

# Risks of E-Commerce: A Legal Perspective

Ken Slade

Senior Partner, Hale and Dorr LLP

Risk & Technology Conference

Marriott Long Wharf, Boston

September 26, 2000

HALE AND DORR LLP

# Overview

- 15 minutes is a very, very short period of time to give you a sense for such a broad and quickly-evolving area of the law
- at best, one can take this as an opportunity to focus on headlines, each of which, unfortunately, is a trap for the unwary
- with apologies to David Letterman, here is my personal “Top 10” list of issues in Internet law to be on the look-out for

# #10 -- International Issues

- If your web site is accessible from a particular country, you may be subject to the criminal laws of that country
  - American neo-Nazi sitting in jail in Germany
  - Pakistani arrest warrant for Michael Jackson
- If problems arise from your goods and services sold through your web site, you probably can be sued in the home country of your customer
- If you are doing enough business with a particular country, you might be subject to income taxes in that country
- these are new issues, not yet squarely addressed by international treaties or conventions

# #9 -- Linking and Spidering Problems

- linking to material which you know to be infringing on the copyrights of a third party can subject the linker to liability for copyright infringement (Utah Lighthouse Ministry case)
- linking to a web site engaging in criminal activities can subject the linking party to criminal liability for aiding and abetting those activities (Japanese pornography cases)
- spidering (or aggregating) data from other web sites may constitute trespass (eBay v. Bidder's Edge case)

## #8 -- Broadband May Not be Coming Quickly

- AT&T v. City of Portland -- Ninth Circuit did not allow municipality to condition transfer of cable franchise on AT&T's opening up of its cable system to competing ISPs
- Federal Communications Commission has the power to regulate cable broadband, but so far has not done so and has instead adopted a wait-and-see policy

# #7 -- European Distance Selling Directive

- EU law now gives consumers entering into electronic contracts through web sites a “right of withdrawal” for at least 7 working days
- that period is measured from their receipt of a written confirmation containing various information
- If the web site operator does not provide such confirmation, this right of withdrawal can last up to three months

## #6 -- Sweepstakes and Contests

- Avoid running afoul of state lottery laws
- sweepstakes: contests in which participants are not required to pay anything for a chance to win; need for alternative free method of entry
- skill-based contests: must be based on skill, not chance
- some countries and U.S. states impose bonding and other requirements

# #5 -- Business Method Patents

- U.S. Patent Office is issuing a rapidly increasing number of e-commerce and business method patents
  - applications subclass for electronic shopping (e.g., remote ordering) increased by 100% from 1998 to 1999
- examples include amazon.com's "single click of mouse" and referral system patents
- amazon.com used its "single click" patent to stop Barnes & Nobles from using this methodology during 1999 Christmas rush
- consider developing your own patent portfolio, for defensive purposes



## #4 -- State Tax Issues Looming

- Internet Tax Freedom Act established a three-year moratorium on new or discriminatory state and local taxes applied to e-commerce
- moratorium ends on October 21, 2001
- as yet, no consensus has emerged
  - dot.coms want to make the moratorium permanent
  - state governments see sales tax receipts dropping
  - brick-and-mortar stores feel that they are being put at an unfair disadvantage

# #3 -- Terms of Use Not Necessarily Binding

- According to the recent Ticketmaster case, posting terms on the bottom of the first page of a web site does not make those terms legally enforceable against users of that web site
  - users were not required to assent to those terms, or even to read them
- for those terms to constitute a legally-binding contract, the web site operator must show that users knew or should have known that acceptance of those terms was a condition for using the web site
  - for example -- a “click-and-accept” on registration, download or ordering
- additional complications for non-U.S. users (e.g., foreign language, foreign laws, varying consumer protection requirements)

## #2 -- Domain Name Disputes

- Still a problem, despite implementation of ICANN Uniform Dispute Resolution Policy and enactment of Anticybersquatting Consumer Protection Act
- someone other than the trademark owner who is legitimately using the trademark as a domain name (e.g., a distributor) can continue to do so (Weber-Stephens case)

## #2 -- Domain Name Disputes

- “Sucks.com” web sites might be difficult to shut down in certain circumstances
  - where the operator of the web site is not demanding compensation for transferring the domain name back to the trademark owner
  - where the court considers the web site to be a parody, or protected First Amendment speech
  - where the web site is not “likely to cause confusion”

# #1 -- Privacy

- At a philosophical level, balancing the protection of an individual user's privacy against the incredible value of information about that user, when applied in cyberspace
- At a practical level, developing an adequate privacy policy and then sticking to it
- Manifestations:
  - no longer enough just to have a policy; Federal Trade Commission is looking at how that policy addresses the widely-recognized privacy principles of:
    - NOTICE about online information collection
    - CHOICE regarding uses of that information

# #1 -- Privacy

- ACCESS to ensure that information is accurate, complete, and up-to-date
  - SECURITY and integrity of information collected online; and
  - ENFORCEMENT to provide effective recourse for improper breaches of personal privacy.
- FTC will go after you
- if you do not follow the privacy policy which you have adopted; OR
  - if you violate the privacy policy of another web site from which you have “data mined”

# #1 -- Privacy

- online profiling is seen as particularly invasive, even if the profile is not “personally identifiable”
  - the Network Advertising Initiative (NAI), a coalition of several leading online profiling companies, formulated a set of self-regulatory privacy guidelines
  - those guidelines have been endorsed by the FTC
- The European Union and Canada have adopted even tougher privacy rules, which must be followed when collecting data from residents of those countries
- Childrens’ Online Privacy Protection Act imposes special rules on the collection of personally-identifiable information from children under 13 years old

# For Further Information

- Subscribe to Hale and Dorr Internet Alerts at [www.haledorr.com/internet\\_law/e\\_alerts.html](http://www.haledorr.com/internet_law/e_alerts.html)
- Contact Ken Slade at [kenneth.slade@haledorr.com](mailto:kenneth.slade@haledorr.com) or 617-526-6184