

## E-Commerce: Managing the Legal Risks

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## Introduction

E-Commerce plays an important role in today's business environment, and that role will continue to grow each year. eMarketer predicts that by "2004, worldwide e-commerce revenues are expected to total USD 2.7 trillion.<sup>1</sup>" E-commerce continues to grow in the United States. "The Census Bureau of the Department of Commerce announced today that the estimate of U.S. retail e-commerce sales for the first quarter of 2004, not adjusted for seasonal, holiday, and trading-day differences, was \$15.5 billion, an increase of 28.1 percent ( $\pm 2.9\%$ ) from the first quarter of 2003."<sup>2</sup> "According to a new study by RoperASW and AOL Time Warner, Europeans spent on average EUR430 on line between August and October 2002."<sup>3</sup> This compares with an average spend of EUR543 per head in the US over the same period.

One of the strategic imperatives for an organization is to seek new markets. As a domestic market matures, it is increasingly difficult to generate high revenue and profit growth. It is a natural extension that e-commerce then has become one of the major methods that businesses use to expand their markets and sell products and services around the world. This paper will address the problem that by engaging in e-commerce a business person faces unknown legal risks due to the lack of a comprehensive and uniform set of legal rules that apply. After addressing each of the legal issues there will be an attempt to provide prophylactic devices that a business person may use to reduce some of those legal risks. These prophylactics will not provide one hundred percent protection from the unpredictable legal environment of cyberspace, but their use will reduce and control some of the risk.

In this article the legal issues, analysis and recommendations are from a U.S. perspective, but much of the material applies to businesses engaged in e-commerce in other countries because the basic legal problem is that e-commerce is "borderless" and the various laws that might apply were created in an environment that had borders. E-commerce changes the historical law and physical border relationship because a website is accessible anywhere in the world, so the actual physical location of the website is somewhat irrelevant.

There have been numerous articles published in regard to the legal environment of e-commerce. Most of these discuss some of the legal issues that are created by the borderless environment of e-commerce, but very few offer specific suggestions to business persons as to what will reduce the legal risks of engaging in e-commerce.

This article attempts to be fairly comprehensive as to the legal issues and offer reasonable suggestions for reducing those risks to help control some of the unknown. However, all that possible today is to try to reduce the risks. The fact is that many of the legal issues discussed here will continue to exist until some comprehensive set of truly international rules are created. Whether or not such a set of rules will ever be created is highly

questionable, but even if that does occur, it will be decades away. Meanwhile business persons will need to use the Internet. In fact, such use by businesses will help create the rules because cases will arise and courts will decide, but most businesses do not want to be the "test case".<sup>4</sup>

## Description of the Situation

Businesses are drawn to the Internet because it seems to offer access to a large (international) geographic market, one location can serve the world, quick response to customer questions, always "open", low transaction costs by saving time and manpower, no "brick and mortar" start up costs, ease of changing the appearance of the business by just changing the website, improved access to information by the consumer, and low barriers to entry. However, there are numerous disadvantages. The one that concerns us here is the uncertainty of the regulatory and legal environment. Trying to control the uncertainty of that legal environment should be considered as part of the start up costs in building a cyber business instead of a "bricks and mortar" business. Ignoring these costs in a cyberbusiness distorts the "ease of entry" picture. Controlling the legal environment should be a major concern of any e-commerce business because the legal environment of cyberspace is an unknown cost that will only be "known" when that business person gets sued. Lawsuits always have to be resolved by the courts, and in this new environment the court may apply legal rules to that transaction that were not expected by the businessperson.

These legal risks exist due to the ease of engaging in e-commerce and the lack of a comprehensive body of laws that could apply. "The Internet makes it possible to conduct business throughout the world entirely from a desktop. With this global revolution looming on the horizon, the development of the law concerning the permissible scope (of law) is in its infant stages"<sup>5</sup>. That quote summarizes the reasons for engaging in e-commerce - the perceived low entry cost, but it also illustrates the high risks - the potentially high legal cost because of the unknown factor of what the legal rules are, or will evolve to be.

The major reason for the lack of predictability is that cyberspace is borderless and the law traditionally has been developed in relation to some physical boundaries. Sovereigns could reach beyond those physical boundaries in limited circumstances, but the basic rules relate to activity within some boundaries of the state - either presence or engaging in business. "Cyberspace undermines the relationship between legally significant phenomenon and physical location. The power to control activity in cyberspace has the most slender connections to physical location"<sup>6</sup>. "Events on the Internet occur everywhere but nowhere in particular. What law should we apply to protect the transactional data? Has the legal world established a jurisprudence of cyberspace? Has the law met electronic technology with a coherent doctrine that takes into account the transnational dimensions of global computer networks?"<sup>7</sup>. The answer to all of those questions is "No!" Since there is no established jurisprudence a prudent business person must take it upon himself/herself to reduce the unknown as much as possible by using existing principles of international law to clarify, as much as possible, the rules of law that will apply to a given transaction.

## Practical Understanding of the Situation

Many business persons overlook the basic fact that while their Internet site allows them to increase revenue and profit potential, it is available everywhere in the world. Understanding that concept is the first step in reducing e-commerce legal risks because by internalizing that fact the business person has taken the fundamental step to recognizing the problem and then taking action to try to control the legal risks as much as possible. By understanding that the website is available everywhere the businessperson will then understand that when goods or services are sold to whoever clicks on the site and decides to purchase what is offered that this is an international business transaction when the buyer and seller are in different countries. That it is an international transaction may not be very obvious since the transaction seems to have taken place at the seller's "location".

However, sending goods to someone in another country is international business. What is even less obvious is the purchase of software over the website when that is accomplished by simply clicking on the purchase icon, giving the credit card number and then downloading the software. That type of purchase will probably raise no red flags, in most people's minds, that this is also an international transaction. In addition, sales of services such as title information about automobiles, etc. also don't trigger the thought "this is an international transaction".

In addition, there does not have to be a sale of goods or services for the Internet site to be subject to foreign laws. As we shall see, the fact that any site is accessible in another country, even if no sales are made, creates potential legal problems. Therefore, recognizing that having a presence on the Internet and engaging in business are international transactions and that there are "legal unknowns" will alert the business person to use available prophylactic measures to reduce the risks of that unknown legal environment.

## The Planning Stage

Prior to engaging in any type of business, a business person must develop a business plan that includes all of the traditional business issues that are part of the planning and preliminary stages of a business. If a business is going to conduct business on the Internet that business person must also consider the additional risks that exist because of cyberspace. As already indicated above, the first issue in this planning stage is to fully understand that the legal risks of cyberspace cannot be fully predicted because there is no universal set of legal rules that will apply. Because it is much safer to operate in a predictable environment, the first consideration should be to restrict one's business activity on the Internet to one's own country. The legal rules that apply to a business transaction within a country, whether in a "brick and mortar" business or via the Internet, are known and predictable, so the business can tailor its activities to comply with those rules, and the risks are no greater than doing business the traditional way. Doing this will still take advantage of the ability to access a larger geographic market of one, or several, "brick and mortar" operations, but it will not expose the business to the legal rules that apply to international and e-commerce transactions of other countries.

If the business person decides that he/she wants to expand beyond the borders of their country, then the next step should be to add countries where the legal risks are known and are predictable. This would involve studying and knowing the legal rules of those countries that the business person wants to add. As we shall see, one cannot assume that the industrialized countries will automatically be “safe”<sup>8</sup>. Once the legal rules are understood in all of the respective countries, the business transactions with customers in each of those countries must meet those rules. Therefore, the Internet site must be customized for each country that the person is doing business in.

In addition, to meeting current rules in all of the countries that he/she will be doing business with, the business person must also have a plan for keeping abreast of the laws as they change in each of those countries because the legal environment of e-commerce continues to evolve. Virtually every country in the world is dealing with this new form of doing business and they are creating laws and changing laws to meet the challenge. In order to remain current there must be a periodic review of the laws and business practices to be certain that the business is still in compliance with the changing legal environment. Understanding the following sections and the use of the prophylactics will help in managing this new and changing environment.

