

Report on the legal aspects for consideration within e-business

Introduction

The rapid development of e-business as a mainstream reality has been such that it is difficult for legislators to catch up. The legal framework for trading on-line can therefore be a little unclear. Inevitably, the exponential rise in Internet usage and trading has not been met with the adoption of legal regulations over how to trade in the borderless World Wide Web. The European Commission proposes to make it the responsibility of the individual member states to determine legal paths, however, while the legal obstacles can be intimidating, the most successful "e-tailers" are not waiting around for 100% legal certainty as they scamper for first mover advantage in their respective fields.

It is therefore wise to adapt a practical approach to legal risk identification and risk management and this guide is designed to highlight some of the issues, which should be considered as part of any web strategy.

European Directives

The law and regulation of e-commerce is a rapidly developing area attempting to keep track of the growth of online business. The EU is to the forefront of ensuring that e-commerce is adequately regulated and that "e-customers" are provided with the protection enjoyed by consumers in the traditional markets.

The European Commission set a clear objective of creating a European coherent legal framework for electronic commerce, by covering the following issues:

- (1) *Establishment of Information Society service providers*
- (2) *Commercial communications (advertising, direct marketing, etc.)*
- (3) *On-line conclusion of contracts*
- (4) *Liability of intermediaries*
- (5) *Implementation*

The legal framework for electronic commerce in Europe is being laid down by directives from the European Commission. Over recent years the commission has produced five significant directives:

- **Directive on Data Protection:** This deals with the holding of personal data on individuals and is covered in each of the EU member states by Data protection legislation.
- **Directive on Distance Selling and Financial Services:** This directive covers all types of distance contracts and it requires companies selling financial services to

provide consumers with certain information prior to the conclusion of a contract, such as the general terms and conditions that apply.

- Directive on Electronic Commerce: This directive relates to the modification of European Laws that are seen as barriers to electronic commerce such as admissibility of computer-based evidence in law.

This legislation has provided the means for electronic contracts and signatures to be accorded legal recognition needed in order to facilitate electronic trade. This legislative framework affords consumers and businesses greater protection and certainty when conducting online transactions. The legislation provides both sellers and buyers of e-commerce the option of either trading online or conducting business in the “traditional” fashion. However, with the advent of new legislation, practical and interpretative problems are encountered by all parties.

Introducing a legal framework has a high priority on government’s agendas because the Internet delivers new forms of currencies and income generating streams that the government needs to tap into. Governments are well aware that its policies and legislation does not control the present administration of the Internet. It seeks firm legal address to regulate what is put out there, both financially, legally and as a whole within the public domain. Most of the Internet environment is privately run and is not subjected to any particular government laws. Also of concern is regulating criminal behaviour like money laundering and tax avoidance. It must also be noted that if government investment is going into new fibre-optics and broadband it will want to reap some money back.

Concerns for businesses in doing e-business

The net can be both Europe-wide and international as well, so one has to think carefully about whom you want to advertise or sell to as well as the business conditions for that particular country. From a business perspective with the growth and maturity of the Internet comes economic opportunities and penetration of international market potential. Companies and individuals are still by nature reluctant to dive head first into reaping the rewards instead choosing to weigh up the risk vs cost analysis before implementation. The entrepreneurs that have made e-business work for them have understood the potential and applied themselves correctly to the sound principles of e-business management which involves researching basic contractual issues and putting into play basic business principles for doing business on-line.

From an individual (consumers) perspective there is still a reluctance to embrace on-line shopping because of perceived lack of security for conducting financial transactions, concerns about reliability of on-line purchasing, privacy considerations in terms of personal information kept on them (spending practices, credit rating, etc) and general unfamiliar with the Internet environment, but this aspect is slowly improving.

Confidence in both user groups is also a main factor in embracing this new medium.

The principal legal issues specific to electronic commerce involve:

Concluding contracts on-line

One of the primary concerns of organisations trading on-line is whether or not transactions concluded over the Internet will be legally binding. To this end, guidance can be taken from existing contract law, taking and using appropriate procedures and the emerging body of e-business legislation. With proper legal advice, a properly drafted set of terms and conditions can minimise the pitfalls associated with on-line commerce such as which country's law should apply to the transaction, ownership of intellectual property, payment and delivery terms etc.

Getting paid

One of the biggest obstacles facing on-line traders is the lack of confidence that consumers and customers have in the on-line medium. For example, many consumers are reluctant to give their credit card details over the Internet and traders are reluctant to divulge high-value information by way of e-mail. The use of appropriate encryption technology and other security measures can allay these fears but regard should be had to the implications of any breaches of such measures. The tax implications of selling online are far from clear.

Consumer protection

With the growth of Internet shopping and advertising consumer protection issues have become very important for businesses. There are a number of EU Directives presently in force which provide a level of protection to Internet consumers:

- Unfair Terms in Consumer Contracts Directive;
- Data Protection Directive;
- Comparative Advertising Directive;
- Distance Selling Directive; and
- Consumer Sale and Associated Guarantees Directive.

These Directives which are, or are due to be implemented depending on the member countries, afford a broad range of protections for consumers, such as ensuring that:

- consumer contracts are not affected by unfairness or bad faith;
- advertising is not misleading;
- a consumer is given all the relevant information relating to a contract before the contract is concluded; and goods delivered are of sufficient quality.

