

Internet and E-commerce Law

Business and Policy



B Fitzgerald ♦ A Fitzgerald
E Clark ♦ G Middleton ♦ Y F Lim

INTERNET AND E-COMMERCE LAW, BUSINESS AND POLICY

BRIAN FITZGERALD

BA (GU), LLB (Hons) (QUT), BCL (Oxon), LLM (Harv), PhD (GU)

Barrister of the High Court of Australia

Professor of Intellectual Property Law and Innovation, Faculty of Law, Queensland University of Technology

ANNE FITZGERALD

LLB (Hons) (Tas), LLM (London), LLM, JSD (Columbia)

Barrister, Supreme Court of Queensland

Professor of Law Research, Faculty of Law, Queensland University of Technology

GAYE MIDDLETON

BSc, LLB (Hons), LLM (UQ)

Solicitor, High Court of Australia, Supreme Courts of Queensland, New South Wales and Victoria

EUGENE CLARK

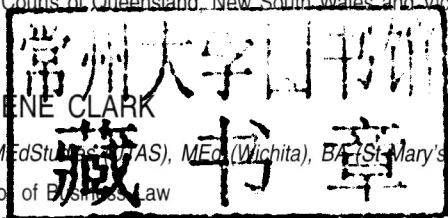
PhD (UTAS), JD (Hons) (Washburn), MEdStudies (UTAS), MEd (Wichita), BA (St Mary's)

Professor of Business Law
Griffith University

YEE FEN LIM

BSc, LLB, LLM (Hons) (Syd)

Associate Professor, Division of Business Law, Nanyang Business School
Nanyang Technological University, Singapore



Published in Sydney by
Thomson Reuters (Professional) Australia Limited
100 Harris Street, Pyrmont, NSW

National Library of Australia
Cataloguing-in-Publication entry

Internet and e-commerce law, business and policy / Brian

Fitzgerald ... [et al.]

Includes index.

ISBN 978 0 455 22796 2 (pbk.).

Computer networks – Law and legislation – Australia. Internet –
Law and legislation – Australia. Electronic commerce – Law and
legislation – Australia. Fitzgerald, Brian F.

343.9409944

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Editors: Marilyn Shields, Wendy Fitzhardinge

Publisher: Robert Wilson

Typeset in Helvetica Narrow, 10 on 12 point, by Thomson Reuters
(Professional) Australia Limited.

Printed by Ligare Pty Ltd, Riverwood, NSW



This book has been printed on paper certified by the Programme for the Endorsement of Forest Certification (PEFC). PEFC is committed to sustainable forest management through third party forest certification of responsibly managed forests. For more info: <http://www.pefc.org>

Internet and E-commerce Law, Business and Policy

Thomson Reuters (Professional) Australia Limited
100 Harris Street Pyrmont NSW 2009
Tel: (02) 8587 7000 Fax: (02) 8587 7100
LTA.Service@thomsonreuters.com
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To G F Somers

Who brought us into new worlds

Foreword

Dr Terry Cutler FTSE, FAHA

Against the long established traditions and precepts of the law, the Internet and electronic commerce are very recent phenomena. The law adapts slowly, and the advent of the digital age is arguably prompting the most radical re-thinking of legal frameworks since the commodification of property title and the advent of industrial scale production.

This ground breaking primer on commercial law in a digital and online era is a reminder for policy makers, for business people, for professional advisors, and for our educational institutions that we have entered a new world of commerce and trade. Its publication also provides a useful occasion to reflect on just where we are in the veritable tsunami of change occurring around us.

We are only beginning to apprehend the long-run impact of the digital era and its transformational implications for the way we live and work. The first commercial *dot com* domain name was registered in 1985 by a computer systems firm in Massachusetts. By the end of 2010 the number of *.com* domains had grown to 88.8 million, without counting those with country specific domains. It is estimated that there are now well over two billion Internet users, representing an average penetration rate of 30% across the world's population, whilst in advanced OECD economies penetration is ranging from 60% to 80%. The Internet is now an integral platform for global supply chains, trade and commerce as well as for social networks. The exponential growth of online social networking in parallel with electronic commerce not only embeds the Internet and digital applications as an all-pervasive general purpose technology within society, but means that the line between social and commercial use becomes blurred, especially around fundamental public policy issues like privacy, fraud and identity theft.

