

PART

INTRODUCTION



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Excerpt

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AN 'ELECTRONIC RENAISSANCE' – DIGITAL *LEX MERCATORIA* AND DIGITAL PERSONA



The clichéd and now classic approach to introducing the digital revolution is to compare it to the invention of the printing press by Johannes Gutenberg in 1450.¹ The Renaissance of the Middle Ages emerged from dark and secretive times, and was contributed to by an explosion of books and the release of knowledge into the wider world. A neoteric intellectual spirit was fostered. Knowledge was power – a power formerly harnessed and monopolised by a relatively small number of abbey-bound monks who hand-copied rare and invaluable tomes and held them in monastic libraries unavailable to any but those the Church permitted. Mechanisation of the production process changed this situation dramatically, and within 50 years there were 20 million books published in Europe. ‘Information wants to be free’ may be the catch-cry of the internet age but it applies to the Middle Ages as well. Mass communication through the printed word became the vehicle that drove the Renaissance, enabling and fostering an exchange of knowledge and ideas. The ‘Electronic Renaissance’ takes advantage of global communications, high speeds, bulk transfers and massive data storage capacities to power a new global knowledge revolution. Individuals in modern society have their digital persona on multiple computers: in government databases, employer databases, as memberships, via social media participation, on criminal databases for some, and as more surreptitiously collected data when we browse the internet. Much of an individual’s digital persona is available to those who know the language of computers. Commercial enterprises collate data and make serious commercial decisions on a macro and micro level.

This book hypothesises that order is endogenous. The structure of language, the systemisation of laws and the constitution of economic systems all emerge from unplanned, arbitrary chaos. The social order which emerges from this chaos is reliant on and will be largely framed by the available raw materials: the nature of any markets it operates within, the structures and the natural and constructed environments within which it must prove efficacious. Technology emerges in response to the experience of the marketplace with emergent technologies, access to the technology, and perceived utility in terms of opportunity costs. The order of any regulation that also emerges will depend upon the perspective of the players. The chapters that follow examine the creation of the law, each providing examples of endogenous order and the societal responses to the creation of that order. These societal responses emerge from three fundamental bases: technological, the legal and the pragmatic.² The heterogeneous expert would argue that substance is merely a function of form. Whether we call it Daoism, determinism, spontaneous

1 There are earlier inventions of the printing press in the East, but Gutenberg’s invention sparked the Western Renaissance.

2 See, for example, Albert Loan, ‘Institutional bases of the spontaneous order: Surety and assurance’, *Humane Studies Review* (1991) 7(1).

order or an invisible hand,³ the course of development, conscious or even inanimate, will invariably follow the path of best fit.

Aphorisms such as 'Information wants to be free', 'Good order results spontaneously' or 'That which is the result of human action but not of human design'⁴ reflect the tensions and isomorphism in the order of law and technology. Each twist and turn takes a path of least resistance. This multiplicity provides the legal system's comfort and structure whilst retaining flexibility and adaptability.

This construct mirrors the development and use of *lex mercatoria*. In the absence of an operative legal framework, the players within the commercial environment resorted to practice, custom, fair play and repetition. Commercial actors independently sculptured norms, free from the clumsy, uninformed overlords whose purpose and directions would be shaped by other considerations. The traditional merchants moulded commercial law in a manner that was 'far reaching and remarkable'.⁵ In the Electronic Renaissance, the pragmatists are the computer technicians, the commercial actors and the individuals interacting socially in a new world of electronic commerce and social media. The law of social media and of electronic commerce has emerged at a breakneck pace for lawyers and legislators. The common law system emerged from centuries of turmoil, as 'an amorphous and unruly thing'.⁶ Even with its rapid advances, the law lags behind the Electronic Renaissance. Nevertheless, there are international bodies intent on filling the gaps.⁷

On one level, electronic commerce began in the mid-1800s, when the first contract was entered into using the telegraph, and later the telephone.⁸ However, the expression 'electronic commerce' is typically used in connection with the expansion of commerce using computers and modern communications, most notably the internet and cyberspace. The word 'electronic' first appeared in 1902,⁹ but the expression 'electronic commerce' did not emerge until the 1990s. The development of security protocols has aided the rapid expansion of electronic commerce by substantially reducing commercial risk factors.