While this body of law will only be uniformly applied in the Member States of the EU and may not cover consumers in other countries, a sensible approach to matters such as cooling-off periods, advertising standards, direct marketing and harmful content will reduce the risk of a legal challenge to the content and use of a website.

Data protection

Data protection can be seen as one of the major barriers to the growth of e-business. Private information held on computers connected to the Internet could either be misused by the company that holds it, or can be misused by hackers that want to profit from it. Data Protection covers how information may be held and processed. The

EU's Data Protection Directive aims to harmonise European laws to allow a free flow of personal data within Europe. If a company has any doubt as to whether they should register they should consult the Office of the information Commissioner in their particular country. It is also important for companies when handling personal information that staffs are trained in procedures to prevent disclosures of information to the wrong people.

Intellectual property

Trade mark and copyright protection and Internet piracy are major legal issues in the online environment. For example, while your company may have high brand recognition within your particular country and you may even own a trade mark which gives you the exclusive right to use your brand's logo, it may well be that a similar legally protected mark exists in another country where your site can be accessed. While to seek trade mark protection in every country in the world is impractical in most cases, a common sense approach can usually ensure the maximum protection possible of your company's intellectual property.

E-mail

E-mail and the Internet have become an invaluable means of business communication. Effective use of these systems can transform a company's efficiency and profitability. To see a business card, letterhead or any type of stationary without an email address is becoming rarer and rarer these days.

To avail of these advantages, it has therefore become necessary for employers to install expensive computer equipment on the desks of their employees. This is very often done without issuing any written rules on the use of computer systems. As a result, in many companies, employees have unlimited access to using the Internet and sending and receiving e-mails for their own personal use. As a consequence, a number of issues have begun to emerge regarding the unauthorised use of business equipment, the monitoring of e-mail and Internet use by employees, the harassment of employees by sending offensive and possibly defamatory e-mails and the implementation of work place policies regulating the use of business equipment.

Insurance of internet related risks

Internet-related losses are a cause of concern for many businesses. Such losses may arise from a number of different sources such as:

- Systems failure;
- Computer viruses;
- Faulty software;
- Fraud;
- Hacking, and
- "Theft" of websites

Indemnity cover is the most secure method of ensuring that your business does not unduly suffer Internet-related losses. The most common forms of insurance taken out by companies to cover any Internet losses are:

- First party property coverage;
- Commercial general liability insurance;

- Directors and officers liability insurance;
- Fidelity, surety and crime insurance; and
- Employment practices liability insurance.

Solutions to consider

Today, the state of the law regarding other countries enforcing their laws against your web site is uncertain. Here are some practical tips to minimize risks:

- When a person is going to buy from a company online, instead of asking them to fill in the name of their country, the company can have a drop list of countries to which this company has affirmatively decided to sell. While people can still view the company's site in countries that aren't on the drop-down list, one can argue that the company has taken reasonable steps to avoid doing business in their country.
- If a company is trying to exclude particular countries, another possibility is to have a pop-up window that says something such as, "If you are a citizen of countries X, Y and Z, it is illegal for you to order our products or view the material on this site." This is especially important because a first-time viewer doesn't know what they'll see on the website.
- Still in its nascent stage is "geolocation" software. This type of software was originally developed to allow local advertisers to reach a local market. When it works right, it can tell the company the approximate location of a web surfer. The problem is that there are many things that can cause the software to miss the target by half a world. The problem stems from the fact that the Internet wasn't developed with the ability to trace geography as a goal. IP (Internet Protocol) addresses just weren't designed to make it easy to physically locate a computer when a user click on a link.
- If a company is in a heavily regulated industry, like tobacco or alcohol, it should remember that regulations also apply online. If a company cannot take phone orders for wine from another country or state, it should assume that it cannot take a web order either. If one sells to a place where possession of what it is the company sells is illegal, the company might be committing a criminal act under their law by shipping it there.
- Yet another approach is to localize your operation. If a business wants to sell to France, it could start a web site called, "YourName.fr." The company could then hire a local attorney to ensure that you comply with local law. Especially when used in conjunction with the other approaches, this might help them if they have to defend themselves in a foreign country.

This guide reflects the current status of activity happening within European legislation and is based on currently available best practice. However legislation and business models are rapidly changing in the world of e-business. Up-to-date legal resources should be consulted for new information and legal advisors consulted for detailed information and interpretation.

Further information about electronic commerce legal issues in Europe can be found on the website of the IST project ECLIP (Electronic Commerce Legal Issues Platform) at www.jura.uni-muenster.de/eclip

Other sources for information on legal aspects of doing e-business include:

www.europa.eu.int/ispo/ecommerce

Europa is the portal site of the European Union, this link leads to the information society and other e-business related links.

www.ilpf.org

The internet law and policy forum is dedicated to promoting global growth of e-commerce and particular legal issues.

www.ebusiness-watch.org

Analysing e-business development at different sectors within the marketplace.

http://cwis.kub.nl/sobu/eec/frm_news.htm

A portal on electronic commerce links, has a variety of sources on articles, publications and organisations.

www.oecd.org

Has a section on ICT's and a relevant section which examines the taxation aspects of electronic commerces.

www.e-gateway.net/infoarea

Links to e-business information sites Europe wide.