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# Introduction

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If this were a book about some long-established, traditional, or otherwise well-defined area of law—a common law field such as contracts, say, or a regulatory area like environmental law—there would be no call for the editor to define the subject matter, or to seek to justify it. To offer a book on electronic commerce law, however, is to invite the questions: Does such a field of law actually exist? What justification is there for treating this field as a coherent body of law?

We must first understand what electronic commerce is. Although different definitions of the term may be appropriate in different contexts,<sup>1</sup> for purposes of this book electronic commerce consists of commercial activity that is accomplished with some substantial involvement of the Internet. The inception of electronic commerce may be dated to 1995, when the U.S. National Science Foundation privatized its inter-networking project, the NSFNet, eliminating the acceptable use policy that had restricted the network's use to noncommercial purposes. It was in that year that Amazon.com, craigslist, and eBay got their start. The early, influential judicial decisions dealing with ecommerce issues began arriving in the mid-1990s—or a bit earlier, if we expand the scope to include legal issues arising from the use of proprietary online services like America Online, CompuServe, and Prodigy. In contracting, for example, *ProCD v. Zeidenberg*<sup>2</sup> validated the procedure of money-now, terms-later contracts, which paved the way for online clickwrap contracts. With respect to intermediary liability, *Religious Technology Center v. Netcom*<sup>3</sup> applied a volition requirement to limit the scope of direct liability, while *Cubby v. CompuServe*<sup>4</sup> assimilated online intermediaries to the rules applying to distributors rather than the more exacting standard applying to publishers for purposes of defamation liability. Some of the foundational cases addressing judicial jurisdiction over online conduct, including *CompuServe v. Patterson*<sup>5</sup> and *Zippo Mfg. Co. v. Zippo Dot Com*,<sup>6</sup> were also

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<sup>1</sup> The term is often used more broadly to include Electronic Data Interchange, a closed electronic messaging system used between businesses that became standardized in the 1970s.

<sup>2</sup> *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir.1996).

<sup>3</sup> *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995).

<sup>4</sup> *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

<sup>5</sup> *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996).

<sup>6</sup> *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

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issued during these years. Both the United States government<sup>7</sup> and the European Union<sup>8</sup> released their first major policy statements on regulating the Internet in 1997.

The quarterly tabulations from the U.S. Census Bureau provide one measure of the growth of electronic commerce. In the fourth quarter of 1999, when the Bureau began tracking it separately, retail ecommerce<sup>9</sup> in the United States amounted to \$4.5 billion, accounting for 0.6 percent of all retail sales. The dollar amount and percentage have climbed steadily, and as of the first quarter of 2016 the corresponding figures stood at \$92.8 billion and 7.8 percent.<sup>10</sup>

So electronic commerce is a large and growing segment of the retail economy. In response to the questions posed above, I think a strong case can be made for the view that there is in fact a body of law that can with justification be referred to as electronic commerce law, and that can profitably be studied as such.

It is easy to formulate objections to the notion that there is any such coherent body of law. The conduct of electronic commerce has given rise to a gallimaufry of legal issues that belong to recognizable distinct subject areas with no obvious commonality. Those subject areas include: alternative dispute resolution, consumer protection, contracts, copyright, jurisdiction over online disputes, patents, payments, privacy, property, regulated industries, taxation, telecommunications, and trademarks. A few additional sets of legal issues are related to, but do not fit comfortably within, any traditional legal subject area: authentication, domain names, electronic trespassing, and service provider liability. There is no obvious reason why all these diverse legal subject areas should be referenced collectively under the rubric of electronic commerce law. Why not simply treat the law of contracting online as an aspect of contract law, the law of online jurisdiction as a new-technology aspect of civil procedure, and so on?

I suggest that what links these various areas of ecommerce law, and what makes them worth studying as a coherent whole, is that they arise from a common set of technological features of the medium through which electronic commerce is conducted.

First, electronic commerce occurs between parties who are in different geographical locations. The absence of visual clues that are present in face-to-face transactions creates a need for authentication mechanisms, and heightens the risk of mistake and fraud.

Second, the speed and cost of communication are independent of the distance between the parties to a transaction. This makes long-distance transactions more feasible, especially those that cross national borders. Multi-jurisdictional transactions create issues of jurisdiction and choice of law when disputes arise.

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<sup>7</sup> WILLIAM J. CLINTON & ALBERT GORE, JR., A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE (1997), <http://clinton4.nara.gov/WH/New/Commerce/>.

<sup>8</sup> *A European Initiative in Electronic Commerce*, COM(97) 157 (Apr. 15, 1997), available at <http://cordis.europa.eu/esprit/src/ecomcom.htm>.

<sup>9</sup> The Census Bureau defines "retail" as excluding online travel sales, brokerages, and ticket sales, several important categories of what in other contexts would be counted as electronic commerce.

