Preface

This book analyses Internet regulation in the European Union (EU). Frank Easterbrook, pointing out the danger of collecting different strands of study into a unified one, famously called Internet law ‘the Law of the Horse’.1 His warning is still valid today. Assuming that Internet law is a unified field, we run the danger of forgetting that its regulation arises out of more general, older legal disciplines. Nevertheless, the Internet has been part of our reality for two decades. Today it penetrates our lives to an unprecedented extent and we can no longer be happy attempting to view it through the prism of other disciplines. Although it may have earlier been true to say that intellectual property or contract law was sufficient to explain the Internet, this is no longer true. There are two reasons for this. First, as a result of the digital revolution, rather than applying the inherited concepts to the digital world, the traditional phenomena such as property, privacy and identity need to be reconceptualised in a broader non-digital frame. Second, the ubiquitous new phenomena, such as user-generated content or social networks, bring new rules, a new language and a new social context that do not easily lend themselves to traditional legal classification.

In this book we understand the Internet to mean a World Wide Web of interconnected computers that use the same language (protocol) to communicate. As such, we do not distinguish between the Internet provided through the regular broadband pipe and through other means (LAN networks, new generation 4G or 5G mobile networks, etc.) This approach inevitably means that a range of phenomena typically relevant in information technology (but which do not involve publicly accessible connected networks) are out of the scope of this book. In other words, this book is not about information technology systems in general but only those which operate on the publicly accessible World Wide Web.

Three other remarks about this book’s scope are in order.

First, a number of works have already been written on the subject of electronic commerce, both in the EU and abroad. Although it is tempting to view the Internet purely as an electronic commerce phenomenon, this would be both wrong and misleading. Although most activities on the World Wide Web have commercial aspects, only some of them take place in the purchase–sale form. A regular visit to a free news website, for instance, is commercial only in that the site generates revenue from advertising, but does not take place in the form of a purchase of a subscription and is outside the scope of a simple electronic sales contract. In other words, Internet regulation is wider than the regulation of sales transactions that take place on the Internet.

Second, excellent works exist on EU intellectual property, EU copyright, EU telecommunications, EU privacy or EU consumer protection. The work that we offer is meant neither to replace nor to compete with them. Instead, we attempt to provide an overview of how these disciplines fit together in situations concerning Internet regulation. As such, the work is not meant as a simple catalogue of disparate legal disciplines but as an attempt to understand their interaction. The chapters that follow represent a collection of what are typically encountered as legal problems in Member States’ courts, although the order in which they are presented does not reflect their relative importance.

Third, the Internet has two components. The first is the infrastructure on which the content is transmitted. The second is the content itself. The former is subject to a separate and relatively complex legal discipline called telecommunications (or electronic communications) law. The second is the subject of various legal disciplines that are covered in this book. The decision not to talk about telecommunications regulation is a result of two factors. The first are space constraints. The second is the existence of a conceptual difference between the regulatory environment that applies to the wires as opposed to that which applies to the content. In addition to that, media law, which regulates broadcasting (traditionally understood as distribution of audio or video content through the audio magnetic spectrum) is also largely outside the scope of this book. Although television or radio share many features with the Internet, they are, as a rule, non-interactive and distributed from the centre to the periphery.

This book is not an attempt to analyse the Internet as a Single Market phenomenon. Although the European Commission often uses Article 114 of the Treaty on the Functioning of the European Union (TFEU) as a

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2 Except where media laws apply to on-demand radio and television.
legal basis when regulating the Internet, the main reason for harmonization is arguably not the fear that disparity between Member States’ laws would slow the economic development but rather that a lack of a coherent vision would have a negative impact on such development in the EU. The EU law-maker, in other words, acts not so much as a harmonizer as it acts as a policy-maker.

The EU’s efforts in Internet regulation may at first appear confusing. Instruments are numerous, policies difficult to distinguish, court decisions conflicting, official statements contradictory, proposals incoherent. But these problems can only partially be attributed to systemic or bureaucratic failures. Arguably, there are two reasons for this apparent failure. The first concerns the radical rethinking of the user/consumer’s role. Few media have contributed to turning the world into McLuhan’s ‘global village’ as much as the Internet has. The reason why it surpassed newspapers, radio, television and other communication media is simple: it allows participation. It turns passive consumers into active players and contributors. The implications of such a new global village for the economy and society at large are as yet unknown. But some elements of the picture are already beginning to emerge. We know that participation increases the number of players (and therefore interests) on the board exponentially. This is the second reason for the apparent failure. We are aware that holders of vested rights are fighting innovation that they perceive is endangering their interests. We know that governments, corporations and other individuals all have their own interests in violating privacy. We are aware of the crucial role of consumers. These disparate interests are not easy to balance and this is evident in EU laws.

The Internet gives us the opportunity to rethink the world we live in. It is a thought experiment in developing legal rules for new social contexts. But the Internet also creates these new social contexts. The motivation for this book on EU Internet law comes from the desire to systematize many instruments that either apply to Internet regulation or have been specifically drafted for that purpose. Today, the United States stands at the forefront of Internet development. Most of what other jurisdictions do can be interpreted as a response or reaction to a trend that comes from the US. The European Union has answered most of these challenges. Sometimes, these answers are distinct, even original or unique. That is the case with at least the introduction of the country of origin principle in the Electronic Commerce Directive. On the other hand, occasionally, the

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solutions are questioned by businesses and the wider public alike. In any case, European regulation of the Internet is a reality.

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NOTE ON THE SECOND EDITION

This second edition presents a thoroughly updated and revised text. This has become necessary for three reasons. The first is that a comprehensive review is currently being undertaken in the telecommunications, data protection and copyright fields with laws in the first two already passed. The second is that a multitude of cases originating with the Court of Justice of the European Union, in particular in the area of copyright, consumer protection and private international law, have clarified some important obscurities in the law. The third is that small-scale changes have taken place in most of the other areas covered such as, for example, electronic commerce, content regulation, digital identity or cybercrime. Where necessary, draft Directives have been presented in full or in part. Even though it is likely that these will be changed in the adopted versions, it is necessary to present the readers with the law-makers’ intentions. Two fundamental proposals have been made in September 2016: a new telecommunications framework and a new proposal on copyright in the Digital Single Market. Since both will be subject to intensive debate and successive amendments, they are only presented very briefly at the end of Chapters 1 and 6, respectively.

As with the previous edition, it has been necessary to exclude a number of areas that would otherwise have been relevant. The Council of Europe’s efforts and the cases of the European Court of Human Rights
have only been included sporadically and when necessary. Competition law, which has in recent years become very important in both the carrier (telecommunications) and the content (e-commerce, media) layers, have also been left out due to space constraints.

The law is up to date as of 1 October 2016.