

Update on U.S. and Australian e-commerce : Speed-bumps or Shortcuts on the Information Superhighway?

Ken Slade of Hale and Dorr LLP
Mark Sneddon of Clayton Utz
Sydney October 18, 1999

Overview - Current Hot Issues

- Domain Names -- changes and trends
- Broadband
 - open access for ISP's to cable television systems
 - digital broadcasting and datacasting
- Spam -- Judicial and Legislative Restrictions
- Encryption -- Revamping export rules
- UCITA -- Uniform Commercial Information Transactions Act
- Privacy Issues
- Authentication
- Electronic Payments Regulation Issues

Increasing Trade in Domain Names

- over 5 million registered domains; principally “dot coms”
- more purchases and sales of names
- rising prices:
 - mall.com: \$250,000
 - computer.com: \$500,000
 - wallstreet.com: \$1,000,000
 - altavista.com: \$3,000,000

Domain Names and Trademark Infringement

- Increasing domain names means more opportunities for infringement
- Greater numbers of trademark suits
- Recent issues:
 - Infringement by metatags?
 - Infringement by country-level domains?

Domain Name Registration System

- Coordinated by ICANN
- NSI will recognize ICANN's authority; will enable all ICANN-accredited registrars to access NSI's master domain name registry
- Dozens of new registrars on the horizon
- New TLDs (.firm, .store, .web)?

Other Domain Name Developments

- ICANN dispute resolution policy
- Anti-cybersquatting legislation

Broadband: Open Access for ISP's?

- "open access" to an essential resource vs. demand for "forced access" to the investments made by the cable companies
- Arguments for open access
 - cable offers greater coverage
 - AT&T and MediaOne are building a new monopoly
 - competing technologies do not yet exist

Broadband: Open Access for ISP's?

- Arguments against open access
 - forced access will decrease investment in broadband
 - competing technologies do exist
 - regulation of cable access will be burdensome
- as of Sept. 17, 1999, Federal Trade Commission opposes open access

Spam -- Judicial and Legislative Restrictions

- Spam is unsolicited commercial mass E-Mail messages
- April 1999: California Superior Court ruled that spam sent to Intel Corporation's employees constituted an illegal trespass of Intel's proprietary computer system
- Proposed legislative limitations
 - allow ISPs to sue unauthorized senders of unsolicited bulk e-mail

Spam -- Judicial and Legislative Efforts

- impose criminal penalties on senders who hide behind false domain names
- allow recipients to "opt-out" of future mailings
- California has imposed a controversial labeling requirement
- expand the existing federal law which already bans unsolicited commercial faxes
- proposed state laws prohibiting spam
- Australia - Industry Code provisions

Encryption -- Revamping export rules

- Bernstein case: May 1999 U.S. federal court rules that encryption source code is “speech” that cannot be subjected to pre-export review by the Government
- Sept. 16, 1999: Proposed Clinton Administration policies would allow U.S. companies to widely export encryption commodities and software
 - regardless of the strength of the encryption features
 - without requiring the manufacturers to provide “key recovery” mechanisms.

Encryption -- Revamping export rules

- post-shipment reporting will be enhanced
 - exporters will be required to notify the Government of all exports of encryption items with key lengths of 64 bits or more.
 - in contrast, the current rules require such reporting only for specified classes of end-users.

Uniform Computer Information Transactions Act (“UCITA”)

- New name for proposed Article 2B of the Uniform Commercial Code, for ALI would not approve
- Scope of UCITA
 - “computer information” means digital information, regardless of form
 - applies to transactions involving creation, modification, transfer or licensing of computer information
- Current status: enactment likely only in Washington and a few other “pro-licensor” states

UCITA -- Issues

- Shrinkwrap terms
- Disclaimers of warranties
- Contract modification
- Electronic self-help
- Reverse engineering
- Transfer of ownership
- Choice of law and forum

Privacy Issues

- Australian national privacy legislation
 - National Privacy Principles agreed
 - Whole private sector must be covered by approved industry code or default legislative scheme
 - ADR and court enforcement for breach of privacy
- US-EU negotiations on development of voluntary safe harbor principles in order to allow continued US-EU data exchanges

Privacy Issues

- June 1998 Federal Trade Commission report
 - effective self-regulation had not yet taken hold
 - recommended that Congress enact legislation setting forth standards for the online collection of personal information from children
- FTC administrative enforcement actions alleging "unfair or deceptive" online information practices
 - GeoCities prohibited from misrepresenting the purposes for which it collects personal identifying information from or about consumers, including children
 - Liberty Financial required to post a privacy policy on its children's sites and to obtain verifiable consent before collecting personal identifying information from children

Authentication

- Electronic Transactions Bill 1999
- Technology neutral - no preference to PKI
- Electronic signatures OK, but must be appropriately reliable
- Recipient gets no statutory presumption of sender identity

Electronic Payments Regulation Issues

- Proposed EFT Code of Conduct for consumers will cover disclosure and liability allocation for:
 - all forms of remote account access
 - all types of account institutions (eg telcos)
 - all credit card payments without manual signature
 - stored value cards and digital cash

Speed-bumps or Shortcuts on the Information Superhighway?

- Shortcuts to facilitate e-commerce
 - broadband
 - domain name registration reform
 - loosening of encryption controls
 - efforts to develop uniform laws
- Speed-bumps which may complicate e-commerce
 - overbroad regulation of spam
 - privacy protections