



## **DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING**

### **EVERYTHING YOU EVER WANTED TO KNOW ABOUT E-COMMERCE BUT WERE AFRAID TO ASK**

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Michael F. Finn  
 Associate General Counsel  
 Teligent, Inc.  
 8065 Leesburg Pike, Suite 400  
 Vienna, VA 22182  
 PH: 703.762.5393  
 Email: [mfinn@teligent.com](mailto:mfinn@teligent.com)

### **JURISDICTION**

In general, the question of whether your Web site will subject you to the jurisdiction of a particular State depends on the nature and quality of commercial activity occurring on the site.

The general rule used to examine jurisdiction over Web sites was formulated in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F.Supp 1119 (W.D. Pa. 1997).

\* Jurisdiction is proper where a Web site does business over the Internet involving multiple electronic interactions with customers over the Internet.

\* In *Zippo*, jurisdiction was proper because the Web site contained information about the company, advertisements, and an online subscription application for the company's Internet news service. Payment for the service was through a credit card, either over the Internet or telephone. The company also had 3,000 Pennsylvania subscribers.

\* Jurisdiction is not proper where the Web site is purely passive, i.e. it simply makes information available to those viewing the site.

\* *Zippo* was adopted by the 5th Circuit in *Mink v. AAA Development*, 190 F.3d 333 (5th Cir. 1999). In that case, the court affirmed the lack of personal jurisdiction over AAA Development as its only contacts were through a passive Web site that merely posted information about the company's products and contained a printable "mail-in" order form and telephone number. No orders were taken through the Web site. The fact that visitors could click an e-mail link and receive replies from the company does not rise to the level of interactivity needed for jurisdiction.

\* The Second Circuit has held that jurisdiction over a Missouri Cabaret named "The Blue Note" would be improper in New York; Cabaret had no contacts with NY and its Web site was passive and did not sell products to NY residents. See *Bensusan Restaurant Corp. v. King*, 126 F.3d 25 (2d Cir. 1997). See also *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997)(Arizona may not assert jurisdiction over a Florida company that has no contacts with Arizona except to maintain a Web site accessible to Arizonans and anyone else on the Web).

\* Jurisdiction MAY be proper over interactive Web sites where the user is able to exchange information with the Web site, depending on the level of interactivity and the commercial nature of the exchange.

\* Jurisdiction proper over Web site selling sunglasses over the Internet. *American Eyewear Inc. v. Peeper's Sunglasses*, 106 F. Supp. 895 (N.D. Tex. 2000).

\* Jurisdiction proper over a Web site dedicated to selling products online to consumers, including those in California, and actually making two such sales. *Stomp, Inc. v. Neato*, 61 F. Supp.2d 1074 (C.D. Cal. 1999).

\* Jurisdiction proper where a Web site promotes an upcoming service and solicits users to add their e-mail addresses in order to receive updates about the service. Such activities constitute active solicitation within the state. See *Maritz v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996).

### **ELECTRONIC CONTRACTS**

Both the new E-SIGN Act (Electronic Signatures in Global and National Commerce Act) and several court cases make clear that electronic contracts accepted by clicking are as valid as those signed on paper.

#### **E-Sign Act.**

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The E-Sign Act takes effect October 1, 2000 and provides that a contract signed electronically has the same legal validity as a paper contract. The Act sets forth extremely detailed processes and procedures for using electronic contracts and contains numerous exceptions with respect to its coverage. The E-SIGN Act:

- \* defines an "Electronic Signature" broadly as "an electronic sound, symbol or process attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record." It therefore validates telephone "number punch" agreements (press 1 to agree or press ....).
- \* allows consumers to choose to receive an electronic record in lieu of a required written record if the consumer (a) consents to receiving the record electronically and (b) is provided with a clear statement before consenting of his rights (1) to have a paper record or (2) to withdraw consent to any electronic record and any consequences from withdrawing consent such as additional fees.

