

International Online Selling

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ISSUES

1. Intellectual Property [Abe]
2. Customer Data & Privacy [Pryce]
3. Web-site liability [Abe]
4. On-line Contracting [Pryce]

Intellectual Property Issues

- Domain Name
- Website and content
- Advertisements, hyperlinks, metatags, etc.

Intellectual Property Recommendations

- Search and Register domain names and trademarks
- Web-site notices
- assignments of ownership
- hyper-linking agreements and licenses

2. Customer Data Privacy

- U.S. regulation
- Transatlantic Regulation
- Canadian Federal Privacy Legislation

Dealing with International Privacy Laws

- Laws can restrict what is collected...
 - US
 - Fair Credit Reporting Act
 - Cable Communications Policy Act
 - Electronic Communications Privacy Act
 - EU privacy directives
 - OECD Guidelines
- ...how it's collected...
 - UK Data Protection Act of 1998

Transatlantic Privacy Harmonization Regime:

**The EU Privacy Directive and
US-EU Safe Harbor**

Privacy: Two Different Approaches

- **US**
 - **Sector-specific legislation**
 - **Industry self-regulation**
 - **Privacy statements**
- **EU**
 - **Comprehensive regulation**

EU Privacy Directive

- **Adopted on October 24, 1995**
 - **Effective on October 25, 1998**
- **Comprehensive approach to all data protection issues; conceived before emergence of Internet**

Basic Requirements

- “Criteria” when data processing permitted
 - “Unambiguous consent”
 - “Necessary for performance of contract”
 - “Compliance with legal obligation”
- All personal data must be:
 - “Processed fairly and lawfully”
 - No incompatible secondary uses
 - Accurate, not excessive, and not held for longer than necessary

Extraterritorial Impacts

- **EU asserts that Directive applies to most, if not all, transactions having a connection to a Member State**
- **Article 25: No exports of personal data to countries that lack “adequate” data protection safeguards**

U.S.-EU Response

- “Safe Harbor” for U.S. business
- Presumption of adequacy of privacy safeguards.
- Negotiated for three years

“Safe Harbor” Principles

- **Notice**
- **Choice**
- **Onward Transfer restrictions**
- **Security of data**
- **Data Integrity**
- **Access for subject**
- **Enforcement - required/essential**

Benefits of Safe Harbor

- **Presumption of “adequate” data protection standards; no automatic disruption of data flows from EU**
- **For U.S.: enforcement by relevant US authorities (FTC or agency with regulatory authority over entity)**
- **Globally: Established model, pattern of practice and interpretation.**

Recommendations

- Privacy Policy
- Obtain Consent
 - Opt-in
 - Opt-out
- Click-screen -- particularly under 13 for Privacy
- Ensure contracts/regulation for data to 3d parties.

3. Web-Site Liability

Web-Site Liability Issues

- Are terms offers vs. invitations to treat?
- Reliance/potential for negligence?
- Potential for inaccuracies, downtimes, viruses, infringing/defamatory content?

4. On-Line Contracting and Jurisdiction

Online Contracting Issues

- **Controlling Jurisdiction**
- **Ensuring Enforcement:
Electronic Signatures/
Electronic Contracts**

Jurisdiction: the Basic Problem

- In the “borderless” environment of the Internet, whose national laws should apply to online commerce and other online activities?

Examples

- “Hate Speech” Laws
- Online Gambling
- Pornography
- Privacy
- Consumer Transactions

Commercial vs. Consumer

Int'l Commercial Transactions

- Very common
- Laws and practices developed over many centuries
- Treaties
- Choice of law ordinarily respected
- Dispute resolution procedures

Int'l Consumer Transactions

- Relatively uncommon
- No single body of int'l consumer law
- No relevant treaties outside of Europe
- Choice of law usually not respected
- No dispute resolution procedures

What Law Governs?

- Paradigm: A consumer in Florida buys liquor online from Paradise Ltd, a corporation based in the Caribbean and Latin America.
- Whose law should govern the transaction?
 - Heaven/Brava Rica law?
 - Florida law?
 - Any law specified in a contract?

What Does It Matter?

- Right to withdraw from the transaction within a specified period of time
- Contract formation issues (e.g., “click-wrap” contracts)
- Disclosures about characteristics of product
- Regulated product (liquor)
- Warranties
- Privacy
- Laws governing financing terms and disclosures
- Right to pursue legal remedies, as well as the remedies available

Different Approaches

- European: “Mandatory rules” of consumer’s jurisdiction apply, notwithstanding contrary choice of law
- U.S. and Canadian law: As a general matter, choice of law would be upheld in consumer contracts
- EU Ecommerce Directive: Company’s principal place of business decides which government may regulate contract (limited to non-consumer contracts)

Problems On Both Sides

Choice of Law

“Mandatory Rules”

- Companies potentially subject to the laws of many different jurisdictions
 - Impact particularly severe for small companies
 - Lack of legal certainty in int'l ecommerce
- Consumers deprived of legal rights that they have in their own country
 - Consumers don't know laws of other jurisdictions
 - Possible consumer abuse havens; loss of confidence

Personal Jurisdiction in U.S.

- CompuServe (CA6 1996): electronic contracts & interaction can yield PJ.
- Thompson v. Handa-Lopez (WD Tex 1998): Consumer can sue in home, despite choice of law and arbitration clauses.
- “Sliding scale” of electronic interaction, but traditional Int’l Shoe/Burger King principles apply

E-Signatures/ E-Contracts

Electronic Authentication

1. The Problem
2. Approaches

The Basic Problem

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The Problem

- “On the Internet, no one knows you’re a dog.”
- To do serious business on the Internet, you must be able to identify your business partner.
- Sometimes, doing business requires getting the customer’s “signature.”

Lawyers to the Rescue

Two ways to solve these problems

1. Authentication agreements
 - Primarily relevant B2B
2. Authentication laws

Authentication Law – UETA

Uniform Electronic Transactions Act

- Records, signatures in electronic form will not be denied legal effect
- Contracts that use electronic records in formation will not be denied effect
- Legal requirements for writings, signatures can be satisfied electronically

Authentication Policy – UETA

Policy Buried in Definitions

- An electronic signature is any electronic symbol
 - “attached to or logically associated with an electronic record” and
 - “executed or adopted by a person *with the intent to sign* the record
- How prove it was *my* signature?
 - May use any evidence, including security technology

E-Sign

- Federal Electronic Signatures Act, entered into effect Oct 1, 2000.
- Applies where no State law enacting UETA in effect.

Authentication Policy – United States

- **Enables** use of electronic signatures and records.
- **Doesn't prescribe** standards for signature devices or Cas
- **Recognizes agreements** concerning use of electronic signatures.
- **Cross-border recognition** not a major concern.

Authentication Policy – European Union

- **Ties** legal recognition of electronic signatures to use of particular technologies.
- Governments and standards bodies inclined to **prescribe standards** for signature devices and operation of PKIs.
- **Grudging accommodation of agreements** concerning use of electronic signatures.
- **Cross-border recognition** remains a serious concern.

Paradise Scenario is Hybrid

- Electronic contract
- Bricks-and-mortar fulfillment

Recommendations - I

- Consider physical location of server and web-site
- Specify location, governing laws and forum
- Security procedures -- cryptography
- Controls on access,
- Screen location of fulfillment
- Rely on credit card, charge-back procedures in consumer context.

Recommendations - II

- Web-site disclaimers and terms.
- Ensure that readers scroll through terms and specifically accept onerous terms.

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