### **The Legal Issues**

Some of the more important legal issues involved in e-commerce include, personal jurisdiction, conflict of law, formation of the contract, the validity/enforceability of the contract, export/import rules and related issues, product liability, government rules and regulations as to product safety, labeling. Import/export regulations, advertising regulations, intellectual property issues, and tort issues. These are the issues that will be covered in more detail in this article. What is not included are the privacy issues, spam issues, and others like that that are not the type of “business” issues that we wanted to focus on, partly because there is much literature on those issues, already.

### **Personal Jurisdiction - Business to Business (B2B) and Business to Consumer (B2C) Transactions**

Because the Internet is a forum without the traditional territorial boundaries, it creates a unique set of personal jurisdiction issues.

Personal jurisdiction means that some government (country) has a legitimate basis for exercising its authority over a person.<sup>9</sup> There is no personal jurisdiction issue in regard to the plaintiff, because a plaintiff gives a court the authority over him/her by filing the complaint in that court. The jurisdiction issue always focuses on the defendant who is not a willing participant and, therefore, the court must have some legal basis for authority over that person.

The universal legal basis for acquiring personal jurisdiction over a defendant is based on the residency of that defendant in the state/country that is attempting to exercise its jurisdiction over that defendant by requiring him/her to be subject to the power of that court. The more complex legal basis for acquiring personal jurisdiction over a defendant

who is not a resident of the state/country where the court sits is based on some sort of “minimum contact” or “doing business within that state/country”. These are the terms that the U.S. courts use, but the underlying concept - voluntarily doing something within a country - is a common basis for personal jurisdiction in most countries in the world.

A recent case demonstrates how “doing business” within a country may be a basis for personal jurisdiction over a foreign defendant. The case, *Dow Jones & Company v Guttnick*<sup>10</sup> involved an alleged defamatory article on a U.S. site about an Australian business person. After the case made its way through the Australian court system the Supreme Court of Australia agreed that there was personal jurisdiction over Dow Jones in Australia. The court decided that there was personal jurisdiction even though anyone who wanted to read the online article needed a password to access the U.S. site. The Australian Supreme Court said that there was personal jurisdiction over Dow Jones because some subscribers lived in Australia and, in effect, Dow Jones was “doing business” there. Based on this, and similar cases,<sup>11</sup> a businessperson must understand that when it sells goods, services or provides information<sup>12</sup> over their website to a buyer in another country, even though the seller is not a resident of that country, there could easily be personal jurisdiction over that seller, because of the broad application of “doing business”. Such a seller could then be sued in another country for breaching the contract, for product liability for defamation, or any number of other civil and/or criminal violations.

Therefore, “Companies planning to use cyberspace should take meaningful steps, and make continuing efforts, to control the scope of its interactions with other forums.”<sup>13</sup> The way to “take meaningful steps” would be to control this legal risk on the company’s website. Fortunately the legal rules of most countries allow the seller to control where there will be personal jurisdiction over the seller in case of a legal dispute. That method is using a “choice of forum clause” on their website. What this means is that the Internet seller may place a clause on its site that states something such as, “In the event there is a legal dispute the buyer agrees that the dispute shall be heard in *insert the country/or state*”. If this clause is readily visible by a purchaser prior to clicking on the purchase icon, the clause will generally be enforceable against the buyer and the dispute will be heard in the named state/country.

However, in the United States the law is evolving in regard to making a choice of forum clause enforceable in consumer transactions. In *America Online, Inc. v. Superior Court*<sup>14</sup> the court decided that a forum selection on an AOL site was not enforceable under California’s public policy. The court said, “Our law favors forum selection agreements only so long as they are procured freely and voluntarily, with the place chosen having some logical nexus to one of the parties or the dispute, and so long as California consumers will not find their substantial legal rights significantly impaired by their enforcement”<sup>15</sup>. Therefore it appears that a forum selection clause in a consumer transaction will not always be enforceable because such a clause will discourage consumers from enforcing their rights due to the burden it places on consumers to file in the seller’s state/country in order to get “justice”.<sup>16</sup> However, in business to business transactions there is not the same public policy issue, so a “choice of forum” clause will continue to be enforceable.

The above is the evolving policy in the U.S., but in the European Union this is the stated policy in a Regulation that came into effect on May 1, 2002.<sup>17</sup> The Regulation states “If a purchaser is determined to be a consumer and the transaction occurs or is initiated on the Internet, the jurisdiction of the consumer’s domicile will apply.”<sup>18</sup> Most countries, in the rest of the world, have not yet established clear principles in regard to consumer transactions over the Internet, but it would appear that many will follow the EU example in consumer transactions and the U.S. example in business to business transactions. Therefore, because of this diversity among countries, it means that if an Internet seller does choose to put a forum selection clause on its site, then in consumer transactions, the clause will not be enforceable in the EU and may not be enforceable in the United States and in many other countries. However, even with this caveat, an Internet seller should still place a choice of forum clause on the site because in business to business transactions such a clause will generally be enforceable.

Even when using such a clause, it must be understood that forum selection clauses are contractual in nature and are therefore only enforceable against parties who actually contracted with each other, and not against third parties who were not part of the contract.

For example, this means that if the sale is to a wholesaler who then resells those goods locally to retailers and/or consumers a forum selection clause in the agreement between the wholesaler and the seller of the goods to the wholesaler will not be enforceable against the buyers of those goods who purchase them from the wholesaler. There are ways the seller can protect itself with a “hold harmless” agreement with the wholesaler, but that will not prevent local lawsuits against the seller when the wholesaler’s buyers are the plaintiffs.

### **Arbitration Agreements**

Instead of a choice of forum clause the business owner may want to include an arbitration agreement on the website, which will replace the choice of forum clause. When an arbitration agreement is used the case will not be heard in a court, instead the dispute will be heard in a private setting with an arbitrator making decisions of fact and decisions of law. There are numerous arbitration bodies in the world, including on-line arbitration bodies that may be used to arbitrate the dispute. Each arbitration association will have its own arbitration rules that become the default rules unless the arbitration agreement on the website contains all of the rules that are necessary. However, it is not necessary to create all of the rules for the arbitration, only to know the default rules and make changes on the website as to the rules that the website owner does not want to apply.

Crafting a proper arbitration agreement should not be taken lightly.<sup>19</sup> Therefore, prior to placing an arbitration agreement on the website the businessperson should research all the issues that relate to arbitration and make a decision that benefits the business the most. At a minimum the arbitration agreement on the website must address the following issues:

- The name of the arbitration association that is chosen to conduct the arbitration. o A choice of law clause

- A choice of language clause.
- How many arbitrators there will be in order to reduce the costs of arbitration since each arbitrator must be paid.
- A clause as to how the costs of the arbitration shall be borne.
- The physical location for the arbitration (when it is not online).

Some of the benefits of arbitration versus litigation include privacy, reduced cost (if properly managed), faster and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the 1958 New York Convention). This Convention makes arbitration awards much more easily enforceable in a foreign jurisdiction when the award is issued in one of the signatory countries. For that reason the arbitration agreement should chose one of the signatory countries as the site for the arbitration. The website owner must also understand that arbitration agreements, especially in B2C transactions in the United States, must be in “good faith”. This means that the website owner may not chose an arbitration body that charges so much for arbitration that it would be too costly for the consumer to ever be willing to file a claim (even when legitimate), and that the place for arbitration must be convenient to the consumer. Essentially, the arbitration agreement cannot be so costly and so inconvenient that it would discourage the consumer from filing a complaint; else the court may not enforce the agreement based on “bad faith”.<sup>20</sup>

### **Conflict of Law**

Every country has conflict of law rules that will determine which country’s laws apply in cross-border transactions. This legal problem is known as “conflict of law.” The legal issue of conflict of laws arises in all situations where the business transaction involves more than one country. The method for controlling whose laws shall apply is the use of a “choice of law” clause on the website. If the parties do not have a choice of law clause in their contract, “then the applicable law is left to be decided by the national rules of the forum state<sup>21</sup> under local conflicts of law rules by determining “the country with the closest connection to the substantive basis for the lawsuit”<sup>22</sup>. The Supreme Court has said, “The general conflict-of-laws rule, followed by a vast majority of the States, is to apply the law of the place of injury to the substantive rights of the parties.”<sup>23</sup> This principle is not always the easiest for a court to apply, therefore, the best way to reduce the risk of having a foreign law apply to a transaction is put a choice of law clause on the website. “The choice of law (clause) is one of the most important contractual elements to be agreed upon between the parties to an e-commerce transaction<sup>24</sup>. It is generally used in conjunction with a choice of forum clause and should state, “In case of a dispute, the law of *fill in the blank* shall apply”.