### **Selected Cases**

- \* Hotmail Corporation v. Van Money Pie Inc., 1998 U.S. Dist. LEXIS 10729 (N. D. Cal. April 16, 1998)(Court enjoined defendants from sending spam as such conduct violated Hotmail's online Term's of Service which defendants had agreed to by clicking a box indicating their assent to be bound by the online agreement.).
- \* Caspi v. The Microsoft Network L.L.C., 732 A.2d 528 (N.J. Super. Ct. App. Div., 1999), cert. denied 1999 N.J. LEXIS 1478 (Oct. 26, 1999)(forum selection clause in MSN online subscriber agreement accepted with a click of the mouse when presented with "I agree" or "I disagree" is enforceable).
- \* Decker v. Circus Circus Hotel, 49 F. Supp. 2d 743 (D. N.J. 1999)(finding that if defendant's Web site activities were sufficient to provide the court with jurisdiction, then plaintiff would be bound by the forum selection clause contained on the Web site).
- \* Stomp, Inc. v. Neato, 61 F. Supp.2d 1074 (C.D. Cal. 1999)(noting that a Web site can control the jurisdiction to which it will be subject by using an online agreement containing a choice of venue which customers must assent to prior to being allowed to make purchases).

### **FTC MERCHANDISE SHIPPING RULE**

Your company has the Web site up and now you are going to start selling products on your Web site. You must obey the FTC rules about shipping merchandise.

With few exceptions, all orders for merchandise made via the Internet are covered by the federal Mail or Telephone Order Merchandise Rule. See 16 C.F.R. § 435. This rule requires that all merchandise must ship within 30 days of the order UNLESS some other time is stated for shipment.

If you can't ship within the time stated or 30 days if no time was promised, you must:

- \* notify the customer of the new shipping date; and
- \* offer a full refund if the customer declines to wait.

If the delayed shipping date is 30 days or less from the original date, you may treat the customer's silence as consent. If the delay is greater than 30 days or is indefinite, you must receive express consent. If you don't receive express consent, you must EITHER ship within 30 days of the original shipment date (60 days from the date of the order) or provide a full refund to the customer.

If you cannot ship by your revised shipment date, you must cancel the customer's order and provide a refund UNLESS you obtain express consent to a further delay PRIOR to the revised date.

You are responsible for any rule violations caused by a fulfillment house or drop-shipper.

Merchants who violate the Rule can be sued by the FTC for injunctive relief, monetary civil penalties of up to \$10,000 per violation (any time during the five years preceding the filing of the complaint), and consumer redress (any time during the three years preceding the filing of the complaint). When the mails are involved, the Postal Service also has authority to take action for problems such as non-delivery. State law enforcement agencies can take action for violating state consumer protection laws.

See 16 CFR Part 435.

### **LINKING**

Links or hyperlinks are the highlighted text, pictures, or logos on a Web page that, when clicked, take the user to some other part of the Web page or to another Web page or Web site. As would be expected, internal links - from one part of your Web site to another - do not typically raise legal issues. Presumably, you have rights to the materials on your Web site and thus linking from one page to another does not implicate intellectual property law. Most of the controversy around linking involves deep links, i.e. links to an interior page of another company's Web site.

You may be aware that British Telecommunications ("BT"), the United Kingdom's largest telephone company, has asserted that it holds a 1989 U.S. patent on linking. Most commenters disagree with BT. They note that the prior art -- which includes work in the 1960s by Andries van Dam, one of the builders of the original hypertext system -- would invalidate the patent.

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### Graphic Links & Plain Text

The general rule is that copyright and trademark laws prohibit your use of another party's design, logo, or trade dress, without permission. Thus, if you are linking to another company, you should use plain text rather than their distinctive logo or trademark. Or, you can obtain permission for use of the logo/trademark.

\* Trademark dilution of the Barbie doll occurred when an adult-content Web site displayed a Barbie-doll-like figure and the lettering, "Barbie's Playhouse," in the font and coloring most commonly associated with the Barbie doll. See *Mattel, Inc. v. Jcom, Inc.*, No. 97 Civ. 7191 (SS), 1998 WL 766711 (S.D.N.Y. 1998).

On the other hand, use of a hyperlink that displays a company's trademark in a plain text font is probably not actionable. A trademark holder cannot preclude others from using its trademark to discuss or refer to product or company identified by the mark.

