The Internet & the Law

E-Commerce:
Fundamental Principles & Current Issues

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(In order to match page references in the speaker’s lecture, this manual is paginated as it appeared when presented live at the Nashville School of Law, December 9, 2010)
I. A. Principle: The law of contracts and the UCC apply to E-Commerce contracts --- sometimes.

B. Current issues: Formation of contracts and the terms of those contracts

Courts are split over basic issues of how and when contracts are formed and who is the offeror as well as what terms are binding on the parties.

Compare Step-Saver Data Systems v. Wyse Technology, 939 F.2d 91 (3rd Cir. 1991)(refusing to uphold a shrinkwrap license agreement as an amendment to the parties’ contract, UCC 2-207 applies); Klocek v. Gateway 2000, 104 F. Supp.2d 1332 (D. Kan. 2000)(denying enforcement of arbitration clause in a contract inside box [shrinkwrap] containing computer); Rogers v. Dell Computer, 127 P.3d 560 (Okla. 2005)(under UCC 2-206(1) the buyer is the offeror); Wachter Mgmt. Co. v. Dexter & Chaney, 144 P.3d 747 (Kan. 2006)(offeror is master of offer whether it is seller or buyer) with Hill v. Gateway 2000, 105 F.3d 1147 (7th Cir. 1997)(telephone order, contract in box, seller is master of offer, can structure transaction so no contract formed until expiration of 30 day return period, all terms in box apply after 30 days, UCC 2-207 does not apply); ProCD v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996)(purchase at store, contract in box, seller is master of offer, can structure transaction so no contract formed until expiration of 30 day return period, all terms in box apply after 30 days, UCC 2-207 does not apply).

Many questions remain, even for jurisdictions that have followed Hill and ProCD: E.g., Does the right to return remain even after customer has in any way “used” the product? See Brower v. Gateway 2000, 676 N.Y.S.2d 569, 572 (S. Ct. 1998) (“until those 30 days have elapsed, the consumer has the unqualified right to return the merchandise, because the goods or terms are unsatisfactory or for no reason at all.”)(italics supplied).

What if the seller provides only a 5 day return instead of 30 days? (Gateway 2000 shortened its return policy from 30 days to 5 days. See Klocek, supra.)

Will future courts ignore the obvious application of UCC 2-207 that Hill and ProCD erroneously regard as inapplicable?

See UCITA section 112 and Comments. UCITA is the law governing software in Maryland and Virginia and where designated in choice of law agreements.
C. Current issue: Not clear what the legal differences may be among shrinkwrap, clickwrap (aka click-through) and browswrap (aka clickfree).

Courts differ in their approach as to what seller must do to obtain buyer’s consent, especially where it’s a browswrap contract. Compare Specht v. Netscape Communications Corp., 306 F.3d 17, 31 (2nd Cir. 2002)(seller must provide an “immediately visible notice of the existence of license terms or require unambiguous manifestation of assent to those terms.”) and Hines v. Overstock.com, 668 F Supp.2d 362, 367 (E.D. N.Y. 2009)(court refuses to enforce browswrap agreement where customer was never advised of the agreement “and could not even see the link to them without scrolling down to the bottom of the screen-an action that was not required to effectuate her purchase….the notice that ‘Entering this Site will constitute your acceptance of these Terms and Conditions,’…was only available within the” agreement), with Hubbert v. Dell Corp., 835 N.E.2d 113 (Ill. Ct. App. 2005)(upholding clause available on Web pages through a blue hyperlink and some Web pages notified buyer all sales subject to Terms and Conditions; “common sense dictates that because the plaintiffs were purchasing computers online, they were not novices when using computers.”). See FTC DotCom guidance., available at www.ftc.gov.

D. Current issue: What law applies to licenses?

UCC § 2-102 provides that UCC Article 2 applies to transactions in “goods.” Consequently, Article 2 applies if goods are being sold or licensed. (See below on whether software is a good.) Many important provisions of Article 2, however, apply only to sale of goods, not licenses. E.g., warranties, contract formation, statute of frauds and remedies.


