CONTENTS

Pr	eface to the Fifth Edition eface to the First Edition knowledgments	xix xxi xxiii
<u>1.</u>	Introduction to the Study of Cyberspace Law	1
A.	Internet Basics	1
	Raymond Shih Ray Ku, Open Internet Access and Freedom of Speech: A First Amendment Catch-22	1
B.	The Study of Cyberspace Law	5
	Frank H. Easterbrook, Cyberspace and the Law of the Horse	5
	Lawrence Lessig, The Law of the Horse: What Cyberlaw Might Teach	8
	Raymond Ku, Foreword: A Brave New Cyberworld?	11
	Note: Cyberspace and the Regulation of Information	15
2.	REGULATING CYBERSPACE	17
Α.	Cyberanarchy versus Cyberorder	17
A.	Cyberanarchy versus Cyberorder John Perry Barlow, Cyberspace Declaration of Independence	
Α.	Cyberanarchy versus Cyberorder John Perry Barlow, Cyberspace Declaration of Independence David R. Johnson and David Post, Law and Borders: The Rise of Law	17
A.	John Perry Barlow, Cyberspace Declaration of Independence	17
A.	John Perry Barlow, Cyberspace Declaration of Independence David R. Johnson and David Post, Law and Borders: The Rise of Law in Cyberspace Jack L. Goldsmith, Against Cyberanarchy	17 17 19 25
A.	John Perry Barlow, Cyberspace Declaration of Independence David R. Johnson and David Post, Law and Borders: The Rise of Law in Cyberspace	17 17 19
	John Perry Barlow, Cyberspace Declaration of Independence David R. Johnson and David Post, Law and Borders: The Rise of Law in Cyberspace Jack L. Goldsmith, Against Cyberanarchy	17 17 19 25
	John Perry Barlow, Cyberspace Declaration of Independence David R. Johnson and David Post, Law and Borders: The Rise of Law in Cyberspace Jack L. Goldsmith, Against Cyberanarchy Note: ICANN and Regulation	17 17 19 25 34
	John Perry Barlow, Cyberspace Declaration of Independence David R. Johnson and David Post, Law and Borders: The Rise of Law in Cyberspace Jack L. Goldsmith, Against Cyberanarchy Note: ICANN and Regulation Personal Jurisdiction	17 17 19 25 34
	John Perry Barlow, Cyberspace Declaration of Independence David R. Johnson and David Post, Law and Borders: The Rise of Law in Cyberspace Jack L. Goldsmith, Against Cyberanarchy Note: ICANN and Regulation Personal Jurisdiction Problem 1.0	17 17 19 25 34 36
	John Perry Barlow, Cyberspace Declaration of Independence David R. Johnson and David Post, Law and Borders: The Rise of Law in Cyberspace Jack L. Goldsmith, Against Cyberanarchy Note: ICANN and Regulation Personal Jurisdiction Problem 1.0 Problem 1.1	17 17 19 25 34 36 36 38

	2. Purposeful Availment and the Internet	44
	a) In General	44
	Zippo Manufacturing Co. v. Zippo Dot Com, Inc.	44
	ALS Scan, Inc. v. Digital Service Consultants, Inc.	47
	Plixer International, Inc. v. Scrutinizer GMBh	55
	Note: Trademarks and In Rem jurisdiction	57
	Cable News Network L.P. v. CNNews.com	58
C.	Regulatory Authority	62
	1. State Regulation of Cyberspace in the United States	62
	a) Cyberspace as a Separate Place?	62
	Voyeur Dorm, L.C. v. City of Tampa, Fla.	62
	b) The Dormant Commerce Clause and Limits Upon State Regulation of Interstate Commerce	65
	American Library Association v. Pataki	65
	State of Washington v. Heckel	72
	South Dakota v. Wayfair	80
	2. International Regulation of Cyberspace	89
	Ligue Contre le Racisme et L'Antisémitisme v. Yahoo!, Inc.	89
3.	Speech in Cyberspace	95
Δ	A New Form of Speech?	95
11.	Anne Wells Branscomb Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspace	95
В.	Access to Cyberspace	103
	Problem 2.0	103
	Problem 2.1	104
	Problem 2.2	104
	1. Access Denied by Government	105
	Packingham v. North Carolina	105
	Knight First Amendment Institute at Columbia University v. Trump	109
	2. Access Denied by Private Parties	115
	a) Pre-Internet Access	116
	Miami Herald Publishing Company v. Tornillo	116
	Turner Broadcasting System, Inc. v. Fcc	120
	Pruneyard Shopping Centers v. Robins	129
	b) Access to the Internet	134
	Verizon v. FCC	134
	U.S. Telecom Ass'n v. FCC	143
C.	Content Regulation	148
	Problem 3.0	149
	Problem 3.1	150
	Problem 3.2	150

