

INDUSTRY AND PRACTICE

Some Internet and E-commerce Legal Perspectives Impacting the End User

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INTRODUCTION

Not too many years ago, hardly anyone had heard the terms "Web browser," "Web," or "electronic commerce." Today, the World Wide Web, often referred to as simply the Web and as the Internet, offers almost limitless opportunities for end users to do research, obtain comparative information on different products or services, and conduct business online. Many users today, for example, have experienced the opportunity to visit competing web travel sites, e.g., Travelocity.com and Expedia.com, to price airline fares, obtain car rental information, and make a hotel reservation. More often than not, it seems, end users are also intrigued by the fact that prices for the same flight or car are not necessarily the same at the sites searched; in a way, users have become much more savvy in their selection of products and services. In general, end users can become much more efficient and effective as they conduct business online, and both consumers and businesses can participate in unrestricted buying and selling. Consequently, the Web is changing the way businesses do business, and, of course, it is changing the way many end users conduct their business as well.

Electronic commerce (e-commerce) mainly consists of business-to-business (B2B) and business-to-consumer (B2C) types of transactions. According to an e-commerce survey (Survey E-Commerce, 2000) B2B transactions accounted for 80% of all e-commerce and added up to \$150 billion in 1999. Further, B2C transactions in the US amounted to about \$20 billion that same year. Although there continues to be a "shaking out" period involving dot.com organizations, questions and decisions about whether to develop Web-based storefronts along with the traditional brick and mortar outlets, e-commerce will most likely continue to expand. But while e-commerce grows, maintaining control over on-line transactions and business risks creates challenges that may not be apparent to unsophisticated end users. One of these challenges pertains to the various and assorted legal issues that confront end users as well as the e-commerce businesses where end users shop. Whether buying or selling on the Web or even just establishing one's home page, legal issues, in addition to providing protection, can also present pitfalls to

the unwary.

This paper discusses briefly two of the legal issues that can confront today's end users as they do business over the Web. They are matters dealing with contract law and jurisdictional questions.

CONTRACT LAW ISSUES

Many of the issues dealing with software-related contracts that end users will confront exist because existing contract law is based on the Uniform Commercial Code (UCC), which was written for a goods economy rather than for an economy that is energized by information. In a sense, technology and its use, such as the Web and e-commerce activities, have outpaced the existing contract law perspectives found in the UCC. Zain (2000) suggests that consumer, i.e., end user, protection in e-commerce is needed because of four reasons. First, on-line consumer transactions need facilitation. The lack of regulation in e-commerce has affected on-line purchases and will most likely continue to do so. Examples include concerns over on-line security and privacy, and the enforceability of existing forms of on-line contracts. Second, there is increased ambiguity and risk associated with online sales. In a traditional setting, the end user can visit a retailer and is allowed to browse, see, feel and even smell some merchandise. However, online purchasers lack the certainty and assurance as to what is being purchased and from whom. This type of arrangement was not envisioned with respect to traditional contract law. Zain (2000) also indicates that existing online contracts are inherently unfair to consumers. The reasons include limited or denied warranties, limited remedies, allocating risks to the purchaser who is the least able to absorb such risks, and defining sellers' rights in a very broad and non-reciprocal manner. And, fourth, Zain (2000) suggests that consumers' interest in the enactment of relevant legislation must be safeguarded. Many countries have already proposed and enacted legislation affecting online purchases, and it is important that consumers' interests be represented in the enactment of legislation.

More recently, the Uniform Computer Information Transactions Act (UCITA) was drafted to address the unique

aspects of contracts for computer information. UCITA, which was developed by the National Conference of Commissioners on Uniform State Laws (NCCUSL), is a contract law statute that would apply to computer software, multimedia products, computer data and databases, online information, and other such products. It was designed to create a uniform commercial contract law for these products. From the end user's perspective, one of the more familiar perspectives related to UCITA is that it covers contracts that are generally known as "shrink-wrap licenses." It is a law that would have to be ratified by each of the 50 states on an individual basis for it to be effective in a particular state; at the moment only Virginia and Maryland have passed the law, although Virginia imposed certain restrictions when it acted on the law. In 2001, it was introduced in Arizona, Illinois, Texas, Maine, New Hampshire, Oregon, and New Jersey, plus the District of Columbia. The Texas legislature, which adjourned in May 2001, did not pass the law.

Adding to the confusion and possible difficulties end users will be confronted with is the uncertainty about UCITA. It is vigorously opposed by many state attorneys general, the Association for Computing Machinery, the Society for Information Management, software developers, and large software customers. According to Thibodeau (2001), UCITA sets a series of default rules for software licensing transactions, which UCITA's opponents claim are too favorable to software vendors. Opponents charge that UCITA would give software vendors the ability to limit their liability, prohibit reverse engineering, and shut down software remotely in some instances. Conversely, UCITA's proponents argue that the statute is misunderstood and erroneously maligned, with corporate users free to negotiate their own contract terms.

End users, whether those within the corporate sector and/or those who operate as individuals from, say, their home computers should be vigilant about UCITA as it may apply in a user's state. Of course, since the law traditionally lags behind technology and its uses, other contractual legal matters are sure to arise that might impact or confuse end users. For instance, one misperception is that all copies of a contract must be signed and delivered to relevant parties. The Uniform Electronic Transaction Act (UETA), which was passed by the US government in 2000, eliminates legal barriers regarding signed contracts. Instead, electronic signatures, which are defined as being electronic sounds, symbols, email, voice mail, as well as Internet transmissions, are valid substitutes for handwritten signatures. A simple click on "I agree" is enough to show the user's intent. Another misperception is that contracts cannot be made on the Internet because it is too difficult to correct errors. Under UCITA, an electronic contract must provide reasonable means of correcting errors.

