

4-1-2003

Law of the Internet in Argentina.

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Recommended Citation

Guillermo Cabanellas, *Law of the Internet in Argentina*, 34 U. Miami Inter-Am. L. Rev. 247 (2003)

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**SYMPOSIUM:
THE INTERNET IN LATIN AMERICA:
BARRIERS TO INTELLECTUAL
PROPERTY PROTECTION**

ARTICLES

LAW OF THE INTERNET IN ARGENTINA

GUILLERMO CABANELLAS*

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I. INTRODUCTION

The Argentine legal system does not include a general codified set of rules applicable to Internet issues. As in other areas, such as trade secrets and unfair competition, the law of the Internet has evolved in Argentina initially by means of the application and adjustment of general rules included in the Civil Code and in other statutes, and thereafter through specific statutes which address certain areas of the law of the Internet, such as electronic signatures.¹

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1. With regard to the general development of the law of the Internet in Argentina see the following: MAURICIO DEVOTO, *COMERCIO ELECTRÓNICO Y FIRMA DIGITAL: LA REGULACIÓN DEL CIBERESPACIO Y LAS ESTRATEGIAS GLOBALES* (2001); HORACIO

There are several reasons behind this approach. One has been that the speed with which Internet use has spread in Argentina cannot be matched by the normal procedures of statutory development. The Internet creates issues and problems in some of the most controversial and conflictive areas of Argentine law, such as patents, copyright and financial regulation. It is not possible to reach a consensus about the appropriate treatment for Internet activities in these areas so as to legislate with the speed necessary to keep up with Internet phenomena. The result has been that the legal status quo has been maintained in many areas not because of any underlying policy behind such conservatism, but simply because of the impossibility of reaching agreements as to what the desirable changes should be.

A second reason behind the approach followed by Argentine law has to do with the general structure of civil law systems generally and of Argentine law in particular. Civil law systems are based on a normative structure of an extremely abstract nature, which is in principle applicable to any type of human conduct or transaction. This basic structure is then adjusted to specific situations by means of more concrete statutory rules, and by means of administrative regulations and case law. Theoretically, the basic general structure can withstand the challenge of new technological developments, and it is the role of case law to make the necessary adjustments to the system in order to make it viable in the context of specific conflicts and transactions.

This methodology for adjustment has worked reasonably well in some areas. For example, tort law is codified in seventy-one sections of the Civil Code, most of which date back to the original version of such Code, enacted in 1869. This basic structure has survived major technological, economic and social upheavals, with only minor statutory modifications. It would be a gross mistake, however, to believe that tort law, as a whole, has remained as stable as the Civil Code on which it is based. On the contrary, a veritable flood of case law continuously changes the way Argentine tort law is applied, and only through multi-volume treatises is it possible to have a general idea of how Argentine tort law really works.

Nevertheless, this type of adjustment to new circumstances is not always possible. Software law provides a good example of how the resistance to adjust the basic structure of Argentine statutory

law to new technological developments can result in insurmountable legal obstacles.²

As has been the case in other countries, Argentina structured the legal protection of software on the basis of copyright law. The initial position taken by government and scholarly authorities was that the very broad terms of the definition of protected subject matter under the Argentine Copyright Law³ (“ACL”) were enough to include software under the provisions of such law. The peculiarities of software – the fact that it implies a set of instructions to a machine, its functional properties, etc. – were considered not to jeopardize the applicability of the Copyright Law to software. It soon became apparent, however, that traditional copyright law did not deal with certain aspects of software. Consequently, specific regulations were issued to address the registration of software for purposes of copyright protection.⁴ This proved to be insufficient due to the fact that Argentine courts considered the criminal law provisions of the ACL inapplicable in regards to certain software infringements.⁵ Criminal law, in civil law systems such as Argentina’s, does not allow the type of flexibility that permits the extension of general private law rules to new technological areas. Hence, it became necessary to amend the ACL so as to adapt it to software protection.⁶

Similar developments have taken place in the area of Internet law. With the exception of domain name protection, an area in which it became immediately clear that a special regulatory framework was necessary, the methodology used by Argentine law has been, initially, to apply preexisting rules and concepts to the issues created by the Internet. In some areas, such as contracts and torts, these were the rules included in the Civil Code, dating back to the 19th century. In other areas, such as patent and copyright law, more specialized statutes have been adapted, with relative success, to Internet issues.

