

# E-Commerce on a Global Scale: Helping Your Clients Achieve Borderless Commerce

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Internet & E-Commerce Law MCLE Conference

Boston

December 5, 2000

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# Premises

- Perhaps one of the greatest reasons to be excited about e-commerce is that it allows companies to offer their goods and services on a worldwide basis, without borders.
- Differences and inconsistencies between national laws are obstacles to such borderless business unless they can be identified and overcome.
- We will focus on eight key issues affecting e-commerce from (1) U.S., (2) German-EU and (3) Argentine-Latin American perspectives, in order to identify some of those differences and suggest strategies for dealing with them

# Key E-Commerce Issues

- Domain name registrations
- Enforceability of click-and-accept agreements
- Privacy
- Spam
- Linking issues: deep linking, spidering and web crawling
- Business method patents
- Cross-border jurisdiction issues
- ISP liability

# Domain Name Registrations: U.S. Perspective

- Registering a domain name or trademark in the U.S. does not entitle you to any domain name in other countries
- No residency requirement to register a U.S. domain name
- Some other countries limit domain name registrations based on residency requirements

# Domain Name Registrations: German/ EU Perspective

- Registering a domain name or trademark in Germany does not entitle you to any domain name in other (EU) countries
- No residency requirement to register a German domain name, however the administrative contact must have a residence in Germany

# Domain Name Registrations: Argentine/Latin American Perspective

- Registration rules are different in each country
- Domain name registration in one LA country does not entitle the owner to rights over domain names in any other LA country
- Some LA countries grant domain names only to residents or local companies ( Brazil, Chile, Paraguay, Venezuela)

# Domain Name Registrations: Argentine/Latin American Perspective

- Only a few LA countries provide rules as regards domain name publicity, transfer and dispute resolution (Chile, Mexico, Peru)
- Most LA TLD are subject to a registration and renewal fee
- In Argentina anyone can register a domain name for free for a year. It is currently the sixth-ranked country in terms of the number of domain names registered.
- Cybersquatting problems.

# Click-and-Accept Agreements: U.S. Perspective

- Shrinkwrap agreements 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.



# Click-and-Accept Agreements: U.S. Perspective

- In 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-and-accept agreement requires litigation to be brought in Virginia
- Court finds that Groff effectively “signed” the click-and-accept agreement by clicking on “I agree” button “not once, but twice”

# Click-and-Accept Agreements: German/EU Perspective

- Electronic contracts must be recognized
  - EU Member States must remove any prohibitions or restrictions on use of electronic contracts
- 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

# Click-and-Accept Agreements: Argentine/Latin American Perspective

- LA does not yet have a legal foundation as regards e-commerce issues, as compared to the US or EU
- Traditional transactional formalities and law are still influenced by XIX Century civil code principles
- Uncertainty as regards validity and enforceability: a challenge for e-comm growth
- Some countries are enacting MLCE inspired legislation

# Click-and-Accept Agreements: Argentine/Latin American Perspective

- Benefit: if MLCE is adopted without much modification, it shall help legal harmonization in the region
- Argentina For an agreement to be valid it must bear a handwritten signature. There is no digital signature legislation yet (6 bills currently in Congress).
- Brazil House of Representatives currently drafting a MLCE inspired bill to govern e-commerce transactions

# Click-and-Accept Agreements: Argentine/Latin American Perspective

- Colombia Electronic Commerce Law 527/99, closely follows MLCE, recognizes e-documents and signatures as having the same legal validity as paper documents
- Mexico E-Commerce Act (June 2000) amends Civil and Commercial Code and Rules of Civil Procedure. It regulates consumer protection, privacy, digital signatures and electronic documents.
- Uruguay Law 16,736/96 sets the basis for the validity of electronic documents

# Privacy: U.S. Perspective

- There is no general privacy legislation in the U.S.
- 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, companies need to develop an adequate privacy policy and then stick 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

# Privacy: U.S. Perspective

- CHOICE regarding uses of that information
  - 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.
- Federal Trade Commission 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”

# Privacy: German/EU Perspective

- EU Data Protection Directive became effective on October 15, 1995; had to be transformed into national law by October 15, 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
  - in other words, the United States



# 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 cannot be kept in identified form for longer than necessary for those purposes.