Most courts in the world will enforce such a clause; however, the EU Regulation mentioned above, also states that in consumer transactions the law of the buyer’s country shall apply. Therefore, in those sales, the choice of law clause will be unenforceable. At this point the United States does appear to enforce choice of law clauses in all contracts, regardless of whether it is a consumer transaction or a business-to-business transaction.



There are some additional issues that need to be addressed in regard to a choice of law clause, but they will be discussed in the next section.

### **Cross-Border Contracting**

As explained above, when there is a sale across national borders, the contract will involve the contract laws of more than one country. A choice of law clause was recommended to control which country's laws apply. However, the issue is more complex than just choosing the local contract law of one of the countries involved in the contract. The reason it is more complex is that there are local laws (laws of the country), and some "international" contract laws.

The recent development of e-commerce has generated some model laws and some legislation in most countries that address some aspects of electronic contracting. One such model law example was created by the United Nations Commission on International Trade Law (UNCITRAL). UNCITRAL offers a model law on electronic commerce which focuses particularly on the legality of the electronic contract itself, and less on the terms of contractual relationship.<sup>25</sup> This Model Law does not create any substantive contract law rules. Therefore, it is not useable for the substantive contract issues and has little application to the discussion here.

In addition to the existence of the UNCITRAL Model Law, many countries have passed legislation that address Internet contracting. However, these laws, like the UNCITRAL Model Law, generally do not include substantive contract law rules that would apply to the contract itself. Instead, the main purpose of these laws is to make electronic contracts enforceable, usually by making e-mail signatures effective. Therefore, the substantive contract law rules that will apply to Internet contracts are the same substantive contract law rules that apply to any other contracts that are not entered into over the Internet. This means that if the contracting parties are all in the same state/country then the contract law of that jurisdiction will apply to resolve the substantive legal issues. If the parties to the contract are in different states/countries then it is a conflict of laws issues, which was discussed above, and can be somewhat, but not entirely, controlled with a choice of law clause.

In international contracting, whether or not the Internet is used, the conflict of law issue is compounded because of the existence of the United Nations Convention on the International Sale of Goods (CISG)<sup>26</sup> This Convention creates substantive "international" contract law rules which apply to non-consumer cross-border transactions<sup>27</sup>. This Convention does not apply to sales of services, nor does it apply to sales of goods for consumer use. However, when there is no, or incomplete, choice of law clause, in a business-to-business transactions that involves a buyer and a seller in different countries the Convention's rules become the default rules.

Therefore, the CISG complicates the conflict of law issue in business-to-business crossborder sale of goods Internet transactions when there is no, or an inadequate, choice of law clause. This complication is caused by the conflicts of law rule that the law with the "closest connection" to the contract will apply - meaning some country's domestic contract

law. The domestic contract law rules could be just the same contract law rules that apply to domestic contracts if the country has not signed the CISG. If the country has signed the CISG then the domestic contract law rules consist of the CISG rules that apply to cross-border B2B sale of goods contracts supplemented by the local contract law rules that apply to all domestic contracts. The CISG has to be supplemented by other contract law rules because the CISG does not cover such contract issues as, legal capacity, fraud, mistake, duress and several other substantive contract issues.

Therefore, to control all of these variables, a choice of law clause should read, "In the event of a contract dispute the CISG shall apply to resolve the dispute, and when the CISG rules do not provide a rule for a particular legal issue the CISG shall be supplemented by the contract law rules of *insert name of country*."

The alternative to the above choice of law clause is to simply opt out of the CISG - which is allowed by the Convention. However, one must then have a choice of law clause that says, "The CISG shall not apply to any transaction entered into, instead the law of *insert name of country* shall apply". It must be specifically stated that the CISG does not apply because otherwise it will become the default set of rules in all situations when the countries involved have signed the CISG and it is a cross-border business-to-business transaction.

### **Choice of Language Clause**

Regardless of whether the dispute is to be heard in some country's courtroom or by an arbitrator, there must be a choice of language clause on the website. If the website has no choice of language clause then the judge or the arbitrator must decide what the official language is. The choice of language clause should be incorporated into the contract by clicking on the icon that shows the user agrees to all of the contractual terms. The choice of language clause will create an official language of the transaction that will apply to all written interactions and all of the documents exchanged between the parties. Meaning that if there is a conflict between the various documents that may exist in the various languages of the transaction the documents that are in the official language will determine what the parties agreed to.

Using a choice of language clause creates a higher degree of certainty and reduces the cost of litigation/arbitration because it eliminates the need for the judge or the arbitrator to decide what the official language of the transaction should be, based on the applicable rules of law. The website owner will choose his/her native language and that will reduce the cost of translating everything in the event of a dispute, and eliminates the risk of an inaccurate translation of all of the documents and correspondence.

### **Intellectual Property**

Intellectual property includes trademarks, copyrights, patents, and trade secrets. The rules that regulate intellectual property were created prior to the existence and use of the Internet. Even though the United States and some other countries have updated the laws, an e-trader, who owns intellectual property, is dealing with mostly outdated intellectual prop-

erty laws and courts may make an attempt to fit those laws into the new environment. Since those laws were created when interactions were territorially based, instead of in cyberspace, the laws are inadequate.

One of the major problems is that there is no international registration or intellectual property, and because the Internet is available immediately in virtually every country in the world, by making intellectual property available on the website, there may be no legal protection of that property in every country that has access to it. Because all protection of intellectual property is a matter of local law, losing one's intellectual property is a very real possibility. Therefore, prior to placing any intellectual property information on the Internet, the owner should do as much as possible to insure that he/she will retain ownership and have legal recourse for violations of that ownership right. The owner of the intellectual property should be as diligent as possible to avail himself/herself to as much protection as is realistically possible. However, the owner must understand that under the current worldwide system of intellectual property laws, it is not possible to get full protection, because there are no uniform international laws that will protect intellectual property. Therefore, the only way to get full protection this is to file in every country in the world under that country's laws - not realistic.

Short of filing in every country, the owner can get some protection because there are some international agreements that will apply. The various cross-border agreements that exist<sup>28</sup> include NAFTA<sup>29</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)<sup>30</sup> and the Berne Convention<sup>31</sup> the Universal Copyright Convention as revised at Paris 1971<sup>32</sup> Patent Co-operation Treaty ("PCT")<sup>33</sup>. In addition there are many others such as the Strasbourg Agreement Concerning the International Patent Classification, and the Madrid Agreement Concerning the International Registration of Trade Marks<sup>34</sup>. Other responses to meet the demands of new technologies include the World Intellectual Property Organization ("WIPO") who promulgated the comprehensive WIPO Copyright Treaty in December of 1996. The Treaty came into force three months later. after<sup>30</sup> states had finally ratified it<sup>35</sup>.

But none of these agreements are truly international since none of these agreements have all of the countries in the world as signatories. The number of signatories on the various treaties/agreements ranges from around fifty countries to over one hundred countries. These treaties and agreements that countries have signed tend to create uniform model rules among member countries, some by forcing member countries to enforce each other's national laws and others by making member countries pass uniform national rules, or treating foreign claims as they would treat their domestic claims - this is known as "national treatment."<sup>36</sup>

For example, the TRIPS agreement, which is part of GATT, states, "Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property<sup>37</sup>. This means that when a German court hears a case involving a United States owner of intellectual property the German court must apply and use the same rules that it would use when

the German court hears a case involving a German owner of intellectual property in Germany.

The TRIPS agreement also requires member countries to create uniform laws and all member countries must enforce intellectual property rights in regard to property that is registered in a member country for one year from the date the local registration is effective. This gives the owner of intellectual property, that has been registered locally a one year "grace period". However, if the owner wants protection in the other countries after that grace period, the owner must file in any country it wants protection to continue to have its property protected in each respective country.

One must also understand that even among the countries that do belong to these various agreements there are still variances among the rules. As pointed out above, despite the various international agreements, the fact remains that protection of intellectual property is still mainly a national legal issue. Therefore, a person should understand that when making the intellectual property information available on the Internet there is some risk of loss, and that risk needs to be understood and accepted as part of doing business on the Internet.