<sup>10</sup> U.S. Census Bureau, *Monthly & Annual Retail Trade*, CENSUS.GOV, <https://www.census.gov/retail/index.html>.

Third, online communications are nearly instantaneous, and transactions can be finalized with the click of a mouse button or tap on a touch screen. This makes it more likely that consumers will enter transactions without sufficient consideration of the terms.

Fourth, website hyperlinks allow presentation of information to the consumer in a layered format that can raise questions about whether the consumer has consented to proposed contractual provisions, and whether the vendor has conveyed disclosure information required to prevent an advertisement from being deceptive.

Fifth, with online communications it is difficult to know the location of the other party. This has implications for a court's assertion of personal jurisdiction over a defendant, which usually must be based on the defendant's purposeful contacts with the forum state.

Sixth, it is difficult to limit the distribution of an online communication to recipients in a particular geographical area. This exposes the vendor to the regulatory regimes of a multiplicity of jurisdictions, with potentially expensive compliance obligations.

Seventh, the near-zero marginal cost of communications makes it rational for vendors to send large quantities of unsolicited commercial email, much of which is fraudulent.

Finally, the radically democratic nature of communication via the Internet, with its absence of gatekeepers such as traditional publishers and broadcasters, has vastly expanded the number and range of potential online vendors to include any individual with an Internet connection. This creates a range of compliance issues.

These technological features are not unique to the Internet: telephone and mail order, for example, have long allowed commercial transactions between geographically remote parties. Other features have only imperfect analogues in older media: for example, incorporation by reference in a paper document shares some features with hyperlinking. But only the Internet collects all of these features into a single communication medium.

If we wish to comprehend the implications of these technological features on how people relate to one another in commercial contexts, if we hope to grasp and critique how courts and legislatures have responded, we must recognize and study the field of electronic commerce law as a unified body. The alternative is to confine our study of contracting via the Internet to a comparison between that and contracting face-to-face, by mail, and by telephone; to confine our study of judicial jurisdiction based on use of the Internet to jurisdiction based on other modes of interaction; and so on. But this would mean missing important connections. For example, the novel aspects of hyperlinks are important in applying both contracting law and deceptive advertising law to online transactions, and for similar reasons: a term presented on a website via hyperlink can become a contractual obligation only if the other party is aware of it,<sup>11</sup> just as a disclosure presented via hyperlink is effective only if the consumer is aware of it.<sup>12</sup> It is only by viewing ecommerce as a whole that we can notice and study such connections.

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<sup>11</sup> See, e.g., *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17 (2d Cir. 2002).

<sup>12</sup> See FEDERAL TRADE COMM'N, *.COM DISCLOSURES* (2013), available at <https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf>.

The chapters that follow are organized into three Parts, which deal with issues at various stages of an ecommerce transaction: entering into transactions, disputes arising from those transactions, and regulatory intervention in the ecommerce marketplace.

Part I deals with the stage of entering into an online transaction. Nancy Kim examines online “wrap” contracts, and shows how their widespread acceptance diverges from traditional contract doctrine.<sup>13</sup> Stephen Middlebrook and Sarah Jane Hughes offer a history of substitutes for legal tender, and draw lessons applicable to bitcoin and other virtual currencies.<sup>14</sup> Jane Winn presents case studies of the adoption of mobile payment systems in Kenya, Brazil, and India.<sup>15</sup> Suzanne Brown Walsh, Naomi Cahn, and Christina Kunz draw attention to the problem of access to digital assets after death, and present the solution offered by the *Revised Uniform Fiduciary Access to Digital Assets Act*.<sup>16</sup>

Part II deals with disputes arising from online commercial transactions. A quartet of contributors address copyright-based disputes. Hannibal Travis explains the economics of book digitization, with a focus on the Google Books project.<sup>17</sup> Ariel Katz addresses the question whether exhaustion of copyright under the first-sale doctrine should apply to works in digital formats.<sup>18</sup> Michael Carroll considers how the Digital Millennium Copyright Act’s safe harbors for online intermediaries apply in the context of social media.<sup>19</sup> And Annemarie Bridy assesses the role of those intermediaries in enforcing copyright in ways that go beyond their statutory obligations.<sup>20</sup>

Proceeding to other fields of intellectual property, Irene Calboli deals with the application of trademark contributory liability doctrine to online intermediaries,<sup>21</sup> while Jay Kesan and Carol Hayes offer a guide to the patentability of business methods and software in the wake of the Supreme Court’s most recent pronouncement on the subject.<sup>22</sup>

The next group of contributors deal with enforcement of rights in online contexts. Marketa Trimble explores transnational enforcement of national laws on the Internet.<sup>23</sup>

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<sup>13</sup> Nancy S. Kim, *Wrap Contracting and the Online Environment: Causes and Cures* (Chapter 1).

