CONTENTS

Preface and acknowledgments  page ix  
Table of cases  xi  
Table of statutes, regulations, directives and treaties  xviii  

1 Jurisdiction and the Internet  1  
1. The global net versus national laws  1  
   A. A story about eggs  1  
   B. Mapping the legal landscape  3  
   C. Who cares?  6  
   D. A conservative approach  11  
2. The building blocks  13  
   A. Jurisdiction  13  
   B. Public law versus private law  19  
   C. The quest for the perfect link  20  
3. Actual and possible solutions foreshadowed  24  
   A. Territoriality: country-of-origin and country-of-destination  24  
   B. The Achilles’ Heel: limited enforcement jurisdiction  26  
   C. More global law or a less global internet: a simple choice  28  
   D. Code: a separate option?  30  

2 Law: too lethargic for the online era?  33  
1. National trademarks versus international domain names  33  
2. The Internet’s impact on law and regulation  35  
   A. The qualitatively new legal problems  35  
   B. The quantitatively new legal problems  37  
   C. The severity of the problems  39  
3. Legal reasoning and legal change  41  
   A. Legal reasoning  41  
   B. Judicial reasoning: continuity and change  43  
   C. Legislative justification: change and continuity  45  
4. The jurisdictional challenge  47  
   A. Is a website enough? Two schools of thought  47
B. Conservatism: a mere result of the judiciary’s limitations? 52
C. The best solution versus the least disruptive solution 56
5. Law as an engine of, or brake on, change 58
   A. The floodgates argument 59
   B. The futility argument 62
   C. The cautious way forward 64

3 The tipping point in law 66
   1. Contract law: unaffected by online transnationality? 66
   2. The tipping point 69
      A. Evolution of law versus the tipping point 69
      B. Substantive justice versus formal justice 71
   3. The evolution of jurisdictional rules in private cases 74
      A. Adjudicative jurisdiction in consumer contracts: no gain without pain 74
      B. Pre-Internet refinements 79
      C. Internet refinements 82
   4. The evolution of jurisdictional rules in public cases 87
      A. Criminal jurisdiction 87
      B. Pre-Internet refinements 89
         The objective territoriality principle 89
         The ‘reasonable’ effects doctrine 91
         Return to a ‘crude’ effects doctrine 94
      C. Internet developments 96
      D. The common denominators 102
         The possibility of concurrent jurisdiction 102
         Insistence on enforcement jurisdiction 104
         Lack of international consensus: moral and cultural values 107
   5. The better path? 108

4 Many destinations but no map 111
   1. Notice of foreign legal obligations 111
   2. Foreseeability of foreign defamation law 115
      A. Foreseeability and the rule of law 115
      B. Absence of noticeable borders in cyberspace 117
      C. Actual access, even if minuscule 119
      D. Foreseeability of foreign law in respect of freely accessible sites 125
         Foreseeability of all destinations 127
         Foreseeability of foreign harm 129
         Foreseeability of specifically targeted destinations 134
      E. Two destination principles: their flaws and merits 138
CONTENTS

3. Foreseeability of foreign criminal law 141
   A. Common rules but multiple interpretations 141
   B. Foreseeability and the territoriality principle 143
   C. Foreseeability of all destinations 145
   D. 'Reasonable foreseeability': some conclusions 149
4. Actually foreseeing and knowing foreign law 153
   A. Actual notice and the effectiveness of law 153
   B. Traditional methods of publication of law 157
   C. The failure of traditional methods in the online world 159
5. An afterthought 163

5 The solution: only the country of origin? 164
   1. The exclusive country-of-origin approach 164
   2. Online gambling: foreign providers’ local activities 167
      A. The general rejection of the exclusive country-of-origin approach 167
         Netherlands and Germany 167
         European Union 168
         United States 169
         WTO and GATS 171
         Australia 173
         New Zealand 174
      B. The exclusive country-of-origin approach and its flaws 175
         The UK Gambling Act 2005 175
         Loss of economic rewards 176
         Forum-shopping and the race to the bottom 178
         Shift of regulatory burden 181
         No protection from harmful foreign content 182
         Lowest common denominator 184
         The special case of the Electronic Commerce Directive 184
   3. Online gambling: local providers’ foreign activities 190
      A. Lack of cooperation in non-harmonised public law 190
      B. The UK and Australia: good neighbours 193
   4. An example to follow? 197

6 The lack of enforcement power: a curse or a blessing? 199
   1. Limited enforcement power: a blessing in disguise 199
   2. Enforceability and legal compliance 203
      A. Enforceability, not enforcement, matters 203
      B. ‘Voluntary’ compliance without the threat of enforcement 206
      C. Enforceability and why it really matters 207
   3. Upholding local law despite foreign violations 210