# US-EU Safe Harbor Guidelines: Seven Privacy Principles

- **NOTICE:** state why the information is collected
- **CHOICE:** individuals must be allowed to opt-out of purposes other than purpose for which data was originally collected
- **ONWARD TRANSFER:** personal information may be transferred to third party only if such transfer is necessary for the original purpose and the third party agrees to comply with the safe harbor principles
- **SECURITY:** take reasonable precautions to protect vs. loss, misuse and unauthorized access, disclosure, alteration and destruction

# US-EU Safe Harbor Guidelines: Seven Privacy Principles

- **DATA INTEGRITY:** take reasonable steps to ensure that data is reliable for intended use, accurate, complete and current
- **ACCESS:** individuals must have access to their data to ensure accuracy
- **ENFORCEMENT:** opportunity to pursue complaints and disputes
- Companies must provide enforcement mechanisms by:
  - complying with private-sector self-regulatory programs;
  - complying with applicable privacy law or regulation for enforcement; OR
  - committing to cooperate with EU data privacy protection authorities

# Privacy: Argentine/Latin American Perspective

- LA countries are enacting privacy legislation for three main reasons: to remedy past privacy violations, promote e-commerce and ensure EU data exchange
- Most LA countries enact comprehensive privacy laws for both the public and private sector, in some cases complemented with particular laws for specific types of information
- Right to privacy recognized in most LA constitutions (Argentina, Brazil, Chile, Mexico, Peru, etc.)

# Privacy: Argentine/Latin American Perspective

- Argentina 1994 Constitution, 2000 Habeas Data Bill
- Brazil 1988 Constitution, Data Consumer Protection and Defense Law, 1996 Data Privacy Bill in conformance with OECD guidelines
- Chile Constitution, 1999 Law of the Protection of Private Life. Chapter on use of financial, commercial and banking data
- Mexico 1917 Constitution, 2000 E-Commerce Act, Consumer Protection Act
- Peru 1993 Constitution, 1999 Data Protection Bill

# Privacy: Argentine/Latin American Perspective

- Most LA privacy laws and bills follow EU Directives as regards:
  - rights of data subjects
  - data processing rules
  - liability and enforcement
  - transfer to other countries

# Spam: U.S. Perspective

- 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: U.S. Perspective

- 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



# Spam: German/EU Perspective

- EU E-Commerce Directive requires
  - unsolicited commercial e-mail (i.e., spam) to be clearly identified as such
  - Providers to regularly consult opt-out registers
- Sending unsolicited commercial e-mail violates German competition law (unfair trade practice)

# Spam: Argentine/Latin American Perspective

- LA has no specific legislation as regards spamming
- In most LA countries (Argentina, Brazil) spammers could be sued if damage is proved under Civil Code provisions
- Brazil -- application of Consumer Code provisions, E-Commerce Bill (specific provision)

# Linking: U.S. Perspective

- 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)
- Framing another site's content within your own site "detracts from persona of the linked site" and constitutes an unfair trade practice (*Total News*)

# Deep Linking: U.S. Perspective

- Linking to pages “deep” within the linked site, bypassing home page and advertising
- Deep linking was upheld in *Ticketmaster Corp. v. Tickets.com, Inc.* case
  - not copyright infringement (not copying, just transferring)
  - not violation of terms of use, unless linked site can show that linking party accepted those terms
  - not unfair competition, as long as there is no attempt to mislead users about source of linked information/goods/services

# Spidering: U.S. Perspective

- Use of “spiders,” “bots” or other automated means to derive information from publicly-accessible web sites
- *eBay, Inc. v. Bidder’s Edge, Inc.*: use of automated means to collect data from auction site for other purposes constitutes cybertrespass
  - violation of eBay’s right to exclude others from its computer systems

