

Current Issues in Internet Law: Top 10 Traps for the Unwary

Hale and Dorr Internet Law Group
Summer Meeting
July 10, 2002

INTRODUCTION:

Internet Law at Hale and Dorr

- Draws on longstanding focus on entrepreneurial and technology companies
- Internet Law Group manages the Firm's Internet practice

Internet Law is Multidisciplinary

- business law
- electronic commerce
- intellectual property
- licensing and strategic alliances
- international
- litigation
- tax
- governmental and regulatory affairs
- commercial and bankruptcy

Traps for the Unwary

- one meeting is a very, very short period of time to give you a sense for such a broad and quickly-evolving area of business and 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 our “Top 10” list of issues in Internet law to be on the look-out for

#10 -- Jurisdictional Issues

- These issues are potentially more troublesome for e-commerce than for offline commerce
 - Likely to be a far greater number of interstate and international e-commerce transactions, now that Internet has created a single world market, at least for some products
 - resolves many communications problems
 - resolves time-zone differences
 - Likely to be a far greater number of interstate and international transactions involving consumers

Will e-commerce result in more disputes than offline commerce?

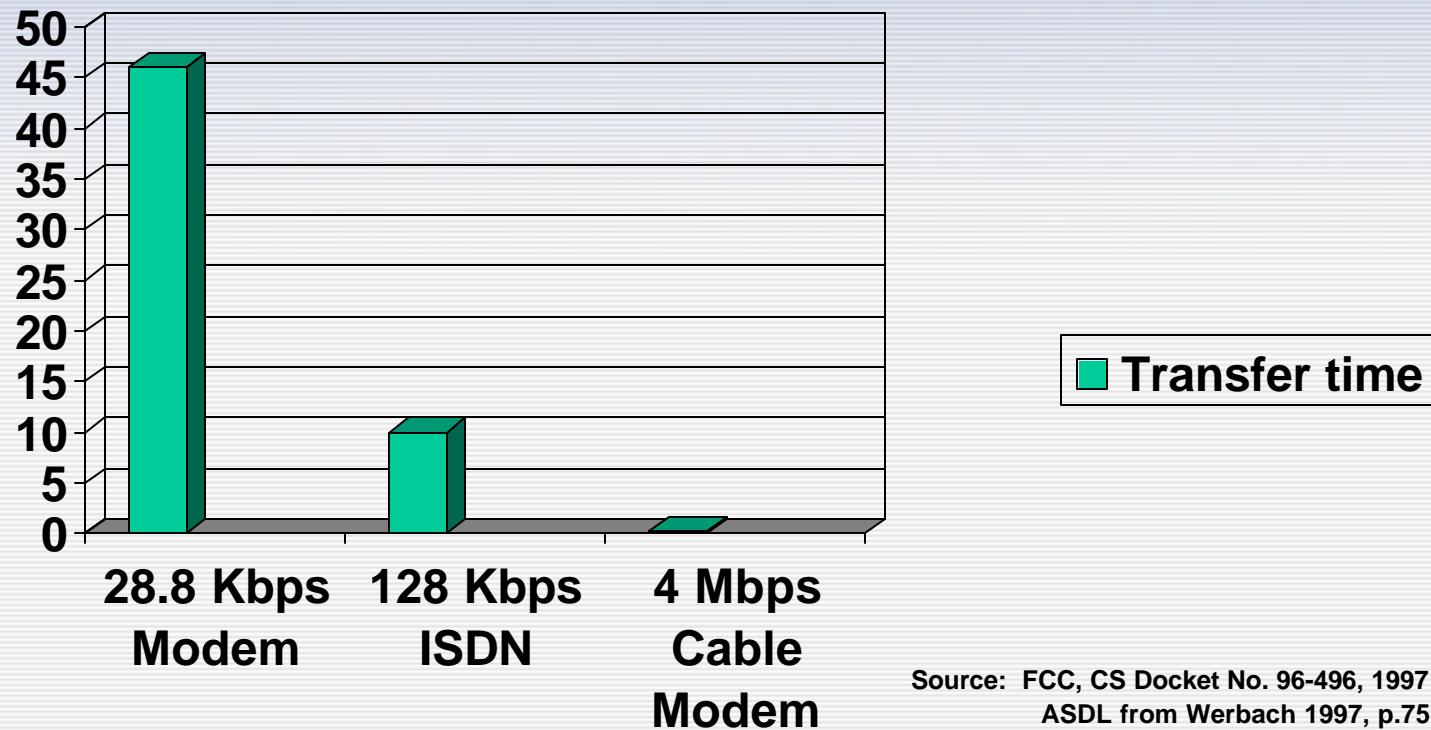
- Less likely to be negotiated contracts
 - parties reacting only remotely
 - emphasis on automated, mass market solutions on the Internet
- Sellers won't necessarily know where their customers are located
- Buyers face greater risks, dealing with potentially invisible sellers