The history of electronic commerce may be short but it is perhaps best characterised as exemplifying Heisenberg's *Uncertainty Principle* from quantum physics, which goes something like this:

*If you know where you are,
then you don't know how fast you are going;
If you know how fast you are going,
then you don't know where you are!*

When that first commercial domain name was registered in 1985 few anticipated the electronic marketplace of today. A decade later, in 1995, a colleague and I conducted a series of workshops with firms interested in exploring the potential of the online economy, and my lasting memory is the way many firms at the beginning of the study were still asserting that the Internet was a blind alley. By the end of 1995 most had changed their position. When we

subsequently published a call to action¹ we quoted approvingly from a paper by Anthony Pennings at an industry forum in Hawaii where he remarked upon the transformation of the global political economy by:

a highly privatised, monetarist-driven, electronic dynamic which is sweeping the world with its imagination of a new order of commerce, finance, and politics. The merging of information technology and the political economy is causing the acceleration of information exchanges and a resultant destabilization of traditional centers of commercial and political power.²

It was also in 1995 that a Global Information Infrastructure Commission (GIIC) was established to promote an inclusive and global digital playing field: to build digital bridges “not only between industries, but also between countries and sectors”. At this pivotal point in the history of eCommerce two leaders emerged from the US to promote a policy-oriented mission to globalise the digital revolution and to encourage the inclusion of emerging economies at a time when the innovative ferment of the day was firmly based in the US. In visits to the US at the time I was struck by the intensely inwardly looking focus around the domestic North American market. Leading firms told me they did not bother to stop and collect data on usage from the “rest of the world”. Fortunately, some influential policy shapers took a broader view. One was Diana Lady Dougan, appointed to a personal Ambassadorship under Ronald Reagan in the 1980s to promote ICT development at home and abroad, and who has demonstrated a lifelong commitment to the belief that while “political differences will always exist, identification of economic commonalities can do much to bridge gaps and stabilize mutuality of interests”. The second and later comer was Ira Magaziner who, as a White House aide within the Clinton administration, played a pivotal role in the second half of the 1990s in promoting global governance models for the Internet – especially in the establishment of the Internet Corporation for Assigned Names and Numbers (ICANN) – and in encouraging jurisdictions to not unthinkingly base digital policy and regulation on analogue models.

A seminal first meeting of the Global Information Infrastructure Commission in 1996, auspiciously held in Beijing, adopted a set of guiding principles for electronic commerce, the *Beijing Declaration of Principles for Advancing Global Electronic Commerce*:³

In order for global electronic commerce to flourish, and for its benefits to be achieved by as wide a community as possible, the following principles have been identified:

1. Increased cooperation between the private and public sectors –

A dynamic electronic marketplace depends on the ability to tap the benefits of fast changing technologies and new service offerings. Governments should facilitate a favorable environment, but industry has lead responsibility for developing the cooperative frameworks for global electronic commerce.

2. Expanded access to the tools of electronic commerce –

The practical use of the electronic marketplace requires interconnectivity, reliability, and reasonable availability of networks and services. Standards, protocols, and

1 R Buckeridge and T Cutler, *The Online Economy: Maximising Australia's Opportunities from Networked Commerce* (Cutler & Company, Melbourne, 1995).

2 A Pennings, “Assessing the Privatisation Revolution – Electronic Money and the Emerging New Zealand ‘Enterprise Society’”, Proceedings of the Pacific Telecommunications Council Conference, Hawaii, 1995.

3 Global Information Infrastructure Commission, *Globalising Electronic Commerce* (International Forum, Beijing, March 1996, Centre for Strategic and International Studies, Washington DC, 1996).