# Web Crawling : U.S. Perspective

- Monitoring of web sites for various reasons
  - confirming compliance with contractual commitments (e.g., affiliate networks)
  - checking pricing of competitors
    - unlike spidering, not collecting data and presenting that data for other purposes
- Unclear area of law, so take precautions
  - obtain consent of monitored party
  - only monitor sites whose terms of use do not prohibit such use
    - under Ticketmaster case, when are those terms binding? click-and-accept? simple posting?
  - seek indemnification from company offering web crawling services

# Linking: German/EU Perspective

- Framing is unfair trade practice (UK: *Shetland Times*)
- Deep linking is unfair trade practice

# Linking: Argentine/Latin American Perspective

- Under Argentine law a link designed to avoid or hide the content's source or its owner's ID or trademark may violate the:
  - Trademark Act
  - Paris Convention (which prohibits confusion with competitor's products or commercial activities)
  - Loyalty Act (which sanctions misleading advertisement)
- If such practice involves fraudulent methods, the Criminal Code may apply



# Linking: Argentine/Latin American Perspective

- Metatagging: unauthorized use of trademarks as metatags may constitute trademark infringement

# Business Methods Patents: U.S. Perspective

- 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; *Priceline.com v. MS Expedia* (name your price service)
- 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

# Business Method Patents: German/EU Perspective

- Business Method Patents are not yet admissible under German/EU law
- Most likely the European Patent Convention will be modified soon to allow Business Method Patents

# Business Methods Patents: Argentine/Latin American Perspective

- Under Argentine law, any invention of products or proceedings in any technology field which is novel and subject to industrial application may be patented
- The Patent Act provides that “rules and methods for performing.... economical and commercial activities” shall not be considered an invention
- Thus, business methods may not be patented

# Cross-Border Jurisdiction: U.S. Perspective

- Each U.S. state and federal district may have different rules
- Some initial decisions have found that a web site alone justifies jurisdiction, while other decisions have required more
- American Bar Association is trying to propose standardized guidelines

# Cross-Border Jurisdiction: German/EU Perspective

- Different countries have different rules on jurisdiction
- Council of Ministers working group is in process of revising 1968 Brussels Convention on Jurisdiction
  - according to Article 15 a company which directs its activities to another EU country can be sued in that country

# Cross-Border Jurisdiction: German/EU Perspective

- since e-commerce could be considered to be directed at all EU countries, in theory an e-commerce company could be sued in all EU countries
- counterarguments to being directed to other countries
  - passive website only
  - certain languages only
  - disclaimers that products not offered in particular countries

# Cross-Border Jurisdiction: German/EU Perspective

- European Commission is also considering changes to Rome Convention on Non-Contractual Obligations, which governs such issues as defamation and unfair competition
  - jurisdiction would exist where impact is felt
  - could subject an e-commerce company to jurisdiction of all EU countries
- Business community concerned because European Commission approach seems heavily pro-consumer



# Cross-Border Jurisdiction: Argentine/Latin American Perspective

- LA jurisdiction rules are different in each country
- A company directing its activities to or in a LA country could be sued before its courts
- Argentina, Paraguay and Uruguay signatories to the 1940 Treaty of Montevideo on International Trade Law

# ISP Liability: U.S. Perspective

- Old rule: carrier may become a publisher by editing content, and thus could be liable for knowingly or negligently distributing defamatory material
- Communications Decency Act: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." (47 USC 230 (c)(1))
- Policy rationale:
  - impossible for ISP to screen all postings
  - don't discourage ISPs from self-policing; continue tradition of minimal government regulation of Internet

# ISP Liability: German/EU Perspective

- UK: *Godfrey v. Demon Internet*
  - Posting of defamatory messages on bulletin board
  - ISP had been noticed by victim
  - ISP was liable for not taking messages down
- Germany: *Hit Bit 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

# ISP Liability: German/EU Perspective

- EU E-Commerce Directive:
  - ISPs are not liable for infringing third party content unless they know or could have known about the illegal content
  - No obligation to monitor
  - however, once ISP learns that particular content is illegal, ISP must block access to such content

# ISP Liability: Argentine/Latin American Perspective

- Argentina there are no specific regulations or precedents concerning ISP liability
- It could be argued that a court might uphold a claim against an ISP in case of gross negligence (analogy with media operators)

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