

案例教程影印系列

CASEBOOK  
SERIES

# 网络信息法

## CYBERSPACE LAW

### 案例与资料

### Cases and Materials

雷蒙德·S·R·库 (Raymond S. R. Ku)

[美] 米歇尔·A·法伯 (Michele A. Farber) / 著

阿瑟·J·科克菲尔德 (Arthur J. Cockfield)



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中 信 出 版 社  
CITIC PUBLISHING HOUSE

## 图书在版编目 (CIP) 数据

网络信息法: 案例与资料 (案例教程影印系列) / (美) 库等著. —影印本. —北京: 中信出版社, 2003.8

书名原文: Cyberspace Law: Cases and Materials

ISBN 7-80073-840-X

I. 网… II. 库… III. 计算机网络-科学技术管理-法规-研究-美国-英文 IV. D971.221

中国版本图书馆CIP数据核字 (2003) 第060763号

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This volume of Cyberspace Law: Cases and Materials, by Raymond S. R. Ku, Michele A. Farber, and Arthur J. Cockfield, is an English Reprint Edition meant solely for publication in the country of China, published and sold by CITIC PUBLISHING HOUSE, by permission of ASPEN PUBLISHERS, INC., New York, New York, U S A., the owner of all rights to publish and sell same.

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## 网络信息法: 案例与资料

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责任编辑: 袁婉君

出版发行: 中信出版社 (北京市朝阳区东外大街亮马河南路14号塔园外交办公大楼 邮编 100600)

经 销 者: 中信联合发行有限公司

承 印 者: 霸州市长虹印刷厂

开 本: 787mm × 1092mm 1/16 印 张: 46 字 数: 920千字

版 次: 2003年8月第1版 印 次: 2003年8月第1次印刷

京权图字: 01-2003-2469

书 号: ISBN 7-80073-840-X/D · 99

定 价: 108.00元

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# 总 序

吴志攀

加入世界贸易组织表明我国经济发展进入了一个新的发展时代——一个国际化商业时代。商业与法律的人才流动将全球化，评介人才标准将国际化，教育必须与世界发展同步。商业社会早已被马克思描绘成为一架复杂与精巧的机器，维持这架机器运行的是法律。法律不仅仅是关于道德与公理的原则，也不单单是说理论道的公平教义，还是具有可操作性的精细的具体专业技术。像医学专业一样，这些专业知识与经验是从无数的案例实践积累而成的。这些经验与知识体现在法学院的教材里。中信出版社出版的这套美国法学院教材为读者展现了这一点。

教育部早在2001年1月2日下发的《关于加强高等学校本科教学工作提高教学质量的若干意见》中指出：“为适应经济全球化和科技革命的挑战，本科教育要创造条件使用英语等外语进行公共课和专业课教学。对高新技术领域的生物技术、信息技术等专业，以及为适应我国加入WTO后需要的金融、法律等专业，更要先行一步，力争三年内，外语教学课程达到所开课程的5%-10%。暂不具备直接用外语讲授条件的学校、专业，可以对部分课程先实行外语教材、中文授课，分步到位。”

引进优质教育资源，快速传播新课程，学习和借鉴发达国家的成功教学经验，大胆改革现有的教科书模式成为当务之急。

按照我国法学教育发展的要求，中信出版社与外国出版公司合作，瞄准国际法律的高水平，从高端入手，大规模引进畅销外国法学院的外版法律教材，以使法学院学生尽快了解各国的法律制度，尤其是欧美等经济发达国家的法律体系及法律制度，熟悉国际公约与惯例，培养处理国际事务的能力。

此次中信出版社引进的是美国ASPEN出版公司出版的供美国法学院使用的主流法学教材及其配套教学参考书，作者均为富有经验的知名教授，其中不乏国际学术权威或著名诉讼专家，历经数十年课堂教学的锤炼，颇受法学院学生的欢迎，并得到律师实务界的认可。它们包括诉讼法、合同法、公司法、侵权法、宪法、财产法、证券法等诸多法律部门，以系列图书的形式全面介绍了美国法律的基本概况。

这次大规模引进的美国法律教材包括：

**伊曼纽尔法律精要 (Emanuel Law Outlines)** 美国哈佛、耶鲁等著名大学法学院广泛采用的主流课程教学用书，是快捷了解美国法律的最佳读本。作者均为美国名牌大学权威教授。其特点是：内容精炼，语言深入浅出，独具特色。在前言中作者以其丰富的教学经验制定了切实可行的学习步骤和方法。概要部分提纲挈领，浓缩精华。每章精心设计了简答题供自我检测。对与该法有关的众多考题综合分析，归纳考试要点和难点。

