

LEGAL LAND MINES IN E-COMMERCE

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Legal Land Mines in e-Commerce

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and

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Preface

Few people would question the idea that the Internet, the World Wide Web, and computer technology are having a profound impact on business. Some consider that effect revolutionary rather than evolutionary. Business leaders and their legal counsel need to understand that businesses have to change the way they organize, operate, and compete in the electronic economy.

When speaking with clients, we consistently find a mistaken belief that the law has kept pace with the practical realities of the electronic economy or that the legal environment in which clients are used to operating applies to the new business environment.

Technology has reduced the size of the world and created the potential for one global marketplace where information carried on the Internet will be available for receipt and consumption anywhere. Technology has made possible the creation and consummation of legal relations between businesses or between businesses and consumers without direct human intervention. We often hear it said that the Internet's World Wide Web provides the opportunity for the smallest companies to look and act as though they were large multinational corporations.

For businesses, the legal issues relating to the Internet and the use of technology require even the smallest companies to take into account whether the laws of the world's hundreds of countries and many hundreds more states, provinces, and other political jurisdictions will impose obligations on the conditions of contracting, operating, and selling and servicing their products and services.

Technology also has had an impact on time. Internet time implies a significantly faster pace at which business is conducted. We also are finding that Internet time changes how law is practiced. Internet time can reinforce the concept of globalization or imply the imperative to deal with legal issues with a degree of immediacy measured in minutes and hours rather than days and weeks.

The concept of Internet time can be demonstrated by the cases in this book. Some of these companies may not survive the period between the writing and the publishing of this book. Their possible demise does not, however, reduce the importance of the legal issues we present.

A new imperative for the legal profession is to have more in-depth knowledge of the client's business, including its use of technology and the Internet, in order to be proactive in advising the client and available to respond to the client's issues faster. Clients increasingly are looking to their legal counsel to be their partners, fully understanding the complexity of the issues they face locally and internationally. In this scenario the up-front participation of the law firm in planning the business is significantly more cost-effective than having to divert attention and financial resources to deal with problems later.

Law is evolving, as it always has, to ensure that the electronic economy has the rules and codes of conduct and operation needed to facilitate transactions and protect the interests of all stakeholders.

Just as consideration had to be given to the legal foundations of commerce when economies evolved from local marketplaces with face-to-face trading, to the use of currencies, to intercommunity and then international trade as transportation systems developed, the Internet requires our legal systems to deal with communication and distribution systems that permit virtually instantaneous and worldwide distribution of services and electronic products.

We need only look back to how the law came to deal with issues relating to contract formation by use of the mails and then how the law dealt with the same issues after the advent of facsimile technology to realize that as technology evolves and business adapts to take advantage of new technologies, the law will have to follow closely behind to add greater certainty to the process.

What legal scholars, practitioners, and businesspeople find of great interest and even greater importance is the unprecedented need created by the Internet for convergence in the laws of the world to bring order to this latest stage of development of the world economy. It remains uncertain whether such convergence ultimately will happen. Until it does or if it does not, business must be much more attuned to the legal issues arising in e-commerce to avoid the legal land mines hidden by the technology.

PURPOSE OF THIS BOOK

Business managers and lawyers need to be able to recognize situations where legal issues arise in the “new economy.” Clients’ knowledge will be enhanced and ultimately legal expenses will be saved as a result of reading a real business case, identifying the places in the case where legal issues arise, and reading an explanation of what the issue is, why it is an issue, and ways to consider dealing with the issue, including contacting qualified legal counsel.

Legal advice often is not sought in e-business situations, as business managers are often not aware that there are legal issues, thinking only of the traditional business or market model. If they do recognize the issues, they may not recognize the ramifications of not dealing with them properly. It is better to deal with these legal issues at the start rather than after one is in a dispute or after one has taken business steps that may be irreversible. Business involves risk assessment and decision making. The greater the level of confidence of a business manager that issues have been identified, the higher the level of confidence in making the decision.

This is not intended to be a legal treatise. The issues are dealt with in a general fashion with the intent of raising those issues in the minds of the reader rather than going into great detail about the technicalities of the law. Law by nature is jurisdictional, and any attempt to be specific about the law in a book intended for a wide audience would be difficult. The law also tends to change rapidly in this area, and while the law does not change at Internet speed, this book could rapidly become out of date if it took a more technical approach.

SOURCE OF MATERIAL

The Richard Ivey School of Business of the University of Western Ontario has provided the cases used in this book. Ivey is ranked as one of the top business schools in the world. It is the world's second leading producer of business cases and the world's leading producer of international business cases. Business schools around the world use Ivey cases.

The cases used in this book are real fact situations, sometimes using the actual company names, and all the cases deal with e-commerce or e-business situations. The cases are full text reproductions of the Ivey material.

