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.

WHAT IS E-COMMERCE?

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.).

UNIQUE FEATURES OF THE INTERNET

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

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

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**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.

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**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

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**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!

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**LEGAL & ETHICAL ISSUES**

(1) Sales and the law
(2) Information
(3) Protection of rights
(4) Dispute resolution
(5) Ethics

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**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*

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**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)

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

(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

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

**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)**

- False and misleading transfer of data prohibited
- Opt-out required
- 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
Cybergriping

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://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

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

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**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

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**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

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**SOME PRACTICE POINTERS**

- Concrete and specific Internet policies
- Education and training
  - Written consent from employees
  - Regular seminars and notices
    - *H1N1 approach: rinse, lather, repeat*
  - Monitoring
- Chief compliance officer / attorney
- Regular audits
- Ask permission
- Technological solutions
LEGAL ISSUES: 3RD PARTY

1. Use of 3rd 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