An example of a situation where the copyright law was updated, but still left some possibility for piracy, is the recently passed Amendments to the Copyright Law by the Taiwanese Legislative Yuan. As one commentator has stated, problem is that the "Changes that define whether piracy is for profit or not have set a threshold that will allow not-for-profit offenders to get off scot-free<sup>38</sup> in some circumstances. In essence, this is a new law that makes some forms of music pirating not illegal, whereas any pirating in the United States is illegal, regardless of whether it is for profit or not for profit. As some entertainment industry officials said, "They are sending out mixed messages about the nation's commitment to fighting piracy"<sup>39</sup>. This means that in a piracy lawsuit in Taiwan the new Taiwanese law would apply along with the "national treatment" provision of the TRIPS agreement and a United States producer under the "national treatment" policy would receive the same treatment as a Taiwanese producer meaning that less than five copies would not create a legal basis for either producer to sue the pirate.

In addition to the above problem of different rules, some countries have no rules, in regard to intellectual property, and some countries, which have rules, do not enforce those rules. Essentially a businessperson must understand that, "it is an intellectual property jungle out there". Since there is no universal protection, the decision making process involves the question of whether to risk the infringement of the intellectual property by placing it on the Internet, and if it is infringed, whether to pursue the infringer for violating the owner's rights. It is essentially a risk/benefit analysis - "am I willing to risk the theft due to the business benefits?" If "yes", then will the costs and likelihood of enforcement be worth the risk of infringement? The only advice is that one understands these risks and makes an informed decision as to what intellectual property to make available on the Internet.

### **Advertising and Related Regulations**

Advertising regulations generally focus on false, deceptive and/or misleading advertising. However, in some countries the regulations may also focus on additional aspects such as

legality, “good taste”, moral issues, and public policy. Therefore, the problem with advertising rules and the Internet is the same as all of the other areas - the information is available everywhere, and there are no universal set of rules as to what is and what is not “legal” advertising. Due to the lack of a uniform set of rules, the site will be judged by national laws in every country in the world where the site may be viewed. In most countries the information that is available on the website will be treated as “advertising” and, therefore, the entire site is subject to national advertising regulations. In the U.S., the Federal Trade Commission has made it clear that it will consider the entire commercial Internet site as an advertisement<sup>40</sup>. Michael Geist, a Canadian e-commerce attorney, states that these new FTC rules show a “first clear indication of how off-line advertising rules can be applied on-line, the guidelines are likely to serve as a benchmark for regulators worldwide”<sup>41</sup>.

A European Commission Green Paper on Commercial Communications in the Internal Market<sup>42</sup> found that there are three categories of potential barriers to E-Commerce sites in the EU due to the various rules among member countries. They are:

- (1) Restrictions that involve an absolute ban on certain types of marketing activity.
- (2) Restrictions that limit marketing activities but without going as far as to ban their use.
- (3) Restrictions that relate to certain specific product categories or types of service.<sup>43</sup>

This Green Paper just looked at the problems with EU wide advertising, and points out that the problems are significant because Member Countries have different and various rules, and a site could be subject to all of those various rules. These same issues exist among all of the countries of the world therefore a myriad of advertising laws and regulations could be violated by a simple website, and examples of enforcement by countries of local laws already exist.

The most famous of these examples is the Yahoo! case. Briefly, the facts of that case were that on Yahoo!’s American, but not French, auction site Yahoo! allowed Nazi memorabilia to be auctioned off. In the U.S. selling such material is not regulated, in France (and Germany), the sale, or offering for sale, of such material is illegal. The French prosecutor filed a criminal action against Yahoo because French residents could access the V.S. site and see such memorabilia being offered for sale. French law prohibits “justifying a crime against humanity” and “exhibiting a uniform, insignia or emblem of a person guilty of crimes against humanity”<sup>44</sup>.

The French court found that Yahoo had violated French law and imposed a penalty and told Yahoo! to remove or block the information from access by persons in France. Other legal battles ensued in the V.S. and France. Yahoo! ultimately won the case because a Paris judge ruled that “justifying war crimes” means “glorifying, praising, or at least presenting the crimes in question favorably.” And the judge decided that Yahoo! did not do these things, simply by allowing Nazi memorabilia to be sold from websites it hosted<sup>45</sup>. The fact that Yahoo! won is not the point, the point is that France attempted to enforce its local rules against a site that was intended to be a U.S. site, but was accessible in France.

This attempt to enforce local laws cost Yahoo! much money in lawyer fees and other costs. Smaller Internet sellers could not take on such an expense, even if they might win. This case illustrates the potential conflicts of the Internet and advertising. Even though they won that case, Yahoo! has decided not permit sale of Nazi memorabilia from any websites it hosts, this was a change in company policy that was adopted for ethical, instead of legal reasons, but the French still have a "moral victory." "These cases raise a critical issue about the extent to which the laws of one country may be enforced against websites and web-hosts located in other countries<sup>46</sup>.

The Yahoo case is just one salvo in what could become a barrage of efforts to impose geographically based regulations over the Internet. Government entities from China to the state of Texas have asserted a right to shield their citizens from content ranging from opinions about the status of Taiwan to lawyer advertising, "You'd be surprised at how many countries have passed laws restricting content", says Megan Gray, an associate with Baker & Hostetler in Los Angeles. "The France-Yahoo matter has gotten a lot of publicity because France is taking action on its laws. Now I think we're going to see a lot more enforcement<sup>47</sup>.

For example, in China the Beijing Municipal Administration for Industry and Commerce (BMAIC) has banned the advertising and selling of such products as tobacco, and products that pertain to sex. "The new prescription compels all Internet service providers (IS Ps) to restrict from Web sites residing on their servers from advertisement of tobacco; sexual products; goods or services specifically prohibited by law; and goods or services that are already banned from advertising"<sup>48</sup>.

In the final analysis there is no universal solution to the problem of complying with the rules of every country where the site is available as the Yahoo! case illustrates, just putting the information on a site that is arguably restricted to just one, or some, countries will not work. It seems that the only recommendation is that one should be certain that the information on the site is clear, not false, not misleading and as non-controversial as possible - however, "controversial" is a matter of local definition. That is not much help, but it is the best suggestion at this point<sup>49</sup>.

### **Other Government Regulations**

These rules involve issues other than the information that is available on the site, which was addressed in the prior section. What is addressed here are the governmental rules and regulations that might apply when there is an actual sale of the goods or services over the Internet to someone in another country. Unfortunately what is, and may be, regulated by all the countries in the world is so diverse that there is no way to produce a general list of what may or may not be regulated. As a USDA/Foreign Agricultural Service reports points out, "Final import approval of any products is always subject to the rules and regulations as interpreted by the country of import at the time of product entry"<sup>50</sup>.

Governments regulate such things as the purity of foods and other items for the safety of their residents. For example the FDA, in the U.S., regulates foods and drugs for safety and purity, the EPA regulates automobile emissions, and the NHTSA regulates auto-

mobile safety requirements such as structural rigidity and airbags, etc. Most countries have regulations as to these same products, but the regulations differ from one country to the other. Things such as toys, clothing, bedding, noise standards, alcohol, gambling, etc. are regulated in most countries to varying degrees.

In the EU fear of genetically-modified foods has spurred the European Commission to pass legislation requiring that food products with genetically-modified material be labeled as such. "Although the EU ban has recently been lifted by the European Parliament, it was replaced by a genetically modified labeling system requiring identifying any foods with over 0.9 percent genetically modified content.. ..Further, while the EU has allowed soybeans genetically modified for herbicide resistance to enter into its markets in spite of the ban, the labeling system will effectively halt imports of the economically important commodity crop into that vitally important marketplace"<sup>51</sup>. This means that a U.S. Internet site that sells food over 0.9 percent genetically-modified to anyone who lives in a country in the EU must indicate that on the label for European sale, even though that would not be necessary to sell that same product in the U.S. and most other countries in the world because they do not have such rule. Most U.S. sellers will not be aware of the rule, nor will they even know whether the food they are selling has over 0.9 percent genetically-modified content as part of the ingredients.

