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Review of “Legal Issues in Electronic Commerce, 2nd Edition”

(Concord, Ontario: Captus Press, 2005)

By Chidi Oguamanam †

This collection of materials is part of the Canadian Legal Studies Series. According to the publishers, the objective of the Series is to offer “a wealth of carefully selected, and up-to-date examinations of Canadian legal issues”. The first of such collections under the same title appeared in 2002. According to Takach, one of the dynamics of computer, and indeed information technology, law is rapid change in technology trends.¹ Thus, after two years, technological developments and corresponding legal responses on the subject of electronic commerce warrant a new edition of materials of this nature.

A striking feature of this collection is how it strives to draw thematic boundaries over extremely interrelated subject matter and issues covered and implicated respectively by the phenomenon of electronic commerce. Within a space of 432 densely packed pages, the editor ingeniously adopts a seven-part outlook on the issues, while selecting relevant materials that speak to the substantive theme of each part. Because of the overlapping nature of the topics, some of the materials feature (as a continuation) in more than one chapter.

Part I is a general introduction, an attempt to situate the complex nature of cyberspace, electronic commerce and information technologies, and the challenge they pose for social, legal (including international) and economic regulatory dynamics. In substantive form, Part II is a collection of interdisciplinary materials covering economic, geographic, sociological, psychological, political, and statistical dimensions of electronic commerce. Parts III and IV are respectively devoted to materials dealing with the sexy subjects of regulation and jurisdiction in relation to cyberspace. Part V deals with domain names; Part VI is titled “local functional issues”, while Part VII is the concluding segment.

For the purpose of this review, a random sampling of materials adapted into this compendium will give a

sense of its scope. In Part II, Gupta *et al.* argue that, even though electronic commerce has “stirred unprecedented excitements and opportunities”,² it holds as yet unexplored potential economic traps for consumers. The authors underscore the need for continued effort in understanding the economic issues and trade-offs inherent in electronic commerce. In “Economic Effects of E-Commerce”, Frank Suijker highlights micro and macro economic effects of electronic commerce in terms of enhancement of market transparency, introduction of novel products and services, and overall increase in competition and business efficiency. The author argues, however, that economies of scale in e-commerce may confer market power on reputable and established e-retailers, and undermine the expectation of intensified competition. Still on the economics of electronic commerce, using microeconomic analysis, Borenstein and Saloner³ catalogue in detailed fashion different arenas in which the Internet has been used to create value with the potential for the re-allocation of existing rent. These include, but are not limited to, ticketing for travel, entertainment, industry newsletters, health and child care services, document management, enhancement of direct marketing and elimination of middlemen, and customization of services at reduced costs. They note, however, as much as the “Web has changed the way in which computers, other consumer electronics, books, and apparel are distributed, the way that they are made has been, so far, much less affected”.⁴

On geography, Kitchin⁵ acknowledges that the nature and extent of cyberspace’s geographic implications are contested. Nonetheless, cyberspace has necessitated a reconfiguration of geography and a lessening of its importance, while opening the road to “corporate decentralization and globalization”.⁶ Kitchin insists that geography, in terms of space and time, is not extinguished by cyberspace because corporations and stake-

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holders in information technology “must locate their command and control centres in areas with suitable infrastructure and affordable costs”.⁷ The author concludes that cyberspace co-exists with geographic space, and that the effect of cyberspace on spatiality is the subject of continuing inquiry for geographers. For Hollifield and Donnermeyer, information technologies help to reduce the barriers of time and distance that obstruct rural communities’ access to major markets. However, the challenge of the interwoven issues of technological access, diffusion, and adoption in these communities remains a major problem. The duo suggest that “the most effective approaches to creating rural demand for information technologies would be a focus on encouraging adoption of local businesses”,⁸ especially locally owned ones.