**案例与解析 (Examples and Explanations)** 由美国最权威、最富有经验的教授所著，这套丛书历

经不断的修改、增订，吸收了最新的资料，经受了美国成熟市场的考验，读者日众。这次推出的是最新版本，在前几版的基础上精益求精，补充了最新的联邦规则，案例也是选用当今人们所密切关注的问题，有很强的时代感。该丛书强调法律在具体案件中的运用，避免了我国教育只灌输法律的理念与规定，而忽视实际解决问题的能力培养。该丛书以简洁生动的语言阐述了美国的基本法律制度，可准确快捷地了解美国法律的精髓。精心选取的案例，详尽到位的解析，使读者读后对同一问题均有清晰的思路，透彻的理解，能举一反三，灵活运用。该丛书匠心独具之处在于文字与图表、图例穿插，有助于理解与记忆。

**案例教程系列 (Casebook Series)** 覆盖了美国法学院的主流课程，是学习美国法律的代表性图书，美国著名的哈佛、耶鲁等大学的法学院普遍采用这套教材，在法学专家和学生中拥有极高的声誉。本丛书中所选的均为重要案例，其中很多案例有重要历史意义。书中摘录案例的重点部分，包括事实、法官的推理、作出判决的依据。不仅使读者快速掌握案例要点，而且省去繁琐的检索和查阅原案例的时间。书中还收录有成文法和相关资料，对国内不具备查阅美国原始资料条件的读者来说，本套书更是不可或缺的学习参考书。这套丛书充分体现了美国法学教育以案例教学为主的特点，以法院判例作为教学内容，采用苏格拉底式的问答方法，在课堂上学生充分参与讨论。这就要求学生不仅要了解专题法律知识，而且要理解法律判决书。本套丛书结合案例设计的大量思考题，对提高学生理解概念、提高分析和解决问题的能力，非常有益。本书及时补充出版最新的案例和法规汇编，保持四年修订一次的惯例，增补最新案例和最新学术研究成果，保证教材与时代发展同步。本丛书还有配套的教师手册，方便教师备课。

**案例举要 (Casenote Legal Briefs)** 美国最近三十年最畅销的法律教材的配套辅导读物。其中的每本书都是相关教材中的案例摘要和精辟讲解。该丛书内容简明扼要，条理清晰，结构科学，便于学生课前预习、课堂讨论、课后复习和准备考试。

除此之外，中信出版社还将推出教程系列、法律文书写作系列等美国法学教材的影印本。

美国法律以判例法为其主要的法律渊源，法律规范机动灵活，随着时代的变迁而对不合时宜的法律规则进行及时改进，以反映最新的时代特征；美国的法律教育同样贯穿了美国法律灵活的特性，采用大量的案例教学，启发学生的逻辑思维，提高其应用法律原则的能力。

从历史上看，我国的法律体系更多地受大陆法系的影响，法律渊源主要是成文法。在法学教育上，与国外法学教科书注重现实问题研究，注重培养学生分析和解决问题的能力相比，我国基本上采用理论教学为主，而用案例教学来解析法理则显得薄弱，在培养学生的创新精神和实践能力方面也做得不够。将美国的主流法学教材和权威的法律专业用书影印出版，就是试图让法律工作者通过原汁原味的外版书的学习，开阔眼界，取长补短，提升自己的专业水平，培养学生操作法律实际动手能力，特别是使我们的学生培养起对法律的精细化、具体化和操作化能力。

需要指出的是，影印出版美国的法学教材，并不是要不加取舍地全盘接收，我们只是希望呈现给读者一部完整的著作，让读者去评判。“取其精华去其糟粕”是我们民族对待外来文化的原则，我们相信读者的分辨能力。

是为序。

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# **CYBERSPACE LAW**



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We wish to dedicate this book  
to our respective families for their  
love and support:

Melissa  
Ronen

■

John  
James

■

Mariah  
Arthur  
Jack  
William

# PREFACE

This casebook is organized under the unifying principle that cyberspace law is the study of the regulation of information in a world interlinked and mediated by computer networks. Today, we live in a world in which information is increasingly distributed through computers rather than traditional mediums such as paper, broadcast, or film, and the interlinking of computers that make up the Internet has increased our ability to communicate and distribute information. Correspondingly, because information is distributed through computers capable of copying, filtering, or altering information, it is now possible to control and manipulate information at various levels throughout the network in ways and to an extent that were otherwise impossible or impractical.

