

## OPERATING AN ONLINE BUSINESS: LEGAL AND ETHICAL ISSUES



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## WHAT IS THE INTERNET?

In 1966, while serving as director of the computer research program at the U.S. Dept. of Defense's Advanced Research Project Agency ("ARPA"), Bob Taylor conceives to link the communication of computers

Commercialized around 1994

Massive network of networks connecting millions of computers together globally, in which any computer can communicate with any other so long as they are both connected to the Internet. Information that travels over the Internet does so via a variety of languages known as protocols.

## HOW ABOUT THE WORLD WIDE WEB?

The "Web" is only one aspect of the Internet - - just like e-mail

The WWW stands as an info-sharing model built on top of the Internet.

Used to access data over the Internet.

Utilizes HTTP protocol to transmit data and browsers to access web pages.

## UNIQUE FEATURES OF THE INTERNET

- Digital data can be copied without degradation.
- Instantaneous transmission of data.
- Encryption to prevent copying possible.

## UNIQUE FEATURES OF THE INTERNET

- No single authority over the Internet.
- Worldwide access/display of information.
- Unique alphanumeric identifiers required for access (no two entities may have the same web or email address).
- Lack of control over transmission route.

## WHAT IS E-COMMERCE?

- Refers to all forms of business activities conducted across the Internet.
- Includes online sales (E-tailing, B2B, etc.), advertising on the Internet, and any online presence used for communication (customer service, etc.).



## E-COMMERCE: BEYOND THE MERE SALE OF GOODS & SERVICES

### Social networking websites

Anyone can join Facebook and Twitter without paying a penny, but MyLife (aka reunion.com) have convinced a large slice of its 30 million users to pay \$9.95 per month to search for people.

### Data theft

Forrester Research Inc. notes that the average security breach can cost a company between \$90 and \$305 per lost record.

### Cybersquatting

Seeking to profit from domain names associated with famous trade names, trademarks, and professionals.

## BEYOND MERE SALES: A FEW MORE EXAMPLES

### Who owns the rights in your e-mail messages?

- Does your message contain copyrighted materials, and do they infringe? What rights does your employer have?

### Unauthorized professional practice

Medical professionals improperly practicing across state lines, or website liable for the unauthorized practice of law!

## E-COMMERCE: THE ROLE OF LAW

**INTERNET SALES:** Selling goods or providing services via the Internet (contracting, performance, payment, etc.)

**INFORMATION:** Communications, acceptable marketing practices, data retention requirements, and others.

### **PROTECTION OF RIGHTS AND INFORMATION:**

- (i) Intellectual property rights (copyrights, trademarks, trade secrets) and privacy
- (ii) Data security

**DISPUTE RESOLUTION:** Jurisdiction, conflict of laws, privacy, free speech, and other issues

## PREDICTABILITY

“Must give predictability to legal system allowing potential defendants to structure their primary conduct with minimum assurance that the conduct will not render them liable to suit.”  
*World-Wide Volkswagen Corp. v. Woodson*

## LEGAL & ETHICAL ISSUES

### (1) Sales and the law

- (2) Information
- (3) Protection of rights
- (4) Dispute resolution
- (5) Ethics

## ONLINE SALES

### Private solutions

Agreements  
Technology solutions

### Public regulation

Legislation  
Case Law



## ONLINE AGREEMENTS

### (1) Digital signatures

E-Sign (Federal Electronic Signatures In Global and National Commerce Act)  
Uniform Electronic Transaction Act (UETA)

## ONLINE AGREEMENTS

### (2) Enforceability

Browserwrap  
Click-wrap  
Links  
Keys to enforcement  
a. Mutual assent is clear  
b. Layout – conspicuous  
c. Reasonable

## ONLINE AGREEMENTS

### (3) Terms of Use

Appropriate use of website  
a. Collecting data  
b. Protecting IP rights  
c. Unwanted contact (SPAM, Virus, etc.)  
d. Interactivity  
    (i) Improper language / communications  
    (ii) Pre-screening and content removal  
e. Limits: linking and access

## ONLINE AGREEMENTS

### (3) Website & Terms of Use

Acceptance of Terms  
Registration, passwords, authorized users  
Choice of law and forum  
Privacy policy  
Disclaimers / Limitation of Warranties  
User indemnification  
Limitation of liability  
Revision of terms

## LEGAL & ETHICAL ISSUES





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## HANDLING OF INFORMATION

- **Data collection.** Type and handling  
Consumer, third party, employment, medical
- **Data portability.** Individuals want to control where and how their profiles are used online.
- **Relevant limitations on data**  
Private, local, federal, & international standards

## HANDLING OF INFORMATION

### EXAMPLE OF PROBLEMS

-  Intentional sale of personal data.  
*Cross Media Marketing v. Nixon (N.Y. 2006)*
-  Mishandling of customer information
-  Inadequate security of data and websites  
Average security breach costs about \$90-\$305 USD per lost record [Source: www.informationweek.com]
-  E-mail and communications  
*Jane Doe v. XYZ Corporation (N.J.)* [External]  
*Aitken v. Comm. Workers of America* [Internal spam]