The expression 'social media' is used to mean personal interaction between individuals using modern communications networks. Some argue that the first such

3 See, respectively, the works of Zhuangzi, 4th century BC; a philosophical concept running contrary to free will and choice; the works of Friedrich Hayek; and the works of Adam Smith, discussed in Chapter 2.

4 See Chapter 2, The rule of cyberspace.

5 Gilles Cuniberti, 'Three Theories of Lex Mercatoria', *Columbia Journal of Transnational Law* (2013) 52(1).

6 Frank Kitto, 'Foreword', in Meagher, Gummow and Lehane, *Equity, Doctrines and Remedies*, Butterworths, Sydney, 1975, v.

7 Ibid.

8 The first known 'electronic' contract was *Walsh v Ionides* (1853) 1 El & Bl 383; 118 E.R. 479, where the court acknowledged a contract of agency made in 1851 by telegraph.

9 Oxford English Dictionary, online edition, <www.oed.com>.

social interaction arose with the use of the telephone in the early or mid-20th century. However, the expression dates from 1994, when the internet began to mature.¹⁰ The human penchant for communication was liberated. The cost of long-distance communication evaporated. Entrepreneurial types have provided a plethora of devices, programs and apps for social media interaction. Their reason for doing so is not altruistic. The greater the uptake, the greater the revenue from advertising, data collection and heuristic marketing. The advantages of electronic commerce to commercial parties include ease of access, anonymous browsing of products, larger choice, the convenience of shopping from the computer, and includes the social media explosion. The disadvantages include the potential for invasion of privacy and security risks. There are also questions regarding jurisdiction, standards, protection of intellectual property, taxation, trade law and other issues. Nevertheless, acceptance of electronic products and services has grown prodigiously.

Security is of paramount importance in electronic commerce. Public key cryptography was invented in response to security concerns and has revolutionised electronic commerce. Communications are now relatively secure: digital signatures or certificates permit the authentication of the sender of a message or of an electronic commerce product.

This book addresses legal issues relating to the introduction and adoption of various forms of social media and electronic commerce. Whether it is undertaking a commercial transaction on the World Wide Web, sending electronic communications to enter into commercial arrangements, social media, downloading material subject to copyright, or privacy concerns about our digital personas, there are legal considerations. Parties must consider the risks associated with social media and electronic commerce, whether or not electronic writing and signatures are equivalent to paper writing or wet ink signatures, and which jurisdiction and which law governs a dispute between parties if the parties are in different countries from the servers. This book addresses intellectual property, cybercrime, surveillance, privacy, defamation, evidence of records and domain name usage and disputes.

Social media and electronic commerce law

An examination of social media law and the law of electronic commerce must begin with a fundamental understanding of the law and its role in society as it has evolved over the centuries. It necessitates understanding terrestrial norms, social

¹⁰ According to the Oxford English Dictionary, the expression 'social media' was coined in 2004. See above n 9.

behaviour and the application of the rule of law. These principles must be applied to new circumstances, infrastructure and contexts, even if these challenge such foundations of society as sovereignty and human rights. It is an exciting time to be charting the course and watching as legislators, courts, merchants and the populace wrestle with this new epoch. In the 18th and 19th centuries there may have been a similar opportunity to observe principles evolving, as there were new developments in relation to consideration (in contract law) and the postal acceptance rule (also in contract law), and as principles of equity matured. But such development was at a snail's pace compared with the eruption of the law of social media and electronic commerce over the last three decades.

The majority of legal problems arising through the use of social media and electronic commerce can be answered satisfactorily by the application of standard legal principles. Contract law, commercial law, defamation and consumer law, for example, all apply to the internet, email communications, electronic banking and cyberspace generally. However, cyberspace gives rise to unique and unusual circumstances, rights, privileges and relationships that are not adequately dealt with by traditional law. This has necessitated legislation, international agreements and a plethora of cases before the courts.