Current Status of Internet Jurisdiction

- 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 -- Open Access: Fight over Internet Access Speeds

(e.g., time to download 3.5 min. video clip)



Source: FCC, CS Docket No. 96-496, 1997;
ASDL from Werbach 1997, p.75;
The Emerging Digital Economy Report

#9 -- Open Access 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 (Internet Alert February 4, 2000)
- 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

FCC's Position on Open Access

- January 11, 2001: FCC conditioned its approval of cable license transfers in the AOL-Time Warner merger on AOL agreeing not to require customers to go through an ISP affiliated with AOL in order to reach their own preferred ISPs
- BUT: Chairman Powell has spoken about taking a more “purely deregulatory” approach
- MOST RECENT: FCC continues to shield cable operators from local regulation, but operators seem to be heading to open access for market reasons – Internet Alert May 20, 2002

#8 -- European Long 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 six months
- Internet Alert August 10, 2000

#7 -- Lotteries, Sweepstakes and Contests

- PRIZE awarded via CHANCE in exchange for some CONSIDERATION = LOTTERY
- Sweepstakes: NO CONSIDERATION --contests in which participants are not required to pay anything for a chance to win; need for alternative free method of entry
- Contests: NO CHANCE -- must be based on skill
- Some countries and U.S. states impose bonding and other requirements for any chance promotions
- Internet Alert November 23, 1999
- Related point on another method to attract Internet traffic – SEC has ruled against Internet stock giveaways (Internet Alert October 12, 1999)

#6 -- 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
- companies are considering developing their own patent portfolio, for defensive purposes
- generally -- Internet Alert May 22, 2000 and December 21, 2000
- specific example – BT hyperlinking case Internet Alert April 17, 2002

#5 -- Sales Tax Issues Looming

- 1998: Internet Tax Freedom Act established a three-year moratorium on new or discriminatory state and local taxes applied to e-commerce
- 2001: moratorium extended through November 1, 2003
- 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

Moratorium Extended, but . . .

- Arkansas has passed a law requiring out-of-state e-retailers to collect sales tax if the e-retailer has a substantial interest in a business with a in-state physical presence (Internet Alert June 26, 2001)
- EU's Council of Economic and Finance Ministers have proposed that, starting in 2003, non-EU companies be required to collect taxes on digital deliveries to EU consumers (Internet Alert March 6, 2002)

#4 -- Terms of Use Not Necessarily Binding

- According to the Ticketmaster and Netscape cases, posting terms on the bottom of the first page of a web site, or asking them to read and accept terms, does not make those terms legally enforceable against users of that web site (Internet Alerts June 26, 2000 and August 20, 2001)
- for those terms to constitute a legally-binding contract, the web site operator must meet a two-part test:
- (1) the user must know or should have known that acceptance of those terms was a condition for using the web site
 - must one set out the terms of the agreement in full?
- (2) the user must affirmatively manifest his or her assent to that agreement by taking a demonstrable step
 - a “click-and-accept” on registration, download or ordering
- BUT -- courts will not enforce clickwrap agreements which are inherently unfair to consumers Williams v. AOL (overriding two defaults; too burdensome for consumer) Internet Alert April 9, 2001
- Update on electronic signature standards – Internet Alert May 28, 2002

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 (see EU Distant Selling Directive, discussed above)
- European Union Software Directive
 - cannot block assignments of software
 - cannot prohibit reverse engineering
- 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

