



E-Business & CyberLaw

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E-Commerce, the Internet & Information Technology

- Quickly evolving area with:
 - rapid technical change
 - rapid business change
 - rapid social change
 - rapid legal change

Disclaimer

- Merely a simplified and general overview of general rules, issues and trends, with many aspects and exceptions omitted
- Not to be relied on as legal advice
- Watching this does not make you a client

Internet

- For a long time, we have had issues of:
 - jurisdiction
 - intellectual property
 - contract formation
 - taxation
- The Internet just accentuates and magnifies these issues

Online Business

- Global (by definition)
 - Where is your business?
 - Where are your suppliers?
 - Where are your customers?
 - Possible presence in many jurisdictions
 - Ability to become an *Instant Exporter*

Jurisdiction

- Ability of a Court or other Tribunal to assume control, to assert its authority and to enforce its decisions
- Global Internet - Local Legal Systems
- Hundreds of jurisdictions world-wide

Jurisdiction

- Foreign Courts may validly assume jurisdiction
- Sliding scale based on passive vs. active web presence, interaction and targeting
- Forum - whose court will adjudicate?
- Law - whose law will be applied?

Jurisdiction

- Canadian and Alberta Courts may enforce assertions of foreign authority, including judgments for money damages
- Even in cases where the law enforced does not exist here

Jurisdictional Risk Management

- Consider context and conduct
- Strategic consideration of *targets*
- Location of *business presence*
- Contractual risk management
 - Choice of law and jurisdiction clauses, disclaimers, limitations, indemnities

Contracts

- Important in legal risk management
 - Jurisdiction
 - Parties can contractually agree on jurisdiction
 - Dispute resolution (arbitration, no class actions)
 - Click-through/Web wrap
 - Rules of International Trade

Contracts

- Important in legal risk management
 - May disclaim presence or targeting
 - Parties can contractually agree on jurisdiction
 - Choice of law
 - Choice of forum

Contracts

- May provide for a mechanism for dispute resolution (arbitration, no class actions)
- May disclaim liabilities and terms the law may otherwise impose, subject to legal bars to such disclaimers
- May limit liability
 - Disclaim certain types of damages
 - Limit amount of possible damages

Contracts

- May manage or shift risk by requiring one party to indemnify another
- May deal with the complex rules of international trade, for example:
 - United nations convention on the international sale of goods
 - When title to goods passes from seller to buyer (when shipped, when delivered, etc.)

Contracts

- Forming Contracts on Line
 - Shrink-wrap, Click-through (Clickwrap)
 - Browse-wrap (Webwrap)
- Click-through:
 - *Rudder v. Microsoft*
 - *Kanitz v. Rogers Cable*
- Browse-wrap:
 - *Specht v. Netscape*

Contracts

- Online or offline, the legal requirements are generally the same:
 - Offer
 - Acceptance (unconditional, of the offer)
 - Consideration (something of value exchanged)
 - Some agreements must be in writing to be enforced

e-Contracts

- Authentication and identification of “signor”
- Integrity of contracts, documents and records (have they changed?)
- Repudiation (will it stand up in Court?)
- Security (in transit and storage)

e-Contracts

- Technological Solutions
- Encryption
- Digital Signatures
 - Authentication and identification of signor
 - Integrity of document and its contents
- Legislation

e-Contracts: Legislation

- Canada
 - UECA (Uniform Electronic Transactions Act, based on the UN Model Law on e-commerce)
- Alberta
 - Electronic Transactions Act
 - Internet Sales Contract Regulation (under the Fair Trading Act)

Alberta - ETA

- Proclaimed in effect April 1, 2003
- No change to general law of contracts
- Subject to certain exceptions (real estate, wills, etc.), legal effect will not be denied solely on basis of electronic communications forming the contract
- Functional equivalency
- Generally, all electronic documents = *a writing*

Intellectual Property

- Technology and Content Transfer and Licensing
- Copyright
- Trade-marks
- Domain Names
- Trade Secrets
- Patents

Intellectual Property

- Means of dealing with Intellectual Property Interests
 - Assignment (basically a sale)
 - License (permission to use)
 - May be exclusive or non-exclusive
 - Waiver (agreement to not enforce a right)

Copyright

- Basically the right to copy and related rights (publish, distribute, publicly perform, etc.)
- There are exceptions
 - Fair dealing (in the U.S., fair use)
- Copyright Act (Canada)
- No copyright at common law

Copyright

- Applies to original works
 - Art (painting, sculpture)
 - Photographs
 - Literature
 - Music
 - Drama
- Quality is irrelevant - garbage gets equal protection

Copyright

- Copyright exists automatically when an author expresses an original idea in a tangible form
- Protects the expression of the idea, not the idea itself
- Registration is available and often recommended but is not required to perfect the right itself

Copyright: Ownership

- Basic rule - owned by the *author*, the person who creates the work
- First owner may be varied by contract:
 - Written agreement
 - Employers will own work produced by employees in the course of their employment

Copyright: Ownership

- Unless otherwise agreed in writing, independent contractors will usually own and retain the copyrights
- Transfer of proprietary interests in copyright must be in a written document
- Proprietary interest includes an assignment and an exclusive license

Copyright: Moral Rights

- Moral Rights are in addition to copyright
- Attribution, Integrity, Association
- Cannot be sold
- May be waived

Copyright Online

- Applies to content, code, software and web sites (digital stuff)
- Peer-to-peer technologies allow cheap or free copying anonymously and globally
 - File sharing and the entire P2P/Napster/MP3 phenomenon

