

*INTERNATIONAL DEVELOPMENT LAW
INSTITUTE*

*Legal and Regulatory Aspects of Electronic
Commerce*

**Basic Legal Tools for E-Commerce:
The Contract**

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Course Overview

- Day 1
 - Legal Framework for E-Commerce Contracts
 - Intellectual Property Issues Affecting E-Commerce Contracts
 - Other International Contracting Issues
 - E-Commerce Contract Types and Vendors
- Day 2
 - Contract Negotiation Exercises and Discussions

Disclaimer: Many Laws, One Instructor

- I cannot address every country's laws.
- The USA is not perfect, but it has lots of contracts and lawyers!
- While there are similarities in laws, there are differences too.
- Please share your knowledge!

E-Commerce Vocabulary

- Shrinkwrap
- Clickwrap
- ASP
- ISP
- Metatags
- Cybersquatting
- Caching
- Streaming
- Warez
- ICANN and IANA
- gTLD and ccTLD
- Hyperlink
- HTML and XML
- B2B and B2C
- Co-Branding
- SSL and SET
- PGP
- MP3

E-COMMERCE BACKGROUND

International Nature of the Internet

- Global advertising/product information/catalogs
- Access to governmental information and records
- Product ordering from anywhere in the world
- Soft goods (content, software) delivery/download to any point on the Internet
- Global customer support/service/maintenance
- Virtual companies; distribution of workforce
- Instant communication/feedback (via e-mail, discussion groups, surveys)

Some E-Commerce Statistics

- Worldwide users who buy and sell goods over the Internet:
 - 1999 240 million
 - 2000 327 million
 - 2003 600 million predicted
- Commerce by 2003: \$1.6 trillion

Source: IDC Internet Commerce Model, ver. 6.1, Jan. 2000

E-Commerce Spending by Segment

- In 1999

– Home	26%
– Small business	19%
– Medium/Large business	44%
– Government	8%
– Education	3%

- By 2003

– Home	13%
– Small business	27%
– Medium/Large business	50%
– Government	8%
– Education	2%

LEGAL FRAMEWORK FOR E-COMMERCE CONTRACTS

E-Commerce Contracts: Overview

- Background: Formation of Contracts
- Shrinkwrap
- Clickwrap
- Terms of Use
- Digital Signatures
- Electronic Payment

Contract Law Overview

- Basic Contract Elements
 - Agreement: Offer and Acceptance
 - Consideration
 - Writing?
 - Signature?

Early Electronic Commerce Forms

- Pre-printed forms;
- Standardized commodity and futures contracts;
- EDI (Electronic Data Interchange)
- Electronic Funds Transfer

Why a New Paradigm?

- Explosive growth of consumers and businesses on-line;
- Corresponding increase in products, information and services offered on-line;
- Globalization of the Internet;
- Ability to deal in complex content: images, sounds, and lots of data;
- Proliferation of information gathering techniques.

Shrinkwrap and Clickwrap Contracts

Shrinkwrap Contracts

- First used by mass-market software vendors;
- Contract terms visible through box wrapper;
- No signature: assent is demonstrated by use of software.

Shrinkwrap: Legal Validation

- “Shrinkwrap” agreements for software and data licensing were validated in *Pro CD v. Zeidenberg* (7th Cir. 1996) if
 - their terms are “commercially reasonable” and not otherwise unconscionable or subject to any other defense available under contract law;
 - user has right to reject terms upon opening package and to receive a full refund;
 - Rejected argument that all terms must be printed on the outside of the product packaging.

What is a Clickwrap Agreement?

- Usually offered with
 - online services,
 - software downloads,
 - CD software installation.
- Contractual terms appear electronically.
- User is asked to “ACCEPT” before usage is allowed,

Enforceability in the US: Groff v. America Online, Inc.

- Groff sues over unavailability of AOL service, due to load problems
- AOL seeks summary judgment, arguing that forum selection clause in click through agreement requires litigation to be brought in Virginia
- Court finds that Groff effectively “signed” the click through agreement by clicking on “I agree” button “not once, but twice”

Current Status of Shrink-Wrap Agreements, based on current statutes and advice of foreign counsel

- Likely to Be Enforced: U.S., Canada, France, Italy, Spain, Netherlands, Scandinavia, Brazil, Saudi Arabia, Hong Kong
- Likely to Be Enforced, Subject to Consumer Protection Laws: Mexico, Argentina, Chile
- Less Certain: Japan and Korea
- Unlikely to Be Enforced: Germany, United Kingdom, Australia (?), China -- yet still worth trying
- click through could be easier to enforce (licensee sees terms before accepts) -- but still not likely to be enforced in China