<sup>14</sup> Stephen T. Middlebrook & Sarah Jane Hughes, *Substitutes for Legal Tender: Lessons from History for the Regulation of Virtual Currencies* (Chapter 2).

<sup>15</sup> Jane K. Winn, *Mobile Payments and Financial Inclusion: Kenya, Brazil, and India as Case Studies* (Chapter 3).

<sup>16</sup> Suzanne Brown Walsh, Naomi Cahn, & Christina L. Kunz, *Digital Assets and Fiduciaries* (Chapter 4).

<sup>17</sup> Hannibal Travis, *The Economics of Book Digitization and the Google Books Litigation* (Chapter 5).

<sup>18</sup> Ariel Katz, *Digital Exhaustion: North American Observations* (Chapter 6).

<sup>19</sup> Michael W. Carroll, *Safe Harbors from Intermediary Liability and Social Media* (Chapter 7).

<sup>20</sup> Annemarie Bridy, *Copyright’s Digital Deputies: DMCA-Plus Enforcement by Internet Intermediaries* (Chapter 8).

<sup>21</sup> Irene Calboli, *Contributory Trademark Infringement on the Internet: Shouldn’t Intermediaries Finally Know What They Need to “Know” and “Control”?* (Chapter 9).

<sup>22</sup> Jay P. Kesan & Carol M. Hayes, *Patent Eligible Subject Matter After Alice* (Chapter 10).

<sup>23</sup> Marketa Trimble, *Extraterritorial Enforcement of National Laws in Connection with Online Commercial Activity* (Chapter 11).

Juliet Moringiello considers the enforcement of rights by secured parties in electronic transactions.<sup>24</sup> And Amy Schmitz discusses the use of online dispute resolution methods in business-to-consumer online transactions.<sup>25</sup> In the final contribution of this Part, Ariana Levinson considers the labor law issues that arise from the use of social media in the workplace.<sup>26</sup>

Part III of the book addresses regulatory oversight of online commercial activity in a variety of contexts. Sonia Rolland surveys the protection of consumer interests in ecommerce under a range of international agreements.<sup>27</sup> Christiana Markou and Christine Riefa examine the applicability of European Union consumer law to mobile apps.<sup>28</sup> John Rothchild offers a guide through the thorny paths of the Federal Communication Commission's network neutrality regulation.<sup>29</sup> And Ed Morse looks at the regulation of online gambling in the United States.<sup>30</sup>

The next few contributions relate to privacy. Jim Nehf explores alternatives to the aging notice-and-choice regime for protecting privacy online.<sup>31</sup> Shaun Spencer considers the implications of predictive analytics for electronic commerce.<sup>32</sup> And Asma Vranaki presents some results of her empirical study of investigations of cloud computing service providers by European data protection authorities.<sup>33</sup>

David Lindsay provides an explanation and analysis of the global processes that regulate the Internet's domain name system.<sup>34</sup> Finally, David Shakow explores the new issues that cloud computing is posing for tax authorities.<sup>35</sup>

It is my hope and expectation that both newcomers to the field of electronic commerce law and specialists in the area will find much of value in this book.

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<sup>24</sup> Juliet M. Moringiello, *Electronic Issues in Secured Financing* (Chapter 12).

<sup>25</sup> Amy J. Schmitz, *Building Trust in Ecommerce Through Online Dispute Resolution* (Chapter 13).

<sup>26</sup> Ariana R. Levinson, *Social Media and the National Labor Relations Board* (Chapter 14).

<sup>27</sup> Sonia E. Rolland, *Consumer Protection Issues in Cross-Border Ecommerce* (Chapter 15).

<sup>28</sup> Christiana N. Markou & Christine Riefa, *App-solutely Protected? The Protection of Consumers Using Mobile Apps in the European Union* (Chapter 16).

<sup>29</sup> John A. Rothchild, *Understanding Network Neutrality* (Chapter 17).

<sup>30</sup> Edward A. Morse, *Regulation of Online Gambling* (Chapter 18).

<sup>31</sup> James P. Nehf, *Protecting Privacy With "Heightened" Notice and Choice* (Chapter 19).

<sup>32</sup> Shaun B. Spencer, *Predictive Analytics, Consumer Privacy, and Ecommerce Regulation* (Chapter 20).

<sup>33</sup> Asma A.I. Vranaki, *Cloud Investigations by European Data Protection Authorities: An Empirical Account* (Chapter 21).

<sup>34</sup> David F. Lindsay, *Domain Name Governance: "Scheherazade on Steroids"* (Chapter 22).

<sup>35</sup> David J. Shakow, *The Taxation of Cloud Computing and Digital Content* (Chapter 23).