\* The holder of the "Boston Marathon" trademark may not preclude a television station from using the name in describing its broadcast. See *WCBC-TV v. Boston Athletic Ass'n.*, 926 F.2d 42 (1st Cir. 1991).

\* Volkswagen may not bar a car repair shop from using its mark because in "advertising [the repair of Volkswagens, it] would be difficult, if not impossible, for [the repair shop] to avoid altogether the use of the word 'Volkswagen' or its abbreviation 'VW,' which are the normal terms which, to the public at large, signify appellant's cars." See *Volkswagenwerk Aktiengesellschaft v. Church*, 411 F.2d 350, 352 (9th Cir. 1969).

### Home Page Links

A link to another company's home page probably is not actionable. The general view of commenters is that the placement of a Web site on the Internet constitutes an invitation to link to the site. Thus, no cause of action arises if such linking occurs.

### Deep Links

The law on deep linking is being developed by the courts and will continue to evolve in the foreseeable future. Most of the cases to date involve various legal theories including copyright and trademark infringement, misappropriation, and trespass to chattels.

The success of any copyright claims relies in large part on whether a court believes that the copying performed by a visitor's Web browser (an act required for the viewing of Web pages) constitutes copying within the meaning of the Act. There seem to be two different views:

Browsing is copying. The Mormon Church was granted a preliminary injunction based on contributory copyright infringement forbidding certain Church critics from posting on their Web site the Internet addresses of other sites featuring pirated copies of a Mormon text. The court reasoned that anyone who went to a Web site and viewed a pirated copy of the text was probably engaging in direct copyright infringement, because that viewer's browser automatically makes a local copy of the text. In addition, the court noted that by posting the addresses of the pirate sites after they were ordered to take the handbook off their site, and by otherwise assisting people who wished to locate the pirate sites, the defendants were liable under a theory of contributory copyright infringement. *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F.Supp. 2d 1290 (D. Utah 1999).

Browsing is not copying. In an ongoing California case, a federal district court dismissed copyright claims against unauthorized deep linking brought by Ticketmaster against Tickets.com which was permitting users of the Tickets.com Web site to deep link to a "purchase tickets" Web page on Ticketmaster's site. In dismissing in part, the court ruled that linking - even deep linking - does not constitute copying and does not involve a violation of the Copyright Act since there is no copying and the customer is transported automatically to the genuine Web page of the actual author. According to the court, "[t]his is analogous to using a library card's index to get reference to particular items, albeit faster and more efficiently." The court also noted that deep linking - by itself without confusion of source - does not "necessarily involve unfair competition." *Ticketmaster Corp. v. Tickets.com, Inc.*, 2000 U.S. Dist. LEXIS 4553 (C.D. Cal. March 27, 2000).

In several cases involving deep links, a claim of trespass to chattels has been raised. This claim requires that an intentional interference with the possession of personal property has proximately caused injury.

\* A California district court granted eBay a preliminary injunction forbidding its competitor Bidder's Edge from utilizing "Web Crawlers" to access eBay's Web site and send back electronic signals containing the various auctions being conducted on eBay. The court found that a trespass occurred through the entry of the Web Crawlers onto eBay's servers -- the physical machinery containing eBay's Internet presence -- and that harm occurred in that repeated entry by Bidder's Edge (and anyone else if the court ruled otherwise in this case) would reduce system performance and increase unavailability to users trying to access eBay's site. See *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F.Supp.2d 1058 (N.D. Cal. 2000), appeal docketed, No. 00-15995, (9th Cir. Aug. 28, 2000) (No. 00-15995).

\* Subsequent to eBay, the Ticketmaster court held that a preliminary injunction "might well issue" if Ticketmaster were able to show that Tickets.com was using Web Crawlers and that such Crawlers were harming its system. See *Ticketmaster Corp. v. Tickets.com, Inc.*, 2000 U.S. Dist. LEXIS 12987 (C.D. Cal. August 11, 2000).

If your Web site contains "Terms of Service" governing viewers' use of the site, inclusion of a "no unauthorized deep links" provision could give rise

If your Web site contains "Terms of Service" governing viewers' use of the site, inclusion of a "no unauthorized deep links" provision could give rise to a breach a contract claim against any party deep linking to your site without permission. The difficulty in such a claim will be to prove that the deep linking party knew and assented to your Terms of Service.

