
Internet Law and Regulation

Graham J H Smith
Bird & Bird

Third Edition



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Internet Law and Regulation

THIRD EDITION

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Preface to the Third Edition

This, the third edition of this work, comes at the tail end of a feverish bout of legislative activity. A glut of new legislation, mostly emanating from Brussels, now affects the Internet and e-commerce. The Electronic Signatures Directive, the Electronic Commerce Directive, the Copyright in the Information Society Directive and directives relating to credit institutions and electronic money have all specifically addressed the electronic environment. The Distance Selling Directive, the Database Directive and the Brussels Regulation on jurisdiction also have significant implications for the Internet. The Electronic Communications Act 2000 and the Regulation of Investigatory Powers Act 2000, both almost entirely home-grown United Kingdom legislation, are also important. The Human Rights Act 1998 now underlies everything.

Since the second edition the dotcom boom has come and gone. The potential of e-commerce is now viewed with greater realism than during those heady days when everyone in town seemed to be armed with a business plan, a concocted name and a non-disclosure agreement. What has not changed is that the Internet continues to be blamed for everything from child abuse to terrorism.

In the preface to the second edition I expressed the hope that the Internet would survive the attentions being lavished on it by governments around the globe. The Internet has indeed survived the dotcom era, the headlines and the attentions of governments with characteristic resilience.

For this edition the international coverage has expanded with the addition of Belgium, New Zealand and Switzerland. We have added a substantial new chapter on competition law. The existing work has been updated and expanded, both to accommodate new subject matter and to treat some areas in greater depth.

This edition is well over double the length of the last. Despite the increase in size the structure, sequence and organisation of the book has changed little since the writing of the first edition in autumn 1995. Paradoxically, in an area so reputedly fast-moving as the Internet, the least change in content has been to Chapter 1 (Overview of the Internet). The typical description of the Internet in 1995 was technical, revolving around protocols such as http, www, telnet, ftp and gopher. Our approach was instead to create a functional taxonomy of Internet actors thrown up by the technology: network providers, access providers, hosts and so on. That scheme has proved robust, accommodating technological changes within a structure that still holds good. A similar functional approach now underpins the liability of electronic intermediaries provisions of the Electronic Commerce Directive.

With each new edition it becomes more difficult to attribute particular sections of the book to individual authors. Doing the best I can, the authorship is as follows:

- Chapter 1 Graham Smith
Chapter 2 Hilary Pearson, Graham Smith, Morag Macdonald; updated for this edition by Hilary Pearson and Graham Smith
Chapter 3 Morag Macdonald, updated and expanded for this edition by Graham Smith; and non-UK contributors
Chapter 4 Graham Smith
Chapter 5 Graham Smith
Chapter 6 Graham Smith and non-UK contributors
Chapter 7 Simon Chalton
Chapter 8 Graham Defries, updated for this edition by Sally Trebble
Chapter 9 Rory Graham, updated for this edition by Graham Smith and Felicity Reeve
Chapter 10 Rory Graham, updated and expanded for this edition by Graham Smith
Chapter 11 Trystan Tether
Chapter 12 Cross-border content, Computer misuse: Graham Smith
Gambling, Pornography, Contempt, Advertising: Hilary Pearson, updated and expanded for this edition by Graham Smith
Financial services: Trystan Tether
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Pharmaceuticals: Jane Mutimear
Chapter 13 Richard Ward
Chapter 14 Simon Topping

Thanks also to Jane Mutimear for commenting on the domain names material; and to Cecilia Cheung who checked citations with her customary cheerfulness and efficiency. However, all errors remain the authors'.

Sofia Lopez earned my gratitude for spending several weeks of her stay at Bird & Bird organising my heaps of research materials into usable form.

Thanks are due to the States of Guernsey for permission to adapt, as part of Chapter 10, extracts from a report prepared by Bird & Bird in connection with their electronic transactions legislation.

The domestic law is that of England and Wales. The law is stated as at July 31, 2001, although it has been possible to incorporate some more recent developments.

At the time of writing the Electronic Signatures Directive ought to have, but has not, been implemented in the United Kingdom. A second round of consultation is awaited. The Electronic Commerce Directive is due to be implemented in January 2002. Important as these two measures are, to have deferred publication until after their domestic implementation would have stretched the period since the last edition beyond acceptability. We hope to issue a supplement dealing with the implementation of these two measures. We also hope to publish some updates to accommodate other significant developments. These will be available at the publisher's website, www.sweetandmaxwell.co.uk.

My thanks go to Sweet & Maxwell, for their patience and for ensuring that this edition finally became a reality.

*Graham J H Smith
Hammersmith
October 2001*

Preface to the First Edition

In 1973 an enterprising American publisher released a book entitled *Essential Government Economic Controls, Regulations and Guidelines*, consisting entirely of blank pages. The reader's first reaction to a book on Internet Law and Regulation might be that the content would be equally insubstantial. However, the suggestion that the Internet has no law is born of wishful thinking more than of cogitation. Local laws of each jurisdiction do apply to activities conducted using the Internet. While enforcing such laws presents new challenges, the pan-political nature of the Internet may in fact render it vulnerable rather than immune to the laws of jurisdictions around the world.

The purpose of this book is to draw together the most relevant law and legislation in England and Wales and analyse how it applies to activities carried on by means of the Internet. This exercise is unavoidably selective. We have tried to include issues that have arisen in practice, have caused concern or should be giving pause for thought. Although some international aspects are discussed, the focus is primarily English law. We have not set out to write a textbook of comparative law.

The Internet and the uses to which it is put change by the day. The law is stated as at 31 December 1995, although it has been possible to take account of some more recent developments. Until case law develops, the task of applying the law to the Internet is to some extent speculative. We hope that readers will bear that in mind when using the book.

The individual authorship of the chapters is as follows: Graham J H Smith: 'What is the Internet?', 'Defamation' and 'Content Liability and Protection'; Rory Graham: 'Contracts between Hosts, Content Providers and Others' and 'Making Contracts over the Internet'; Hilary Pearson: 'Intellectual Property' (co-author) and 'Prohibited and Regulated Activities'; Morag Macdonald: 'Intellectual Property' (co-author); Simon Chalton: 'Data Protection'; David Kerr and Graham Defries: 'Telecommunications and Broadcast Regulation'; Trystan Tether: 'Payment Mechanisms over the Internet'; and Richard Ward: 'Tax'.

The seeds of this book were sown during a series of seminars given by some of the authors during the summer of 1995. Out of those seminars grew the idea of a book. To convert the idea into text was a daunting prospect, and thanks are due to all those who made it happen: to my fellow authors who produced their contributions with only light touches of the whip (administered in part by Jane Gunter); to those who assisted with some of the chapters, Mark O'Connor, Gaynor Clements, Ravinder Chahil, Nicholas Perry and Dominic Cook; and to John Lambert, who reviewed a draft of Chapter 1 for technical accuracy. Joanna Hicks of FT Law & Tax fostered the idea and remained enthusiastic and firm in equal measure. Any errors remain those of the authors.

It is sometimes suggested that the Internet should be regulated. I hope this book shows that the Internet does not exist in a legal vacuum. Unless and until the existing law is found wanting there should be a presumption against further legislation. As to the form of any legislation that may be required, let there be a presumption against regulation of a discretionary nature, in favour of known, certain laws capable of general application.

*Graham J.H. Smith
Hammersmith
February 1996*

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