Electronic commerce law

The expression 'electronic commerce law' is used to describe all changes and additions to the law that are a result of the electronic age. Justice Fryberg,¹¹ in an address to the Australian Conference on the Law of Electronic Commerce, asked, 'Is there such a thing as Electronic Commerce Law? I suggest there is not',¹² although he acknowledged that he had completed a keynote address on precisely that topic. Joseph Sommer¹³ argued that 'cyberlaw' was nonexistent as a separate body of law, and that cyberspace 'is a delightful new playground for old games':

[N]ot only is 'cyberlaw' nonexistent, it is dangerous to pretend that it exists. A lust to define the future can be very dangerous, especially when we cannot even agree on the present. A lust to define the law of the future is even worse, since law tends to evolve through an inductive accretion of experience. It is much safer to extract first principles from a mature body of law than to extract a dynamic body of law from timeless first principles. An overly technological focus can create bad taxonomy and bad legal analysis, at least.

11 Former Justice of the Supreme Court of Queensland.

12 HG Fryberg, 'The Impact of Electronic Commerce on Litigation' 28 March 2003. Available at <archive.sclqld.org.au/judgepub/2003/fry070403.pdf>.

13 'Against cyberlaw', (2000) 15 *Berkeley Tech LJ* 1145.

At worst, it can lock us into bad law, crystallizing someone's idea of a future that will never be.¹⁴

Judge Frank Easterbrook¹⁵ initiated the debate with his article 'Cyberspace and the law of the horse'. Easterbrook argued that cyberlaw is unimportant because it invokes no first principles.¹⁶ He made reference to the comment of a former Dean of the University of Chicago Law School that a course in the law of the horse was not offered: 'Lots of cases deal with sales of horses; others deal with people kicked by horses; still more deal with the licensing and racing of horses, or with the care veterinarians give to horses, or with prizes at horse shows' – nevertheless there is no discrete body of horse law.¹⁷ Judge Easterbrook argued that there was no reason to teach the 'law of cyberspace', any more than there was reason to teach the 'law of the horse', because neither, he suggested, would 'illuminate the entire law'. By analogy he proclaimed that cyberlaw did not exist.¹⁸

In his article 'The law of the horse: What cyberlaw might teach', Lawrence Lessig¹⁹ responded to Easterbrook's assertions. Through a series of examples he demonstrated that cyberlaw or electronic commerce law, however described, forms a unique area of legal discourse. Lessig referred to privacy and spam in cyberspace. He argued that any lesson about cyberspace requires an understanding of the role of law, and that in creating a presence in cyberspace, we must all make choices about whether the values we embed there will be the same values we espouse in our real-space experience. Understanding how the law applies in cyberspace in conjunction with demands, social norms and mores, and the rule of cyberspace, will be valuable in understanding and assessing the role of law everywhere.

Easterbrook and Lessig's disquisitions are now dated in a field which has advanced more quickly than any other field of law. The law of electronic commerce has increasingly become a distinct study, with legal specialists, texts and courses in every law school. Legislation has been deemed necessary for several cyber issues. Those who scorned words such as 'cyberlaw' and 'cybercrime' perhaps winced at the introduction of the Australian *Cybercrime Act 2001* (Cth). Traditional laws had proven inadequate, necessitating legislation on computer-related crime, credit card fraud, bank card fraud, computer forgery, computer sabotage, unauthorised access to computer systems, unauthorised copying or distribution of computer programs, cyberstalking, theft of intellectual property and identity theft.

¹⁴ Ibid.

¹⁵ Judge of the US Court of Appeals for the Seventh Circuit.

¹⁶ 'Cyberspace and the law of the horse', (1996) *University of Chicago Legal Forum* 207.

¹⁷ Interestingly, the US law firm of Miller, Griffin and Marks advertises that it specialises in 'commercial, corporate and equine matters'.

¹⁸ See also James Boyle, 'Foucault in cyberspace: Surveillance, sovereignty, and hard-wired censors', (1997) 66 *University of Cincinnati Law Review* 177.

¹⁹ 'The law of the horse: What cyberlaw might teach', (1999) 113 *Harvard Law Review* 501.

Spam has become a real economic waste for virtually all business, resulting in legislation and international agreements.²⁰ The digitisation of data results in real privacy concerns. In response to this the Australian *Privacy Act 1988* (Cth) was overhauled in 2000 to make the private sector accountable, and was revitalised in 2013. The Australian Law Reform Commission (ALRC) has undertaken a further review, with recommendations to expand privacy laws so that they deal with technological developments.