But for software licenses in Maryland and Virginia and where choice of law designates either of those states, UCITA governs.

E. Current issue: What law governs software?

UCITA in Maryland and Virginia and where choice of law designates either of those states.

UCC § 2-105(1) defines “goods” as “things” which are “movable.” Courts have added the requirement that goods also must be “tangible” and most have determined that software qualifies as a good. But see Specht, supra, at 30, note 13, questioning whether downloadable software is governed by the UCC.


F. Current issue: What law governs the law of services, such as computer repair?

Contract law.
G. Current issue: What law governs mixed transactions involving both the provision of goods and services? Example: A computer repair that requires both servicing the computer and replacing some of its parts. Courts have adopted various approaches. The predominant purpose test is most popular. The gravamen test is used by some courts, the component test by a few.

II. A. Principle: Trademark owners can sue persons who use their marks in domain names and on websites --- sometimes.

B. Current issue: Courts vary in their approaches where the defendant maintains a cybergriping site. Compare Planned Parenthood v. Bucci, 42 U.S.P.Q.2d 1430 (S.D.N.Y. 1997)(home page said “Welcome to Planned Parenthood Web page;” this was more than communicating a message, it was using a mark to identify the source of product, preventing users from obtaining mark owner’s goods or services) with Taubman v. Webfeats, 319 F.3d 770 (6th Cir. 2003)(rejects Planned Parenthood’s prevention test) and Bosley Medical Institute v. Kremer, 403 F.3d 672 (9th Cir. 2005)(rejects prevention test; test is whether defendant offered competing goods or services to public).

III. A. Principle: The Computer Fraud and Abuse Act (CFAA) provides a company with a cause of action against employees, former employees, and third parties who use data they obtain from the company without authorization --- sometimes.

B. Current issue: Can the company sue under the CFAA where the defendant had authorized access to the company’s computer system, but once gaining access, the defendant obtained information to which the defendant was not entitled?

The cases are split, with some holding that as long as the defendant had authorization to access the system, any unauthorized use of information in the system is not a CFAA violation. Compare Int’l Airport Centers v. Citrin, 440 F.3d 420 (7th Cir. 2006)(CFAA applies only if unauthorized access, does not apply if authorized access but misuse or misappropriation of information in system) and Brett Senior & Assoc. v. Fitzgerald, 2007 WL 2043377 (E.D. Pa. 2007)(defendant had authority to view information in plaintiff’s system; misuse of appropriately obtained information is not a violation) with Int’l Sec. Mgmt. Group v. Sawyer, 2006 WL 1638537 (M.D. Tenn. 2006)(exceeded authorized access when misused information).
IV. A. Principle: Courts apply trespass to chattel to defendants interfering with a company’s e-mail system or web site --- sometimes.

B. Current issue: Under what circumstances can a company sue for trespass to chattels?

Compare eBay v. Bidder’s Edge, 100 F. Supp.2d 1058 (N.D. Cal. 2000)(auction aggregator liable for trespass where potential for substantial impairment of condition or value if others [copycats] also engage in same conduct) with Intel Corp. v. Hamidi, 71 P.3d 296 (Cal. 2003)(denying trespass to chattel where former employee’s thousands of e-mails to current employees caused lower productivity but did not cause or threaten to cause damage to company’s computer system).

V. A. Principle: The Communications Decency Act (CDA) protects “interactive computer services” (such as web site owners/operators and ISPs) from liability from defamation and other tort claims against them for statements made on their sites by visitors to the site --- sometimes.

B. Current issue: Under what circumstances are interactive computer services treated as “information content providers” and liable when sued in tort?