- respect for legal rights and information access should be established and maintained to assure security, integrity and efficiency of transactions.
3. Broad commitment to new legal and regulatory frameworks –
All business transactions rely on the certainty that an established legal framework provides. As commerce moves from paper to electronic documentation and certification, simple, clear, and equitable legal and regulatory solutions must be a high priority at both the domestic and international levels.
 4. Rapid transformation of the banking and currency management systems –
The advent of digitalization has enabled precise, cashless transactions that increasingly displace traditional forms of currency payment and value. Central banks and other institutions are encouraged to expeditiously develop practical frameworks for electronic monetization.

Already in 1996, therefore, and on the cusp of the take-off of the Internet, certain themes had been identified that have persisted. These include the tension between market pull and regulatory restraint, the importance of ubiquitous service protocols and platforms, and the recognition that “electronic monetization” is a game changer.

Nonetheless, in 1997 the *Economist* magazine could still talk of the “cold light of cyberdawn” and point to the gap between the optimistic hype of emerging eCommerce proselytisers and the confusion on the ground.⁴ While concluding that “for most consumers today’s Internet, far from being a perfect market, is the high street from hell”, the magazine justified devoting a special supplement to the phenomenon on the grounds that “it will get better – much better – and in ways that today’s fitful efforts only hint at”. From the perspective of today the verdict from the *Economist* appears prescient and its forecast remains only partially fulfilled.

Throughout the 1990s national governments began to address the challenge of re-thinking policy and regulatory frameworks for the emerging digital era. In most, attention to new “convergence” legislation and the re-orientation of regulatory agencies was slow – the exceptions came from emerging economies like Malaysia with its 1998 *Communications and Multimedia Act*, which I helped draft. The policy mantra of the time was “industry self-regulation”, and whilst this credo was driven largely off the back of telecommunications de-regulation and privatisations, it did serve to provide a policy background which countered premature regulatory intervention in online marketplaces until the emerging landscape became clearer.⁵

By 1998 the OECD had well and truly entered the fray, describing electronic commerce as “a ‘new engine’ for economic and country development” and urging governments to ensure their interventions were “proportionate, transparent, consistent and predictable, and technologically neutral”. Thus “technology neutrality” joined “self-regulation” as keywords of the 1990s, and whilst their effect was to slow regulatory activism an unintended consequence was to distract attention from some of the more far-reaching impacts of a digital era. For me, the OECD Ministerial Conference on Electronic Commerce held in Ottawa in October 1998⁶ provided an important point to take stock.

4 “In search of the perfect market”, *The Economist*, 10 May 1997.

5 See, for example, “The legal framework for electronic commerce: Self-regulation?”, Ministry of Economic Affairs, The Netherlands, 1998.

6 See http://www.oecd.org/document/36/0,3746,en_2649_34223_1932772_1_1_1_1,00.html.

The OECD's four priority areas of focus for global electronic commerce from 1998 remain relevant today:

1. Building trust for users and consumers
2. Establishing ground rules for the digital marketplace
3. Enhancing the information infrastructure for electronic commerce
4. Maximising the benefits

Many talked then as if the matter of electronic commerce was a “greenfields” opportunity, a tabula rasa for new regulatory and legal frameworks, a clean slate. In the opening session of the 1998 OECD conference, chairman John Manley of the Canadian Industry Ministry defined the opportunity as “*building a global economy on a clean canvas*”. This tendency is still often reinforced by the wild enthusiasm of the industry's many entrepreneurs.

And it was the digital entrepreneurs who, towards the end of the 1990s, hijacked policy debate with the distractions of the dot.com boom. Attention turned to the prognostications of Wall Street analysts and how central banks would deal with the market exuberance which bubbled, and then burst dramatically. Thus it was that the focus shifted from the demand side to the supply side of the digital economy, with commentary focusing on the ups and downs of the ICT industry and less on the transformation of marketplaces.⁷ Ironically, and following the dot.com crash, in the first decade of the 21st Century electronic commerce quietly moved towards the mainstream at the same time as the hype moderated, to be substituted by the new focus on consumer wireless applications and the rollout of social networks.

Reflecting on this brief history of digital marketplaces reminds us that electronic commerce is not separable from the global economy we have both inherited and work within: it is not separate from the challenges and tensions embedded within legacy frameworks. And this is why the impact of electronic commerce is so significant and challenging. The new digital economy and electronic commerce transforms our old economic systems. It supersedes the old in part. But it does not create a clean slate for our interworking and co-operation in trade and commerce. This reality creates several challenges of which we need to be very conscious in our deliberations.