HOW TO USE THIS BOOK

Each chapter contains a business case. A chapter starts with a short introduction to the issues we are focusing on in the case. Having introduced the reader to the issues, we recommend that the case be read in its entirety to gain an appreciation of the nature of the business or organizational situation it presents. We have numbered the paragraphs of each case and highlighted places where the issues we address arise in the case. After having read the entire case, we recommend that the reader reread the highlighted portions.

Following the case is a discussion of the legal issues, including, where relevant, background information to assist the reader's understanding of the technical or legal environment. We have attempted to explain each legal issue in a way that identifies the legal principles involved, the foundation or source of the law, developments in the law, and uncertainties in the law and to provide some comments with respect to considerations or options to deal with the issue.

THE LEGAL ISSUES

This book discusses what we consider significant areas of potential benefit for businesses. We have not attempted to deal with all the legal issues that might arise through the use of technology or the conducting of business in the electronic economy.

The issues raised in the chapters are not addressed in the order that follows, nor are they covered in the groupings listed below. We present the subject area groupings to assist the reader's thinking about the relationships among the issues.

Corporate Organization

Securities

Issues regarding the raising of capital, initial public offerings (IPOs), and the consequences of looking for investors without following corporate and securities laws.

Insurance

The availability of insurance to protect against things such as unintentional infringement of copyright or patents and hacker attacks.

Employment

Computer, Internet, and e-Mail Policies

The advantages of having policies in place that govern how employees are to use the computer and Internet resources provided by the employer.

Employment Policies

Policies that businesses should have in place relating to things such as confidentiality, copyright, and moral rights and the significance of using contracted resources instead of employees.

Confidentiality and Privacy

Privacy

Issues relating to protection of personal information and private-sector privacy legislation being passed around the world.

Confidentiality

The need to ensure confidentiality of sensitive company information by using confidentiality provisions in contractual arrangements.

Document Retention

The advantage of archiving copies of a website from time to time as it changes.

Intellectual Property

Copyright

Who owns copyrights in things such as software and websites and the related issue of moral rights.

Software Patents

The increasingly important issue of the patentability of software, the risk of violating such patents, and the rewards of possessing them.

Business Names, Trademarks, and Domain Names

The differences between generic top-level domains such as .com and country-specific domains such as .us (United States), .uk (United Kingdom), .hk (Hong Kong), .jp (Japan), .sg (Singapore), and .ca (Canada). The relationship between trademarks and Uniform Resource Locators (URLs) or domain names and how to rationalize the differences in their application. The mechanisms that are in place to deal with situations where someone else has registered a domain name that one feels ought to be his or hers.

Software Licensing

The need to understand how software is licensed and the differences between creating one's own, contracting to create it, and licensing existing software.

Interjurisdictional Transactions

Electronic Contracting

As the Internet is a worldwide phenomenon, making websites available to people around the world, businesses may be exposing themselves to laws in multiple jurisdictions. Issues surrounding the sale of goods on the Internet are not always as clear as they are when one is selling from a store, such as obligations for mistakes in pricing.

Third-Party Internet Suppliers

ISPs

Issues facing Internet service providers (ISPs), such as their responsibility for materials posted on the websites they host.

Website Development and Hosting

Issues such as who owns elements of the site such as text and images, the ability of the party commissioning the work to approve the work, and obligations for ongoing maintenance.

ASPs

Issues for the application service provider (ASP) model, including service levels and responsibility for service outages.

Competition and Criminal Law

Contests and Promotions

The need to ensure that laws regarding lotteries and gaming are followed, such as the need for skill-testing questions and the requirement to restrict a lottery to certain jurisdictions.

Criminal Offenses

Criminal consequences can apply to issues such as online gambling, pornography, and hate literature. These rules vary by jurisdiction.

Competition

The application of laws intended to prevent monopolistic behaviour.

CAVEATS

It should be no surprise that a book written by lawyers contains some caveats.

This book is not intended to provide legal advice. The law varies by jurisdiction, and the application of the law is determined by individual circumstances. The nature of this book also requires the discussion of the law to be simplified in many cases to keep it generic and understandable. Any readers who feel that they may

have issues related to the topics disclosed in this book should seek competent legal advice in the appropriate jurisdiction.

The Ivey business cases have been prepared solely to provide material for discussion. The authors of those cases do not intend to illustrate either effective or ineffective handling of a managerial situation. The authors may have disguised certain names and other identifying information to protect confidentiality.

This book does not discuss all the legal issues in each case. The legal discussion is not a commentary on whether the businesses in the cases took the right or wrong legal steps or on the quality or nature of the legal advice they received.

We hope that readers will be able to use this book as an overview of a number of the legal issues that will arise in the various areas of e-business and as a tool to assist them in recognizing when a certain fact situation should cause them to consider whether a legal land mine may lie beneath the road ahead of them.