## INFORMATION SECURITY

### Wanted users

- Customers
- Privacy policy
- Handling of minors

### Unwanted users

- Attacks: Disruption or denial of service
- Unauthorized use of credit cards
- Unauthorized changes to database records
- Fraud

### Employee issues

- Misuse of data about vulnerable populations
- Employee misuse of the Internet
- Employee privacy
- E-mail harassment

## INFORMATION SECURITY

### Top Ten Risks for 2011

- |                                |                                    |
|--------------------------------|------------------------------------|
| 1. Cybercrime                  | 6. Malware                         |
| 2. IT infrastructure weakness  | 7. Web 2.0 vulnerability           |
| 3. Tough statutory environment | 8. Espionage                       |
| 4. Outsourcing                 | 9. Insecure user activities        |
| 5. Erosion of networks         | 10. Blur between work and personal |

Information Security Forum  
[http://www.prosecutor.gov/Customization/News/IT\\_Security/Data\\_Protection/Analysis\\_from\\_the\\_ISF\\_details\\_top\\_10\\_future\\_IT\\_threats.asp](http://www.prosecutor.gov/Customization/News/IT_Security/Data_Protection/Analysis_from_the_ISF_details_top_10_future_IT_threats.asp)

## INFORMATION SECURITY SOLUTIONS

### What needs to be done to protect?

- Follow privacy policy
- Implement security measures through technology & training
- Document tracking and retention

### What happens if the data gets out?

- Pre-built emergency micro-site
- Apology
- Reporting requirement
- Overseas issues

## INFORMATION & MARKETING

### Federal CAN-SPAM Act (2003)

- a. False and misleading transfer of data prohibited
- b. Opt-out required
- c. Commercial e-mail versus relationship

Pop-ups

Pay-per-click fraud

## LEGAL & ETHICAL ISSUES

(1) Sales and the law

(2) Information

**(3) Protection of rights**

(4) Dispute resolution

(5) Ethics





## IP RIGHTS IN E-COMMERCE

### Presence in E-Commerce

- Website development** [Construction]
  - How the website looks and performs
  - Billing and compensation
- Warranties, indemnification, liability limits
- Website ownership
  - Changes to website
  - Use with other customers/competitors
- Dispute resolution

## IP RIGHTS IN E-COMMERCE

### Trademarks & Marketing

- Domain names
- Adwords / Keying
- Cybersquatting
- Typosquatting
- Cybergripping

## IP RIGHTS IN E-COMMERCE

### Copyright issues

#### Exposure

Damages for infringement claims can be very high.

#### Examples

- “Thomas verdict: willful infringement, \$1.92 million penalty” *Ars Technica* (June 18, 2009)  
<http://arstechnica.com/tech-policy/news/2009/06/jammie-thomas-retrial-verdict.ars>
- “Jury Awards \$675K in Boston music downloading case” *Associated Press* (Aug. 2, 2009)  
[http://news.yahoo.com/s/ap/us\\_tec\\_music\\_downloading](http://news.yahoo.com/s/ap/us_tec_music_downloading)

## IP RIGHTS IN E-COMMERCE

### Copyright Issues

- Website design
- Website content
- Data collections
- Interactive content from users  
(e.g. comments on blogs, etc.)
- Modifications and remixes



## IP RIGHTS IN E-COMMERCE

### Copyright infringement exemption?

- Digital Millennium Copyright Act
- Liability of ISPs
- Pass through services (YouTube, E-Bay)
- Liability of non-profit institutions of higher education

## LEGAL & ETHICAL ISSUES

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## JURISDICTION: WHERE CAN YOU BE SUED?

*If your client does business on the Internet, shouldn't they be subject to being sued anywhere?*

### Domestically

Long-Arm Statute; Due Process Clause

Case law

### Internationally

Applicable standards

## FOUNDATION: CHOICE OF FORUM

### Location of the lawsuit

Applicable law

Contractual choice

Arbitration

### Other methods of limiting exposure

"Target" practice

Don't fill orders

Terms of use / Disclaimers

Technology

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## ETHICS

1. Honesty, integrity, and trustworthy
2. Ethical marketing
3. Privacy of customers
4. Unethical redirects to other websites
5. Mousetrapping
6. Domain name scams

## LEGAL CHALLENGES

Traditional laws generally apply to the online context, BUT

- 🐞 Laws cannot keep up
- 🐞 New technology poses new and unforeseen challenges
- 🐞 Expanded reach of the law
- 🐞 Proof issues
  - Difficult to catch (anonymous users)
  - More information in the open though

## SOME PRACTICE POINTERS

- 🐞 Concrete and specific Internet policies
- 🐞 Education and training
  - Written consent from employees
  - Regular seminars and notices
  - \* *HINI approach: rinse, lather, repeat*
- 🐞 Monitoring
  - Chief compliance officer / attorney
  - Regular audits
- 🐞 Ask permission
- 🐞 Technological solutions



## LEGAL ISSUES: 3<sup>RD</sup> PARTY

1. Use of 3<sup>rd</sup> Party Technology
  - a. Hosting
  - b. Customer service
  - c. Credit cards
  - d. Information gathering
2. Data policies and practices – Coordination
3. Use of marks, branding, technology
4. Linking
5. Indemnity and warranties
6. Terminating the relationship & troubleshooting