First, in stressing technology neutrality, that is, the functional equivalence as between old commerce and electronic commerce, we run two risks:

- (a) The risk of sidestepping being collectively innovative about better futures, failing to seize the opportunities from electronic commerce to reconstruct arrangements that are becoming creaky.
- (b) The risk of being partial in our application of the principles addressing different areas of concern: for example, as between taxation regimes and matters of consumer protection. OECD debates tend to treat the former on the basis of the transparent carry-through of existing rules and principles, whereas in the latter case private interests would prefer to wind back existing protections.

⁷ Two pieces of commentary typical of that time are the World Information Technology and Services Alliance's *Digital Planet 2000: The Global Information Economy*, and a special supplement in the *Australian Financial Review*, “Internet and E-Commerce after the Crash”, 19 July 2000.

The second challenge is that we are dealing with an imperfect and still immature market for electronic commerce. As an imperfect market, electronic commerce creates some significant challenges and risks:

- (a) The risk of limiting potential by taking actions that entrench immature, and still rapidly evolving, business models. This reinforces the importance of working from clear principles.
- (b) The risk that first movers, not key future stakeholders, will shape developments in ways which constrain the full potential of electronic commerce developments for emerging or small economies, for future consumers, and for new emerging enterprises. Examples of this risk have been recurrent US proposals to “internationalise” US regulatory frameworks, most famously around intellectual property protections in a digital environment.
- (c) The risk that sophisticated market mechanisms like industry self-regulation will favour those companies and countries with strong global company brands and market share.
- (d) The risk that insufficient attention will be paid to the embedded, structural barriers to the potential application of electronic commerce within vertical markets, such as health, caused by sector specific regulation based upon dated and entrenched models of service delivery.

The third challenge is the speed of developments and the timeframes within which national governments and international forums can move to establish guidelines and recommendations on key matters such as tax, liability and consumer protection. The appropriateness of these timelines will affect both investor and consumer confidence. Investors, small enterprises and consumers need confidence and a sense of certainty before they will stake their futures on the new digital economy. One of the greatest potential sources of uncertainty is the lack of synchronisation between the pace of industry development and that of Government and policy responses. We used to talk about “internet dog years” noting that, on the other hand, government policy time and regulatory renewal appear to move in slow motion.

A significant tension emerges from the conflict between two realities, which lead to claims for inaction on one hand, and targeted action on the other. The horns of this dilemma are:

- (a) the claims that none of us really know where the digital economy is heading, creating high risks for those who wish to lock down governance structures prematurely. The logical extension of this position is support for caution or even moratoria on government intervention.
- (b) the countervailing argument that no truly global electronic commerce futures can flourish unless consumers, start-up ventures and investors gain confidence to commit themselves to an electronic future.

In responding to change there are, correspondingly, two styles of response. One is to pretend that what is happening is merely incremental additions to practice, and hence what is needed is the adaptation of existing frameworks around the edges. The other is to recognise that what we are dealing with is tectonic shifts, requiring us to re-examine and re-think the fundamental principles and assumptions shaping legal frameworks and regulatory regimes. Meanwhile, life has to go on, and so we tend to muddle along. It is left to a small cadre of forward looking lawyers like Brian and Anne Fitzgerald to help us chart a course from the pre-digital era in which many of us grew up into the transformed legal landscape of tomorrow.

This volume helps us navigate this brave new world, by clearly identifying the fundamental principles and issues involved, and charting the evolution of case law dealing with our migration to a fully digital environment. This volume is not, however, the last word on the subject. There remains much uncharted territory, and over the coming decade I believe we will need to need to develop a much more expansive vision for “next generation” cyberlaw. The reasons for this are worth noting as a backdrop to the “work in progress” summarised in this volume.