From a sociological perspective, Hedley plots the parallels between previous technological revolutions and the extant information technology revolution in order to understand its emerging principles. He argues that the material and non-material content of the Internet is predominantly Anglo-American based and driven, involving “rapid and widespread transmission of information in a culture-laden, asymmetrical way”.⁹ In this matrix, the Internet, as a vehicle of cultural dominance, is “far more culturally geared to the American creed of antistatism, individualism, populism, and egalitarianism”.¹⁰ One of the major challenges of the Internet-driven information revolution is how to ensure its dissemination in culturally harmonious ways to bridge the disparities amongst nations and cultures. In their review of the social implications of the Internet,¹¹ DiMaggio *et al.* state that the Internet “offers a once-in-a-life opportunity for scholars to test theories of technology diffusion”. Reviewing a number of studies in sociological perspectives on the Internet, they affirm, albeit independently, the aforementioned observations by Hollifield and Donnermeyer, and Hedley on diffusion of information to rural communities, and the American cultural domination of cyberspace. In addition, they argue that sociologists should pay closer attention to how the organizational pattern of Internet content shapes its use, which is a key to understanding the Internet’s social effect. Takach’s contribution is an excerpt from his book, *Computer Law*.¹² Therein, he captures how the computer-driven information revolution has made information the driver of contemporary global economic growth, with challenging implications for the legal system and process.

Granic and Lamey’s contribution on the psychological dimension¹³ focuses on how the Internet facilitates largely unmediated mass information. This upstages the tyranny of modernism and the latter’s emphases on essentialism and authoritarianism of both the written text and the teacher, and thus paves the way for postmodern thought. The Internet unlocks the gate to perspectivism, and entrenches cognitive flexibility by enabling access to an overwhelming number of diverse

approaches to, and information on, a given subject matter.

Part III is a collection of materials that highlight practical issues implicated in establishing personal jurisdiction in relation to parties who conduct transactions on the Web.¹⁴ The materials reproduced in this part include Johnson and Post’s 1996 seminal article wherein they canvassed regulation as the most viable approach to the Internet.¹⁵ The editor juxtaposes Johnson and Post with Lessig’s equally seminal article, which was for the most part a counter argument to Johnson and Post’s thesis.¹⁶ Lessig maintains that technology-induced regulations, subsidized by law, represent a viable alternative to self-regulation, while noting that “perfect technology of control” does not necessarily correlate to justice, hence the need for vigilance in the evolution of “perfect technology of choice” as the future of cyberspace.¹⁷ In the discourse on controlling illicit behavior in cyberspace, B.S. Schweiger argues that while self-regulation was viable in Cyberia’s early stages, it is no longer viable given the exponential increase in the number of cyber patrons and its increasingly heterogeneous nature. Schweiger proposes a contract-driven model of cyber-regulation in which system administrators would be central to access management.¹⁸ Expanding the cyber regulation debate, Cannataci and Bonnici¹⁹ synthesize the Johnson/Post and Lessig perspectives in order to reach common ground. They endorse an expansive interpretation of self-regulation to accommodate all other regulatory approaches, including various roles of the state. According to them, “self-regulation is not the only form of regulation and should be thought of in the context of the co-existence with other methods of regulation”.²⁰ These key articles capture the dominant perspectives on the subject of appropriate regulatory approaches to cyberspace.

In addition to regulation, jurisdiction, which is the subject of Part IV, is yet another key topical subject for cyberspace, and the editor’s difficulty in separating the two subjects in two different segments is quite obvious. McCarty’s note²¹ captures in simplistic terms the nature of the cyberspace jurisdiction debate. Because of the non-territorial nature of cyberspace, it is not amenable to general jurisdiction, which is essentially territory-driven. McCarty argues that specific jurisdiction is not territory-driven. Rather, it looks beyond state borders and takes into consideration, in an objective way, a party’s state of mind and circumstances that implicate “purposeful contact” as a basis for a state to assume jurisdiction. As such, the doctrine is more suited to Internet contact than general jurisdiction, which is a more traditional approach to jurisdiction.