Nicole Coutrelis states that, "Any operator wishing to market a food product in France can be faced with problems of acquaintance with regulation or case law. (Because) A product is not governed based on its material or commercial nature, but rather on its legal nature, the product must be classified with reference to the existing categories in French law"<sup>52</sup>. The GAIN Report by the Foreign Agricultural Service for Pakistan states, "For animal products, 'halal' certification (that is, slaughtered in accordance with Islamic law) is incorporated in the guidelines." The GAIN Report for Nigeria states, "Nigeria has a pre-shipment inspection policy which requires all imports to be inspected in the country of origin by designated Inspection Agents." "The Brazilian Consumer Protection Law number 8,078 of September 11, 1990, requires that all domestic and imported food and beverage must provide the consumer with correct, precise, clear and easily readable information about the product in Portuguese"<sup>53</sup>.

Sometimes knowing whether or not a regulation is being violated is very difficult to discover. For example, "A firm specializing in e-commerce and allied matters has warned that many firms in the UK and Europe may be breaking the law by generating invoices to their commercial customers via e-mail. Invoices via e-mail in the UK and Europe may be breaking value-added tax (V A T) rules from HM Customs and Excise (in the UK) and other government agencies"<sup>54</sup>.

The above product regulation examples illustrate the complexity of the problem with selling goods over the Internet and all of the varying rules that one must comply with, but may not even be aware of. Therefore, the seller must make a business decision as to whether to sell to anyone in any country or to limit its sales to certain countries. The guiding principle for e-traders should be not to sell any product/service to another country until the seller has hired local lawyers to look at the product/service to determine whether it

meets all applicable laws and regulations. This is restrictive, time consuming, and expensive, but it is the only certain way to avoid what may be criminal prosecution and/or expensive civil fines.

### **Tariff Regulations - Imports**

One aspect of Internet sales that is often overlooked is that when one sells goods to another country there are import/export regulations that will apply. The import regulations, the laws of the country to where the goods are shipped, will apply to the person who is the "importer" - the person who has to clear the goods through customs in that country. Normally, the importer will be determined by the shipping terms in the agreement. When the transaction involves a negotiated contract the parties will most likely discuss this and reach an agreement as to where the goods shall be delivered to the buyer or the buyer's agent. Therefore, it will be clear who the importer is. However, in most Internet transactions there is no "negotiated" contract, the goods are purchased off the site by a click from the buyer - it's "click and ship". In those instances, the shipping terms agreed upon will be found on the website if the owner has had the foresight to put them there. If the owner of the website has failed to be clear as to the shipping terms, then the applicable contract law rules will apply to determine what the shipping terms will be, and, in effect, who the importer will be.

For example, in the United States, in a sale of goods when there is no agreement on shipping terms, the default rule under the UCC states that the place for delivery to the buyer is the seller's place of business<sup>55</sup>. The CISG, discussed above, also has default shipping rules<sup>56</sup>. Other countries may have different local rules that apply to create the shipping terms. Therefore, when there are no agreed upon shipping terms, there could be "surprises" as to who will have to clear the goods through customs and pay all of the shipping costs and tariffs in the buyer's country.

When there are shipping terms on the website, the owner must also understand that the shipping terms in international and domestic business vary. In international business the shipping terms consist of CIS terms - cost, insurance and shipping charges to a destination. In domestic business the shipping terms consist of FOB terms - free on board to a destination. Using the wrong set of shipping terms could also involve additional legal expenses.

Whether one becomes the importer expressly by the terms in the contract, or impliedly by the application of the appropriate set of default rules, the result is the same, the importer will learn that the contract price of the goods includes shipping to the buyer, and the cost of the tariff. In addition, that person is subject to the legal restrictions as to what may or may not be imported. Therefore, a website that quotes a price for the goods and then states "free shipping included" may also have inadvertently taken on the burden of paying the tariff, if the shipment is to another country.

The issue of tariffs/taxes has not been ignored by countries around the world. For example, "The Australian Customs Service has issued a reminder to Internet users thinking about doing a little Christmas shopping on the Web: taxes apply to imported goods. The customs service said government charges may apply on all goods bought from overseas e-



tailers via the Internet, as well as on gifts sent by foreigners, even if they were not requested by recipients in Australia. A concession - no tax or charges - applies to gifts received in the mail, but only to the first 200 Australian dollars (\$U.S.1 03.20) of the value of the gift. 'The concession does not apply to items that you purchase yourself via mail order, fax, phone or Internet', according to the statement<sup>57</sup>. Other parts of the world have the same policy, "Customs duty is payable on goods imported into Ireland from outside the EU. There are exceptions from customs duty for gifts of low value and commercial packages of low value<sup>58</sup>.

In addition, the goods that are shipped might turn out to be goods that are restricted and not be legally imported into that country. Being the importer and violating the import restrictions may involve serious consequences, including prison and/or fines. As already mentioned, goods that do not meet the various governmental safety requirements, labeling requirements and such will be restricted. In addition, some countries simply restrict certain goods for a variety of reasons. Something as innocuous as liquor filled chocolates could be a restricted import into some Muslim countries.

Obviously, the easiest way for an Internet seller to avoid these problems is to be very clear as to who the importer is in any transaction. The website should be very clear that the buyer of the goods is the importer and therefore, liable for all tariffs and any laws of the importing country. Such a clear statement as to what the shipping terms are, and adherence to that statement should provide a hundred percent immunity from local import laws and regulations.

### **Export Restrictions**

The U.S., and other countries, have numerous export restrictions that apply to exports of goods and, often, technological information. Therefore, the export regulations are broader than just the exportation of goods; they could include exportation of technical information, either directly or indirectly when the restricted information is being made available on the Internet site. We will use the U.S. export laws as an example, but one must understand that each country has its own set of unique laws and regulations that must be complied with by exporters in that country.

In the U.S., the government agencies that regulate this area have websites with detailed current information that is updated on a daily basis. Most countries will have websites for the agencies that regulate their exports. Therefore, an exporter should have some system in place that will be used to monitor the change in rules and be able to comply with the change as it occurs.

In the U.S., the Bureau of Export Administration (BXA) administers the export regulations. There are three different types of exports controlled by BXA: (a) Products and technical data that is directly exported from the United States; (b) United States products and technical data that is re-exported from one foreign country to another foreign country, and; (c) Foreign made products that contain United States origin parts, components, or technical data when that foreign made product is exported or re-exported from that foreign country<sup>59</sup>. What these regulations should make one notice is that the rules apply "extrater-

ritorially” to goods and technical information. The purpose of those regulations is to regulate export and re-export of goods and technical information for national security, nuclear proliferation, foreign policy and short supply reasons. One can see that, for example, national security and foreign policy issues may change regularly. Because of the way these rules apply one may not assume that because the goods or the technical information were not “shipped” directly from the United States, that U.S. export laws will not apply. Clearly, the rules are much broader than that and regulate goods and technical information that “originated” in the United States, regardless of the actual place of shipping or availability. In addition, making restricted technology available on the website is also defined as “shipping” under the rules and one must have a license to place such information on the website<sup>60</sup>.

A license to export or re-export will be required to “ship” regulated goods and technical information when either originated in the United States. However, as the BXA states, “A relatively small percentage of exports and re-exports requires the submission of a license application to BXA. License requirements are dependent upon an item’s technical characteristics, the destination, the end use, and the end user...”. The EAR groups items into ten categories each containing several entries<sup>61</sup>. The entries are used to determine the Export Control Classification Numbers (ECCN), which are used with the Country Chart to determine the need for an export license. Therefore, even though only a relatively small percentage of exports require a license, a seller must know whether or not what is being sold falls into one of the categories that do require a license. Not knowing, and selling something that requires a license without having such a license will have serious consequences in fines, penalties, and other restrictions.

In addition to the above complex regulations, the Treasury Department also controls exports for other reasons. These reasons are, “economic and trade sanctions against targeted foreign countries, terrorism sponsoring organizations and international narcotics traffickers based on U.S. foreign policy and national security goals”<sup>62</sup>. When the site was visited in October of 2001 the U.S. had sanctions against the governments of Iran, Iraq, Libya, Federal Republic of Yugoslavia, including Kosovo, Cuba, North Korea, Angola, Syria, Burma, Sudan, and the Taliban in Afghanistan. When the site was visited on August 3, 2004 the list contained the Balkans, Burma, Cuba, Iran, Iraq, Liberia, Libya, North Korea, Sudan, Syria, Zimbabwe, and restrictions on diamond trading, narcotics trafficking, nonproliferation and terrorists. This is an example of how the list changes. The list only represents the sanctions by the U.S., most countries in the world have sanctions against other countries; therefore, the law of the country where the exporter is located must be known and understood.

