



LEGAL ISSUES CONCERNING E-COMMERCE AND BUSINESS IN CYBERSPACE

Presented by Garfield & Hecht, P.C.
for the Aspen Young Professionals Association

David H. McConaughy, Esq.

Daniel D. Reynolds, Esq.

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Doing Business In Cyberspace

- Pros:
 - Small businesses reach global audience at low cost
 - Live and work anywhere you want (e.g., Aspen)
 - Open 24 hours a day, seven days a week
- Cons:
 - Technology, customs, protocols, and the law are still evolving
 - Congress takes long to “catch up” with technology
 - New business models are always risky
 - Dot.com bubble
- The future is here
 - Get on the bus or get left behind



Taking the E-Commerce Plunge

- Merriam-Webster's Collegiate Dictionary defines commerce as:
 - The exchange or buying and selling of commodities on a large scale involving transportation from place to place



Elements of an E-Commerce Transaction

- A product;
- A place to market and sell the product;
- A way to accept orders;
- A way to accept money;
- A fulfillment facility to ship products to customers;
- A way to accept returns;
- A way to handle warranty claims if necessary;
- A way to provide customer service.



Domain Name

- Domain names are registered on a first-come, first-serve basis (www.whois.com) (www.godaddy.com)
- Trademark search (www.uspto.gov)
- Corporate name search (www.sos.state.co.us)



Developer Contracts

- Establish hard deadlines for a “go live” date, meaningful holdback in payments, penalties for delays, and adequate test procedures
- Include warranty provision that your use of the site will not infringe on anyone else’s IP
- Include confidentiality provision
- Clarify ownership and all necessary rights, licenses and permissions



Do-It-Yourself Software Programs

- To hire a developer for a unique solution can be costly
- As a result, there are a number of do-it-yourself software solutions:
 - WebExpress from MicroVision Development (www.mvd.com/webexpress)
 - Visual Site Designer from CoffeeCup Software (www.coffeecup.com)
 - Adobe's Dreamweaver – top choice for most professional web developers (www.macromedia.com/software/dreamweaver)
- FreeGraphics (www.freegraphics.com) & IStockPhoto (www.istockphoto.com)



Hosting Agreements

- Use a do-it-all web hosting providers
- Web hosting services offer site-building tools
- Make sure hosting arrangements address:
 - Response time
 - Customer support
 - Routine maintenance
 - Uptime
 - Security from hacking
 - Redundancy
 - Data backup
 - Exit strategy



Web Hosting Providers

- Yahoo! Merchant Solutions
(www.smallbusiness.yahoo.com/ecommerce)
- Ebay (www.ebay.com)
- Amazon (www.amazonservices.com/webstore)
- Volusion (www.volusion.com), Affinity Internet
(www.affinity.com) and 1 and 1 Internet Inc.
(www.1and1.com)



Clickwrap Contracts

- The “clickwrap” has evolved from the word “shrinkwrap”
- Clickwrap agreements with your users as part of the purchase process give you a legal remedy to ensure:
 - That you will be paid;
 - That the user will waive legal warranties;
 - That you may disclose users’ identities to government authorities;
 - That the user is over 18 and a US citizen;
 - That the site may only be used as permitted;
 - That venue and jurisdiction for disputes are in Colorado;
 - That there are limits to your civil liability.



Business Method Patents

- The US Patent Office has granted a number of “business-method” patents, covering e-commerce processes like Amazon.com’s “one-click” process, Priceline.com’s reverse auction method and DoubleClick’s banner advertising system
- Every e-commerce site owner has two concerns:
 - Whether your site uses methods that are the subject of a patent
 - Whether you can patent the unique features you have developed



Payment Options

- In order to accept online payment, you will need:
 - Internet merchant account and
 - Payment gateway account
- Adds an extra layer of security
- Providers of payment gateway accounts: PayPal (www.paypal.com); Authorize.Net (www.authorize.net); VeriSign from Symantec (www.verisign.com); & Cybersource (www.cybersource.com)



Digital Signature Technology

- Both Colorado and Federal law recognize the validity of electronic signatures
 - A contract is not invalid simply because it is not signed on paper
 - Electronic Signature: an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record
 - No specific technology is required; different approaches will make it easier to prove intent to sign



General Contract Rules Apply

- Identification of the parties
- Intentions of the parties
- Consideration
- Unilateral vs. Bilateral Contracts



Types of Electronic Signatures

- Click-wrap
 - Lowest form of proof; easiest to use; no identity
 - Requiring “scroll down” better
- Retype a word
 - Avoids automated purchases
- PIN/Password
 - Useful to verify identity of party
- Scanned Signatures
 - The computer as a fancy pencil
- MS-Word Signatures
- Biometrics



Online Corporate Services

- Colorado Secretary of State:
<http://www.sos.state.co.us/pubs/business/main.htm>
- Search existing business including address and registered agent
- Search for name availability
- File articles of incorporation or articles of organization
- File periodic reports (no more green postcards)
- Will not help you select your entity type
- Don't stop here. Corporations require bylaws; LLCs require Operating Agreements; other documents
- Other states have similar websites: search for them