Part V’s focus on domain names is structured to reflect two major approaches to the subject matter, namely, the traditional, and the new approach. As a backgrounder, Albert’s contribution carefully outlines

the technical and operational details of the Internet domain name system.²² With a review of early case developments, Campbell (the editor of the compendium) sketches the judicial involvement in domain name dispute in federal and provincial courts in Canada, which is part of the traditional approach that focuses mainly on trade mark infringement and passing off claims. Concluding that the failure of the traditional approach is evident in “how checkered and dubious the court system has been in resolving the domain disputes”,²³ the remaining materials in this section turn to the new approach. Demonstrating self-regulation in action, the editor incorporates Canadian Internet Registration Authority (CIRA) policy objectives and its procedural rules along with a substantial amount of key CIRA domain name decisions. Clearly, the shortcomings of the traditional system, such as its costly and time-consuming nature in the midst of rapid technological changes,²⁴ and a dearth of appropriate expertise on the bench makes the new approach more attractive. The success of CIRA and ICANN as alternative domain name dispute resolution fora is evident in the virtual cessation of recourse to the courts in domain name disputes. However, given the optional nature of the CIRA process and the residual jurisdiction of the courts, Campbell critiques *Black v. Molson*, the first Canadian decision on a CIRA panel decision. He argues that the major issue in judicial intervention is how to ensure that it does not undermine the efficacy of consensually undertaken panel proceedings.

Under the title of Local Functional Issues, Part VI isolates materials that spotlight the intersections of information and communication technologies (ICT), contract issues, consumer protection, and personal information/privacy as key local functional issues for e-business in Canada. It begins with a 2004 stock-taking document published by Canadian e-Business Initiative (CeBI).²⁵ Laced with a number of commissioned studies, surveys and statistics, this document is a reflection on the potential of e-business for Canada in the global economy. Despite Canada’s infrastructural advantage in ICT, “cautious public policy leadership in this area”²⁶ undermines the requisite aggressive strategies to boost the ability of Canadian SMEs to maximize their participation in, and the potential of, electronic commerce. While acknowledging improvement in SMEs’ adoption of e-business strategies, the CeBI outlines obstacles to progress in this area, including cost and supply issues, non-availability of skilled professionals, and a crisis of confidence in dealing with software vendors. The CeBI report notes that privacy and security practices are vital to a successful e-business adoption strategy. It calls for continued government intervention to address issues arising from e-commerce, as well as the need for businesses to familiarize themselves with recent legislative developments in these areas, especially the *Personal Information Protection and Electronic Documents Act* (PIPEDA).²⁷

Materials dealing with contract²⁸ highlight the challenges to traditional contract principles posed by the

phenomenon of electronic commerce, as well as the dynamic evolution of automation devices and intermediaries,²⁹ and the rapidly evolving jurisprudence in this area in Canada. There appears to be a certain consensus by contributors that the evolving contract regime in the e-commerce context does not, and ought not, reflect radical deviation from the modern law of contract’s pursuit of reasonable expectation of parties. The central thesis here is that “the modern law of contract can be extended smoothly enough into electronic environments”, but only as part of a broader policy response designed to “develop trust and confidence in the new medium”.³⁰

As Gupta *et al.* indicate in Part II, e-commerce presents potential economic traps for consumers. These are mainly in the areas of security of payment, abuse of consumer privacy/personal information by e-retailers, and miscellaneous possibilities for online fraud. Clearly, the success of electronic commerce depends, to a large degree, on the level of consumer confidence. The remaining selections³¹ under Part VI sketch Canadian national and international legal, quasi-legal and policy initiatives for the evolution of a framework of consumer protection in electronic commerce. The general impression of the diverse approaches to consumer protection lends credence to Cannataci and Bonnici’s thesis in Part III of co-existence of self-regulation with other methods of regulation.

The collection ends with a continuation of the CeBI reflection on the prospects of ICT for Canada, and the latter’s current ranking and prospects in a global e-economy. The initiative emphasizes the strategic importance of SMEs in the Canadian economy, counselling that they need public sector support to overcome identified barriers to the adoption of advanced e-business solutions and optimization of Canada’s ICT infrastructure. This objective is critical for Canada to make the transition from e-commerce to full blown e-economy.

