

# Cyberlaw: Cases and Materials on the Internet, Digital Intellectual Property and Electronic Commerce: Book Review

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Cyberlaw: Cases and Materials on the Internet, Digital Intellectual Property and Electronic Commerce  
Brian Fitzgerald and Anne Fitzgerald\*  
Publishers: LexisNexis Butterworths 2002  
Price: \$242.00 (inc. GST)  
ISBN: 1 86316 208 9  
Pages: 794

## Introduction

At the end of 1999, I left work in the information technology industry and education to take up law. I shopped around course offerings, searching for a law school that had an understanding of IT and internet issues. At the open night of an eminent technology university in a major capital city, I put the question to a panel of experts as to what role information technology - and more particularly the shift to a digital world - was having on law. After some hesitation along the row of professors, one indicated that course lecture notes were available on the Web. Another, that case databases were useful for current litigation. For them, there was no paradigm shift but a mere change in legal process.

Research into academic offerings in this nascent field led me to 'Cyberlaw' - the law "relating to the internet, digital intellectual property and electronic commerce"<sup>1</sup> - run as a summer school course by Southern Cross University at Byron Bay.<sup>2</sup> The main presenter was Lawrence Lessig,<sup>3</sup> then Professor of Law at Harvard who was at the time writing an amicus curiae brief in the Microsoft anti-trust case.

This book evolved from such courses taught by the editors (Brian Fitzgerald and Anne Fitzgerald) and others in Australia and at Santa Clara University in Silicon Valley in the USA since 1996.

## About the Editors of Cyberlaw

The book is a work of co-authorship by a sibling team with diverse interests and backgrounds in law.

Anne Fitzgerald has published several books, numerous articles and book

chapters, on the law relating to digital technologies, and electronic commerce law<sup>4</sup>. She teaches cyberlaw and legal components in multimedia and electronic commerce. Her academic output has been complemented by industry experience. Anne worked on government standing advisory committees including the Advisory Council on Intellectual Property (ACIP) which advises IP Australia, and as a member of the Copyright Law Review Committee's Expert Advisory Group. She was Technology Lawyer for Software Engineering Australia and is now in the Technology and Communication Law Team of the Crown Law Office in the Queensland Department of Justice and Attorney General.

Professor Brian Fitzgerald headed the School of Law and Justice at Southern Cross University before taking up the position of Head of Law at Queensland University of Technology in Brisbane in 2002. He holds postgraduate law degrees from Oxford University and Harvard University. During 2001, he was a Visiting Professor at Santa Clara University Law School in Silicon Valley USA, teaching a seminar on Digital Property. He was Head of the School of Law and Justice at Southern Cross University from 1998-2001. He is co-editor of one of Australia's leading texts on e-commerce, software and the internet - *Going Digital 2000* - and has published articles on Law and the Internet, Technology Law and Intellectual Property Law in Australia, the United States, Europe and Japan. In July 2002 he organised a conference on the legal implication of using free and open source licensing in digital property at Queensland University of Technology.<sup>5</sup>

## The Editors' Approach

In cyberspace, England is no longer the dominant source of precedent or influential case law. To complement Australian material, the editors derive sources from the United States and European contexts. It is these jurisdictions that lead developments in law relating to cyberspace.

The authors do not examine only case law and legislation as a mode of regulation. While not ignoring black letter law principles, they use a broad range of sources to highlight other modalities of regulation - *social norms (education), markets and architecture* in the form of code.<sup>6</sup> Computer code is at the heart of cyberspace and digital property. Those that control production and distribution of code are dominant. Coded options allow end users self-regulation. For example, privacy-enhancing technologies allow a user to survey a web site before entry and content filters allow a user control over unwanted content. Developers of digital property can choose to build copyright enforcement measures into their products by way of mechanisms such as pay-per-view or a set number of uses before expiry limitations. Conversely they can use copyright law to force their source code, and derivatives of it, to remain in the public domain.<sup>7</sup>

## Who Should Use this Book

This book is for those involved in rapid and unrelenting change. Lawyers who have secure practices applying the verities of real property to the transaction of atoms may find this book unappealing. Practitioners who deal in the property of cyberspace in the form of intellectual property

rights, be they assignments or licensing agreements, will find this book indispensable. Academics in the field of law, in-house counsel in IT companies and relevant government departments should also have it on their reference shelf and would find it has little time to gather dust on their shelves. In addition, and because the book covers the four modalities of regulation, it is highly relevant to system operators, chief information officers and IT managers in local or wide area networks.