\* Ticketmaster did not have a breach of contract claim based on its online terms of service forbidding deep linking as there was no proof that Tickets.com saw the terms or assented to them and, moreover, a customer could ignore the terms and still move about the Web site. Ticketmaster Corp. v. Tickets.com, Inc., 2000 U.S. Dist. LEXIS 4553 (C.D. Cal. March 27, 2000).

## **SEC ISSUES**

More than likely, your company's Web site contains hyperlinks to information located on third-party Web sites (analyst reports, new articles, etc.). Recently, the SEC issued interpretive guidelines ("Guidelines") discussing responsibility for information on third-party Web sites to which a company places a link. See Use of Electronic Media, SEC Release Nos. 33-7856, 34-42728, IC-24426 (April 2000).

Under the Guidelines, a company will be responsible for the accuracy of information on third-party Web sites to which it hyperlinks if the company endorses -- explicitly or implicitly - the information on those third-party sites. Endorsement is determined on a case by case basis looking at three non-exclusive factors:

- (i) the context of the hyperlink;
- (ii) the risk of investor confusion; and
- (iii) the presentation of the hyperlinked information.

### **Context of the Hyperlink**

Under this factor, the SEC looks to what the company says about the hyperlink or what is implied by the placement of the hyperlink. For example, if the company says, "the following link will provide you with an excellent description of our business", the company may well be held to have endorsed the information contained on the linked site. A hyperlink to an analyst report may also be considered an endorsement of the report by the company. See, e.g., Cypress Semiconductor Sec. Litig., 891 F.Supp. 1369, 1377 (N.D. Cal. 1995), aff'd 113 F.3d 1240 (9th Cir. 1997)(distributing analysts reports may amount to an implied representation by the company that the reports are accurate). Similarly, a hyperlink could be used to support statements made by the company such as, "As noted by Bethesda Today, we are the largest producer of commercial software."

The SEC also noted that silence about the hyperlink will not necessarily absolve a company of liability for the hyperlinked information.

### **Risk of Investor Confusion**

Risk of investor confusion is determined by the presence or absence of precautions against investor confusion about the source of the hyperlinked information. According to the SEC, hyperlinked information on a third-party site may be less likely to be attributed to the company placing the link if an end user is provided with an intermediate Web page indicating that he/she is leaving the company's Web site and moving to another site containing information not owned by the company. There is also less confusion if the company places a "clear and prominent" statement disclaiming responsibility for, or endorsement of, the information. Such disclaimer, however, is not a guaranteed safe harbor.

Risk of investor confusion is higher when information on a third-party site is framed or inlined.

### **Presentation of Hyperlinked Information**

Adoption of hyperlinked information also depends on how the information is presented by the company placing the link. Where large amounts of information on a particular matter are available and if the information hyperlinked by the company is not representative of the available information, the company's use of the hyperlink could be an endorsement of the selected information. Likewise, a company that creates and eliminates hyperlinks to third-party Web sites depending on what such sites say about the company could constitute an attempt to control information to investors, thereby constituting an adoption of the information during the times the hyperlinks are in operation.

According to the SEC, the layout of the Web page is also relevant to determine whether hyperlinked information has been adopted. Any action to differentiate a particular hyperlink from other hyperlinks through size, prominence, location, font, color, etc. could be seen as an endorsement.

### **Documents Filed With the SEC**

The SEC guidance also provides that a hyperlink embedded within a prospectus or any other document required to be filed or delivered under securities laws causes the hyperlinked information to be part of the filed document. Consequently, the filing company will be responsible for such hyperlinked information.

## **PRIVACY**

The privacy of personally identifiable information continues to be a large issue for any Web business. There are several new laws and court cases that have shaped and will continue to shape this emerging issue.

### **Children's Online Privacy Protection Act ("COPPA")**

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\* COPPA, 5 USC § 6501 et. seq., and its implementing regulations, 16 C.F.R. Part 312, require that any Web site directed in full or in part to children under 13 must post a prominent statement about its information collection policies on its home page and at each location where it collects information about children.