Without doubt, this compendium is a gigantic initiative. It represents a one-stop-shopping layout for law researchers and their interdisciplinary counterparts interested in the dynamic phenomenon of cyberspace and its spin-offs, including the Internet, e-commerce, and various aspects of ICT. Despite the interrelated nature of the various subject matters and the diversity of the sources, the editor’s arrangement of the materials into carefully articulated heads of issues is quite helpful, even though, surprisingly, the subject of privacy was not considered significant enough to be treated as an independent head.

One of the major highlights of this compendium is the diversity of the materials included. Materials are sourced from authoritative journals and they reflect a roll call of leading scholars and their select or representative scholarships in their varied fields. However, the publisher’s claim to reflect “examinations of Canadian Legal Issues” on the subject is only true in part. The strong

American influence, resulting scholarship and case law on cyberspace is quite obvious from the selections. For the most part, the collections do not reflect the subject of electronic commerce in a manner that justifies the book's title. They encompass diverse aspects of ICT; hence, the title does not truly reflect the book's content, despite the attempt in Parts VI and VII to refocus the conceptual framework to Canadian law and the subject of electronic commerce.

Apart from reputed journals, other sources of materials include excerpts from leading texts, as well as leading and relevant industry policy statements, procedural rules, regulations, etc. Perhaps most importantly, the collection is interspersed with leading cases on the subjects. In all, the reader/researcher is dealing not only with a collection of leading articles, but also of important notes, cases, and case commentaries. Also incorporated are editor's notes that not only give helpful hints on the history of materials, but also point to additional useful sources regarding a given subject matter, especially those that have been published since the last edition of the compendium but are presently not included.

For mainstream researchers on subjects covered by this book, most of the included materials may be familiar, yet the luxury of assembling these diverse materials in one package is quite attractive. Also helpful is the attempt to keep the materials as up-to-date as possible. However, despite the editor's attempt in this regard, a number of the collections are clearly obsolete. Given the evolving nature of developments in the cyberspace arena and the rapid pace of technological transformation, legal responses strive to keep abreast. The editor might be a little more radical in regard to exclusion of certain materials, so that subsequent editions will not be

unwieldy and unmanageable. On the topic of editing, editorial interventions on a few of the materials tend to be abrupt. It is not clear why the editor retains error pointers (i.e., "sic") in an edited text when that could be taken care of by the editor. It is a little disappointing that "articles included in this book do not contain the note text or references that originally appeared in the articles".³² Footnotes are a vital aspect of research. For a research-oriented work of this nature, this point cannot be overemphasized. The omission of footnotes may have been the editor's sad compromise made for the reason of space constraints.

Apart from established researchers, graduate and undergraduate students in the multidisciplinary fields covered by this collection will find it to be a very useful and handy work. It will not only assist them in understanding the contemporary issues around the subjects covered, but will also facilitate readers' rapid familiarization with an evolving field of study. Also, the diversity of the materials and perspectives in the scholarship thereby represented will assist students and researchers alike to construct researchable projects, and to meaningfully engage with the literature. I have referred this collection of materials to a few research students at the conceptual stage of their research projects, and I have been pleasantly impressed by how they were able to jump-start their research. There is no doubt that this book is a very important compendium on the cyberspace phenomenon and its spin-offs in the areas of the Internet, electronic commerce and ICT in general. It is a publication that facilitates research and teaching in Canada and elsewhere on the subjects covered, both for established and burgeoning researchers, and students, especially those with an interdisciplinary bias.

Notes:

¹ George S. Takach, *Computer Law* (Toronto: Irwin Law, 2003).

² See Gupta, *et al.* "Economic Issues in Electronic Commerce", in R.L. Campbell, ed. *Legal Issues in Electronic Commerce*, (Concord, Ontario: Captus Press, 2005) 2nd ed. 35 at 37.

³ See Severin Borenstein & Garth Saloner, "Economics and Electronic Commerce", in *Legal Issues in Electronic Commerce*, *supra* note 2 at 47.

⁴ *Ibid.* at 50.

⁵ Robert M. Kitchin, "Towards Geographies of Cyberspace", in *Legal Issues in Electronic Commerce*, *supra* note 2, at 55.