	C	Contents	-	xiii
	1. The First Amendment and the Internet			151
	Reno v. American Civil Liberties Union (ACLU)			151
	Ashcroft v. ACLU (I)			162
	Ashcroft v. ACLU (II)			169
	2. Mandating Filters			180
	United States v. American Library Association, Inc.			180
	3. Virtual "Speech"			188
	Brown v. Entertainment Merchants Association			188
D.	Anonymous Communications			195
	Problem 4.0			195
	Problem 4.1			196
	Problem 4.2			196
	1. The Right to Speak Anonymously			197
	Talley v. California			197
	McIntyre v. Ohio Elections Commission			199
	2. The Right to Remain Anonymous			202
	In re Subpoena Duces Tecum to America Online, Inc.			203
	Doe I and Doe II v. Individuals, whose true names are unkn	iown		205
	Doe v. 2TheMart.com, Inc.			209
	In re Verizon Internet Services, Inc.			215
E.	Internet Service Provider Liability for Speech			219
	Problem 5.0			219
	Problem 5.1			220
	Problem 5.2			221
	1. Common Law Liability: Distributor or Publisher			221
	Cubby, Inc. v. CompuServe, Inc.			221
	Stratton Oakmont, Inc. v. Prodigy Services Company			224
	2. Liability After the Communications Decency Act			231
	Zeran v. America Online, Inc.			231
	Blumenthal v. Drudge			237
	Fair Housing Council of San Fernando Valley; The Fair Hou	asing		241
	Council of San Diego v. Roommate.com, LLC			241 249
_	Jones v. Dirty World Entertainment Recordings LLC			
F.	Code as Speech			255
	Bernstein v. United States Department of Justice			255
4	CONTENT AS PROPERTY IN CYBERSPACE			263
A.	Trademarks, Domain Names, and Internet Search Engine	ës		263
	Domain Names and Trademark Infringement			266
	Problem 6.0			266
	Problem 6.1			267
	Problem 6.2			268

xiv Contents

	a) Traditional Trademark Law	268
	i) Trademark Prerequisites	268
	Panavision Int'l, L.P. v. Toeppen	269
	Planned Parenthood Federation of America, Inc. v. Bucci	271
	ii) Likelihood of Confusion and Dilution	277
	Brookfield Communications, Inc. v. West Coast Entm't Corp.	277
	Hasbro, Inc. v. Clue Computing, Inc.	281
	Note: Liability of Domain Name Registrars for Assigning Infrin Domain Names	ging 286
	b) Anticybersquatting Laws	287
	Electronics Boutique Holdings Corp. v. Zuccarini	289
	c) Private Dispute Resolution	292
	Uniform Domain Name Dispute Resolution Policy	293
	Bruce Springsteen v. Jeff Burgar and Bruce Springsteen Club	297
	Note: Which to Use—The ACPA or the UDRP?	308
	Note: Political Cyberfraud	309
	2. Domain Names as Speech	312
	Playboy Enterprises, Inc. v. Terri Welles, Inc.	312
	Planned Parenthood Federation of America, Inc. v. Bucci	316
	Bally Total Fitness Holding Corp. v. Faber	318
	Note: Are Domain Names Property?	326
	3. Search Engines and Metatags	327
	Brookfield Communications, Inc. v. West Coast Entm't Corp.	328
	Playboy Enterprises, Inc. v. Terri Welles, Inc.	330
	Playboy Enterprises, Inc. v. Netscape Communications Corp.	333
	Rescuecom Corp. v. Google Inc.	340
В.	Copyright in Cyberspace	344
	1. Copyright Basics	344
	2. The Digital Dilemma	345
	Pamela Samuelson, The Copyright Grab	346
	Problem 7.0	351
	Problem 7.1	352
	Problem 7.2	352
	3. Copyright Infringement	353
	a) What is a copy?	353
	The Cartoon Network and Cable News Network v. CSC Holdinand Cablevision Systems Corporation	
	b) Direct and Indirect Copyright Infringement	361
	Playboy Enterprises, Inc. v. Frena	361
	Religious Technology Center v. Netcom Online Communicatio Serv., Inc.	n 363
	A&M Recording, Inc. v. Napster, Inc.	373
	Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.	383
	Perfect 10, Inc., v. Google Inc.	392