Finally, the U.S. Department of Commerce and the Office of Foreign Assets Control each have lists of denied persons (real and juristic), blocked persons and debarred persons that a U.S. business may not sell to<sup>63</sup>. All of these lists are updated on a daily basis.

The United States also has a unique law that is an anti-boycott law. The Anti-boycott laws were adopted “to encourage, and in specified cases, require U.S. firms to refuse to participate in foreign boycotts that the United States does not sanction”<sup>64</sup>. The antiboycott

provision are intended to prevent a U.S. based business from doing anything that would be considered complying with foreign boycotts that the United States does not sanction. Such compliance might even be as little as answering questions about where a U.S. business does business and with whom.

The purpose of the above discussion was to show the complexity of exporting, because of all of the rules that may apply in any given country. In order to avoid legal problems with the exporting country, the exporter must know the rules, must comply with those rules, and must have a system in place to stay current. Anything less than this will leave the exporter open to the risk of serious legal problems including fines, removing their right to export, and/or imprisonment.

### **Tax Laws**

“Given the complex, intangible, and multi-jurisdictional nature of e-commerce, taxation of the Internet touches on some of the most controversial and cutting-edge issues in state, federal and international transactions. Although these issues predate e-commerce, they have become much more complex in the increasingly interconnected and constantly changing environment of e-commerce. These issues cut across tax types and national boundaries and need to be clearly understood both for purposes of complying with current tax rules and for adapting new tax rules for an Internet-age economy<sup>65</sup>. This quote summarizes the problem very well. In any given transaction a country’s sales, value added, and income tax might apply to an Internet transaction. In tax jargon, the issue is the “nexus” of the transaction, which means, “Where does the sale take place?” There are no clear rules to answer this question, because each country’s laws will determine the “nexus” of the transaction. If that country’s rules determine that the “nexus” is local, then the seller must pay taxes to that country. That tax may include sales, value added, and income tax. For example, in the Philippines, “Rules under existing statutes stipulate that tax can only be imposed if the transaction was consummated within Philippine soil’. By using the Internet as a marketplace, a company could simply argue that it purchased a product through a website that was located overseas even if (the company purchasing the product) were physically located in the Philippines<sup>66</sup>. The response by the agency has been to recommend that “A tax will be charged on a sale made regardless of the place where it was conducted, as long as one or both parties are based in the Philippines”<sup>67</sup>. This is just one example of the issues. Tax laws were created prior to the Internet, and may not reflect the current practice in businesses when they use the Internet. Currently, there is much activity in trying to get some set of uniform rules, but nothing concrete has materialized. The problem with the traditional principles of “source country” and/or “nexus” is in determining the source country/nexus because of the lack of physical boundaries in cyberspace. For example, a German buyer might ‘click on” a United States seller’s site while the buyer is vacationing in Brazil. The U.S. seller’s server could be located in Canada, and the goods might be shipped from Mexico to Germany. Whose tax laws will, and/or, should apply? The best policy for an Internet business to adopt would be to be familiar with the tax laws of the countries in which they engage in business and attempt to comply with those laws. In addition, because almost every country is looking at this issue, the businessperson must be vigilant to changing rules so that they can comply with new rules as they come into effect.

## Product Liability

Product liability includes the liability for injury resulting from the use of the product itself and for the product itself because of a defect. Internet sellers should heed this warning: "Companies selling goods over the Internet fear that 'they could be hauled into courts around the world for a ... product liability claim.'"<sup>68</sup>.

Most countries in the world have laws in regard to liability for defective products and laws that regulate the products themselves. The laws for liability generally focus on how dangerous the product is compared with how safe it could be made and still serve its intended purpose. In general, the U.S. and the EU have the most comprehensive set of product liability laws; however, other countries also protect consumers from what they consider dangerous products. For example, the EU and Japan have recently passed more comprehensive product liability laws<sup>69</sup>. These laws address the issue of liability for bodily injury and property damage resulting from a "defective" product.

The problem for the Internet seller is that controlling lawsuits for allegedly defective products based on the buyer's/users local laws is very difficult. Referring to the discussion about jurisdiction and conflict of law one might believe that this legal risk can be controlled as to where the lawsuit may be filed and whose laws apply by using the choice of forum and choice of law clauses discussed above. However, this conclusion is in error because as already mentioned above, contract terms can only bind the parties who have actually entered into a contract with each other. Therefore, a contract clause restricting product liability may be enforceable against the buyer only if the seller sold the product directly to that buyer and placed a choice of forum and choice of law clause into that contract. However, that cannot be done when the seller sells the goods to a wholesaler/distributor who then resells the goods to other buyers. Even when the seller sells directly to the ultimate user a choice of forum and choice of law clause may not be enforceable because if that buyer is a consumer (instead of a business) the trend is to provide consumers with local access and local law when suing a foreign seller, therefore, these clauses will not work in countries that have adopted those principles.

For example, a U.S. seller (Soap-R-Us) may sell a few bars of soap to a French consumer and a truckload of soap to an Italian retailer. Both transactions occur over the Internet and the seller's site has a choice of forum clause and choice of law clause that states that all lawsuits shall be filed in the courts of Wisconsin and that Wisconsin law shall apply. Assume that the French consumer has used the soap and that the Italian retailer has resold the soap and that all of the customers, including the French consumer, develop a rash and have to be hospitalized. In both cases the choice of forum and choice of law clauses will be ineffective. The French consumer, because of the EU directive that protects consumers from such clauses, will be allowed to sue in France and use French law. On the other hand, the Italian consumers did not agree to either clause since they were not the ones who contracted with the U.S. seller (only the Italian retailer would be subject to the clauses), therefore, the Italian consumers could sue in Italy and use Italian law.

Another problem is that even if the choice of forum and choice of law clause may be used, other local laws may prevent the restriction of certain rights in regard to product li-

ability. For example, in the United States, the Uniform Commercial Code does not allow a seller to disclaim liability in regard to bodily injury in consumer transactions<sup>70</sup>. Finally, there may be plaintiffs who did not purchase the goods, but who were injured by the goods when they were using them and they did not perform properly, these plaintiffs are also not subject to any contractual terms that may have been on the website. Therefore, there are many potential plaintiffs who will not be subject to these contractual terms and will be able to file a lawsuit for product liability in their country using their laws.

Even with all of the variances, it is still the best policy to place both the choice of forum and choice of law clauses on the website. In addition, the seller should restrict the warranties that are made and restrict its potential liability as much as possible. Because when none of the exceptions apply, these clauses will apply and provide protection for the seller.

### **E-Commerce Checklist**

- Website owner has gathered relevant information and understands the legal risks of being “global”.
- Website owner has made an informed decision as to whether to stay local, go into select countries or go “global”.
- The web site contains either a choice of forum clause or an arbitration agreement
- The website contains all of the contract law terms that the owner wishes to include into every contract. These terms must reflect and conform to the discussion in the body of this text.
- As a backup to the above, and because the interpretation/application of the stated terms must be done with some set of laws, the website contains a choice of law clause that is complete enough to reflect the problems with the application of local contract law, the Convention on the International Sale of Goods (CISG) and the interactions/gaps in those sets of contract law rules.
- The website contains a choice of language clause
- Prior to placing any intellectual property information on the web site the site owner has done everything reasonably necessary to protect his/her ownership and retention of that property in accordance with the discussion in the text.
- The website information and “look” complies with the FTC “Dot Com” guidelines
- The website information and advertising complies with the rules and regulations of all of the countries that the site owner has decided to do business in. This may be virtually impossible, but the site owner must make a good faith attempt to not violate anyone guidelines as to advertising.
- The website owner has researched and met all other governmental regulations such as safety, labeling, and warnings of all of the countries that he/she will sell the product or service to.