⁶ *Ibid.*

⁷ *Ibid.* at 60.

⁸ Ann Hollifield & Joseph F. Donnermeyer, "Creating Demand: Influencing Information Technology Diffusion in Rural Communities" in *Legal Issues in Electronic Commerce*, *supra* note 2, at 69.

⁹ R. Alan Hedley, "Technological Diffusion or Cultural Imperialism? Measuring the Information Revolution", in *Legal Issues in Electronic Commerce*, *supra* note 2, at 78.

¹⁰ *Ibid.*

¹¹ Paul DiMaggio *et al.*, "Social Implications of the Internet", in *Legal Issues in Electronic Commerce*, *supra* note 2 at 83.

¹² *Supra* note 1.

¹³ Isabela Granic & Alex V. Lamey, "The Self-Organization of the Internet and Changing Modes of Thought", in *Legal Issues in Electronic Commerce*, *supra* note 2, at 97.

¹⁴ See D. Thatch, "Personal Jurisdiction and the World-Wide Web: The Bits (and Bytes) of Minimum Contacts", in *Legal Issues in Electronic Commerce*, *supra* note 2, at 137.

¹⁵ David R. Johnson and David G. Post, "Law and Border—The Rise of Law in Cyberspace", in *Legal Issues in Electronic Commerce*, *supra* note 2, at 139.

¹⁶ Lawrence Lessig, "The Zones of Cyberspace", in *Legal Issues in Electronic Commerce*, *supra* note 2, at 144. The Johnson/Post and Lessig articles were published in the same edition of *Stanford Law Review* in 1996.

¹⁷ *Ibid.* at 148.

¹⁸ See B.S. Schweiger, "America's Adventures in Cyberland" in *Legal Issues in Electronic Commerce*, *supra* note 2 at 135.

¹⁹ Joseph A. Cannataci & Jeane Pia Mifsud Bonnici, "Can Self-regulation Satisfy the Transnational Requisite of Successful Internet Regulation?", in *Legal Issues in Electronic Commerce*, *supra* note 2, at 160.

²⁰ *Ibid.*, at 161.

²¹ D.L. McCarty, "Internet Contacts and Forum Notice: A Formula for Personal Jurisdiction" in *Legal Issues in Electronic Commerce*, *supra* note 2, at 205.

- ²² G. Peter Albert Jr., “Eminent Domain Names: The Struggle to Gain Control of the Internet Domain Name System”, in *Legal Issues in Electronic Commerce*, *supra* note 2, at 267.
- ²³ R. Lynn Campbell, “Judicial Involvement in Domain Name Disputes in Canada”, in *Legal Issues in Electronic Commerce*, *supra* note 2, 281 at 286.
- ²⁴ *Ibid.* at 358.
- ²⁵ Canadian e-Business Initiative, “Fast Forward 5.0: Making Connectivity Work for Canada”, in *Legal Issues in Electronic Commerce*, *supra* note 2, at 429.
- ²⁶ *Ibid.* at 364.
- ²⁷ *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5.
- ²⁸ R. Brownsword & G. Howells, “When Surfers Start to Shop: Internet Commerce and Contract Law”, in *Legal Issues in Electronic Commerce*, *supra* note 2, at 371; Bradley J. Freeman, “Electronic Commerce Under Canadian Law — A Practical Guide”, in *Legal Issues in Electronic Commerce*, *supra* note 2, at 376–385.
- ²⁹ Ian R. Kerr, “Ensuring the Success of Contract Formation in Agent-Mediated Electronic Commerce”, in *Legal Issues in Electronic Commerce*, *supra* note 2, at 385–388.
- ³⁰ Brownsword & Howells, *supra* note 28, at 376.
- ³¹ David Waite, “Consumer Protection Issues in Internet Commerce”, in *Legal Issues in Electronic Commerce*, *supra* note 2, at 407–418; see also Industry Canada, “An Anti-Spam Action Plan for Canada”, in *Legal Issues in Electronic Commerce*, *supra* note 2, at 419–423.
- ³² *Supra* note 2, at ix.