

BOOK REVIEW

The New Legal Framework for E-Commerce in Europe.

Lilian Edwards (ed), Hart Publishing, 2005, 521 pp., £35.00, ISBN 978-1841134512

The area known variously as “Cyberlaw”, “Internet law” or “E-Commerce law” has rapidly evolved since its emergence in the latter half of the Nineties, and the background to this book offers an interesting illustration of this development.

It is the third in a series of texts published by Hart. The first, Lilian Edwards and Charlotte Waelde (eds.) *Law and the Internet: Regulating Cyberspace* (1997), consisted of a collection of thirteen essays based on papers presented at a conference in Edinburgh that year. At the time, the area was still new to the legal mind, and the essays tended to reflect that fact, with pieces such as Andrew Terret’s “A Lawyer’s Introduction to the Internet” and John MacKenzie’s “Setting up a Legal Web Site: Pitfalls and Promises” needed to offer guidance for those going online for the first time. Similarly, essays such as “Contract Formation on the Internet: Shattering a Few Myths” by Lars Davies offered a discussion of an area which at the time suffered from extreme uncertainty due to a dearth of either caselaw or legislative guidance.

Three years later, the second edition – Lilian Edwards and Charlotte Waelde (eds.) *Law and the Internet: A Framework for Electronic Commerce* (2000) – was an almost entirely new book, with only four essays carried over from the first edition while ten essays were new. This reflected a dramatically changed legal landscape – the intervening period had seen (to give just a few examples): new legislation including the Electronic Communications Act 2000, the Regulation of Investigatory Powers Act 2000, the Electronic Commerce Directive, and the Electronic Signatures Directive; caselaw such as *Godfrey v. Demon Internet* [1999] 4 All ER 342; and other developments such as the adoption of the UDRP, the Safe Harbour principles for the transfer of personal data to the US, and the UNICTRAL Model Law on Electronic Commerce. At the time, therefore, it appeared to the editors that: “the regulation of e-commerce ... is more than a moving target: it is one in a sort of constant and frantic Brownian motion”.

The current volume is again an almost entirely new book. Though it shares an editor and several contributors with the first two works, only three essays follow previous contributions, and those in substantially reworked and updated form. Significantly, perhaps, the focus is also rather different. The previous books (and particularly the first edition) were quite broad in their scope, addressing issues such as online pornography, computer crime and contempt of court. Here the emphasis is squarely on the legal issues associated with doing business online and in particular the implications of the Electronic Commerce Directive. The editor describes this choice as reflecting the fact that while much had been written about the Directive prior to its passing, relatively little had been added since domestic laws were put in place. This in turn reflects a point which recurs throughout the essays – to a large extent, the period since 2000 can be seen as one of consolidation rather than innovation. In the majority of areas covered, the basic legal framework was in place at the time of the second edition – since then, we have seen for the most part incremental development of existing law.

The essays are divided into two parts. Part I – “The Electronic Commerce Directive” – consists of five chapters. The first, by Charlotte Waelde is titled “International private law, consumers and the Net”, and is a notably clear and thoughtful examination of the often bewildering array of rules applying to choice of law and jurisdiction in online business to consumer transactions. Chapter 2 “Canning the spam and cutting the cookies” by Lilian Edwards builds on her essay in the second edition and considers not just the legal rules governing junk email and cookies but also whether existing law can effectively be applied to newer issues such as RFID chips, traffic data and locational data. She also addresses a point often overlooked by lawyers by considering whether technological solutions (such as privacy enhancing technologies or filtering) might offer a more effective solution than legal regulation.

In chapter 3 “Contracting electronically in the shadow of the E-Commerce Directive” Andrew Murray considers articles 9 to 11 of the Directive. He gives a particularly useful analysis of the framework within which these provisions was drafted, analysing how the Directive was influenced by the UNICTRAL Model Law on E-Commerce and the Uniform Electronic Transactions Act (UETA). He is also critical of the manner in which they were implemented in the United Kingdom, noting that the Article 9 requirement of blanket equivalence for electronic contracts was effectively undermined by the *ad hoc* approach to equivalence ultimately adopted by the Government.

Lilian Edwards tackles the difficult subject of ISP liability in chapter 4, explaining how Europe, the US and Australia have tackled the issue of intermediary liability and examining the policy issues associated with granting or refusing ISPs immunities in respect of the material they carry. This chapter contains a particularly lucid discussion of the freedom of expression issues associated with a notice and take down regime and the extent to which it is appropriate to delegate what is in effect a censorship function to non-governmental (or quasi-governmental) bodies such as the Internet Watch Foundation or to the automated and invisible constraints of filtering software. Her somewhat depressing conclusion – proven true since publication – is that we will continue to see an “onslaught on on-line intermediary immunity” led by “national governments, transnational law enforcement authorities, moral lobbying groups and the content industry”.

In chapter 5 Paul Motion provides an interesting discussion of an often neglected aspect of the Directive – the way in which it sought to encourage online dispute resolution (ODR). His analysis is informed by his own experience as a director of the Scottish ODR site Intersettle.co.uk, and as a result it is both detailed and practical. I was particularly pleased to see his discussion of “the quality of justice on-line” – an issue sometimes overlooked by promoters of ODR but highlighted by the apparent institutional bias of the UDRP described by Michael Froomkin and Milton Meuller.

Part II – “Other European and UK E-Commerce Legislation” – also contains five chapters, and begins with Andres Guadamuz and John Usher discussing the European regulatory approach to electronic money and in particular the 2000 Electronic Money Directive. They conclude that the Directive was a missed opportunity – being drafted with smart card technology in mind it fails to be technology neutral and doesn’t lend itself to the regulation of the account based schemes (such as PayPal) which have largely taken over from card based schemes.

In chapter 7 Sandra Eden deals with the VAT on Electronic Services Directive and considers how cross border business to business (B2B) and business to consumer

(B2C) transactions should be taxed. It is hard to disagree with her conclusion that “there is no fantasy world which more effectively achieves the standards of Byzantine complexity than the VAT rules on supplies of international services.”

Annette Nordhausen provides comprehensive coverage of distance marketing in the European Union in chapter 8. This is particularly valuable for the discussion it gives of the varying implementation of the Distance Selling Directive in different Member States.

The next chapter in this Part is by Jane Fraser and considers the topic of electronic surveillance in the workplace. This is a relatively short chapter which nevertheless gives a good overview of UK law in this area and the interaction between the Data Protection Act 1998, the Human Rights Act 1998, the Regulation of Investigatory Powers Act 2000 and the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000. This chapter could have been improved, however, had it offered some discussion of how this issue has been approached in other jurisdictions.

Finally, in chapter 10 Martin Sloan outlines the law on web access and disability in the light of the Disability Discrimination Act 1995. While this is a relatively new area in the UK Martin Sloan draws on the more extensive jurisprudence from the US and Australia in considering how the 1995 Act might be applied by the courts.

Overall, this is a book which should be on the shelves of any lawyer – practising or academic – who has an interest in E-Commerce. The level of analysis is uniformly high, and the contributors succeed both in locating the legal issues in their broader technical, business and international context, and also in outlining the soft law (such as codes of practice and industry self-regulation) which has developed in parallel.

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DOI: 10.2966/scrip.040307.295

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