About The Authors

David R. Canton

David Canton is the senior lawyer in Harrison Pensa LLP's High Tech and e-Business Practice Group. He majored in computer science before entering law school at the University of Western Ontario and was called to the Ontario Bar in 1981. Before joining Harrison Pensa, David practiced for a number of years as Senior Corporate Counsel for a major Canadian financial institution, focusing on information technology law. He is a member of several local, national, and international high-tech associations. He has been quoted in newspaper articles and in a recent book entitled *B2B Canada* and has spoken on e-business issues for various audiences and on television.

Canton assists clients in dealing with the many legal issues related to computerization, the Internet, and e-business, including ASPs, Web developers, Web hosts, software developers, and works with traditional businesses conducting e-business or with knowledge-based issues.

He writes a weekly newspaper column on e-business law for the *London Free Press*, which can be found on the www.canoe.com news website. David is a member of Harrison Pensa LLP, a full-service law firm that provides comprehensive and innovative legal services to individuals, private companies, government agencies, and multinational corporations. Harrison Pensa LLP provides proactive legal advice based on the unique needs of each client.

With a London office and affiliate offices around the world, the firm is a member of Meritas, a worldwide organization of independent law firms. Harrison Pensa LLP serves local, national, and international clients.

John E. Millar

John Millar is the Executive Vice President and General Counsel with the Internet security and technology firm Attache Group Inc. Attache provides Internet and network security services to leading Canadian financial services companies and professional services firms.

Millar earned an MBA from the Richard Ivey School of Business and a law degree from the University of Western Ontario. Before moving to Attache, he practiced law in the High Tech and e-Business Practice Group of Harrison Pensa LLP. John has over fifteen years of senior-level business experience with national and international companies.

Millar is a member of the Canadian Bar Association Information Technology Section and the Canadian Corporate Counsel Association. He is a director of Biotech London Council and is chairman of the steering committee for TechAI-

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Finally, the authors would like to thank everyone at McGraw Hill who turned our manuscript into the final product.

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Domain Names

The case in this chapter—“www.centralmba.com”—presents the following issues:

1. Domain name registration systems
2. Entitlement to domain names
3. Relationship between domain names, business names, and trademarks
4. Cybersquatting
5. Domain name dispute resolution mechanisms
6. Use of metatags within websites
7. Disparaging domain names
8. Domain name monitoring

Internet domain names represent a new and unique form of property, evidencing the truly global nature of the Internet and the World Wide Web.

Domain names are registered through the use of different methods than those used for business names or trademarks, the two traditional legal name registration systems. Similarly, disputes involving domain names probably will be resolved according to new rules and procedures that have been adopted or will be adopted around the world.

As an indication of the speed at which change is occurring, this case was written in 1999, and already domain name registration, dispute resolution systems, and numerous statutory laws have changed.

Legal jurisdiction must always be considered when dealing with domain names, as is the case with many issues pertaining to the Internet. While the Internet has international reach, laws are based on jurisdiction.

Central's fact situation is based on the registration of a competing university's name as a domain name. The issues are exactly the same as they would be if two competing businesses were involved.

Case 1-1

Www.centralmba.com

Sources: Professors Michael Parent and Robert J. Fisher prepared this case solely to provide material for class discussion. The authors do not intend to illustrate either effective or ineffective handling of a managerial situation. The authors may have disguised certain names and other identifying information to protect confidentiality.

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1. Dave Newman, associate dean of programs at the School of Business at Central University, stared at his computer screen in disbelief. Acting on an e-mail message from an executive MBA student, he'd typed the Uniform Resource Locator (URL) www.centralmba.com into the address line of his Web browser and watched in amazement as the home page for Central's closest competitor, State University's executive MBA Program, loaded onto his monitor.
2. While competition between the two schools for executive education students had been particularly fierce over the past few months, he refused to believe that State or its agents might resort to such action. He wondered what Central should do about it, if anything at all.

The Growing Competition in Executive Education

3. Executive MBA programs were intensive, part-time educational programs that lasted from one to three weeks and did not award a university degree for completion. Program participants tended to be middle- or upper-level managers in large organizations who did not hold a graduate degree. In 1999, the cost for top-tier nondegree programs was approximately \$6,000 per week, including meals and accommodation and a variety of recreational and social activities. In contrast, full-time MBA degree programs typically lasted two years and cost between \$12,000 and \$15,000 per year. Participants in both degree and nondegree programs selected a school on the basis of a number of factors, such as cost, educational benefits, program prestige, and networking potential.
4. The competition between Central and State began in the early 1980s, when State entered the two-week executive education market with nondegree programs in human resources management and industrial relations. State had gotten up and running by hiring several Central faculty (including Newman) to teach on a part-time basis. Strong demand led State to expand its nondegree product line to the general management, marketing, operations, finance, and strategy areas. In addition, State, like Central, also offered a full-time MBA program, albeit on a smaller scale.