

Internet Law and International Business

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Industry Background

International Nature of the Internet

- Global advertising/product information/catalogs
- Product ordering from anywhere in the world (both retail and EDA)
- Product (software) delivery/download to any point on the Internet
- Global customer support/service/maintenance
- Communication/feedback (via e-mail, discussion groups)

Worldwide Internet Size Projections

- 320 million worldwide users by end of 2002
- Worldwide Net advertising \$6.5 billion in 2001
- Total worldwide Net commerce of \$1.3 trillion by end of 2003

The Internet Boom outside the US

- By end of 2003, 168.5 million users in Western Europe
- Top European sites (Freeserve, Demon) draw 1+ million users each from US annually

Legal Issues Overview

- Intellectual Property
 - Trademarks/Domain Names
 - Copyright
 - Patent
- Content Regulation
- Data Privacy
- Jurisdiction

Some Other Legal Issues Not Covered

- Sales of Securities
- E-Contracts and Digital Signatures
- Chat Rooms
- ISP Liability
- Payment Systems
- Taxation
- Telecommunications Regulation
- Telephony

Intellectual Property

Domain Name Demographics

- Today, 14.8 million registered domains
 - .com 8,900,000
 - .net 1,300,000
 - .de 980,000
 - .uk 960,000
 - .ar 154,000
 - .jp 65,000
 - .cn 32,000
 - .mx 18,000

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: \$3,000,000
 - 2000: loans.com: \$3,000,000
 - 1999: business.com \$7,500,000

Coming Soon?

- New Generic Top Level Domains (.firm, .store, .etc)?
- expanded use of the 243 ISO country TLDs (.tv)
- New international TLDs (.eu, .ps)

Domain Names and Trademark Infringement

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

Trademark Infringement

- Trademark holders in different lines of business (*Prince: spaghetti v. tennis rackets*)
- Trademark holders in different countries (*Internet World*)
- First to register (AOL.com.br, amazon.gr)

Metatags and Keywords

- Metatag: Use of a trademark in invisible site text (*West Coast Video, Playboy v. Welles*)
- Sale of search engine keywords for prioritizing search results;
- Sale of search engine keywords for display of banner ads (*Estee Lauder v. Fragrance Counter; Playboy v. Netscape and Excite*)

Cybersquatting

- 1999 Anticybersquatting Consumer Protection Act
- “cybersquatting” is the act of registering a domain name in “bad faith”
 - applies to trademarks and personal names
 - does not require use in commerce
 - definition of “bad faith” includes mitigating factors
 - “in rem” actions possible
 - statutory damages of \$100,000 per name

ICANN Dispute Resolution Policy

- Adopted in October, 1999
- Implemented by NSI, AOL and most other registrars
- Applies to “bad faith” use
- Mandatory arbitration by defendant (not plaintiff), subject to initiation of court action by either party

Copyright

- Copying and posting content (Elvis and *Star Trek* sites)
- Unauthorized software downloads (LaMacchia loophole closed by NET Act).
- Commercial piracy still a major issue in many countries (esp. Asia, Latin America).

Linking and Framing

- Hyperlinking
 - Unfair association;
 - Use of logos;
 - “Deep” linking (*Ticketmaster v. Microsoft*)
- Framing
 - Generally understood not to be permitted
 - *Total News; Shetland Times*

Patents

- “Business Methods” patents are now available in the US (but not in Europe)
 - *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)

Content Regulation

Encryption -- US Export Restrictions

- Pre-1999: strict controls on export of encryption software from the U.S.
- 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

Encryption -- new export rules

- Jan. 2000: New Bureau of Export Administration regulations.
 - allow U.S. companies to widely export retail encryption software (other than to the 7 terrorist states)
 - exporters will be required to notify the Government of all exports of encryption items with key lengths of 64 bits or more.

International Content Regulation

- Encryption (US)
- Pornography (US, Australia, Europe, Asia)
- Racism (UK ISPs)
- Terrorism (Germany, Spain, Asia)
- Sedition (principally Asia)
- Language (France)
- Gambling (US, Europe)
- Advertising (Germany)
- Everything? (China)

Data Privacy

Employee Data Privacy

- May a Company Monitor its Employees?
- For the Most Part, “Yes”
- Pending Legislation Might Prohibit
- Give Notice to Employees

Customer Data Privacy in the U.S.

- 1998: Children's Online Protection Act (websites directed at children under 13)
- 1998: FTC Guidelines (websites should provide notice, choice, access, security and enforcement)
- 2000: Federal Reserve and OTC rules (banks and holding companies)

EU Data Privacy Directive

- Prohibits Export of “Personally Identifiable” Data to Non-Compliant countries
- Data must be:
 - Accurate and kept up to date;
 - Not kept for longer than necessary;
 - Safeguarded
- Customers have:
 - Right to be informed of the purposes of collection;
 - Right to consent;
 - Right to obtain a copy of data;
- US/EU “Safe Harbor”: Not yet implemented.

Private Sector Privacy Initiatives

- Privacy Policy Certification Groups
 - TRUSTe
 - BBBOnline
- P3P: Platform for Privacy Preferences (will enable users to screen websites based on privacy policies)
- Activism: Center for Democracy and Technology boycott of DoubleClick

Jurisdictional Issues

Jurisdictional Issues

- Where can a web-based company be sued?
 - Content regulation;
 - Intellectual property infringement;
 - Contract and warranty claims;
 - Consumer protection laws;
 - Product liability;

Recent US Jurisdictional Cases

- Jurisdiction WAS asserted in
 - Comuserve v. Patterson (6th Cir. 1996)
 - American Network (S.D.N.Y. 1997)
 - Zippo (W.D. Pa. 1997)
- Jurisdiction was NOT asserted in:
 - Cybersell (9th Cir. 1997)
 - Bensusan v. King (2nd Cir. 1997)

US Trends in Internet Jurisdiction

- Interactivity Now the Key
- Passive Sites = No Jurisdiction
- Highly Interactive = Jurisdiction
- American Bar Association is trying to propose standardized guidelines

International Jurisdictional Structure

- No global convention on assertion of jurisdiction
- Assertion/reach of jurisdiction is a determination by each country
- European Union: Brusses/Lugano Convention on Jurisdiction and Enforcement of Judgments
- U.S. Uniform Enforcement of Foreign Judgments Act and Uniform Foreign Money Judgments Recognition Act
- Extradition treaties

International Initiatives

- EU Council of Ministers working on revisions to 1968 Brussels Convention on Jurisdiction
 - pro-consumer initiative that could lead to jurisdiction in any country where activities were “directed”
- ICC Task Force with North American and European members also considering

CONCLUSION

- On the Net, new paradigms of doing business are arising rapidly.
- Opportunities are boundless, both for “dot.coms” and bricks and mortar;
- The price of expanding the boundaries is legal uncertainty at the edges.