Special Issues Affecting International Enforceability

- Translate terms into local language
- Comply with localization requirements
 - Spain: all packaging in Spanish
 - France: documentation and on-line help in French
- Variations in consumer warranty requirements
- European Union Software Directive
 - cannot block assignments of software
 - cannot prohibit reverse engineering

Special Issues Affecting International Enforceability

- EU Distant Selling Directive (Articles 5 and 6): buyer must receive written confirmation or confirmation “in another durable medium”; 7-day right of withdrawal runs from receipt of confirmation.
- Most consumer protection laws will ignore consumer’s acceptance of choice of law and dispute resolution provisions which choose a foreign law or forum
 - Japan (?), the Netherlands, Norway and the United Kingdom (?) are the exceptions

When should you reconsider click-through agreements?

- Problem of Contractual Authority
 - Can the “clicker” bind the company?
 - Better for individuals, rather than organizations
- When Digital Signatures are preferable
 - when authenticity and security are important
- Legal Requirements for a “written contract”

Terms of Use

Online Terms of Use

- Written “rules” about the use of an online site or service.
- Neither signed nor “Accepted” by the user
- Many of these are hidden behind obscure links, and few can purport to reflect a “meeting of the minds”

Terms of Use: What they Cover

- Copyright restrictions (internal, non-commercial use) and notice
- Privacy policy (gives notice, helps meet regulatory requirements)
- Disclaimers of warranties (may be difficult to enforce in consumer context)
- Required payments, etc.: probably unenforceable

Enforceability of Terms of Use

- US: *Ticketmaster v. Tickets.com*
 - Contract is not created simply by use of a Web site
 - Obscure or hidden placement makes enforcement unlikely

Digital Signatures

What is a Digital Signature?

- An electronic file encrypted by the sender;
 - Public-key encryption;
 - Biometrics (fingerprint, pen trace, iris scan)
- Enables the recipient to identify the sender with a high degree of reliability.

5 Requirements for Secure Digital Signatures

- Identification
- Authenticity
- Integrity
- Confidentiality
- Non-repudiation

US Digital Signature Legislation

- E-Sign Act (2000)
 - Electronic signatures, contracts and records shall have the same effect as written signatures, contracts and records
 - Electronic documents may be substituted for any document required to be provided to consumers “in writing”, if consumer consents
 - Records may be retained in electronic form.
- Uniform Electronic Transactions Act (UETA)
- State legislation (Cal. v. Utah)

Digital Signatures in the EU

- Electronic Signature Directive (1999)
 - Legal recognition of Digital Signatures that meet specific requirements;
 - Minimum liability for certification services;
 - Technology neutral (encryption, biometrics)
- E-Commerce Directive (2000)
 - Member States must remove any prohibitions or restrictions on use of electronic contracts

Other (non-EU) Countries With Digital Signature Laws

- Argentina (1997)
- Colombia (1999)
- Czech Rep. (2000)
- India (2000)
- Malaysia (1997)
- Mexico (2000)
- South Korea (1995)
- Switzerland (2000)
- Thailand (2000)

International Organizations with Digital Signature Guidelines

- OECD (1997 Guidelines for Cryptography Policy)
- UNCITRAL (Model Law on Electronic Commerce – followed by several US states)
- ICC (1997 General Usage in International Digitally Ensured Commerce (GUIDEC) – like Incoterms)

Electronic Payments

Current Forms of Electronic Payment

- Electronic Funds Transfer
 - Interbank systems (US Fed, CHIPS)
 - Settlement is immediate, irrevocable
- Consumer Debit Cards
 - direct debit to consumer's account
 - May be accepted by merchants or used at ATM facilities/networks (NYCE, Cirrus, Swift)
- Pre-Paid Cards
 - Generally single-purpose (i.e., phone calls)
 - User purchases capacity for later use.

Current Forms of Electronic Payment

- Electronic Bill Payment
 - **Initially offered by banks**
 - **Often still involves paper checks or records**
 - **3rd party (Checkfree, Visa) systems offer truly electronic transactions**
- Credit Cards
 - **Direct access to credit through bank or merchant;**
 - **Issuer charges**
 - **transaction fees to merchants;**
 - **annual fees and interest to consumers.**
 - **Most popular method for Internet payments today**
 - **SSL built into most browsers**
 - **PayPal allows consumers to accept card payments**

Failed Attempts at New Electronic Payment Systems

- SET

- *Secure Electronic Transactions* standard for Internet credit card transactions,
- developed by Visa and Mastercard,
- failed by 1999, due to technical complexity.

