The Legal Aspects of an E-Commerce Transaction
The Pre-contractual Phase
by
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Outline of the introductory comments

The five papers in this morning's session will give the speakers plenty of opportunity to go into detail and hopefully to provide detailed answers to the issues that arise in this context. By way of introduction I would like to set the scene and to raise at least some of the questions, which the speakers may wish to address. All of these arise against the background of the dematerialisation, deterritorialisation and detemporalisation of law in the area of e-commerce.

I suggest to you that two sets of issues arise in the pre-contractual phase or at least that a division in two parts is useful for this morning's proceedings. A first part deals with issues surrounding marketing and advertising on the one hand and market research on the other hand. We have a paper dealing with each of these topics and the reason why they need to be distinguished will no doubt be addressed by our speakers. Let me however take them together in my introduction. The second part deals with copyright and trade marks, as used in an e-commerce context.

I. Marketing/advertising and market research

- Marketing and advertising and market research have been regulated at national and European level.
- Industry codes of conduct also play an important role.
- All instruments operate however primarily at national domestic level.
- Even at national level there are unresolved issues relating to the interaction of the various instruments, but at international level in an e-commerce/Internet setting it becomes much more difficult to determine which regulatory system will apply and which courts (or for that part industry body) will have jurisdiction over cases of alleged violations of the appropriate norms.
- For example, national rules on comparative advertising and on advertising particularly directed at children differ substantially. Which court or body will be able to deal with complaints of aggrieved competitors, consumer organisations or parents? Which of the regulatory systems will they apply in relation to Internet advertising?
- Questions that arise in this context include the issue whether an advertisement on the Internet is by its nature global in scope, or whether disclaimers or mechanisms that specifically target one or more markets can limit its scope. This may have its importance in terms of jurisdiction. Can article 5(3) of the Brussels I Regulation for example be used to confer jurisdiction for local damage to just about any court worldwide (or at least in the EU)? The answer will have an enormous impact both on the trader-defendant and on the claimant-consumer or competitor and may differ depending on the way the question is approached.
- More specifically in relation to market research it is not always clear from which part of the world one is contacted by phone. If one has a complaint that must mean that it is not easy to determine to which court one can address such a complaint (jurisdiction issues).

- Similar problems arise in relation to choice of law. Which law governs the market research if I am rang up from abroad?
- In an Internet context a lot of questions are also raised by the relatively recent practice of data mining. Issues include data-protection (which law applies?) and privacy. In terms of private international law this may give rise to public policy concerns on top of the normal choice of law issues.
- Data-mining quite often means the person subjected to the exercise, *i.e.* the person whose data are used, is unaware of the whole operation. That person is therefore not informed of the fact that data are held or that he or she may have a right to check and amend any such data. Often various databases are sold and combined to provide a broader base for the research or to complete the picture. Again massive issues arise in relation to privacy and data-protection, but even if these can be sorted out at national level an additional layer of complications is added by the jurisdiction and choice of law issues because the exercise takes place on the Internet.

II. Copyright and Trade Marks

- In terms of private international law copyright and trade mark infringement is classified as tortuous, but even so, where is the infringing act committed if for example a copyright work is downloaded from a foreign server or if a trademark is used on line? And where does the damage arise?
- The suggestion has been made to use satellite broadcasting and the country of uploading principle as an example. On what basis can we use this example in relation to e-commerce? Is it a valid example? Is it an example that should be followed?
- Or do we need new rules altogether in this area? If so, which?
- Can disclaimers and territorial restrictions on the range of customers one will deal with play a role in this respect? Can they assist in avoiding liability for copyright infringement or trademark infringement?
- Can US interstate practice in relation to specific personal jurisdiction in relation to internet trademark infringement cases be a model? I think in this respect of cases such as the *Zippo* case, the *Cybercell* case and the *Blue Note* case.
- Or is article 2 of the Brussels I Regulation and its limited option for centralisation of litigation a better route?
- In terms of applicable law a lot of questions arise too. Which law applies when copyright works or trademarks are used on a website or are downloaded?
- What is the private international law role of concepts such as territoriality, public policy and registration of rights in this area?
- Are we too concerned about the potential application of several trademark laws to a single issue? Can substantive trademark law limit the impact through the rule that infringement presupposes use in the course of trade of the mark? I think of cases such as *Payline* in France, *Fender Musik Instumente* in Germany and *1-800 Flowers* and *Euromarket v Peters* in England.
- Is the absence of the need for registration in copyright significant in terms of choice of law or does the wording of the Berne Convention open up options in relation to authorship and ownership and in relation to moral rights?

- Can we in relation to copyright make a distinction between choice of law in relation to the question whether there has been infringement and choice of law in relation to the question of the consequences of infringement? Can we helpfully apply a different law to each of these issues?
- What is the impact of the fact that domain name issues are dealt with by international bodies rather than by national legislators? What role if any is left for national courts and legislators and their applicable laws?
- How do domain name issues and rules interact with trademark issues and rules?
- Can it be argued internationally in relation to domain names that cyber squatters may infringe a trademark with a reputation?
- How do we deal with issues of unfair competition in terms of applicable law in the area of e-commerce? Is there a need for a specific rule on choice of law?

Maybe this list contains far too many questions for this morning's session and no one will blame our speakers if they cannot address or answer all of them. They will at least try to clarify matters for us all and I therefore hand over to them without further delay.