#3 -- Domain Name Disputes

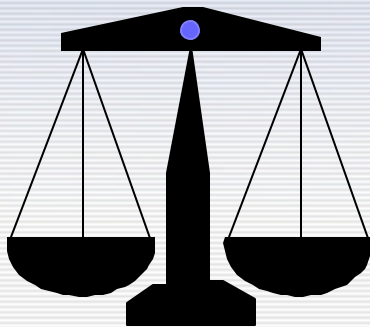
- Still a problem, despite implementation of ICANN Uniform Dispute Resolution Policy (Internet Alert February 15, 2000) and enactment of Anticybersquatting Consumer Protection Act (Internet Alert December 7, 1999)
- someone other than the trademark owner who is legitimately using the trademark as a domain name (e.g., a distributor) can continue to do so (Weber-Stephens case) Internet Alert June 2, 2000

#3 -- 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”
 - Internet Alerts September 13, 2000 and July 30, 2001
- New Top Level Domains (“TLDs”) such as .biz and .info may require even more defensive filings
 - new .eu TLD (Internet Alert June 5, 2002)
- Complexities of protecting domain names in multiple countries: requirements vary widely (Internet Alert June 5, 2002)

#2 -- Privacy

Fair Information Practices



1. **Notice**
2. **Choice**
3. **Access**
4. **Security**
5. **Enforcement**

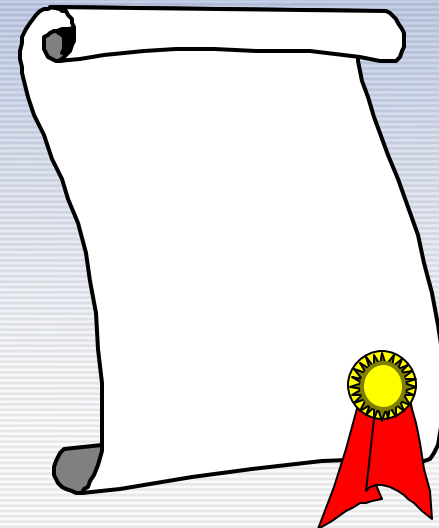
Internet Alert May 2, 2000

Fair Information Practices

1. NOTICE

Before collection, use, or disclosure,

- Who is collecting data?
- What data is collected?
- How data is collected?
- Why data is collected? (primary uses)
- What other uses? (secondary uses)
- How data is protected?
- What choices are available?



Fair Information Practices

2. CHOICE

Consent to secondary uses of data:



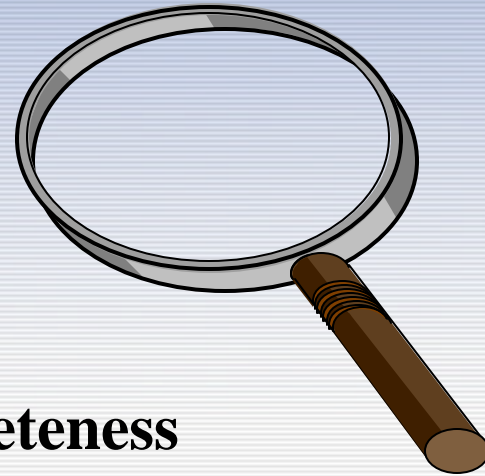
Opt-in

Opt-out

Fair Information Practices

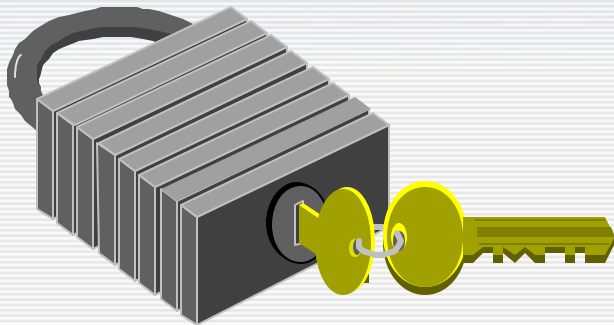
3. ACCESS

- Right to **view** data about oneself
- Right to contest **accuracy & completeness**
- **Procedures** for viewing & requesting revisions



Fair Information Practices

4. SECURITY



- **Data Integrity**

- Trusted sources

- Up-to-date

- De-identification

- **Data Security**

- Managerial safeguards

- Technical safeguards

- Physical safeguards

Fair Information Practices

5. ENFORCEMENT

- Complaint procedure
- Investigation
- Redress
- Sanctions

Federal Internet Privacy Mandates

Internet privacy mandates follow a “**sectoral**” approach:

- **Children’s privacy**
- **Health data privacy**
- **Financial data privacy**

Mandates expand upon Fair Information Practices:

Notice: Timing, placement & content

Choice: Prior consent

Federal Mandates: Children's Privacy

Children's Online Privacy Protection Act

Law enacted 1998

FTC regulations took effect **April 21, 2000**

- Protects **“personal information”**
- Collected by web sites and online services
- From children **under 13**

Focus on

Notice to parents

Advance parental **consent**

- Internet Alert February 11, 2000

Federal Mandates: Electronic health data

- HHS regulations issued December 28, 2000; to become effective in February 2003
- Protects **electronic, identifiable health data** handled by: Health plans; Health care providers; Health care “clearinghouses” (claims processors); and Business partners
- Consent required for uses other than **treatment, payment, and “health care operations.”**
- **Exceptions** for research, public health, law enforcement, emergencies, etc.
- Internet Alerts November 2, 1999 and May 31, 2001

Federal Mandates: Financial Data

Gramm-Leach-Bliley Act enacted Nov. 1999

Rules became effective July 1, 2001

- Protects “**nonpublic,**” **personally-identifiable** information handled by “**financial institutions**” “**significantly engaged**” in financial activities with consumers.

Notice requirements:

Initial notice at start of customer relationship

Annual notices to customers

Notice to consumers prior to disclosure

Choice requirements:

Opt-out of disclosures to nonaffiliated third parties

Internet Alert June 28, 2001

Enforcement

“Self-regulated” DOES NOT MEAN “unregulated”...

GeoCities (1998): Registration data released to third parties contrary to stated restrictions. First Internet privacy settlement based on FTC charges of “unfair” and “deceptive” use of online data.

ReverseAuction (2000): Collected addresses of eBay users and sent spam misrepresenting that eBay IDs were about to expire, in violation of eBay’s terms of use. “[B]eyond self-regulation, those who violate consumers’ privacy should be promptly called to task.” FTC action “is an effort to buttress, not supplant or detract from, initiatives of private parties. . . who develop and implement their own privacy arrangements.”

ToysMart (2000): Proposed bankruptcy sale of customer data would violate stated privacy policy forbidding release to third parties. Settlement authorized sale only to “qualified purchaser.”

Online Profiling

- Online profiling is seen as particularly invasive, even if the profile is not “personally identifiable”
- 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
- Internet Alert August 28, 2000

EU Data Protection Directive

- 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
- Principles are both a minimum and a maximum
- 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.

How are US companies responding?

- So far, U.S. companies have been slow to qualify under the voluntary safe harbor; perhaps waiting for other approaches
 - Internet Alerts February 14, 2001 and December 27, 2001
- Meanwhile, other countries are following the EU lead, creating perhaps an international standard that the U.S. (or U.S. companies) will ultimately be required to follow
 - Canada: Internet Alert February 5, 2001
 - Chilean and Argentine laws; Brazilian and Peruvian proposed laws: Internet Alert December 11, 2000
 - Japanese proposed legislation: Internet Alert May 14, 2001

#1 -- National Security

- In the wake of the September 11 attacks, U.S. Government's focus has been to enhance security, even at the expense of privacy (Internet Alert October 9, 2001)
 - includes tighter export controls, immigration controls and expedited government contracting
- increased monitoring, and simplified procedures for monitoring, e-mail and Internet use
 - California's governor vetoes law blocking an employer's ability to monitor E-Mail and Internet use of its employees

#1 -- National Security

- Combating cyberterrorism -- making computer systems more secure
 - heightened oversight and spending
- Criminal investigations and prosecutions of international terrorists, without warrants and other typical judicial procedures
- U.S. Government undertakes major technology initiative to fight terrorism (Internet Alert November 14, 2001)

National Security, but at what cost?

- Is free speech in jeopardy?
- Convention of Cybercrime facilitates international cooperation in the prosecution of Internet crimes such as child pornography and the denial of service attacks
- proposed additional protocol would criminalize speech that European member states deem "racist or xenophobic"
 - U.S. opposes on First Amendment grounds
 - European nations still believe that U.S. can cooperate in shutting down "unlawful hosting" in the US which is directed to EU nationals
- Internet Alert December 4, 2001

For further information:

- Hale and Dorr Internet Alerts at www.InternetAlerts.net