- First Virtual and DigiCash

- Customers authorized charges from a bank account or credit card to fund an electronic “wallet” for online purchases
- Failed in 1998, due to lack of customers.

More Proposals for New Electronic Payment Systems

- Millicent, CyberCoin
 - “Micropayment” wallet systems for small on-line transactions
 - Still alive, but languishing
- Mondex (NatWest and Midland Banks)
 - Stored-value card
 - Processing occurs on card, not through central system
 - Trials in Europe, Canada

New Developments

- Incentive/Loyalty Programs
 - ClickRewards, MyPoints, Beenz
- Pseudo Currencies:
 - like Frequent Flyer points
 - Flooz: accepted at Tower Records, B&N
 - Tax issues?
- ECML: Electronic Commerce Modelling Language
 - Standard for web-based electronic wallet
 - Supported by Visa, MC, Microsoft, IBM, Nordstrom

Proposed Regulation of E-Payments

- EU: Proposed Electronic Money Directive (2000)
 - Would allow institutions to issue e-money under existing credit (rather than banking) regulations;
 - capital and investment requirements;
- Japan: considering electronic money and electronic payment system legislation

INTELLECTUAL PROPERTY ISSUES

Intellectual Property Issues: Overview

- Trademark/Domain Names
- Copyright
- Patent
- Data Privacy
- ISP Liability

Trademarks and Domain Names

Allocation of Generic Domain Names

- .com, .org, .net (gTLDs)
 - ICANN: accredits Registrars
 - IANA: assigns IP addresses
 - Registrars: assign names
 - Shared Registry (NSI): keeps track of all names
- New gTLDs are coming.

Allocation of Domain Names

- ccTLDs (country code TLDs)
 - 243 codes based on ISO 3166-1 code
 - Assigned by local NIC (Network Information Center), or an “aggregator” (e.g. NSI, register.com, alldomains.com)
 - Governed by local law (some restrictions on registration may apply)

Domain Name Statistics

Today, >27 million registered domains

– .com	17,000,000
– .uk	2,100,000
– .de	1,700,000
– .ar	320,000
– .jp	191,000
– .cn	93,000
– .is	4,600

Source: domainstats.com, Sept. 5, 2000

The Market for Domain Names

- more purchases and sales of names
- rising prices:

- 1996: business.com **\$150,000**
- 1998: computer.com: \$500,000
- 1999: wallstreet.com: \$1,000,000
- 1998: altavista.com: \$3,300,000
- 1999: business.com **\$7,500,000**

Domain Names and Trademark Infringement

- More domain names mean more opportunities for infringement
- Registration of a domain name does NOT grant a trademark license

Cybersquatting

- registration of a domain name that is a trademark or personal name in “bad faith”
 - Coke, Hertz, McDonalds
 - “sucks” sites (LucentSucks.com)?
- US: 1999 Anticybersquatting Consumer Protection Act
- International: first to register may still apply (AOL.com.br, amazon.com.gr)

Trademark Infringement

- Same trademark, different lines of business
(*Prince: spaghetti v. tennis rackets*)
- Same trademark, different countries
(*Internet World: Germany and UK*)
- Metatags and Keywords

Resolution of Domain Name Disputes

- ICANN Uniform Dispute Resolution Policy
 - Domain registration disputes only
 - Arbitration by an approved panel (**WIPO** + 3 others)
 - May be appealed to a court
 - Quick, e-mail proceedings
 - Low fees
 - >3000 proceedings since late 1999
- Local court action
 - Jurisdiction and enforcement issues

Copyright

Berne Convention

Berne Convention on the Protection of
Literary and Artistic Works (1886, updated to
1971)

- 122 member countries
- Establishes protected works
 - Writings, lectures, dramatic, choreography, music compositions, art works
 - translations
- Establishes moral rights

WIPO Copyright Treaty (1996)

- Special agreement within Berne Convention
- Ratified by 53 countries
- Clarifies protection of
 - Computer software, compilations of data, digital works
- Adds distribution right
- Requires penalties on circumvention of protection mechanisms

Copyright Infringement on the Internet

- Copying of Web page content
 - Star Trek, Elvis, Disney, Playboy cases
 - Image banks
 - News and text
- Unauthorized sharing/downloading of software, music and video
 - Warez sites
 - MP3, Napster
 - DVD

Commercial Software Piracy

- BSA estimates that in 1998, 38% of all new software installed worldwide was pirated, causing losses of \$11 billion:
 - Vietnam 97%
 - Hong Kong 59%
 - Canada 40%
 - USA 25%
- Internet makes piracy easier
 - Anonymity
 - Speed and Convenience
- US DOJ believes organized crime moving into this area