JURISDICTIONAL ISSUES

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 personal jurisdiction based on Internet use is in its infant stages (Zippo, 1997).

The following questions are perhaps ones that people do not often ask, but they are certainly relevant in today's cyberspace world of e-commerce. Where can someone be sued? What does the question of jurisdiction mean for the average Internet user, if there is such a person? Since state boundaries are irrelevant on the Internet, how do the courts view jurisdiction where the Internet is concerned? Is there a general consensus among the courts? How can the owner of an Internet home page take steps to see that he/she will not have to defend a lawsuit in a court in a distant state? Jurisdictional issues are becoming increasingly important, as more and more businesses are turning to the Internet to conduct their business, and in turn, more and more end users are doing the same (Lyn, 2000).

Black's Law Dictionary (1990) defines jurisdiction as the "power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties" (p. 853). As far back as 1877, the US Supreme Court dealt with the matter of personal jurisdiction, stating that what was essential was a defendant's physical presence in a forum, i.e., a court or location where cases are usually tried. Since that time, there have been a number of newer interpretations by courts brought about by new technologies, e.g., the telephone, business practices, e.g., telemarketing, and social changes in general. The Internet, the Web, and e-commerce today, as newer technologies and applications thereof, only serve to add confusion to businesses and end users. Perhaps the following scenario, adapted from Lyn (2000) can serve to illustrate the uncertainty.

A small business named "Hollywood Coffee House" located in Somewhere, Maine includes as part of its logo the characters "Emmy Latte" and "Oscar Cappuccino" as a pair of dancing coffee mugs. In an effort to increase business, the business' owner decides to establish a Web presence, i.e., a simple home page, with the Emmy Latte and Oscar Cappuccino highlighted on the Web page. The Web-based approach to increase business is successful, and many new customers from in and around Somewhere, Maine, having seen the home page, now frequent the coffee shop. One day, the business owner is served with complaints issued by the Academy of Television Arts and Sciences and the Academy of Motion Picture Arts and Sciences. Each organization claims that the "Emmy Latte" and "Oscar Cappuccino" infringes on the respective registered federal trademarks owned by these groups. The complaint alleges trademark dilution and unfair competition. The complaint also requires that the business owner appear in a California federal district court to answer to the complaints. The business owner is most likely confused because he believes his business has nothing to do with

California and he himself has never been in California. Reading the complaints further, the owner is told that he is subject to California jurisdiction because the home page is accessible by residents of California and, as such, there are sufficient contacts between the business and California requiring that the owner appear there. As a result of easy-to-use software to develop what may appear to be very unsophisticated Web home pages, business persons like the owner of the coffee shop as well as end users who create their own pages may encounter legal difficulties similar to the scenario described.

The fact that Internet applications are relatively new and that different courts do not all follow the same thinking when dealing with Internet-based personal jurisdiction matters only adds to confusion for businesses and end users. In other words, different interpretations by different courts may result, regarding the coffee house example outlined above. Depending on a court's interpretation of the Internet, one court could find that the business owner's Web page is passive and that the California court would decline personal jurisdiction. Still another court might find that the coffee house's home page is available to users in all states as far as personal jurisdiction is concerned (Lyn, 2000). In a related matter, although the California court may decline personal jurisdiction, the Academy of Television Arts and Sciences and the Academy of Motion Picture Arts and Sciences could still pursue trademark actions against the business owner in Maine. More muddy water to deal with, so to speak!

Although each situation regarding the Internet and personal jurisdiction is obviously different, there are a few guidelines that business persons and end users can follow in order to limit exposure to potential legal difficulties dealing with personal jurisdiction. Avoiding controversy in the first place is one action. For instance, owners of Web pages should conduct trademark searches to ensure that their Web page names do not infringe on someone else's registered trademark. Expressly limiting the reach of a person's or business' Web site by including a prominent statement that the Web site's reach is limited to a particular state or by including a list of states that the Web site owner wishes to avoid may also limit jurisdictional actions. Another suggestion is to limit the use of "autoresponders." An autoresponder is a feature that can be added to a home page that systematically and automatically sends information over the Internet to anyone requesting it through that home page. Similar to the previous suggestion, inquiries from outside a person's state of residence should be addressed carefully, indicating that business activity is not done in the requestor's locality (Lyn, 2000). Schmitt and Nikolai (2001) also indicate that businesses should review any messages from vendors or customers received through its Web site. Careful scrutiny of customers' physical location is in order. Schmitt and Nikolai (2001) suggest too that businesses watch non-electronic contacts

with entities from various jurisdictions. Many cases involving personal jurisdiction and the Internet turn upon whether a defendant had contacts with the plaintiff's forum outside of cyberspace, i.e., through correspondence, telephone calls and physical trips.

CONCLUSION

This paper has dealt briefly with just two areas affecting businesses and end users in today's Web-based e-commerce arena: contractual matters and jurisdictional issues. Other important issues include matters dealing with advertising and intellectual property. With regard to advertising, the Federal Trade Commission (FTC) issued a working paper (Dot Com Disclosures, 2000) confirming that long-established advertising laws, regulations, and guidelines used in traditional media apply equally to online advertising. Even though the working paper cannot be regarded as law, it provides guidelines with respect to how the FTC views Web-based advertising. This means that deceptive or unfair advertising would be illegal and that all advertisement claims must have substantiation. With regard to intellectual property matters, the matter of trademarks was touched on briefly in the paper. However, there is much more to be investigated, i.e., trademark infringement, trademark dilution, invalid use and registration of domain names, improper linking, etc. End users obviously need to be vigilant as they not only surf the Net but conduct business on it.

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