Identify Theft and Internet Fraud

- Protect Yourself
- More Importantly: Protect Your Customers
 - Sony Playstation vs. Nintendo Wii?
- Red Flag Rules
 - Federal requirement for “Financial Institutions” and “Creditors”
- Social Security Numbers



Red Flag Rules

- Everyone should have a policy to prevent identity theft and to protect sensitive data
 - Storage
 - Passwords
 - Encryption
 - Employee policies



Red Flag Rules

- Required under Federal Law for:
- Financial Institutions
 - Banks, savings associations, credit unions, anyone holding a transaction account for a customer
- Or Creditors
 - Regularly obtain or use consumer reports in connection with a credit transaction
 - Regularly furnish information to a consumer reporting agency
 - Regularly advance funds except incidental to a service
- As to Covered Accounts
 - “A continuing relationship established by a person with a financial institution or creditor to obtain a product or service for personal, family, household, or business purposes.”
 - EG: credit cards, auto and home loans, cell phone accounts, utilities



Social Security Numbers

- May not be posted, displayed, or required for use as a password or ID under Colorado law
- C.R.S. § 6-1-715



SPAM

“The term ‘spam’ derives from a 1970 Monty Python Flying Circus sketch in which a waitress recites a menu containing, ‘egg and spam; egg bacon and spam; egg bacon sausage and spam; spam bacon sausage and spam; spam egg spam spam bacon and spam; spam sausage spam spam bacon spam tomato and spam....’” *White Buffalo Ventures, LLC v. University of Texas at Austin*, 420 F.3d 366, 368 FN 1 (5th Cir. 2005).



SPAM

- Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C.A. § 7701, *et seq.*
- Prohibits:
 - false or misleading transmission information
 - deceptive subject headings
 - Unsolicited e-mail 10 days after a recipient has objected to such messages
- Requires:
 - A valid reply address or other method for the recipient to request removal from future mailings
- Imposes liabilities on businesses that knowingly promote themselves with e-mails not in compliance
- Harsh penalties for sending pornography



Identify Theft Resources

- Colorado Identify Theft hotline: 855-443-3489
- Federal Trade Commission Red Flag Rules:
www.ftc.gov/bcp/edu/microsites/redflagsrule/index.shtml
- Colorado Attorney General:
www.coloradoattorneygeneral.gov/initiatives/identify_theft
- Colorado Bureau of Investigation:
http://cbi.state.co.us/inv/ID_theft/Index_IDTheft.html



Intellectual Property

- Protect your IP from unauthorized use by others
 - Publish at your peril
 - Do you want to be quoted or copied?
 - No such thing as bad publicity
- Avoid liability by misuse of others' IP
 - Trademarks/logos
 - Text and Images
 - Mike Tyson's Tattoo?



Intellectual Property

- Who owns the IP?
- Employment Agreements
- Confidentiality / Nondisclosure Agreements
- Trade Secrets



Trademark

- Word, phrase, symbol, design, or combination thereof
- Identifies and distinguishes the source of goods of one party from those of others
- Nike, Microsoft
- www.uspto.com



Copyright

- Your “work”
- Tangible form
 - Books, music, movies, art, software, architecture, electronic media
- Creative
 - Not “1+1=2”
- Not just an “idea” for a “work”
- www.copyright.gov \$35



Liability Concerns

- Graphics, content, or programs found elsewhere on the internet
 - Don't assume it's permissible
 - Don't be the next Napster test case
- Sales tax
- Unsolicited e-mail (spam)
- Keyword Advertising
- Trademark/Copyright Infringement
- Identity Theft
- Libel/Slander/Defamation
- False Advertising
- Fraud
- File retention policies
- Litigation hold
- Employment Policies for Internet and E-mail



Helpful E-Commerce Websites

- Domain Name Sellers
 - All Domains (www.alldomains.com)
 - WhoIs? (www.whois.com)
 - Go Daddy (www.godaddy.com)
 - Network Solutions (www.networksolutions.com)
- Software
 - WebExpress from MicroVision Development (www.mvd.com/webexpress)
 - Visual Site Designer from CoffeeCup Software (www.coffeecup.com)
 - Adobe's Dreamweaver (www.macromedia.com/software/dreamweaver)



Helpful E-Commerce Websites - Continued

- E-Commerce Solutions
 - Amazon's WebStore (www.amazonservices.com/webstore)
 - eBay (www.ebay.com)
 - Yahoo! Merchant Solutions (www.smallbusiness.yahoo.com/ecommerce)
 - Volusion (www.volusion.com)
 - Affinity Internet (www.affinity.com)
 - 1 and 1 Internet Inc. (www.1and1.com)
- Graphics
 - FreeGraphics (www.freegraphics.com)
 - IStockPhoto (www.istockphoto.com)



Helpful E-Commerce Websites - Continued

- Payment Gateway
 - PayPal (www.paypal.com)
 - Aurorize.Net (www.authorize.net)
 - VeriSign from Symantec (www.verisign.com)
 - Cybersource (www.cybersource.com)
- Legal
 - Garfield & Hecht, P.C. (www.garfieldhecht.com)



Conclusion

Presentation can be found in the
Recent News Section at
www.garfieldhecht.com

