Book review: “Law and the Internet” - 3rd Edition, edited by Lilian Edwards and Charlotte Waelde

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DOI: 10.5033/ifosslr.v1i2.18

Abstract
Andrew Katz reviews the Third Edition of Law and the Internet (ed. Edwards and Waelde, 2009), with particular emphasis on chapters 10, 11 and 12, covering the legal protection of computer software, free and open source software, and open access, respectively.

Keywords
Book review; Law; information technology; open access; internet law; Free and Open Source Software

Info
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Hart Publishing, 2009. RRP £30
ISBN: 9781841138152

Since its first publication in 1997 (under the title Law and the Internet: a Foundation for Electronic Commerce), this book has experienced one intervening edition, expanded in girth and scope, and dropped the restrictive shackle of the subtitle “a Foundation for Electronic Commerce”. Although some chapters of the book have been updated, most are entirely new and in the same way that a 1997 VW Polo shares little in common with its 2009 descendant, Law and the Internet is, under the skin, far removed from its predecessors.

The 22 chapters in the current edition, while arranged in a logical order, are otherwise almost entirely disconnected from one another, and each can be read as a stand-alone essay by its author. Whether you find this inconsistency irritating or charming is a matter for the individual reader. I think it unlikely that any reader is likely to start at chapter one and work her way through the book linearly until the end, so in practice the lack of consistency is unlikely to be an issue. The chapters are of a generally high standard and well annotated.

The inconsistency does mean that some chapters read as textbook-like factual distillations, and some read more as academic papers exploring and arguing a point more rigorously. Some (like Andrés Guadamuz's chapter Free and Open-Source Software) manage to switch from one style to the other mid-stream. I do not regard this as a major issue.

The chapters most of interest to free and open source lawyers are chapters 10,11 and 12, which deal with protection of computer software, free and open source software, and open access, respectively. It's arguable that they should not feature in a book on law and the internet at all, but in their absence there would be no review. In any event, the internet runs on an infrastructure powered largely by free and open source software, and the internet has been a critical element in the success of FOSS, so I'll allow the connection, at least to chapters 10 and 11, and move on.

Protection of Computer Software by cellist Arne Kolb, is interesting as an artefact from a parallel universe, possibly one in which Richard Stallman became a TV chef and never had the opportunity to interact with a computer. The first word of the title reveals the stance that Kolb takes throughout the rest of the piece, and indeed we learn that “...software developers...[want] strong legal protection for their own software...”. The piece goes on to explore traditional views of copyright licensing, copyright infringement (including look and feel) and patent licensing. Whilst reasonably up to date, it takes a very narrow view of the subject. For example, it is apparently the case that “the developer...has an interest in preventing the creation of software with a similar 'look an feel'”: this may have been true in the days of 80 column displays, but since the development of commercial GUIs (like the Mac in 1984), the proprietors of those GUIs (such as Microsoft and Apple) have been at pains to ensure a consistency of look-and-feel between apps running on their respective platforms, and have published style guides accordingly.

Free and Open-Source Software by Andrés Guadamuz is, in contrast, a well-researched, easily readable introduction to FOSS, including a history and a brief analysis of the philosophical differences between free software and open source. It explains licence ecology (although he describes the BSD licence as having an “assignation of rights” clause: I'm informed by Scottish colleagues that “assignation” is a synonym for “assignment”, and there is no assignment in the BSD licence).

Other licences briefly covered are MIT and Apache 2.0. There is a reference to Creative Commons (although it would have been helpful to explain that this is really a suite of licences, many of which are not “free” or “open” at all). GPL v2 is covered in a little more depth, although Guadamuz misleadingly talks (with respect to section 2b) about “restrictions against using the software to create commercial software”. If, by “commercial,” he means what is generally called proprietary (or closed source) software, then this statement makes a little more sense than if he gives “commercial” the more common (if disputed) meaning used by the Creative Commons, for example. He also describes the LGPL as being virtually identical to the GPL, sans copyleft clause. There are pairs of copyleft/non-copyleft licences which could be described as virtually identical in this way (the Open Software Licence and the Academic Free Licence being an example), but not the GPL/LGPL: there are many differences in text between GPLv2 and LGPL v2.1. LGPL v2.1 does contain a copyleft clause, but it is weaker than that contained in GPL v2.

GPL v3 is also covered in greater depth (and justifiably criticised).

Guadamuz has written at some length about the consideration problem: namely, are FOSS licences contracts or bare licences? Six pages of the 32 page chapter are devoted to this issue. Since this is clearly a topic close to his heart, Guadamuz changes gear here and stops informing us about FOSS, and starts arguing his pro-contract view. I happen to disagree with him, but his arguments are interesting and worthy of further analysis. However, I'll restrain myself from doing such an analysis here for the same reason – lack of space – which Guadamuz should possibly have considered when devoting about a fifth of his allotted pagecount to this issue. Having said that, it's an important, and frequently overlooked topic, and a two page analysis of this topic would probably have been more in keeping with the remainder of the chapter than an out-of-place attempt

to persuade the Court of Appeals for the Federal Circuit that allowing the appeal in Jacobsen v Katzer was wrong. The four freed pages could have been devoted to some more analysis of patent and trademark issues.

The rest of the chapter reverts to Guadamuz's clear explanatory style. GPL-violations.org gets some coverage in the “enforcement” section, although it's inaccurately described as a non-profit branch of the Free Software Foundation – it certainly works closely with the Free Software Foundation Europe, but is independent of it, and Harald Welte is not so much a “main supporter” of GPL-violations.org, as its founder. Despite this, the reference to Welte and his work in this chapter is welcome. The SCO cases are briefly discussed, as is Wallace v IBM .

Finally, Guadamuz gives us some useful information to place FOSS in context from a practical perspective, and some indication of how he feels the future lies for FOSS.

In general, then, the chapter is an excellent and up-to-date introduction to FOSS and most of the main legal issues concerning it, and despite the factual quibbles, a lack of more commentary on patents and trade marks, and some over-analysis of the contract/licence issue, I highly recommend it to any lawyer or law student seeking a brief introduction to the legal issues behind open source.

Charlotte Waelde's chapter, Scholarly Communications and New Technologies: the Role of Copyright in the Open Access Movement, covers a very specific issue in greater depth: namely making scholarly articles and journals freely available, in both senses of the word “freely” with which the readers of this article will be familiar. The path of the open access movement parallels that of the free and open source movement (save that scholarly journals appeared a little earlier than software: apparently the first academic journal “Philosophical Transactions”, was published in 1665, and remains in print to this day1). The article suggests that the first significant date for Open Access was 1966, when ERIC – the Educational Resources Information Center was launched in the US to make bibliographic information relating to journal articles freely available. The chapter as a whole is a fascinating romp through the cultural, legal and economic issues affecting academic publishing, and whilst of little direct relevance to free and open source software, it's interesting to learn what fellow-travellers are up to.

Law and the Internet is the Las Vegas five-star buffet of internet law. The dishes are fresh and generally well-prepared and of high quality, although the breadth of choice does mean that there is a little inconsistency in execution and style from one to the other. However, all hungry readers will find that, if they select wisely, they will come away with a personal selection which will satisfy them well.