

Internet Law Fundamentals and How to Use this Book

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I. What is Internet Law?

What, exactly, is “internet law” or the “law of the internet”? We do not believe there really is such a subject. At least, we don’t believe such a category exists in the same way that we might speak of a discrete body of legal rules and theories focusing on a specific set of legal rights and limitations, such as “real property law” or “intellectual property law,” or in the way we might refer to the legal rights and restrictions applicable to a discrete area of commerce, such as “maritime law” or “entertainment law.”

Instead, the phrase “internet law” should best be understood as a reference to new ways of reasoned application of existing laws in the context of online communications and commerce. Initially, many of us who started considering issues of internet law or the law of cyberspace first addressed what happens to the enforcement of contracts as they moved into electronic formats. As business transactions and personal communications migrated first to electronic data interchange and e-mail and then to web-based or cloud-computing-based platforms and social networks, the way we analyzed the rights and obligations of the parties shifted. Our analysis now considers whether, and to what extent, the digital structure of transactions or communications informs the relative positions of the parties.

Sometimes, the online context of a transaction or dispute may lead us to anticipate a different outcome from what would occur in a similar offline dispute. Yet when we analyze the matter under traditional legal theories, the outcome is the same although the way in which the elements of a claim are expressed may be novel. For example, we might apply theories of conversion or trespass traditionally applied to rights in personal property or real property to a party’s rights to a digital version of the same in an online game or virtual world.

Similarly, the fact that website terms of use may exist only in a digital form and are not reduced to a written contract has not prevented courts from using the traditional elements of contract formation to analyze whether a contract has been formed and may be enforced, although there may be questions of whether a user's "express manifestation of assent" to the contract's terms is present.

But sometimes the ways that people and businesses interact in an online environment have made it difficult to fit existing theories of liability to the circumstances. For example, sometimes the ease of communicating and distributing content online makes us question whether content creators and distributors fit within traditional designations that may be assumed by established theories of liability. Thus, the ease with which comments may be posted on websites and redistributed online can render one-time comments on blogs and other websites publications for purposes of establishing a defamation claim. Bloggers readily posting comments on topics of interest may or may not be afforded the same privileges and responsibilities once reserved by law to members of the press. And the proliferating ways businesses make reference to other parties' trademarks in order to promote their own businesses online may or may not constitute "use" of that trademark for purposes of determining whether infringement has occurred.

The challenges presented as we attempt to fit evolving digital circumstances into existing legal structures have led courts and legislatures to create or consider new theories of liability addressing an online context. And since the beginning of the internet era, legislators have been busy arguing about and enacting new statutes and regulations dealing with online circumstances. This has occurred at the federal level, with Congress creating liability shields for content providers in certain circumstances (Section 230 of the Communications Decency Act, and the Digital Millennium Copyright Act's procedures for dealing with infringing content) and protections for certain online data and electronic communications—the Electronic Communications Privacy Act (ECPA), the Computer Fraud and Abuse Act (CFAA), and the Children's Online Privacy Protection Act (COPPA)—as well as at the state level, with states enacting website privacy policy requirements, cyberbullying statutes, data breach notification laws, and other specific kinds of online liabilities.

We have also seen international adoption of new ways of dealing with disputes generated by the growth of the online world, such as widespread use of ICANN (Internet Corporation for Assigned Names and Numbers) arbitration—through organizations such as the National Arbitration Forum and the World Intellectual Property Organization—for disputes between domain name registrants and trademark owners.

The shift of business to the online world has also changed the way business lawyers work with their clients. Business lawyers often strive to get to know their clients' businesses early on, to help them to anticipate issues that will arise when negotiating with other companies. With the ease of online communications, clients may exchange much written communication about a potential transaction, or easily obtain suggested forms of legal documentation, long before a

lawyer is apprised of developments. And many of these communications may implicate the inadvertent creation of enforceable agreements.

The migration of business services online—to application service providers, software-as-a-service providers, and cloud service providers—represents another significant shift in the way lawyers may be consulted to assist businesses with many of the legal arrangements affecting how they operate. Many of the services once provided pursuant to custom or significantly negotiated legal agreements now are being procured in ways similar to how consumers obtain commodity-like services from large-scale providers, such as wireless carriers, energy utilities, and cable companies (that is, with little opportunity for negotiating customer protective provisions or customizing the service offerings).

This book seeks to help lawyers understand the many significant ways the internet has affected legal issues and is continuing to shape our understanding of legal rights and obligations for our clients. In reviewing the many contexts in which this is apparent, the lawyer should keep the following general propositions in mind:

- The development of the law always lags behind the development of new technologies ... and is always struggling to adapt itself accordingly.
- As stated at the top, there is no body of law that can be called internet law, but instead, the proliferation of online communications and digital technologies requires a reasoned application of existing principles to rapidly changing new contexts.
- The United States has experienced an increase in statutory law dealing with specific internet-related circumstances.
- It is always important to attain a basic level of understanding of the technology our clients use in their businesses.
- It is important that executives understand the technology that supports their business, is used to operate their business, and is offered by their business.
- There may be significant generational differences within the work force, regarding trust, outlook, and view of new technologies, which will affect technology adoption and reliance.
- In the digital age, the record we make as we negotiate transactions, deal with customers, vendors, and suppliers, and communicate with the outside world is extensive and difficult to erase.
- Issues involving compliance with international laws arise more frequently and often there can be problems reconciling different laws.

II. How to Use This Book

This book is designed for the business lawyer who is not yet immersed in all of the issues that arise in internet transactions. To introduce the reader to the field and the important issues, this book is divided into four sets of chapters: Fundamentals of Internet Transactions, The Substantive Law of Internet Transactions, Transaction Planning/Conducting Your Business, and Doing Business with Canadians.

Immediately following this chapter is an introduction to the statutory law of internet transactions. Although there are many statutes affecting business in the electronic environment, the authors of this book, together with other members of the American Bar Association Cyberspace Committee, compiled a “Top Ten” list of statutes with which every lawyer should be familiar when advising clients doing business in the electronic environment.

The book is designed to provide the business lawyer with a toolkit for advising clients in the electronic environment. Some of its chapters explain the substantive laws that apply to electronic transactions, such as contract law, patent law, payments law, and trademark law. Others suggest best practices for dealing with specific issues, such as the management of electronic records, doing business in the cloud, and dealing with harmful or infringing content on a website. The reader will find many practice tips and pointers on how to avoid traps for the unwary as well as a detailed discussion of relevant cases, statutes, and regulations. Where appropriate, the authors have included charts and timelines to guide you in areas that may seem complicated.

The chapters on Canadian law are written with the U.S. lawyer in mind, and they highlight important differences between U.S. and Canadian law. We recognize that crossing national borders is a lot easier in the electronic environment than it was in the past, so we have provided these chapters to illustrate the legal challenges that can arise in cross-border transactions.

We hope that this book will help the reader to spot the important issues when business is conducted in an electronic environment. As we stated above, internet law is not a new body of law; it’s a new way of looking at existing law in an environment that is constantly evolving. Although it may seem daunting to some, we hope that the chapters that follow will help all lawyers feel comfortable in this environment.