New forms of Internet Copyright Infringement

- Hyperlinking
 - Unfair association and use of logos prohibited
 - “Deep” linking alone may be permitted
 - Linking is the “nature of the Internet”
 - US: *Ticketmaster v. Tickets.com*
 - Netherlands: *PCM v. Kranten.com*
 - Linking to Infringing content could be prohibited (US: *Utah Lighthouse, 2600 Magazine*)
- Framing
 - Detracts from persona of the linked site
 - Prohibited: US: *Total News*; UK: *Shetland Times*

Creation and Ownership of Copyright

- Act of creation is all that is necessary (registration generally not required)
- Employees: works made for hire will be owned by employer
- Contractors: need assignment to obtain copyright
- Moral Rights cannot be assigned or waived (but not generally recognized in US)

Patent

Patent Protection

- National protection only
 - EU-wide patents available
 - Patent Cooperation Treaty allows recognition of priority dates
- Protection of “ideas” and inventions
 - Software patents allowed in US and Japan
 - European Patent Office voted in Sept. 2000 to allow software patents
- No protection until patent issues

E-Commerce Patents

- “Business Methods” patents are now available in the US
 - *State Street v. Signature Financial* (mutual fund hub and spoke management method)
 - *Amazon.com v. Barnesandnoble.com* (one-click ordering)
 - *Priceline.com v. MS Expedia* (name your price service)

Data Privacy

Internet Data Collection

- personal identifying information (name, e-mail, street address)
- demographics (gender, preferences, postal code)
- Sites visited (click history)
- transaction data (what was purchased, when and for how much)
- Cookies

EU Data Protection Directive

- Effective in 1998
- Establishes legal principles for privacy protection and free flow of data within the EU
- Prohibits the transfer of personal data from EU countries to any countries which do not have “adequate” data protection laws

Principles of EU Data Protection

- Data must be collected for specified, explicit and legitimate purposes and used in a way compatible with those purposes;
- Accurate and, where necessary, updated
- Not kept in identified form for longer than necessary for those purposes.

EU Rights of the Data Subject

- Right to be informed of the purposes of collection, intended recipients, and data subject's rights, at the time of collection.
- Right to obtain a copy of data about oneself.
- Right to obtain corrections, erasure or blocking of data processed in violation of the Directive.
- Appropriate security safeguards must be adopted by controllers of data.

Data Privacy Legislation in USA

- “Safe Harbor” guidelines with EU approved
- FTC enforcement actions
 - GeoCities (violation of privacy policy)
 - Toysmart.com
- Children’s Online Privacy Protection Act (websites directed at children under 13)
- Federal Reserve and OTC rules (banks and holding companies)

Other Data Privacy Legislation

- Most countries have legislation re. protection of:
 - Financial and credit information;
 - Medical records
- General Data Privacy Protection Laws
 - Australia, Canada, Czech Republic, Estonia, Hungary, Israel, Japan, New Zealand, Poland, Russia, Switzerland, China,

Private Sector Privacy Initiatives

- Privacy Policy Certification Groups
 - TRUSTe
 - BBBOnline
- Trade Group Privacy Guidelines (NAI profiling guidelines, endorsed by FTC)
- P3P: Platform for Privacy Preferences (will enable users to screen websites based on privacy policies)
- Proxy sites (zeroknowledge.com, anonymizer.com)

Privacy Policies

- Do You Need One?
- Some Partners Require
- Must Follow Policy if Established
- Impact on Existing Relationships

Success (?) of Privacy Policies

- 97% of randomly-selected websites collect personally-identifying data
- 62% posted a privacy policy
- 20% posted privacy policies which addressed all four "Fair Information Practice Principles." (notice, choice, access, security)
- 97% of US government sites failed to address Fair Information Principles

Internet Service Provider Liability

Internet Service Provider (ISP) Liability

- When is an ISP liable for content posted by its users?
- Some countries (US and Australia) have passed legislation protecting service providers.
- Other countries (UK and Germany) have found ISPs liable.

US Laws Protecting ISPs

- *Digital Millennium Copyright Act:*
 - Relates to copyright infringement
 - No liability for storing, caching or transmitting user content;
 - Notice and take-down requirements
- *Communications Decency Act:*
 - Relates to defamation and obscene content;
 - ISPs are not “publishers” of objectionable material, even if they screen content.