### **What's Inside**

The book is presented in four parts. The first examines the nature of cyberspace, content regulation and jurisdiction. The internet is shown as much more than a technical device, and as "a medium for extending personality through technology." The disintermediation of traditional forms of regulation due to the net's end-to-end architecture is a central tenet of the materials. Critically, and it is a recurring theme throughout the book, the capacity of cyberspace to facilitate commerce but threaten its income is highlighted. The material on content regulation reflects the full range of the four modalities of regulation. The Australian Broadcasting Authority (ABA) places the responsibility on ISPs to apply architectural solutions in preventing access to overseas-hosted illicit material by mandating use of filters. The ABA suggests the application of market forces so ISPs provide differentiated services to clients "where there is market demand". A clean service allows access to a known list of filters only. Alternately, a best effort service utilizes a proxy to block a list of known sites resulting in a best effort by the ISP that cannot be guaranteed. The ABA also enhances norm reinforcement through provision of an education framework.<sup>8</sup>

The second section of the materials looks examines the most vexing impact of the net. John Perry Barlow, one of the libertarian early founders clearly states the challenge to conventional law and commerce that has emerged in cyberspace:

*The enigma is this: if our property can be infinitely*

*reproduced and instantaneously distributed all over the planet without cost, without our knowledge, without it 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>9</sup>*

The book offers cases, legislation and persuasive material that relates to protection of informational value. Hugenholtz indicates that in a digital economy direct contract relations by way of user licenses have become the norm. He poses the question whether the terms of these licenses and technological solutions that enforce intellectual property rights through code can override the statutory limitations and rights of copyright legislation.<sup>10</sup> Arguing that we must be wary of a pessimistic future where the net will lose much of its open character, he concludes "code will rule the internet with iron logic". To counter such a future Hugenholtz champions the development of a body of public information law that secures a right of access to important information and safeguards the public domain in areas such as fair use.

The editors offer an extensive coverage of Australian copyright legislation. Source code and the object code of a computer program are protected as a literary work. New provisions for non-infringement under the *Copyright Amendment (Computer Programs) Act 1999* are detailed.<sup>11</sup> The Australian legislators have been careful to explicitly indicate that contractual provisions that seek to remove these provisions will be void. In addition, in order to maintain the open architecture of the net, ISPs are not liable for breaches "where they merely provide facilities for communication and are not responsible for the content of the communication".<sup>12</sup> The extension of patents to business methods, which seek to emulate current practices in an internet environment, is examined and lamented by many commentators. Patent applications that are contentious include a system for making bids at an online auction and then placing a purchase order over the internet.<sup>13</sup>

These materials indicate a central concern. Extension of intellectual property rights, particularly registerable ones that convey exclusive rights, may chill innovation and creativity in cyberspace if monopolies continue to arise. The role of the free software and open source movement as a counter to those who vigorously use intellectual property rights to limit competition is alluded to but could form a more significant part of further materials in a new addition.

In the third section of e-commerce we see materials on social issues included. Economic rationalism tends to regard a social issue as having importance if it chills acceptance of economic opportunity in cyberspace. Consequently, it is seen as an important issue by the authors of one report because lack of trust has resulted in relatively slow adoption of consumer e-commerce "partly due to the reticence of consumers to supply information about themselves over the internet".<sup>14</sup> For those who wish to know the difference between a samurai, a dark-side hacker, a cracker, a hacker, phreaking, spamming and spoofing, the section on cybercrime is indispensable.

