

Derecho Privado de Internet, Cuarta Edición

Pedro Alberto de Miguel Asensio

Book Review

by **Gerald Spindler**, Göttingen, Prof. Dr., Department of Civil Law, Commercial and Economic Law, Comparative Law, Multimedia- and Telecommunication Law, University of Göttingen

© 2012 Gerald Spindler

Everybody may disseminate this article by electronic means and make it available for download under the terms and conditions of the Digital Peer Publishing Licence (DPPL). A copy of the license text may be obtained at <http://nbn-resolving.de/urn:nbn:de:0009-dppl-v3-en8>.

Recommended citation: Gerald Spindler, Book Review: Derecho Privado de Internet, cuarta edición by Pedro Alberto de Miguel

- 1 This book is appearing in its 4th edition, which gives a clear hint of its outstanding importance in the Spanish (and international) discussion. The author deals with nearly all conceivable issues in terms of 'Internet law' or electronic commerce.
- 2 Whereas the first chapter is dedicated to the foundations of the Internet –in particular the 'governance' of the net such as ICANN or domain names and IP numbers–the second chapter turns to the fundamental services and their providers with regard to their liability. The steadily intensifying discussion surrounding data protection (which recently reached its zenith with the publication of the proposal of the new EC regulation on data protection) is dealt with in the third chapter, followed by a somewhat smaller part on unfair competition law. In contrast, De Miguel focuses on intellectual property rights such as trademark law (fifth chapter) with special regard to domain name litigations or copyright (sixth chapter); here the author applies abstract findings on the most salient phenomena on the Internet, including p2p networks, search engines and the retro-digitization by Google Books. The last chapter of the book is dedicated to contract law with an emphasis on the formation of the contract, electronic payment services and digital signatures and their like.
- 3 Given the global character of the Internet, it is quite obvious that conflict of laws plays an essential role in its regulation. Hence, every chapter (each legal area) is concluded with a reflection on international private law and the criteria that should be used to assess the location of an act or a damage. In this context and with regard to the principle of country of origin enshrined in Art. 3 of the E-commerce Directive, the author recommends – in line with the recent decision of the European Court of Justice – that this article not be read as a principle of private international law rather than limiting the applicable law (No 127 s.). However, although the ECJ has now clarified the interpretation of Art. 3 of the E-commerce Directive, the details of its application still remain unclear, such as the test of which law is more provider-friendly (including how far the test should reach).
- 4 For such an encyclopedic review of nearly all aspects of Internet law, it is quite difficult for a reviewer to select specific parts on which to concentrate. I will focus on abstract issues, such as regulation of the Internet, as well as on some more specific issues, including liability and intellectual property rights.
- 5 In his first chapter, De Miguel elaborates the well-known tension that was intensively discussed in the 1990s between the anarchical and global structure of the Internet on one hand and the regulatory approaches of states to somehow regain control of the Internet. The author omits neither self-regulatory phenomena nor software as a means to steer the behavior of participants, taking into account most of the internationally relevant literature from both sides of the Atlantic (No. 71 –89). He discards the idea of a virtual space free of regulation and points to a multifactor and multilevel approach that pragmatically uses those means that promise to render an efficient result in each case.
- 6 Regarding liability issues, Miguel intensively discusses the role of contractual disclaimers (No. 138 -140) that are frequently also part of standard contract terms. However, the author does not further analyze whether these standard contract terms could be deemed unfair, for instance with regard to the control of virus infections of data stored by a host provider. After reviewing potential liability issues such as defamation, product liability, and wrongful information, De Miguel also debates the role of Internet intermediaries. He takes the developments in the US into account, in particular the DMCA, and compares

these with the harmonization in Europe (and the implementation of the E-Commerce Directive in Spain – No. 196 ss.). The Spanish jurisdiction plays an interesting role in the EU as some important cases have already reached the ECJ, somehow puzzling by the narrow interpretation of the E-Commerce Directive. This is the background for Miguel's commentaries (and criticism), for instance, on the ruling of the Court of Barcelona concerning Google with regard to Art. 13 of the E-Commerce Directive (by applying the caching privilege, No. 207).

