Where Business is Conducted in the 21st Century

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By Leonard D. DuBoff <lduboff@dubofflaw.com>

About

Historically, a business was located in a particular jurisdiction, conducting activities within the comparatively small geographic area surrounding it. As time went on and commercial activities expanded, businesses stretched beyond their original geographic locations, and it was not long before some businesses became active throughout all of the United States and even overseas.

Today, with the advent of the World Wide Web, virtually every business can have a presence throughout the world in cyberspace. According to a January 2007 estimate, online sales in the United States alone were $102 billion by the end of 2006, and they are expected to reach $116 billion in 2007.

Unfortunately, this expanded commercial activity is accompanied by expanded legal exposure. Not only may you be liable for violation of laws or breach of contract in other countries, but it may be more difficult for you to address infringement of your own intellectual property or disputes with your customers or clients.

Jurisdiction

In order to litigate a matter, it is essential for the court in which the case is heard to have the legal power to deal with the dispute, as well as the parties involved. The legal doctrines are referred to as subject matter jurisdiction, which covers the dispute in question and personal jurisdiction, which deals with the power to adjudicate a case involving the relevant parties.

The United States Constitution has established guidelines for determining when these forms of jurisdiction are present. Early Web cases determined that courts could exercise power over almost any Web-based activity. Later, the doctrines were refined, and today the vast majority of
U.S. jurisdictions require the Web-based activity to be such that the business has “purposely availed itself” of the benefits of the jurisdiction in which the litigation is to be decided. That is to say, mere online advertising or Web presence will not be enough to satisfy the constitutional requirements for jurisdiction.

In a case handled by our law firm, we were able to establish that a business that conducted significant commercial activity within our state was purposely availing itself of the benefits of this state. In another case, we were able to establish purposeful availing with regard to a state from which orders are placed by customers through the Web.

**Terms and Conditions**

Recognizing the potential of being hauled into court virtually everywhere that a website can be determined to have had some commercial benefit, many businesses have attempted to control their legal exposure. This has been accomplished by requiring users of the site to agree to certain terms and conditions before permitting any commercial activity, such as the ordering of products. The terms and conditions generally provide that all disputes will be adjudicated in a specified forum and that the law governing any dispute involving the site will be that of the Web-based business’s home jurisdiction.

In the few cases that have considered these so-called forum selection clauses, the agreed choice of law has been held to be binding. It is, therefore, important for anyone conducting an online business to work with an experienced attorney in order to establish the proper method for having an effective forum selection agreement.

**Intellectual Property**

Online businesses have also had to deal with questions involving the protection of intellectual property. The United States is a party to several multinational copyright treaties, and thus complying with U.S. copyright law will provide a business with protection in more than 160 countries throughout the world. Unfortunately, not every country is a party to these worldwide treaties.

While U.S. customs laws bar the importation of works that infringe registered U.S. copyrights, it is necessary to register the copyright in the item with the U.S. Copyright Office and to establish a proper Customs block in order to take advantage of this form of protection.

There are also questions about extraterritorial protection for trademarks. It is well known that there is common law protection for trademarks in the United States when the mark is properly used in commerce, although there are better remedies and better protection for a trademark that is federally registered.

Unfortunately, the United States is not a party to any multinational treaty that would provide
American trademark owners have the ability to enjoy reciprocal rights in other countries. The United States is a party to the Madrid Protocol, which enables American trademark owners to register their marks in other signatory countries through the United States Patent and Trademark Office. This is a simpler, cheaper and more efficient process for registering marks in foreign jurisdictions, but unlike copyright treaties, the Madrid Protocol still requires a foreign registration. As in the case of copyright protection, U.S. Customs and Border Protection will defend our borders against products bearing infringing trademarks, so long as the trademarks are registered with the U.S. Patent and Trademark Office and an appropriate Customs block is put into place.

Unfortunately, the circuits are split on what kind of activity by Web-based businesses will be required in order to have extraterritorial protection for American trademarks. Hopefully, the United States Supreme Court will agree to establish one unified rule for the United States. Until then, it will be necessary for businesses to deal with different rules in different jurisdictions where extraterritorial issues have been considered. Experienced intellectual property lawyers can assist in evaluating your business’s situation and recommend the best method for protecting its intellectual property.

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