Compare Fair Housing Council v. Roommates.com, rehearing en banc, 521 F.3d 1157 (9th Cir. 2008)(holding that part of owner/operator’s questionnaire exposed it to liability, but part did not; in determining if operator materially contributed to unlawfulness, court considered: did operator elicit illegal conduct, make aggressive use of such conduct in conducting business, did site directly participate in developing illegality, is site designed to solicit & enforce illegal conduct) with Fair Housing Council v. Roommates.com, 489 F.3d 921 (9th Cir. 2007)(same holding but different considerations: whether operator channeled information or encouraged, solicited or prompted the objectionable information), and with Chicago Lawyers’ Committee For Civil Rights v. Craigslist, 519 F.3d 666 (7th Cir. 2008)(craigslist not a publisher under CDA, so not liable), and with Carafano v. Metrosplash.com, 339 F.3d 1119 (9th Cir. 2003)(site operator immune under CDA because even though operator required users to complete questionnaire, the objectionable information the imposter-defamer provided was not solicited in the questionnaire). See also FTC v. Accusearch, 2007 WL 4356786 (D. Wyo. 2007)(operator claimed immunity under CDA; court agreed with FTC that action was based on company’s unfair business practices, not its publishing activities, so not protected by CDA).

VI. A. Principle: Mobile Financial Services (using cell phones to engage in financial transactions) are subject to the same legal rules as providing those services through other means --- sometimes.

B. Current issues:

If error occurs in transferring funds, financial institution is probably subject to Electronic Fund Transfers Act (EFTA), but other parties who may have caused the error are not subject to
the EFTA and it is often unclear what law does apply. Other parties include the manufacturer and seller of the handset (hardware), the provider of the software, and the communications carrier.

Where EFTA applies, financial institution’s investigation of consumer’s claim may be restricted to institution’s “four walls” even though error may have been caused by other parties to the transaction.

Increasingly, payment systems by-pass financial institutions, also bypassing the laws that govern payment transfers involving financial institutions. Instead, customers’ transactions are billed to their carrier’s bills. Can carrier terminate all phone service because customer disputes a payment transfer, refuses to pay that part of bill related to the transfer, but pays amount related to phone service? (Compare with situation where consumer charges a transaction to a credit or debit card account.)

VII. A. Principle: Storing data on the cloud presents no unique legal problems --- wrong.

B. Current issues:

If cloud provider stores a financial institution’s customer information on servers in other countries, may be violation of U.S. privacy rules.

If cloud provider loses law firm’s data or its data is stolen from cloud, law firm still faces liability if it cannot fulfill obligations re: confidentiality of client information, e-discovery, spoliation, etc.

If agreement with cloud provider is terminated, or provider goes out of business, company may not be able to recover data from provider.

VIII. A. Principle: A game is just a game --- maybe.

B. Current issue: Does a participant in a social network or on-line game who has earned virtual currency or other items of value have a property interest in those virtual goods?

See Bragg v. Linden Research, 487 F. Supp.2d 593 (E.D. Pa. 2007) (Linden confiscated all of Bragg’s virtual property and currency when he allegedly improperly purchased virtual land on Linden’s Second Life web site; court refused to enforce arbitration agreement, did not decide property interest issue).

C. Current issue: If participants on sites such as Second Life can purchase virtual money with U.S. currency and convert the virtual money into legal currency, and visitors on sites such as Facebook and Target can purchase virtual money to use to play on-line games, purchase pixel art, etc., are these companies operating as financial institutions, subject to at least some of the laws to which traditional financial institutions are subject? See Daniel Wolfe, Facebook Pushes

IX. A. Principle: Online endorsements and testimonials are subject to the FTC’s guides prohibiting deceptive practices --- always.

B. Current issue: Under what circumstances will the FTC find a company’s practices deceptive?

In In re Reverb Communications, the FTC charged a company with engaging in deceptive practices when it had its employees post online game reviews without disclosing that the reviewer had a financial connection to the game’s owner. FTC No. 092 3199 (Aug. 26, 2010). The FTC has notified Anne Taylor it violated the FTC guides when persons who attended its company fashion preview and blogged about the show did not disclose they had received gifts from the company. (May, 2010). See FTC’s Guides Concerning the Use of Endorsements and Testimonials in Advertising, revised 74 Fed. Reg. 53138 (Oct. 15, 2009).