The final section on digital entertainment covers an area that has led to much litigation. Development of MP3 file compression and peer-to-peer connectivity has made a CD-burner an indispensable tool in many households and enabled widespread copying, communication and distribution of digital entertainment products. Litigation has been not been brought against end users. Rather the creators of machines used to play infringing copies, the operators of web sites containing infringing content and intermediaries such as Napster that allow searching and downloading of data have been the target. Even soon it appears the dominant commercial groups cannot continue to ignore the new paradigm for entertainment products. In Australia, at least some record labels are succumbing to a cyberspace model of distribution and marketing.<sup>15</sup>

### **Conclusions**

The book has two limitations. First,

since *lex internet* is replete with terminology the book suffers from the lack of a page index for the busy reader. Secondly, the publishers have not taken a perfect opportunity to 'walk the talk' in cyberspace by maintaining current materials on a web site. It is a necessary precondition of the atom based existence of paper books that in an area such as cyberlaw it needs updating long before it has landed on the shelves of bookshops. At the time of writing this review the editors indicate such a site is nearly operational, subject to permissions being granted.

Such limitations aside, the book presents a big canvas on which the reader can view the regulatory possibilities for our digital millennium. It is not a book for those that take comfort in legislative certainty and ample precedent. With apologies to those that may be offended by the sexist selection of pronouns in the following extract, the editors and contributors of this book faced tribulations such as those encountered by Netscape pioneer Jim Clark, the quintessential searcher for the new, new thing:

*He gropes. He does not seriously want to sit back into any chair.*

*He needs to keep on groping. He chooses to live perpetually with that sweet tingling discomfort of not quite knowing what it is 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>16</sup>*

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\* Disclosure: The author of this book review studied law at Southern Cross University and worked as a researcher for Professor Brian Fitzgerald.

- 1 Cyberlaw at xv.
- 2 See: <http://www.scu.edu.au/schools/law/cyberlaw/>.
- 3 The author of leading works in the area of Cyberlaw including *Code and Other Laws of Cyberspace; The Future of Ideas*. Also see: <http://cyberlaw.stanford.edu/lessig/>.
- 4 For example see: *Going Digital: Legal Issues for Electronic Commerce, Multimedia and the Internet* (Prospect Media) in August 1998; *Intellectual Property Law*, (Lawbook Co/Thomson, first ed 1999, 2nd ed March 2002).
- 5 Adam Turner, "Intelligence for the Open Source War", *SMH*, July 2 2002, IT Section at 2.  
See: <http://www.smh.com.au/articles/2002/06/29/1023864671766.html>.
- 6 Lawrence Lessig, "The Law of the Horse: What Cyberlaw Might Teach" (1999) 113 *Harv. L. Rev.* 501, pp 506-7.
- 7 For example see the General Public License [[www.opensource.org/licenses/gpl-license.html](http://www.opensource.org/licenses/gpl-license.html)].

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- 8 Australian Broadcasting Authority, 'What every Family Should Know – Filters and Label Tools', Chapter 5, at 267.
  - 9 John Perry Barlow, 'The Economy of Ideas...', Chapter 6, at 281.
  - 10 P Hugenholtz, 'Copyright, contract and code: What will remain of the public domain?', at 287.
  - 11 Cyberlaw at 295.
  - 12 Cyberlaw at 297.
  - 13 Cyberlaw at 396.
  - 14 Freehills' Internet Privacy Survey Report 2000, "Internet privacy survey shows Australian websites lacking", [2000] PLPR 1.
  - 15 EMI has announced plans in Australia to sell music through an online subscription service as a reaction to figures that show sharply declining CD sales in the USA: Kirsty Newman, "If you can't beat 'em: CD label goes online", *SMH*, 28 August 2002, at 3.
  - 16 Michael Lewis, *The New New Thing*, Hodder and Stoughton, London, at xiii.

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## New geographic 2LDs for Oz

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The auDa Board has decided to create eight new second level domains (2LDs) for Australian States and Territories – act.au, nsw.au, nt.au, qld.au, sa.au, tas.au, vic.au and wa.au.

The geographic naming system is aimed at reserving geographic names for use by the relevant community.

The proposed structure is placename.state/territory.au, for example 'Bathurst.nsw.au'. Use of the domain names would be restricted to community website portals that reflect community interests, such as local business, tourism, historical information, special interest groups and cultural events.

auDa's CEO has predicted a 12-18 month implementation period.

For more info:

<http://www.ada.org.au/about/news/2002111402.html>; and

<http://www.ada.org.au/policy/panel-newname-2002/>.

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