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CYBERSPACE LAW

CASES AND MATERIALS

THIRD EDITION

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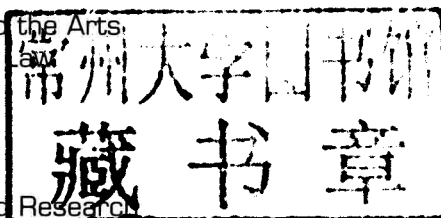
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We wish to dedicate this book
to our respective families for their
love and support:

Melissa
Ronen
Nya



Patrick
Sean
Brianne

PREFACE TO THE THIRD EDITION

Much has happened in the field of cyberlaw since the publication of the second edition. In particular, Web 2.0 technologies have emerged. This term is used to refer to the more participatory, user-generated nature of much that happens on the modern Internet. From social networking sites like Facebook, to blogs, wikis, and sophisticated multiplayer online games, more people are interacting with one another globally in forums very different from those that characterized the early Internet.

These technological developments raise significant new challenges for law and policy makers, both domestically and globally. Professor Lawrence Lessig's comments regarding the need to appreciate multimodal approaches to cyberspace regulation take on new significance in this context. Where legal regulation becomes more difficult in the context of virtual worlds and other online forums, more emphasis needs to be placed on other modes of regulation, including code, norms, and market forces. Importantly, however, lawyers need to understand how legal regulation interacts with these other modes of regulation in cyberspace, and how law can both shape and respond to online behavior.

While we have retained the basic framework of our previous editions, we have revised it in certain important respects with new technological developments in mind. We still maintain that the study of cyberspace law deals with the regulation of *information*, rather than of specific *technologies*. Thus, our approach to Web 2.0 technologies focuses on their impact on the regulation of information exchanged by online participants in new online forums. As in the previous editions, we also aim to assist students develop legal reasoning methodologies based on both doctrinal and non-doctrinal approaches to particular cyberspace problems. Thus, we have retained the structure of comparing "real world" cases to newer digital examples of legal regulation. However, in the context of the digital examples, we have supplemented early Internet cases with more recent problems involving newer technologies, such as sophisticated search engines, modern online payments systems, and online social networks. We have also updated the original problem sets and supplemented them with a new series of Web 2.0-focused problem sets. This enables students to compare

issues arising in the early days of the Internet with more recent issues involving blogging and other more recent forms of online communication.

In terms of coverage, we have retained the structure of the previous editions in ranging through jurisdictional questions, free speech issues involving the Internet, property and intellectual property rights online, privacy issues online, and issues relating to the private ordering of cyberspace. We have broadened the scope of some of these issues by including new issues arising in recent cases both in the United States and in other jurisdictions. In particular, in Chapter 5 we have included some European and British cases dealing with online privacy rights. We have also extended the coverage of intellectual property issues by incorporating details of recent litigation relating to the use of trademarks and copyrights by search engines, by including in the patent coverage discussion of the recent *Bilski* litigation, and by adding updated material on *sui generis* online property rights. We have also revised the notes and comments sections throughout the text and provided new notes on trade secrets, net neutrality, and political cyberfraud.

The authors would like to thank Aspen's editorial staff for their hard work during the publication process on this edition. Barbara Roth and Troy Froebe deserve a special mention for all their efforts. We would also like to thank Case Western Reserve University School of Law and, in particular, the support and encouragement we received from Dean Gary Simson and, subsequently, from Interim Dean Robert Rawson.

Raymond S. R. Ku
Jacqueline D. Lipton

February 2010

PREFACE TO THE SECOND EDITION

“This instrument can teach, it can illuminate; yes, and it can even inspire, but it can do so only to the extent that humans are determined to use it to those ends. Otherwise it is merely wires and lights in a box.”

Edwin R. Murrow

While Murrow was describing the emerging technology of his day—the television—his sentiments are equally applicable to the vast global network of the Internet, and our purpose is to introduce students to the ends that we may achieve and the means for achieving them. In approaching the second edition, we naturally had to ask ourselves what was new since the first edition. Did we agree that cyberspace law is still the study of the regulation of information in a world interlinked and moderated by computer networks as noted in the preface to the first edition? Moreover, are we today more or less convinced that cyberspace law is a distinct field of law, or is cyberlaw at least more of a law of the horse than it seemed in 2002?

Law of the horse or not, both of us remain convinced that there is a value to studying the regulation of information disseminated on an increasingly global scale over the Internet and other new global communications media. We still take the view that focusing on the regulation of *information* over these networks, rather than the regulation of specific *technologies*, is the appropriate way to approach this subject matter. As in the first edition, our focus here is to help students develop legal reasoning methodologies as well as doctrinal and nondoctrinal approaches to resolving specific kinds of problems in new contexts. We have retained the structure of comparing real world case examples to newer digital media examples to facilitate this process.

Again, we range through fields such as jurisdictional questions, issues relating to freedom of expression on the Internet, the development of property rights and specifically intellectual property rights within this medium, and varying attempts to privately order what might be defined as cyberspace. The second edition retains the basic structure of the first edition. However, we have included a number of new developments and perspectives.

The addition of Professor Lipton as a co-author brings a comparative and international flavor to the text, particularly in areas concerning the protection of digital data against unauthorized use both through intellectual property law and other legal means. Additionally, there have been a number of specific legislative and judicial developments since the first edition including a number of digital copyright cases such as *MGM v. Grokster*, *Perfect 10 v. Google*, *Chamberlain v. Skylink*, and *Lexmark v. Static Control Components*. The European Union Database Directive has undergone substantive critical review and Congress has introduced several new database protection bills, none of which have yet been enacted. The U.S. Supreme Court has ruled on several free speech issues, including the cases of *Ashcroft v. ACLU* and *United States v. American Libraries Association*.

We have retained and updated the narrative problem sets that were utilized in the first edition and updated the extensive Notes and Comments sections to facilitate class discussions. A number of professors have also used these problems and comments effectively to foster online discussions between classes.

The authors would like to thank Aspen's editorial staff for their hard work during the publication process as well as the anonymous reviewers who commented on the first edition. We would also like to thank our various research assistants for their contributions to the book and to Case School of Law and, in particular, the support and encouragement we received from Dean Gerald Korngold and subsequently from Dean Gary Simson.

Raymond S. R. Ku
Jacqueline D. Lipton

October 2006

PREFACE TO THE FIRST EDITION

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.

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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 Hardwired 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.

Hunter, Dan, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 *Cal. L. Rev.* 17 (2003). Copyright © 2003 by the California Law Review, Inc. Reprinted from *California Law Review* Vol. 91, No. 2, by permission of the Regents of the University of California.

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.

Ku, Raymond S., *Think Twice Before You Type*, 163 *N.J. L.J.* 23 (2001). Copyright © NL IP Company. Reprinted with permission. This article was first published in the February 19, 2001, issue of the *New Jersey Law Journal*. Further duplication without permission is prohibited. All rights reserved.

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.

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