This initial methodology has rapidly shown its limitations. Certain private law rules are basically incompatible with the needs of Internet transactions. Thus, for example, contract formation under Argentine law is based on the execution of written doc-

2. With regard to software law in Argentina see HORACIO FERNÁNDEZ DELPECH, *PROTECCIÓN JURÍDICA DEL SOFTWARE* (Abeledo Perrot ed., 2000).

3. Law No. 11723, Sept. 30, 1933, as amended 1989 [hereinafter ACL].

4. In particular see Decree 165, Feb. 3, 1994, [1994-A] E.D.L.A. 241.

5. See DELPECH, *supra* note 2, at 17-18.

6. These amendments were made by Law No. 25036, Nov. 6, 1998, [LVIII-E] A.D.L.A. 5040.

uments by means of the signature of the parties.⁷ Electronic contracts and electronic signatures are not compatible with that system, and therefore it has been necessary to introduce special legislation to make such contracts and signatures legally viable.⁸ Also, since criminal statutes are narrowly construed, it is often impossible to punish conduct that is nothing but “normal” criminal conduct pursued by means of the Internet.⁹

Reaction to these shortcomings of the preexisting legal structure has been less than swift. In some cases, such as electronic contracts and signatures, only after years of having these transactions frustrated by the absence of adequate rules have the necessary statutory instruments been put in place. In other areas, such as crimes committed through the Internet and Internet financial transactions, the necessary statutory adjustments have not yet been made and the resulting gaps cannot be covered by judge-made law or administrative regulations.

The result of this peculiar road of development taken by the law of Internet in Argentina is far from satisfactory. In some areas, such as torts committed by means of the Internet, the basic statutory system is flexible enough so as to accommodate most of the situations created by Internet activity. In others, such as domain names, electronic contracts and digital signatures, the necessary statutory changes have taken place and there is no insurmountable barrier between the statutory framework and business needs. Finally, there are aspects of Internet activity in which the existing statutory rules do not create a minimum basis for such activity, regardless of the diligence of courts and administrative agencies. Such is the case in connection with computer and Internet crimes,¹⁰ financial transactions¹¹ and to some extent copyright protection,¹² among other areas of Internet law.

7. See Cód. Civ., art. 1193.

8. See *infra* Part III.

9. See DELPECH, *supra* note 2, at 149.

10. Under general principles of Argentine law, crimes must always be defined by statutes and the statutory definitions must be interpreted narrowly, not being extensible to conduct analogous to that expressly punished by the criminal laws.

11. Financial activities are highly regulated in Argentina. Banks cannot extend their activities to new areas without prior regulations allowing such extension. The regulatory framework for the expansion of Internet banking has not yet been put in place. See G. Cabanellas, *Banking Regulation in Argentina and the Treatment of Foreign Banks*, in M. GRUSON & R. REISNER, 2 REGULATION OF FOREIGN BANKS 1 (LEXIS Publishing, 2000).

12. Although the copyright laws are very broad in scope, the range of relations that the Internet creates in connection with material protected by copyright is much broader than in connection with pre-Internet material and it is not always possible to

There are several reasons, common to most countries, why the adjustment of the legal system to the Internet phenomenon has been inadequate. The following may be noted:

- a) The Internet is basically an international system. In this context it is difficult to locate conduct in a given territory. Also, the extent to which conduct in a given territory has effects in other territories is much larger than in most legal areas. Enforcing national legal rules in this context would require a high degree of cooperation between different states for purposes of legal harmonization,¹³ determination of the applicable law and judicial and administrative enforcement. But in Latin America in general, and in Argentina in particular, the level of international cooperation in legal matters related to the Internet is weak.
- b) The Internet creates technological possibilities that fall beyond the scope of preexisting laws. The methodology traditionally used by civil law countries to adjust to new social and economic phenomena, namely using rules of such generality that they may cope with basically any type of phenomena, has worked fairly well in the past, particularly in areas such as torts and contracts, but the technical changes implicit in the Internet often fall beyond the generality of such rules. For example, in spite of the very general terms of traditional contract law, it is inadequate to address the issue of electronic contracts.
- c) The Internet creates special enforcement problems. Part of these problems, for instance in the areas of gambling and advertising, result from the international nature of the Internet. Other issues are the consequence of the technological possibilities created by the Internet. For example, certain copyright infringements made possible by the Internet have a potential detrimental effect on copyright owners which cannot be matched by infringements made through the use of more traditional means. Rules drafted to deal with such "traditional" forms of infringement lack effectiveness in the new environment created by the Internet.
- d) There is no strong constituency supporting the adaptation of the legal system to the needs created by the Internet.