- 7 Regarding host providers, De Miguel highlights the developments in Spain, especially the decisions concerning the Google AdWords case (No. 208 ss.). However, the difficult distinction between 'neutral' host providers and 'actively' engaged providers offering additional services to customers, thus losing their liability privilege according to the decision of the ECJ in the *L'Oreal v. eBay* case, is obviously still not being discussed in depth in Spain. A well-known deficit of the Spanish implementation of the E-Commerce Directive consists in the definition of knowledge of the provider, which is apparently restricted to official notices by 'competent authorities' (No. 217). Miguel criticizes this stance with good grounds as 'confusing'.
- 8 Of utmost interest for other member states such as Germany are the vigorous rules in Spain regarding liability exemptions of hyperlinks and search engines (No. 229 ss.). Art. 17 of the Spanish act applies the liability regime of host providers to search engines and hyperlinks without any distinction.
- 9 Thus, De Miguel gives a broad overview of the recent developments of liability at the Spanish, European, and international levels. However, given the recent cases of the European Court of Justice, it would be commendable to extend this profound analysis to injunctions. Obviously, actors are increasingly sticking to injunctions to safeguard their interests, in particular in cases of Internet marketplaces (trademark infringements) or access providers (copyright cases like the *SABAM* case decided by the European Court of Justice). In particular, in a huge number of cases the German courts have developed new criteria for assessing the liability of intermediaries that go far beyond the traditional landmarks laid down in the E-Commerce Directive, including obligations to collaborate between Internet marketplace and trademark owners or some kind of notice-and-takedown procedure for host providers of blog forums.
- 10 With respect to data protection, the author outlines in detail the fundamental directives on the European level as well as their Spanish counterparts. Miguel extensively analyzes the scope of the famous *Lindqvist* decision of the European Court of Justice concerning personal data made public by a website (No. 268 ss.). Moreover, the author realizes the ever-growing importance of social networks by reporting the corresponding recommendations of the Art. 29 Data Protection Group. However, De Miguel obviously restricts himself to the modest role of commentator (cf. for instance No. 260 ss. concerning the concept of consent); the severe problems of consent assumed just by means of registration—for instance, in the case of Facebook—are partly omitted. In general, the concept of con-

sent is at the center of debates surrounding the new EU proposal of a regulation on data protection; this needs to be elaborated more, given the fact that people often are not aware of the dangers that are involved concerning the use of their data. Moreover, the specific problems of minors who represent a large part of the social communities should be on the agenda more than before.

- 11 With regard to cookies and behavioral targeting/advertising (No. 283 ss.), De Miguel points to the (debated) Art. 5 (3) of the E-Privacy Directive 2009/136/EU. Unfortunately, however, he does not take a firm stance on the highly disputed issue of how these provisions should be implemented, given the fact that the same directive obviously allows for the use of a browser to express in general (!) a consent for setting a cookie. Moreover, the conflict between freedom of speech and data protection is becoming more and more important because any communication contains personal data. This conflict, however, is seldom addressed by regulations, nor is it addressed by Spanish data protection rules as Miguel does not refer to this fundamental conflict. Finally, the application of EU data protection law with regard to US-based corporations entangles problems of interpretation of location of data processing. The author here follows the approach of the Art. 29 Data Protection Group, which will now be codified in the new EU proposal on Data Protection. Thus, the market principle will govern the application of data protection norms, in particular whether the website has directed its services and offers to clients in the EU. The existing bulk of data protection norms already can be read in that manner, a view shared by Miguel (No. 296 ss.).
- 12 Finally, it is interesting how the discussion on intellectual property rights is reflected in De Miguel's oeuvre. With regard to Web 2.0 content, in particular 'mash ups', the author details the protection of newly generated content as well as the limits for users to modify protected content of third parties (No. 599 ss.). Of utmost interest are De Miguel's reflections upon issues of responsibility of services such as Facebook or YouTube that claim to benefit from the liability privileges of host providers while at the same time imposing strong licenses on their users to make use of the content (No. 603 s.). The author points to the ongoing discussions about monitoring obligations of these services as well as deals with regard to collecting levies.
- 13 In contrast to other works on Internet law, it has to be emphasized in this context that De Miguel also discusses licenses such as creative commons at length (No. 605 ss.). As the author shows, Spanish courts (as well as other courts in the EU) accept creative commons licenses as applicable and enforceable (No. 609). According to the importance of Spanish cases on cache copies related to Google services, De Miguel pays much attention to the interpretation of the corresponding limits of the right of reproduction (No. 616 ss.). However, from the perspective of an outsider, the highly debated issue of streaming and its impact on cache reproduction should be taken up in future editions to come.
- 14 Regarding limits to copyrights, Miguel concentrates on the copy for private purposes. This is closely related to the famous *Padawan* case in Spain concerning levies for

copying without any distinction between private and business purposes (No. 640 ss.). He also discusses the concept of (tacit) consent to make use of content uploaded to the Internet, at least for services that are quite common such as search engines (No. 648 ss.). De Miguel seems to favor this as a back door to the closed list of limits to copyright enshrined in the Information Society Directive, coming close to the fair use doctrine in the US. However, we should realize that these figures and constructions undermine traditional legal thinking and freedom of consent, thus opening the Pandora's box of every 'unwritten' limit to copyright. The list of interesting topics seems to be endless – and Miguel copes with almost all of them, be it the Google Books project, the *loi Hadopi* in France or other legislative initiatives.

- 15 In sum, there are scarcely any topics of Internet law-missing. Only a few issues are not touched upon, and it might enrich the book to include chapters on antitrust law, media law (such as regulation of convergence, which De Miguel already discusses) or contracts with providers, including access provider contracts, social network contracts, or 'apps' contracts concerning specific platforms for software and digital content. However, this should not be regarded as a fundamental critique of the oeuvre as, in sum, De Miguel's book is indeed an encyclopedia of Internet law, with special regard to its implementation in Spain. The effort to undertake such a comparative legal work is huge, and it is the only way to cope with the global phenomenon of the Internet. The book is highly recommendable for everyone engaged in electronic commerce and Internet law as a rich source of information that spans all kinds of legal areas, thus making it indispensable for European lawyers in these fields.