While existing doctrines such as freedom of speech, intellectual property, and privacy are used as familiar doctrinal and theoretical starting points, cyberspace allows, and often requires, a re-examination of the values underlying those areas of law. This re-examination is necessary not only to translate those values into cyberspace applications, but to alter existing rules and legal institutions in real space as well. To give one example, the value of studying cyberspace law is not only about answering whether data stored in random access memory should be considered a copy under copyright law, but whether copyright protection or the control of information in any form is necessary in a world in which information can be perfectly reproduced and distributed globally at almost no expense.

Our approach to this subject matter differs significantly from the existing books on the market. We believe that the study of cyberspace law is fundamentally the study of the rules and norms governing the control and dissemination of information in a computer mediated world. While computers, routers, and fiber optics are all needed to make Internet communication possible, we have chosen not to rely upon technology or any particular substantive area of law

to tie together what might otherwise appear to be unrelated cases. It is our belief that the characteristics of information transmission presented by computer mediated communications are what make Internet law unique and not the underlying technology, which is constantly changing. Moreover, this approach requires students not only to examine whether new technology requires the modification of existing contract or copyright law, it requires students to examine and question our existing conceptual and legal categorization of information problems into separate fields, such as freedom of speech, intellectual property and privacy.

Given the pace at which Internet cases are decided and frequently overruled, one of the greatest challenges for a cyberspace law casebook is to keep the materials from becoming obsolete even before the book is published. Any approach that treats Internet-related cases under the traditional casebook formula (presenting the so-called majority position with some discussion of minority views) is especially susceptible to becoming rapidly outdated. How does one present the doctrine when the doctrine is still being developed? How does one hold a byte or an electron in one's hand? While some see this doctrinal indeterminacy as an obstacle or problem to be avoided by limiting the materials to include to those decisions that present black letter law, we embrace the indeterminacy.

Recognizing that the law is in a state of flux, we endeavored to organize our materials around the competing approaches and theories for any given issue rather than so-called current leading cases. This approach has several important pedagogical benefits. First, by emphasizing the competing theories offered by different courts, different jurisdictions, scholars, and policymakers, this approach provides students with the necessary foundation for handling the next generation of legal controversies in an area of law where the only guaranty is that the technology and case law will change. Second, this organization allows professors the flexibility to present the materials from the perspectives of legislative/policy making, private regulation and bargaining, judicial doctrine, or some combination. Lastly, this organization facilitates the development of advanced legal reasoning and argument by requiring students to confront and employ both doctrinal and nondoctrinal authorities in an effort to resolve legal problems.

In addition to principal materials and explanatory text throughout the casebook, materials are presented with narrative problems. We have found that many students find it beneficial to approach materials from the perspective of addressing a "real world" problem rather than reading materials in the abstract. The problems further reinforce the idea that these materials are tools and not answers.

The authors would like to thank Aspen's editorial staff for their assistance and patience in seeing this project through to completion, and the various outside reviewers whose comments and criticisms helped make this a better book. We would also like to thank our various research assistants for their contributions to the casebook. Professors Ku and Farber would like to say a

special thank you to Seton Hall Law School and to Richard Mixter for his faith in this project.

Raymond S. R. Ku  
Michele A. Farber  
Arthur J. Cockfield

April 2002

# ACKNOWLEDGMENTS

Barlow, John Perry, Cyberspace Declaration of Independence, 1996.

Barron, Jerome A., Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967). Copyright © 1967 by Harvard Law Review. Reprinted by permission.

Boyle, James: Focault in Cyberspace: Surveillance, Sovereignty, and Hard-wired Censors, 66 U. Cin. L. Rev. 177 (1997). Copyright © 1997 by University of Cincinnati Law Review. Reprinted by permission.

Branscomb, Ann W., Anonymity, Autonomy and Accountability: Challenges to the First Amendment in Cyberspace, 104 Yale L.J. 1639 (1995). Copyright © 1995 by Yale Law Journal. Reprinted by permission.

Burk, Dan, The Trouble with Trespass, 4 J. Small & Emerging Bus. L. 27 (2000). Copyright © 2000 by the Journal of Small & Emerging Business Law. Reprinted by permission.