- The website owner understand the domestic and international shipping terms and used the appropriate terms on the website and in each shipment
- In cross-border shipments the site owner understands that if the destination in the shipping terms require the seller to get the goods to the buyer's location inside the country the seller will also be liable for tariffs, the legality of the goods, and for the process of clearance through customs
- In cross-border transactions the seller understands the U.S. Bureau of Export Administration's (BXA) rules and has checked every sale of goods to be certain that the goods may be exported without a special license
- If an export license is needed the site owner has gathered all of the information necessary to acquire the license prior to shipping the goods
- If restricted computer software is made available on the website the site owner understands that this is an "export" and has complied with the applicable rules and licensing requirements prior to placing this information on the website (in reality this cannot be done since the information would be available to anyone with access to the website)
- In cross-border sales the seller has checked the Treasury Department information as to trade sanctions and restrictions prior to shipping the goods
- In any sales, including cross-border sales, the seller has checked with both the U.S. Department of Commerce and the Office of Foreign Assets Control to be certain that the buyer is not on a restricted persons list
- The website owner understands and is complying with all local and foreign tax laws
- The website owner understands the product liability risks.
- The website owner has conformed the products, labels and other aspects of the goods to the laws of each country that the goods are being sold to - this would be in addition to meeting specific governmental

## Conclusion

A natural extension of a business strategy to increase their revenues and profits will often include incorporating an internet site. However, the law in cyberspace is not a completely known and understood quantity and there are a myriad of issues, laws and regulations that may have a tremendous impact on an e-trader's business. What a well informed business person must realize is that the legal issues are very complex, but some of the unknowns can at least be controlled to reduce risks. Even though it may be difficult to control all of the unknown legal issues, a sophisticated business person will make an attempt to control as many of those "unknowns" as possible. They must be very well informed, stay current, placing the appropriate clauses on his/her website, and by take all of the other necessary precautions. "It is difficult to comply with all applicable laws when marketing to an international market. By selling to buyers in other countries, the necessity of adapting to the de-

mands of other countries merely because the company uses the cyberspace could lead to significant unexpected burdens and liabilities on businesses in cyberspace. Companies planning to use cyberspace must take steps to control the scope of their interactions with other forums<sup>71</sup>.

As early as 1980, new strategic models based on strategic trade theory were developed. These models provided a new justification for government trade intervention. However, from a business person's point of view, one does not rely on government entirely and knows that in order to make a good decision they must be aware of the risks that exist in this new environment and then calculate whether the economic benefits outweigh the economic risks. Right now, that is a difficult decision to make in the e-commerce environment because there are no clear guidelines in most instances. However, it must, at the very least, be a well informed decision. One cannot just place an e-commerce site on the Internet and "hope for the best."

We have tried to point out some of the issues that need to be addressed from both the regulatory aspects as well as the potential changes in culture of the businesses who are considering doing business on the internet. The only conclusion that can be reached is that the law in cyberspace is not well defined or consistent. This presents those doing business in cyberspace unique opportunities as well as challenges.

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4. G. I. Zekos, *Legal Problems in Cyberspace*, 44 *Managerial Law* 45 (May 2002). This article provides an excellent discussion of some of the legal issues in cyberspace.
5. *Jewish Defense Organization, Inc. v Superior Court* 72 Cal. App. 4th 1045, 1060; 85 Cal. Rptr. 2d 611, 620 (1999).
6. G. I. Zekos, *supra* note 4, at 46
7. *Id.* at 46
8. “Safe”, in this context, means that the legal environment (the rules) are the same as those in the business person’s home country.
9. The law defines “person” as a natural person and a juristic person, such as a corporation.
10. [2002] 194 A.L.R. 433 (Aust!.)
11. *Don King v. Lennox Lewis*, [2004] EWHC 168 (QB).
12. In the *Gutnick* case the “service” was information.
13. G. I. Zekos, *supra* note 4, at 48.
14. 90 Cal. App. 4th 1; 108 Cal. Rptr. 2d 699 (WO 1).
15. *Id.* at 20.
16. *But see*, *Freedman v. AOL*, Civil No. 3:03cv1048 (Conn. Dist 2004), (the case may be found at <http://www.ctd.uscourts.gov/Opinions/120503.PCD.Freedman.pdD> where the court upholds a forum selection clause. The court agreed that some forum selection clauses should not be upheld, saying “Forum selection clauses should be enforced unless the resisting party ‘clearly show[s] that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.’” (citation omitted); *see also* *Bense v. Interstate Battery Sys. of Am.*, 683 F.2d 718, 721-22 (2d Cir. 1982). Where the court says that enforcement of a forum-selection clause is inappropriate where it “would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.” The court went on to say, “Although California courts have found such forum selection clauses to contravene California public policy. (citation



omitted) Connecticut courts have generally upheld forum selection clauses, absent a showing of fraud or overreaching.” (citing) *United States Trust Co. v. Bohart*, 197 Conn. 34, 41-42, 495 A.2d 1034 (1985); *see also* *Fairfield Lease Corp. v. Romano’s Auto Service*, 4 Conn. App. 495,498 (1985) (“When what the court selected is reasonably appropriate, and where there is no indication that the parties had such greatly disproportionate bargaining power that the agreement could be regarded as unconscionable, the tendency is to give effect to such agreements”) (internal quotation omitted).

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22. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2750; 159 L. Ed. 2d 718, 737 (2004)

23. *Richards v. United States*, 369 U.S. 1, 11-12; 82 S. Ct. 585; 7 L. Ed. 2d 492 (1962).

24. G. I. Zekos, *supra* note 4, at 46.

25. Catherine L. Mann “The Uniform Computer Information Transactions Act And Electronic Commerce: Balancing Issues and Overlapping Jurisdictions in the Global Electronic Marketplace: The Ucita Example” 8 *Wash. U. J.L. & Pol’y* 215. 222 (2002). *See also*, (United Nations Commission on International Trade Law, UNCTRAL available at <http://www.uncitral.org>).

26. United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.9 7/18 (1980) [hereinafter CISG].

27. *Id.* Article 2(a), “This Convention does not apply to sales: (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use.”

28. For a thorough discussion of the various intellectual property laws and resources, see, *Stefanie Weigmann*, *Researching Intellectual Property Law in an International Context*, <http://www.llrx.com/features/iplaw.htm>. last visited on 10-5-2004.
29. North American Free Trade Agreement (NAFTA). 32 I. L. M. 605 (1993).
30. Agreement on 'Trade-Related Aspects of Intellectual Property Rights, Including 'Trade in Counterfeit Goods. art. 27.1, Apr. 15, 1994. Marrakesh Agreement Establishing The World 'Trade Organization, Annex I c, Legal Instruments—Results of the Uruguay Round. 33 I.L.M. 81. 93 (1994)
31. Berne Convention Implementation Act of 1998, Pub. L. No. 100-568, 102 Stat. 2853 (1988). 17 U.S.C. 116. The Berne Convention fix the Protection of Literary and Artistic Works (Brussels trest, 1(48), reprinted in Paul Goldstein. *International Copyright: Principles, Law and Practice* 368 C~OO 1).
32. (Paris text, 1971), 17 U.S.C. 101 (1978).
33. With Regulations, June 19, 1970, 28 U.S.T. 7645
34. All of these treaties are administered by the World Intellectual Property Organization. The full text of the treaties, and the signatories to each, are available on-line. World Intellectual Property Organization Treaties, available at <http://www.wipo.org/treaties/index.html> (last visited October 10, 2004).
35. WIPO Copyright Treaty, 20 December 1996. <http://www.wipo.int/lea/docs/en/wo/v033en.htm> (last visited October 10, 2004), (In December of 2001 thirty states had ratified this treaty) (In October 01'2004 (sixtyeight states had ratified this treaty).
36. An example of the difficulty of enforcing ones intellectual property rights involves a relatively recent multi-jurisdictional dispute that involved regulatory diversity in a new area of copyright protection was iCraveTV.com webcasting enterprise. Using new technology, the company converted broadcast signals from Canadian and U.S. television programs into a October 3, 2003 at 39 available at [deltafarmpress.com/mag/farming\\_agriculture\\_stands\\_biotechindex.html](http://deltafarmpress.com/mag/farming_agriculture_stands_biotechindex.html) (last visited on October 11, 2004). Into a videostreaming format. The videostreaming information was located on the company's server in Canada, because Canada had not yet made this form of copyright infringement illegal. However the videostreaming over the computer was available to both Canadian and U.S. viewers. Several U.S. broadcasters brought suit against iCraveTV in the United States. They claimed that the company's actions constituted infringement pursuant to U.S. copyright law (which had been updated and included this as infringement). Had the case gone to court and the plaintiffs won, the judgment would have been enforceable in Canada, even though the activity was not illegal in Canada, because Canada is a signatory to the Berne Convention and that obligates them to enforce judgments from member countries that violate that member country's copyright laws. After some posturing by the president of the company, it agreed to settle with the U.S. plaintiffs and shut down its webcasting site.

