describe the basic instruments in each of the relevant fields, covering electronic commerce, jurisdiction, content regulation, intellectual property, consumer protection, privacy and criminal regulation. Each is observed as a framework through which the Internet is regulated. Rather than provide a comprehensive catalogue of applicable instruments, the author analyses their interaction.

*EU Internet Law* will appeal to academics, students and practitioners, and will be of interest to the legally-minded and legally-informed public as it discusses issues of general importance and interest.

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