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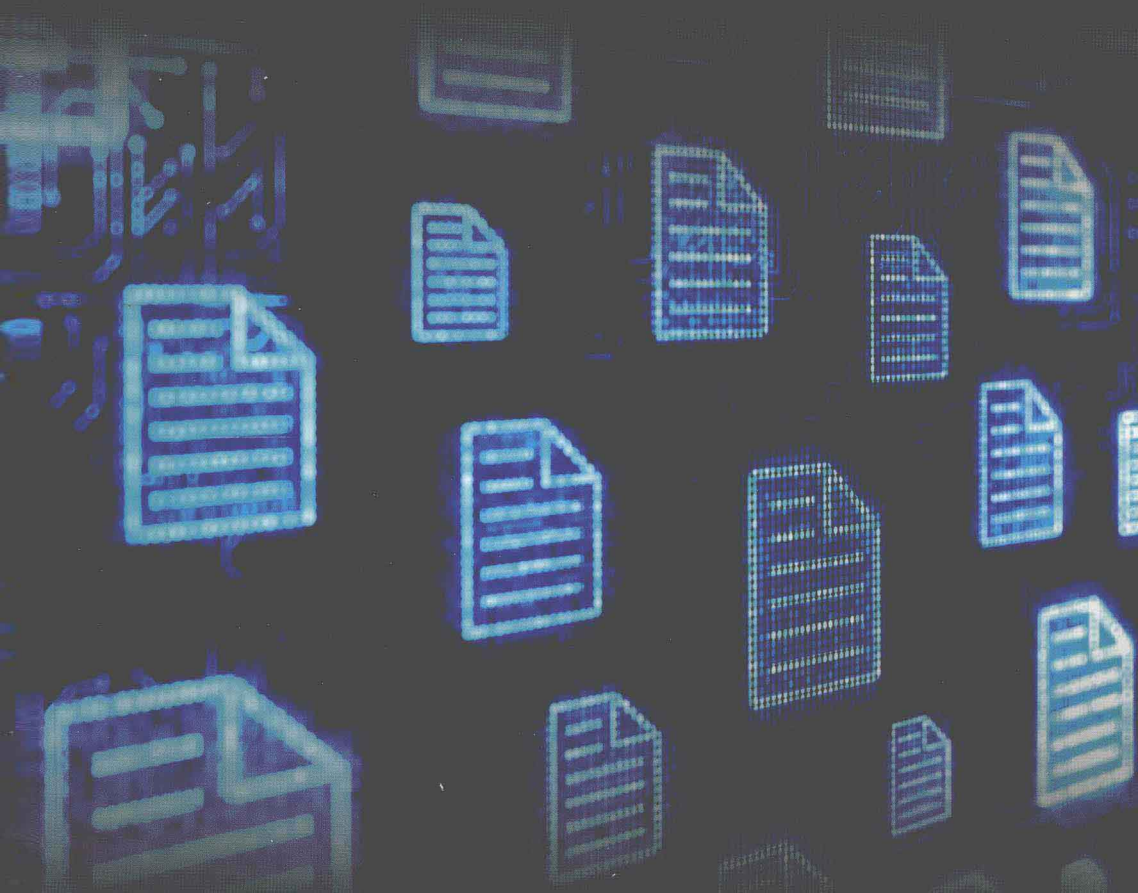
MAKING LAWS FOR CYBERSPACE

Chris Reed



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CHRIS REED

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Prologue

It was over thirty years ago that I first began thinking about law and computing technology, and for nearly twenty-five years I've taught and written about nothing else. Cyberspace arrived, and the subject became even more fascinating as the global clash of legal cultures flooded its way onto my desktop. I've also been fortunate in advising companies trading in cyberspace—an internet lottery, online banking and e-payment ventures, e-signature schemes, internet telephony, and of course a range of more general e-commerce activities. I've even dipped my toe into the law-making process for the EU and the UK.

And yet . . .