37. Article 3(1), Agreement on Trade-Related Aspects of Intellectual Property Rights, [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agmO\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agmO_e.htm)
38. B. Heaney, *IPR law creates confusion*, Taipei Times Thursday, June 12, 2003, at 10 available at: [www.taipetimes.com/News/biz/al-hi-vc~/2003/06/t2L200;3054990](http://www.taipetimes.com/News/biz/al-hi-vc~/2003/06/t2L200;3054990), (last visited on October 11, 2003).
39. *Id.* at 10.
40. Dot Com Disclosures, available at [www.ftc.gov/bcp/online/pubs/buspubs/dotcom](http://www.ftc.gov/bcp/online/pubs/buspubs/dotcom), (last visited on October 4, 2004).
41. G. Geist, *The fine print behind FTC's advertising rules for the dot-com world*, The Globe and Mail News, June 1, 2000, available at [ncws.globetchnology.com](http://ncws.globetchnology.com), (last visited on June 2, 2000).
42. COM(96) 192 European Commission: Green Paper on Commercial Communications in the Internal Market, available at [europa.eu.int/en/record/green/gp006/en/](http://europa.eu.int/en/record/green/gp006/en/) (last visited on October 11, 2004).
43. *Id.* at 3.
44. *In The News*, 24 Entertainment Law Reporter 1 (March 2003).
45. *Id.*
46. *Id.*
47. M. Thompson, *Forward Looking: 2001: Cyberexperts forecast the most significant developments in Internet law for the coming year*, The Recorder, February 5, 2001 available at [www.law.com/index.shtml](http://www.law.com/index.shtml) (last visited on March 3, 2001).
48. Too hot to handle: Beijing bans online tobacco, sex ads and a lot more. *China Online*. 16 April 2001. Available at: <http://www.chinaonline.com/issues/internet/online/ncvsarchive/secure/2001/april/10/41215.asp>. (last visited on October 13, 2004).
49. For additional recommendations one could look at *Recommendation of the DECD Council Concerning Guidelines For Consumer Protection in the Context of Electronic Commerce* at [www.oecd.org/dataoecd/12/40/2091613.pdf](http://www.oecd.org/dataoecd/12/40/2091613.pdf) (last visited on October 11, 2004).
50. FAS Online, "Attache Reports Query Results...", Aug. 12, 1999, [www.fas.usda.gov/scripts/attacherep/gaindisplayreport.asp?Rep10=25475459.0](http://www.fas.usda.gov/scripts/attacherep/gaindisplayreport.asp?Rep10=25475459.0)
51. Patrick A. Stewart, *Agriculture stands at biotech crossroads*, Delta Farm Press,
52. Nicole Coutrelis, *The Marketing of Foodstuffs in France*, 53 Food Drug L.J. 543, 545 (1998).

53. Brazil Food and Agricultural Import Regulations and Standard, Food and Agricultural Import Regulations and Standards, Gain Reports #BR461 6, at 9, July 28, 2004. Available at: [www.fas.usda.gov/GainFiles/200408/1461\\_070\\_15.pdt](http://www.fas.usda.gov/GainFiles/200408/1461_070_15.pdt): (last visited on October 13, 2004).

54. S. Dennis, *European E-Commerce Invoices May Be Illegal*, Newsbytes, 29 Mar 2001. Available at: [www.newsbytes.com/news/01/163837.html](http://www.newsbytes.com/news/01/163837.html)(last visited on April 2, 2001).

55. UCC 2-308(a).

56. Article 31 states: if the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

(a) if the contract of sale involves carriage of the goods - in handing the goods over to the first carrier for transmission to the buyer;

(b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place - in placing the goods at the buyer's disposal at that place;

(c) in other cases - in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, available at Pace Law School Institute of International Commerce Law, <http://www.cisg.law.pace.edu> (last updated May 2, 2003) (hereinafter CISG). The CISG was incorporated into the law of the United States on January 1, 1988.

57. A Creed, *Australians Warned About Taxes On Overseas Net Buys*, Newsbytes Dec. 4, 2001, available at [www.webcentro.com.au/news/archive.php?id67](http://www.webcentro.com.au/news/archive.php?id67). (last visited on October 11, 2004)

58. *E-Commerce: A Practitioner's Guide To The Legal Issues: Taxation Implications*, presentation given by John Ryan of Matheson Ormsby Prentice Solicitors to the Law Society of Ireland on 23 January 2001, available at [www.bakernet.com/ecommerce/Tax/CR%20ireland.doc](http://www.bakernet.com/ecommerce/Tax/CR%20ireland.doc) (last visited on October 11, 2004).

59. 15 C.F.R. **734.3** (2002). This regulations states that items subject to EAR: (a) Except for items excluded in paragraph (b) of this section, the following items are subject to the EAR:

(1) All items in the United States, including in a U.S. Foreign Trade Zone or moving in transit through the United States from one foreign country to another;

(2) All U.S. origin items wherever located;

(3) U.S. origin parts, components, materials or other commodities integrated abroad into foreign-made products, U.S. origin software commingled with foreign software, and U.S. origin technology commingled with foreign technology:

(i) In any quantity, as described in section 734.4(a) of this part; or

(ii) In quantities exceeding de minimis levels as described in section 734.4(c) and Supplement No. 2 of this part;

(4) Certain foreign-made direct products of U.S. origin technology or software, as described in §736.2(b)(3) of the EAR. The term “direct product” means the immediate product (including processes and services) produced directly by the use of technology or software; and

(5) Certain commodities produced by any plant or major component of a plant located outside the United States that is a direct product of U.S.-origin technology or software, as described in §736.2(b)(3) of the EAR.

60. Technology is “released” for export when it is available to foreign nationals for visual inspection (such as reading technical specifications, plans, blueprints, etc.); when technology is exchanged orally; or when technology is made available by practice or application under the guidance of persons with knowledge of the technology. See §734.2(b)(3) of the Export Administration Regulations (EAR).

61. *A Basic Guide to Exporting - International Legal Considerations*, at 1, available at [www.unzco.c.com/basicguide/c9.html](http://www.unzco.c.com/basicguide/c9.html). (last visited on October 11, 2004).

62. [www.treas.gov/offices/eotffc/ofac/sanctions/index.html](http://www.treas.gov/offices/eotffc/ofac/sanctions/index.html)

63. <http://www.bxa.doc.gov/DPL/Deflmlt.shtm>; [www.treas.gov/offices/eotffc/ofae/sanctions/index.html](http://www.treas.gov/offices/eotffc/ofae/sanctions/index.html). And [www.pmdtc.org/debar059.htm](http://www.pmdtc.org/debar059.htm). (last visited on October 11, 2004).

64. Anti-boycott Compliance Requirements [www.bxa.doe.gov/AntiboycottCompliance/OACRequirements.htm](http://www.bxa.doe.gov/AntiboycottCompliance/OACRequirements.htm) I

65. Gregg Mauro, *E-Commerce Tax Policy and Planning: domestic and International* 23, (2000), available at [www.econference-board.org/publications/describe.cfm?id=451](http://www.econference-board.org/publications/describe.cfm?id=451), (last visited on October 11, 2004)

66. M. Calimag, *Philippine Revenue Agency Studies E-Commerce Taxation*, Metropolitan Computer Times, 11 Jan. 2001, [www.newsbytes.com/news/01/160372.html](http://www.newsbytes.com/news/01/160372.html) (last visited January 13, 2001).

67. *Id.*

68. Brenda Sandburg, *Vague Hague Treaty Causes a Stir*, The Recorder, Feb. 7, 2001, available at: [lists.essential.org/pipermail/ecommerce/2001\\_q1/000411.html](http://lists.essential.org/pipermail/ecommerce/2001_q1/000411.html) (last visited on October 13, 2004).

69. EC Council Directive 85/374/EEC, and Seizonbutsu Sekininhou, Law No. 85 of 1994

70. UCC 2-719(3).

71. G. I. Zekos, *supra* note 4 at 63.