Domain names are valuable business identifiers, traded in the millions of dollars and subject to numerous disputes. Most national domain name administrators have introduced dispute resolution procedures. The courts have dramatically expanded the tort of passing off, in a manner not contemplated until recently, in an attempt to provide remedies.

Conflict of laws principles in cyberspace have been inadequately served by traditional principles established over centuries. The courts have formed new approaches. Online defamation, for instance, is unlike the static occurrences. Now, a defamation statement can be published continuously worldwide 24 hours a day. The courts have had to reconsider the single publication rule, and the applicability of local laws to a website that was intended for another jurisdiction but has global reach.

Child pornography, terrorism, suicide materials, spyware and censorship are issues on which laws vary dramatically internationally, and yet each website is typically available globally. Nations have different ages at which a person is no longer regarded as a child, and freedom of speech issues arise with terrorism issues (plans to make a bomb) and suicide information. The law must address the easy reach of such material in the digital age in ways that in other contexts may be considered draconian. Censorship laws for print and television are ineffective for online materials. What is electronic writing, and an electronic signature? The range of issues related to electronic contracting has resulted in international Electronic Transactions Acts. Evidentiary issues arise in relation to digitising paper documents and printing out electronic documents. The internet raises a range of intellectual property issues, such as peer-to-peer file sharing (music and videos in particular), digital rights management, time-shifting and format-shifting. Electronic commerce by its nature does not recognise borders, and it raises questions regarding security of transactions, standards and protection, legally and otherwise, in an international context.

Many international organisations have spent considerable time and resources on resolving legal issues and difficulties in electronic commerce: the UN Commission on International Trade Law (UNCITRAL), the International Chamber of

²⁰ For example, the *Spam Act 2003* (Cth) and the Memoranda of Understanding between Australia, South Korea and the US.

Commerce (ICC), the Asia-Pacific Economic Cooperation (APEC), the Organisation for Economic Cooperation and Development (OECD) and the World Trade Organization (WTO) are some examples.²¹

The law of electronic commerce (or cyberlaw) has emerged as a new, disparate and coherent body of law.

Internet use in Australia

Internationally there are more than 3 billion internet users, and more than 1 billion websites. Each day we send 250 billion emails, make 600 million contributions to Twitter, and view 8 billion videos on YouTube. There are 1.3 billion Facebook users.

The following figures are for the year 2012–13 from the Australian Bureau of Statistics (ABS): 83 per cent of Australians were internet users, and there were 12.397 million active internet subscribers, of which 78 per cent were household subscribers and 22 per cent were business and government. Those aged 15–17 had the highest proportion of use, at 97 per cent, compared to those aged 65 or over (46 per cent). The most popular online activities were paying bills and banking online (72 per cent), social networking (66 per cent), listening to music or watching videos or movies (58 per cent) and accessing government services (also 58 per cent). Those aged 15–17 most commonly used the internet for educational purposes (93 per cent) and those aged 18–24 used it for social networking (92 per cent).²²

The vast majority (97 per cent) of internet users accessed the internet from home, with the next most popular being the user's place of employment (49 per cent) and a neighbour's, friend's or relative's house (41 per cent). Most internet users (76 per cent) purchased goods or services via the internet. The three most common types of goods or services purchased were travel, accommodation, memberships or tickets of any kind (74 per cent); CDs, music, DVDs, videos, books or magazines (50 per cent); and clothes, cosmetics or jewellery (49 per cent). Although the proportion of households with internet access is higher in capital cities, at 85 per cent, the percentage outside capital cities has increased significantly recently, to 79 per cent. Finally, 81 per cent accessed the internet at home every day.

The ABS report also found that income and education were key factors in people's internet access: 97 per cent of those earning \$120,000 or more were internet users, compared to 77 per cent of those earning less than \$40,000. Of those with a Bachelor degree or higher, 96 per cent were internet users, whereas of persons educated to Year 12 or below, 75 per cent were internet users.

²¹ See Chapter 19.

²² In 2013 the ACT had the highest connection rate, with 89 per cent of all homes connected, with Tasmania the lowest at 78 per cent.