ELECTRONIC COMMERCE

LAW AND PRACTICE

Third Edition

Michael Chissick

Alistair Kelman

Sweet & Maxwell
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FIELD FISHER
WATERHOUSE

and

Alistair Kelman

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FOREWORD

Every new frontier is inherently lawless and thereby full of new and liberating freedoms, and as a species we revel in the opportunity afforded by zero constraint. Not that we seek to be dishonest or wish to commit crimes, but by our very nature we are driven to explore the boundaries of what is safe, proper, ethical, profitable (in the broadest sense of the word) and ultimately what is acceptable and sensible for our society. In the past the writers of societal rules, our statutory laws, had to contend with challenges on a human scale and timeframe that encompassed a specific society or nation. International law bridged the gap and often took decades to formulate, agree, and enact. But this was at a time before and during the industrial revolution, before technology began to drive us, our society and our institutions, before our total dependency on a machine-driven world that affords us prosperity, well-being and survival.

Well, the arrival of the Internet just 11 years ago and its commercialisation a mere six years ago changed everything. With almost all our technology advancing at an exponential rate that says (for example) that computing power and networking doubles in power every 12 months or so, the old modes of operation do not work and the old mind sets have to be buried. The lawlessness of the Internet has seen an unparalleled availability of pornography that is relentless in its growth and pervasiveness, whilst being totally impervious to the efforts of individual governments to protect their populations. At another extreme, the efforts of a blind and atrophied music industry to destroy Napster, is prompting the peer-to-peer networking of music on a scale that now defies all attempts at control. These examples of the eBusiness exude a well-established ethos born of the Internet—the concept of total FREEDOM being a right and a basis for bit trading. Freedom to go anywhere, get anything, do anything, and all for FREE. And for a short while this new eFREEDOM was palpable, almost true, almost ubiquitous! But, we all know, there is no FREE lunch. We always have to pay, we are always accountable for our actions, and we owe it to ourselves, our society, species and future to be responsible. Ultimately, rules are always necessary; otherwise damage is done and people get hurt.

From the beginning of the eBusiness revolution the authors of this book have been active in the field of policy and legal formulations at the cutting edge of change. Alistair Kelman for over 20 years as a practising barrister, has been intimately involved in the prosecution of the law and the testing of its validity in one of the oldest legal frameworks on the planet—creating new precedents, teaching and thinking. Michael Chissick and his team at Field Fisher Waterhouse have been providing cutting-edge commercial advice to clients who have wished to participate in the eRevolution. Together they have been warning of the need to arm those very offices of the nation's legal practices and institutions with appropriate technologies as they try to cope with a world changing at a rate never experienced before.

If you are a member of the legal profession you will find this text laced with argument and example to help you cement the key differences and relationships between the old world of atoms and the new world of bits. On the other hand, if you are a lay reader, you will find much to put your mind at rest, and even more to cause concern in your efforts to remain/become legal. This is not light reading, but it is necessary reading for companies, concerns and individuals involved in the eBusiness. Ignorance is no excuse, and there is certainly no immunity from it, but without doubt it is an increasingly evident qualification we all share as our networked planet advances with technological change. So I commend this book to you in this third (and expanded) edition as an essential primer and reference work for today and the future.

Professor Peter Cochrane
Director and Co-Founder
ConceptLabs CA
August 2001

PREFACE TO THE THIRD EDITION

Thanks are given to the team at Field Fisher Waterhouse without whom this book would not be possible. To Sarah-Whalley Coombes for the domain name section and Charles Whiddington for the Competition Law section. Graeme Nuttall for the tax chapter, Kirstene Baillie for the financial services section and Hayley Stallard (now at BskyB) for the Webvertising chapter lastly thanks are due to Amanda Ritchie for her typing most of this book and John Hartle for his guidance and checking of the earlier editions of this book.

Naturally all mistakes are our joint responsibility.

Writing the first edition changed both our lives. At the time in 1998 e-commerce was in its infancy. Since then it has grown up, beaten up innocent investors and not-so-innocent venture capitalists, been exiled our of polite society and currently sits wounded but still plotting World Domination.

Our own lives have, to some extent, mirrored this dynamic evolution. Michael's practice at Field Fisher Waterhouse quadrupled over the 2 years leading to Field Fisher Waterhouse representing over 180 e-commerce clients. This rate of growth has now slowed as the dotcom meltdown takes its toll but the practice continues to expand into new areas such as e-government and electronic delivery of services.

Alistair's life has been on the e-commerce roller coaster. In December 1999 he ceased practice at the Bar to concentrate on developing his first e-commerce application, EasyClear — a tax calculation plug-in for e-commerce web sites backed by a patent application for the technology he had invented. The business model for EasyClear was destroyed by the activities of some Bulgarian hackers in late 1999[1], leading to a situation where by the start of 2001 Alistair had been through his first dot-com near death experience. Somewhat wiser but still intoxicated by the possibilities, Alistair has settled in as E-Commerce Counsel to Enformatica whose flagship products Enfocast (**www.enfocast.com**) and NewsScape (**www.newsscape.com**) are coming to a desktop near you real soon.

In producing this new edition it has been necessary to completely rewrite Chapter 1. This has meant that the original chapter with its analysis of the likely growth of e-commerce in Europe and the mini-drama set in 2004 has had to be omitted for reasons of space. Readers who nevertheless would like to read them are welcome to go to **www.law.usp.net** where the original chapter and a variety of other legal materials written by Alistair (including material from his first book from the early 1980s "The Computer in Court") will continue to be available. The site requires the reader to register their name and e-mail address and is password protected. The password is "shyster".

The law of electronic commerce is the most active branch of law and changes and new legal and technological developments occur constantly. It is therefore important that the reader should be in possession of the latest information as soon as possible and this book should be treated as a starting point rather than as a conclusive document. The book is no substitute for professional legal advice.

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[1] A long story — if you ever meet Alistair he will be happy to tell you the saga.

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We have tried to restrict Web references to pages either to home pages or to pages that appear unlikely to be moved in the near future. However, web sites do get redesigned and altered and readers will find, over time, that the detailed web references at some future date may not always lead to the sought document. When this situation occurs we would recommend readers to put the text description of the web reference into a web search engine to find the reference's new location. We have found the Northern Light search engine (**www.northernlight.com**) and the Google search engine (**www.google.com**) to be particularly useful in performing these tasks.

This law is given in this edition at it stood on 1st September 2001 unless another date is given.

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