Trade-marks and Domain Names

- Trade-marks are generally local or national in scale
- Domain names are, by definition, global
- Domain names are administered by an authority located somewhere
- TM protection in a dot-com world

Trade-marks

- Must be a mark - a word or words, design, logo, combination of letters and numbers, etc.
- Not merely descriptive, but distinguish a product or service from its competitors in a market
- Must be and remain distinctive

Trade-marks

- Ownership is acquired and maintained by use
- There are common law rights as well as the ability to register under the Trade-marks Act (Canada)
- Brands are basically trade-marks

Trade-marks

- Linking the exclusive use of a distinctive trade-mark with the product or service will result in associated goodwill and reputation
- At common law, market and public reputation is protected by the ability to sue for *passing off*
- Registration gives greater rights

Trade-marks

- Concurrent use of the same or a confusingly similar trade-mark in connection with the same or a similar product or service in a marketplace may be infringement
- May result in confusion and loss of distinction, meaning ownership and protection may be lost, and registration may be *expunged*

Domain Names

- Alphanumeric and easy to remember equivalent for an IP address
- Used globally
- What happens when two identical or similar trade-marks, each valid in a particular location or jurisdiction, want to use the same or a similar domain name online?

Domain Names

- .ca is administered in Canada so use is likely to be subject to Canadian law
- .com, .net, etc. are administered from the U.S. so use is likely to be subject to U.S. law
- U.S. courts may validly assume jurisdiction over domain name disputes in certain cases

Domain Names

- Canadian businesses using U.S. based domains may be subject to U.S. law:
 - Lanham Act (U.S. federal trade-mark law) and state trade-mark laws
 - Anti-Cybersquatting Consumer Protection Act

Domain Names

- Upon registration, domain name registrants agree to dispute procedures and online arbitration:
 - UDRP (ICANN)
 - CDRP (CIRA)

Domain Names and Trade-marks

- Before use and/or registration, consider legalities and current use by others online and in applicable jurisdictions
- Tie up where possible related domain names
- Do not tolerate infringing use by others

Trade Secrets

- Processes, information, source code, know-how, data, plans, lists, etc.
- Protected by contracts (NDAs, etc.) and restriction of access to need-to-know basis
- Potentially eternal but disclosure or independent discovery means loss of protection

Patents

- Inventions
- Novelty, utility, non-obviousness
- Public disclosure required (opposite of trade secrets), limited term of protection (20 years)
- E-commerce, computer, business process, bio-tech, etc.
- Evolving area, jurisdictions vary in approach

Privacy

- Approach varies depending on jurisdiction
- European Privacy Directive
- U.S. *laissez-faire*
- Canada
 - Federal legislation
 - Provincial legislation

Privacy: A Definition

- The right to control intrusion into a person's seclusion
- The right to control disclosure of private facts about a person
- The right to prevent a person being put into a false light in the public eye, and
- The right to control the exploitation of a person's name and image

Privacy Online

- Personal information
- Common law tort of invasion of privacy
- Criminal Code and other legislation on interception of electronic communications
- Personal Information Protection and Electronic Documents Act (PIPEDA) (Canada)

PIPEDA: 10 Principles

1. Accountability
2. Identifying Purposes
3. Consent
4. Limiting Collection
5. Limiting Use, Disclosure & Retention

PIPEDA: 10 Principles

6. Accuracy
7. Safeguards
8. Openness
9. Individual Access
10. Challenging Compliance

PIPEDA

- Privacy Commissioner
 - www.privcom.gc.ca
 - Power to investigate complaints and to conduct audits
 - Reports
- Federal Court remedies for well founded complaints
- Offences

Privacy & Technology

- Cookies, profiling, web bugs, click-streaming
- P3P (Platform for Privacy Preferences)
- Hackers, crackers, malicious and/or stupid human actions

Security

- Free and easy access to those who are desired to have such access
- Preventing access to those who are not
- Freedom from danger or risk
- Confidence and trust in the systems and resources used

Security

- Failure to have adequate security may have legal implications:
 - Loss of assets, money, existence
 - Liability in negligence or otherwise to others and lawsuits by injured parties
 - Breach of statutory or legal duty
 - Liability for users of your systems or web site

Liability for Users

- Vicarious liability or Implied seal of approval
- Possession of illegal or infringing material
- Failure to train or supervise users
- Poisoned work place, hostile work environment
- Non compliance with legal requirements

Monitoring Users

- May be illegal (invasion of privacy, Criminal code [illegal wiretap], PIPEDA)
- May be desirable to enforce Acceptable Use Policy (AUP)
- Implementation must be done properly
 - Knowledge of at least one party
 - Contractual consent and agreement
 - Pursuant to privacy policy

Internet-Specific Issues

- Linking, deep linking, inline linking
- Framing
- Meta-tags
- Search engine keying
- Diverting/redirecting traffic
- Typopiracy, page jacking, etc.
- Cybersquatting

Other Issues

- Basically, all areas of the law are affected
- Online torts (e.g., cyberlibel)
- Breaches of regulations (e.g., securities laws)
- Taxation (presence, good or service, export or not, etc.)

Other Issues

- Online marketing, advertising and promotion:
 - Contests
 - Trading in mailing lists
 - *Spam*
 - Multilevel marketing and pyramid schemes
 - *Competition act* and anti-trust issues

Other Issues

- Ephemeral nature of digital information
- Tracking bad guys
- Finding and preserving evidence
- Document retention and destruction
- Litigation and record production
- Meta-data in documents and records

Questions?

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Shared Vision

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