\* Notice Requirements. The notice must contain contact information for the company collecting or maintaining the children's information, the kinds of information being collected (name, address, e-mail or any information about interests or hobbies) and how it is collected (passively through cookies or directly from the child); how the information is used (marketing back to the child or notifying contest winners); whether third parties receive the information (if so the kinds of businesses in which the third parties are engaged; how the information is used; and whether the third parties have agreed to maintain the confidentiality and security of the information); and how the parents may review the child's information, decline any further collection or use or have it deleted.

\* Parental Rights. Before collecting, using or disclosing personal information from a child, a Web site must obtain verifiable parental consent from the child's parent. Site operators may use e-mail to get parental consent for internal uses of personal information provided certain additional steps are taken to increase the likelihood that the parent has provided the consent. Web sites that desire to provide a child's personal information to third parties must use a more reliable method of consent, including getting a signed form from the parent via postal mail or facsimile, or accepting and verifying a credit card number. Consent must be obtained anew if the Web site's information practices change in any material way. Parents must also be given the ability to review their child's information, to revoke their consent to have information collected, and to have any information already collected deleted.

### **Gramm-Leach-Bliley Act ("GLBA")**

The GLBA, 15 U.S.C. § 6802, sets forth privacy and security standards for the collection and use of nonpublic personal information obtained by financial institutions from consumers and customers (consumers that have an ongoing relationship with the financial institution).

\* The term "financial institution" is construed very broadly to be any institution engaging in a financial activity and therefore includes: (a) mortgage brokers; (b) credit counseling services; and (c) retailers that (i) lease or finance or (ii) issue their own credit cards.

\* The term nonpublic personal information encompasses any information provided by a consumer to obtain a financial product/service as well as any information resulting from any such transaction. A list of a company's credit card customers would be nonpublic personal information. Assuming it is publicly available, a list of a mortgage company's customers would not be nonpublic information.

\* GLBA requires various notices to be given to consumers and customers. In general, they must be informed of the information being collected (i.e. from an application, etc.), the kinds of third parties to which the information is disclosed, and an opportunity to opt-out prior to your sharing their nonpublic personal information with a third party. Customers must be given an initial notice of your policies when the relationship is established and then annually.

\* GLBA is effective on November 13, 2000 with full compliance by July 1, 2001

### **The Federal Trade Commission Act**

Although Web sites that do not fall within the scope of COPPA or the GLBA are not required to post privacy policies, those that do post policies are obligated to abide by them. The Federal Trade Commission's primary enforcement tool for privacy statement violations on the Web has been Section 5 of the FTC Act which prohibits deceptive and unfair trade practices. If your company has a privacy policy and your activities fall outside the policy, your company may run afoul of Section 5.

A recent example of a Section 5 action involves Toysmart.com. The company was an online retailer whose privacy policy stated that it would "never" share information with a third party. The company fell on hard times and began negotiating to sell its assets including its customer information before being forced into bankruptcy by its creditors. The FTC sued in District Court to preclude the sale of Toysmart's customer information and 48 states filed objections to the sale in the bankruptcy court. The FTC alleged that, because the privacy policy represented that customer information would never be disclosed to third parties, any offer to sell, any sale, or any disclosure would constitute a deceptive trade practice under Section 5.

In May of this year, the FTC recommended to Congress that legislation be passed requiring Web sites to abide by four "Fair Information Practice Principles" common to most International and self-regulatory schemes governing online privacy: notice, choice, access and security. The notice principle states that a Web site should disclose what information it collects, how the information is collected, how the information is used (for example, to fulfill orders, customize the site or contact the consumer regarding new offers), and whether information is shared with third parties. The choice principle states that consumers should be given a choice as to whether their information is used for purposes beyond those for which it was originally provided, particularly for marketing by either the original Web site or third parties. The principle of access involves consumers' ability to access the information collected about them and to correct or delete it. Depending upon how broadly access is defined, it could be as simple as allowing consumers to update address information, subscribe or unsubscribe to offers or newsletters, etc. Finally, security measures should be taken to safeguard consumers' information against inappropriate use, disclosure, destruction, or corruption. A variety of privacy bills have been introduced in Congress this term designed to implement some or all of these basic principles.

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