Cohen, Julie E., Examined Lives: Informational Privacy and the Subject as Object, 52 Stan. L. Rev. 1373, 1406-08 (2000). Copyright © 2000 by Stanford Law Review. Reprinted by permission.

Easterbrook, Frank H., Cyberspace and the Law of the Horse, 1996 U. Chi. Legal F. 20, 207 (1996). Copyright © 1996 by University of Chicago Law Review. Reprinted by permission.

Froomkin, Michael A., The Metaphor is the Key: Cryptography, the Clipper Ship and the Constitution, 143 U. Pa. L. Rev. 709, 781 (1995). Copyright

© 1995 by University of Pennsylvania Law Review and Michael A. Froomkin. Reprinted by permission.

Froomkin, Michael A., Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution, 50 Duke L.J. 17 (2000). Copyright © 2000 by Duke Law Journal and Michael A. Froomkin. Reprinted by permission.

Goldsmith, Jack L., Against Cyberanarchy, 65 U. Chi. L. Rev. 1199 (1998). Copyright © 1998 by University of Chicago Law Review. Reprinted by permission.

Johnson and Post, Law and Borders—The Rise of Law in Cyberspace, 48 Stan. L. Rev. 1367 (1996). Copyright © 1996 by Stanford Law Review. Reprinted by permission.

Kang, Jerry, Information Privacy in Cyberspace Transactions, 50 Stan. L. Rev. 1193 (1998). Copyright © 1998 by Stanford Law Review. Reprinted by permission.

Kerr, Orin S., The Fourth Amendment in Cyberspace, Can Encryption Create a Reasonable Expectation of Privacy?, 33 Conn. L. Rev. 503 (2001). Copyright © 2001 by Connecticut Law Review. Reprinted by permission.

Ku, Raymond S., Forward: A Brave New Cyberworld?, 22 T. Jefferson L. Rev. 125 (2000). Copyright © 2000 by Thomas Jefferson Law Review. Reprinted by Permission.

Ku, Raymond S., Irreconcilable Differences? Congressional Treatment of Internet Service Providers as Speakers, 3 Van. J. Ent. Law & Prac. 70 (2001). Copyright © 2001 by Raymond S. Ku and Vanderbilt Journal of Entertainment Law & Practice. Reprinted by permission.

Ku, Raymond S., Open Internet Access and Freedom of Speech: A First Amendment Catch-22, and originally published in 75 Tul. L. Rev. 87-135 (2000). Reprinted with the permission of the Tulane Law Review Association, which holds the copyright.

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Lessig, Lawrence, The Law of the Horse: What Cyberlaw Might Teach, 113 Harv. L. Rev. 501 (1999). Copyright © 1999 by Harvard Law Review. Reprinted by permission.

Lessig, Lawrence, *The Limits in Open Code: Regulatory Standards and the Future of the Net*, 14 *Berkeley Tech. L. J.*, 759, 764-766 (1999). Copyright © 1999 by Berkeley Technical Law Journal. Reprinted by permission.

Murphy, Richard S., *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 *Geo. L.J.* 2381, 2382 (1996). Reprinted with permission of the publisher, *Georgetown Law Journal* © 1996.

Rotenberg, Marc, *Fair Information Practices and the Architecture of Privacy (What Larry Doesn't Get)*, 2001 *Stan. Tech. L. Rev.* 1, 72-89 (2001). Copyright © 2001 by *Stanford Law Review*. Reprinted by permission.

Samuelson, Pamela, *The Copyright Grab*, *Wired* (Jan. 1996). Copyright © 1996 by Conde Nast and Pamela Samuelson. Reprinted by permission. Courtesy of The Conde-Nast Publications Inc.

Schwartz, Paul, *Privacy and Democracy in Cyberspace*, 52 *Vand. L. Rev.* 1609, 1620 (1999). Copyright © 1999 by *Vanderbilt Law Review*. Reprinted by permission.

Solove, Daniel J., *Privacy and Power: Computer Databases and Metaphors for Informational Privacy*, 53 *Stan. L. Rev.* 1393, 1397-98 (2001). Copyright © 2001 by *Stanford Law Review*. Reprinted by permission.

Tien, Lee, *Publishing Software as a Speech Act*, 15 *Berkeley Tech L. J.* 629, 665-686 (2000). Copyright © 2000 by Lee Tien. Reprinted by permission.

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