In the 1990s the advanced countries of the world largely adopted a cautious – but thankfully not a precautionary - approach in their regulatory reactions to the advent of the Internet and this was important in allowing digital infrastructure to reach a tipping point. In the second wave of Web 2.0 and beyond, however, where virtually every aspect of commercial and civic life is grounded upon digital architectures, every aspect of the application of legal and regulatory frameworks needs to be fundamentally re-examined and re-thought. Entire areas are at risk of becoming lawless by default, or obsolescent frameworks are criminalising whole areas of activity. The meltdown associated with the Global Financial Crisis exemplified the nature of these foundational challenges we are facing in the 21st century. Thus next generation cyberlaw will require re-consideration of virtually every aspect of legal frameworks: constitutional and international law, criminal, contract and property law, as well as tort and customary and traditional practices. In parallel our notions about rights and responsibilities, as well as our overall ethical frameworks, will also be challenged.

Thus sustained and critical thinking must continue to be applied to this domain of cyberlaw and the development of next generation legal frameworks. This is a global challenge, but someone has to and must assume thought leadership and practice in this domain. Hence, whilst gratefully appreciating and benefitting from this present text, we also will have an eye open for the next edition and version.

April 2011

Preface

Few would dispute that developments in digital technologies and the internet over the past two decades have been little short of remarkable, bringing about a revolution in the way we communicate, interact, create and use various materials, engage in business transactions and deal with information. However, it is now clear that the developments we have witnessed to date are only the beginning of an era in which fundamental aspects of our everyday existence will continue to be reshaped in unpredictable and unimaginable ways.

For each of the authors, the interaction between technology, policy and law in the online environment has been a long-standing focus of interest. Each of us has devoted much of our professional activity over the last 15 years or so to understanding, applying and shaping the law as it relates to the internet and e-commerce. Although Australians have enthusiastically embraced information technology and the internet, the resurgence in the mining and resources sector since the early 2000's led to insufficient attention being paid to online innovation. With construction of the National Broadband Network underway and the International Monetary Fund reminding of the dangers of becoming overly reliant on resources exports, Australian governments and businesses are now beginning to grasp the potential of the digital economy. In moving towards a more strategic approach to the internet and e-commerce, public and private sector players alike will find themselves grappling with complex issues of the kind discussed in this book.

There are several people whose contributions to this project need to be specifically acknowledged. Chapter 9 (E-taxation) includes research and materials provided by Tim Beale, and Professor George Cho AM has contributed to Chapter 13 (E-government). Our graduate researchers Damien O'Brien, Cheryl Foong, Kylie Pappalardo, Ben Atkinson, Steven Gething, Rami Olwan and Tim Seidenspinner have assiduously tracked down and digested a diverse range of materials, while our colleagues Neale Hooper (Queensland Government), Richard Best and Keitha Booth (New Zealand Government), Peter Coroneos (Internet Industry Association) and Dr Ben McEniery (QUT) have generously provided information, guidance and insights.

Particular thanks are extended to Thomson Reuters, notably Robert Wilson who has worked with us on publishing projects for many years, Marilyn Shields who again carried the major responsibility for editing and formatting of the text, and Lara Weeks who took up the baton from Marilyn for the finishing leg of the project. Lastly, all of the authors thank their families and friends, without whose support and forbearance projects such as this could not be achieved.

The chapters have been authored as follows:

- Chapter 1: Brian Fitzgerald and Anne Fitzgerald
- Chapter 2: Gaye Middleton and Brian Fitzgerald
- Chapter 3: Gaye Middleton and Brian Fitzgerald
- Chapter 4: Brian Fitzgerald and Anne Fitzgerald
- Chapter 5: Anne Fitzgerald
- Chapter 6: Anne Fitzgerald
- Chapter 7: Anne Fitzgerald
- Chapter 8: Yee Fen Lim and Anne Fitzgerald
- Chapter 9: Anne Fitzgerald
- Chapter 10: Anne Fitzgerald
- Chapter 11: Yee Fen Lim and Anne Fitzgerald
- Chapter 12: Gaye Middleton and Brian Fitzgerald
- Chapter 13: Eugene Clark and George Cho
- Chapter 14: Eugene Clark
- Chapter 15: Brian Fitzgerald

ANNE FITZGERALD

*South Bank, Brisbane
21 April 2011*

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