Cases Holding ISPs Liable

- UK: *Godfrey v. Demon Internet*
 - Posting of defamatory messages on bulletin board;
 - ISP had notice by victim;
 - ISP was liable for not taking messages down
- Germany: *Hit Box v. AOL*
 - Downloading of pirated music over AOL
 - AOL was liable if it could/should have known of illegal content and did not block access

EU E-Commerce Directive

- No liability for ISPs who play a passive role with respect to illegal information from 3rd parties:
 - Mere conduits (transmission)
 - Caching
 - Hosting (w/o actual knowledge)
- No obligation to monitor

OTHER INTERNATIONAL CONTRACTING ISSUES

UN Convention on Contracts for the International Sale of Goods

- Ratified by 56 countries
- Automatically applies if either party is in a country that has ratified;
- Can be excluded by contract.
- Does it apply to e-commerce or software transactions?

Export Restrictions

- Restrictions on US Technology Exports to certain countries and persons
- Arab Boycott of Israel
- US Anti-Arab Boycott Regulations

EU Directives

- Long Distance Selling Directive 20/5/97
- Long Distance Selling of Financial Services 19/11/98 (proposal)
- E-Commerce Directive (entered into effect July 17, 2000)

Long Distance Selling Directive

- Applies to Internet consumer transactions
- Seller has to provide information before conclusion of agreement
- Consumer may withdraw without reason within seven (7) days
- Mandatory National Law

Long Distance Selling of Financial Services (proposed)

- Banking, insurance, investing and payment
- Right to revoke (14-30 days) except:
 - foreign exchange services/securities and the like
 - non-life insurance <1 month
 - Fully completed contracts
- Mandatory National law

E-Commerce Directive

- To be adopted in national law by 2002
- identification of providers of Information Society services
- unsolicited commercial e-mail (spamming)
- permissibility and formation of electronic contracts
- No liability of service providers for “mere conduit”, caching and hosting
- codes of conduct/out of court dispute settlement etc.

THE WORLD OF E- COMMERCE CONTRACTS

Types of Contracts

Service Contracts

- Systems Integration/Software Development
- Website Development
- Outsourcing
- Support/Help Desk

Hosting and Access

- Internet Access (ISP)
- Web Hosting
- Application Hosting (ASP)

Rights and Licenses

- Software License
- Database Usage
- Data Feeds
- Patent License
- Domain Name Transfer

B2B Agreements

- Advertising
 - banner ads
 - click-through
- Portal Placement
- Linking/Affiliation
- Co-Branding
- Electronic Marketplaces and i-EDI

B2C Agreements

- Subscription for Services
- Software License
- Privacy Policy
- Terms of Conduct

The E-Commerce Site: Buy or Build?

Costs of an E-Commerce Site

- Average cost of \$1,000,000
 - “Get on the Map”: \$300,000 to \$1M
 - “Run with the Pack”: \$1-5M
 - “Market Differentiator”: \$5-20M
- 79% labor, 10% software, 11% hardware
- *Source: 1999 Gartner Group “Survey Results: The Real Cost of E-Commerce Sites”*

Needs of the E-Commerce Site

- Hardware
- ISP
- Software
- Content
- Customer Support
- Integration with Existing Systems
- Updating Plan

Software

- License from third parties
 - Web server
 - Payment processing
 - Advertising capability
 - Database
- Develop in-house
- Develop using contractors

Purchase of a Web Site

- Acquire all rights to
 - Content and designs
 - Owned Software
 - Owned Hardware
 - Contracts with software licensors, lessors, hosting firms, ISP, advertisers
 - URL, trademarks, copyrights and other IP
 - Employee and contractor assignments of rights
 - Customer database, records and information

Who are the Vendors?

Global IT Giants

- Players:
 - IBM (\$87B),
 - EDS (\$18B),
 - Andersen Consulting (\$9B)
- Large IT infrastructure projects; major eBusiness sites
- Excellent Reputation and References
- Large Project and International Experience
- Highest Cost
- Very Inflexible Negotiations

Leading Internet Consultants

- Players
 - Sapient (\$277M),
 - Razorfish (\$170M),
 - Cambridge Technology Partners (\$628M)
- Major eBusiness and Web Design
- Expertise in Internet Projects
- Large Project and International Experience
- High Cost
- Inflexible Negotiations

Web Design Specialists

- Players
 - Viant (\$61M),
 - Breakaway Solutions (\$25M)
- High-profile eBusiness and Web projects
- Less large-scale/international experience
- May partner with other specialists
- Moderate cost
- More flexible negotiations

Local Programming Shops (“rent-a-programmer”, “body shops”)

- Players: thousands!
- Reputation unknown (check references!)
- Limited experience
- Lowest cost; T&M pricing
- Most flexible negotiations

END OF PART 1

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