		Contents	■ XV
	Perfect 10, Inc. v. Visa International Service Association		406
	The Cartoon Network and Cable News Network v. CSC H	Holdings	100
	and Cablevision Systems Corporation	roranigo	421
	American Broadcasting Cos. v. Aereo, Inc.		427
	4. Fair Use		437
	Problem 8.0		439
	Problem 8.1		439
	Problem 8.2		440
	a) Personal Use		440
	Sony Corp. of America v. Universal City Studios, Inc.		440
	UMG Recordings, Inc. v. MP3.com, Inc.		454
	A&M Records, Inc. v. Napster, Inc.		456
	BMG Music v. Gonzalez		462
	b) Transformative Use		465
	Campbell v. Acuff Rose Music, Inc.		465
	Graham v. Prince		472
	Authors Guild v. Google, Inc.		478
	c) Anti-Circumvention under the DMCA		488
	Realnetworks, Inc. v. Streambox, Inc.		490
	Universal City Studios, Inc. v. Reimerdes		495
	d) Notice and Takedown		510
	Lenz v. Universal Music Corp.		511
	Note: Copyright and the First Amendment		517
C.	Patenting Cyberspace		518
	1. The Supreme Court and Business Method Patents		521
	Bilski v. Kappos		521
	2. Internet Business Method Patents		529
	Amazon.com, Inc. v. Barnesandnoble.com, Inc.		530
	Note: Trade Secrets in Cyberspace		534
D.	Sui Generis Protection		535
	Problem 9.0		536
	Problem 9.1		536
	Problem 9.2		536
	1. Constitutional Framework		537
	Feist Publications, Inc. v. Rural Telephone Serv. Co.		537
	2. Factual Information as Property		544
	International News Service v. Associated Press		544
	National Basketball Ass'n v. Motorola, Inc.		550
	3. The E.U. Database Directive		559
	Jacqueline Lipton, Balancing Private Rights and Public Policies: Reconceptualizing Property in Databases		560

5.	Privacy	565
A.	Government Surveillance and Information Collection	570
	Problem 10.0	570
	Problem 10.1	572
	Problem 10.2	572
	1. The Fourth Amendment and Technological Information Gathering	572
	Olmstead v. United States	572
	Kyllo v. United States	578
	Warshak v. United States	585
	Riley v. California	592
	Carpenter v. United States	603
	American Civil Liberties Union v. Clapper	617
	Klayman v. Obama	629
	2. Other Restrictions Upon Government Data Collection and Disclosure	636
	Whalen v. Roe	636
	Privacy Act Of 1974	641
	Note: ECPA	644
B.	Private Information Gathering	647
	Problem 11.0	649
	Problem 11.1	649
	Problem 11.2	650
	1. Access to Data	650
	Smyth v. Pillsbury Co.	653
	City of Ontario v. Quon	655
	Konop v. Hawaiian Airlines, Inc.	661
	In Re Pharmatrak, Inc.	670
	2. Use and Disclosure of Information	676
	Dwyer v. American Express Co.	676
	Note: The Federal Trade Commission	681
	3. Facebook: A Deep Dive	685
	Fraley v. Facebook, Inc	696
	In re Facebook Internet Tracking Litigation	701
	United States v. Facebook, Inc.	704
	Statement of Chairman Joe Simons and Commissioners Noah Joshua Phillips and Christine S. Wilson In re Facebook, Inc.	710
	4. The European Approach	719
	5. Personal Privacy	733
	Jacqueline Lipton, "We, the Paparazzi": Developing a Privacy Paradigm for Digital Video	733
	Jackson v. Mayweather	735
	State v. VanBuren	743
	Note: A Civil Rights Paradigms?	756
	Note: Remedies	759
	Google Spain Sl v. Agencia Española de Protección de Datos	761

	Contents •	xvii
6.	NETWORK OWNERSHIP AND ACCESS	765
	Problem 12.0 Problem 12.1 Problem 12.2	765 766 767
A.	Statutory Prohibitions Against Illegal Access Computer Fraud and Abuse Act United States v. Morris Shurgard Storage Centers, Inc. v. Safeguard Self Storage, Inc. U.S. v. Nosal hIQ Labs, Inc. v. LinkedIn Corp. Moulton v. VC3 Pulte Homes, Inc. v. Laborers' International Union of North America	767 767 771 775 778 784 791 792
В.	Common Law Trespass 1. Access to Users a) Real Property Cases Marsh v. Alabama State v. Shack b) Internet Cases CompuServe, Inc. v. Cyber Promotions, Inc. Intel Corp. v. Hamidi 2. Restricting Access to Data eBay, Inc. v. Bidder's Edge, Inc.	798 798 799 799 802 805 805 810 819
7.	Problem 13.0 Problem 13.1	825 826 828
A.	Problem 13.2 Shrinkwrap, Click-Wrap, and Browser Agreements ProCD, Inc. v. Zeidenberg Specht v. Netscape Communications Corp. Nguyen v. Barnes & Noble, Inc. Starke v. SquareTrade, Inc. Note: Electronic Self-Help	828 828 829 838 842 845 852
В.	Limitations upon Private Ordering 1. Contractual Forum Selection and Choice of Law Carnival Cruise Lines, Inc. v. Shute Caspi v. The Microsoft Network, L.L.C. 2. Freedom of Expression Cohen v. Cowles Media Co. 3. Intellectual Property Preemption	853 853 853 858 861 861

866

869

Vault Corp. v. Quaid Software Ltd.

ProCD, Inc. v. Zeidenberg

xviii Contents

4. Market Power and Antitrust	873
United States v. Microsoft Corp.	873
Summary of Commission decision of 27 June 2017 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.39740 — Google Search (Shopping)) (2018/C 9/08)	890
Table of Cases	897
Index	905