For the last twenty years or so I've been dissatisfied with the state of the laws that I've been teaching, writing about, and advising on. Far too much of my time, and that of my students and clients, seems to have been wasted in discovering what the law is and what it was intended by its lawmaker to mean. Those who have advised clients will understand this particularly well. The client has no real interest in what the law says, or even what its technical meaning is. What the client wants is advice on the best way to achieve its aims, whilst also acting in a lawful way. And yet the law was so complex and hard to understand that only a small proportion of my time could be spent on that useful advice, because it took so long to get to grips with the law itself.

Worse, I gradually came to the understanding that in cyberspace it was almost impossible to act lawfully. Hundreds of lawmakers clamour for the attention of the cyberspace actor, and clearly not all of them can be obeyed. The sheer cacophony of legal noise obscures the right way to behave, even if there is some law-making consensus about what is and isn't right.

This offends my sensibilities, as a lawyer and as a thinking human being. An important purpose of law is to create order in human relations, so that individuals can interact with each other on a rational and reasonably certain basis. But the system of laws which claim to govern cyberspace is so chaotic that it fails to fulfil this purpose. The best that the would-be law-abiding cyberspace actor can manage to achieve is not to offend the most powerful—Ruritanian laws can safely be ignored here; the Utopian authorities are unlikely to take enforcement action if we do X, even though Utopian law doesn't favour X; and so on. The situation is highly unsatisfactory.

For 2009–11 I was fortunate to be awarded a Leverhulme Major Research Fellowship, to allow me to concentrate uninterruptedly on this problem. I believed that I understood most of the ways in which lawmakers had gone wrong, and could produce a technocratic manual which explained how to avoid these pitfalls in future law-making.

As I happens, I was mistaken. What we have in cyberspace, or at least so I now believe, is not a set of disparate technical flaws in our law-making. Instead, I see

a small number of fundamental and related defects in the way laws, in general, are devised. The effects of those defects are less apparent in laws as they govern our physical world activities, but in cyberspace they result in a system of laws which is so far from ideal that it imperils the very enterprise of law itself. If, as I believe, it is important that cyberspace should be a lawful space, then it is essential to know what these defects are and how they might be remedied. What follows is my best effort at explaining these matters.

Acknowledgements

First, the Leverhulme Trust, whose generosity made this work possible. Few people in any field of endeavour are granted the opportunity to work uninterrupted for a long period on a project of their own choosing, and I am conscious of the privilege.

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I must also mention my academic colleagues in the Centre's Institute for Computer & Communications Law, all of whom have made helpful criticisms of my thinking in this area. In particular, Professors Ian Walden and Christopher Millard have taken the time to comment on parts of this book, and I am most grateful for their thoughtful comments. I must also acknowledge the work of my PhD student, Sofia Casimiro, whose research on re-casting copyright in terms of economic and intellectual uses of works, rather than enumerated rights, helped in developing my ideas on this topic.

Andrew Murray from the London School of Economics and Chris Marsden from the University of Essex have also read parts of the book, and their input has reshaped my thinking as I responded to their comments. Lilian Edwards from the University of Strathclyde has encouraged me by saying and writing unwarrantably nice things about some of the thinking here which I published as articles, and that helped enormously.

From the practising side of the profession, Mark Lewis, now partner at BLP, gave me the chance to advise on a number of cutting-edge cyberspace projects during our time together at the various incarnations of Tite & Lewis, and has constantly exhorted me to raise my academic game. I hope this book meets at least some of his expectations. Graham Smith, partner at Bird & Bird, has rigorously dissected elements of my thinking through our work together for the Society for Computers & Law—he will doubtless disagree with many of the ideas here, but without his help they would have been far woollier and less well supported.

Outside the field of law I also need to thank my friend Graham Higgins. Although a graphic artist by profession, he foolishly expressed an interest in the ideas I was working on, and took the role of the lay commentator whose apparently naive questions I struggled to answer. At least I spared him from reading the footnotes.

And finally Jilly, who in the kindest and most supportive way kept my nose to the grindstone for the two years it took to write this book.

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