apply the copyright laws to the new relations created by the Internet; e.g., access to Web sites as distinguished from copying material included in such sites.

13. Robert Kossick, *The Internet in Latin America: New Opportunities, Developments and Challenges*, 16 AM. U. INT'L L. REV. 1309, 1316 (2001).

Employment generated by the Internet is low. The Internet bubble and its aftermath have devastated Internet entrepreneurship. In the context of a rather unhappy experience with globalization, foreign Internet companies have little or no lobbying power. Gross commercial protectionism in the United States, the European Union and Japan has placed compliance with the World Trade Organization agreements as a very low priority of the Argentine government.

II. THE STRUCTURE OF THE LAW OF THE INTERNET IN ARGENTINA

The development of new legal areas in Argentina, as in other civil law countries, may use different methodologies. One consists of adapting preexisting legal concepts to new types of conduct or transactions. The other implies creating a new set of legal concepts adapted to a novel area of human conduct.

Sometimes both methodologies are used jointly. For example, at the time in which the basic codes provided by the Argentine Constitution were enacted, in the second half of the 19th century, banking law hardly existed as such in Argentina. Argentina was a backward, mostly illiterate agricultural country, with no banking system to speak of. Nowadays banking law is a major and complex legal area. This is partly the result of adapting the rules included in the basic codes mentioned above, and partly the result of special statutes which use specific legal techniques and concepts. A pledge, for instance, is a creature of the Civil and Commercial Codes, and its effects are basically the same regardless of whether the pledgee is or is not a bank. Deposit insurance, on the other hand, only makes sense in the context of banks, and the special rules applicable thereto only govern deposits made with banks.

The law of the Internet follows this eclectic methodology. Most of it is nothing but the adjustment of preexisting law – contract, copyright, torts, and criminal law – to new phenomena. Part of it – domain name regulation and electronic contracts – is totally new, even if part of it is already integrated with the rest of the Argentine legal system.

This eclectic methodology implies that the expression “law of the Internet” has a meaning unlike that of expressions such as “patent law” or “contract law.” There is no general system of rules on which the law of the Internet is built, peculiar to that legal area. Under Argentine contract law, for instance, if an issue can-

not be solved through the specific rules applicable to a given type of contract, it is possible to go a step further in the level of abstraction of the rules being applied, resorting to the so called general rules of contract law. There are even more general rules, applicable to all types of legal transactions (*actos jurídicos*), including contracts.

Unlike contract law there is no general set of rules or principles applicable to the Internet as a whole. If, for example, a copyright question related to the Internet can not be solved with the extant statutory or court rules, the solution will not be found in a hypothetical general law of the Internet, but rather in general copyright or intellectual property law.

Hence, the following Sections of this Article will examine the different legal areas in which the Internet has had a significant impact on Argentine law, without attempting to describe a possible, but to this day non-existent, general law of the Internet.

III. ELECTRONIC CONTRACTS AND ELECTRONIC SIGNATURES

Under Argentine law, contracts must be entered into, in most cases, in written form.¹⁴ In the absence of a written document, the existence of a valid contract may be proved by other means only in exceptional cases.¹⁵ Such cases include when it is practically impossible to enter into an agreement in writing,¹⁶ or when performance of the agreement has already begun,¹⁷ or when there is some written evidence regarding the agreement even if the agreement as such has not been entered into in writing.¹⁸ Under these provisions it became practically impossible to enter into legally enforceable electronic contracts,¹⁹ since, pursuant to the Argentine Civil Code system, a written document exists only if it is signed in writing.²⁰

The effects of these obstacles extended beyond the contractual area. The written signature requirement applies to all documents

14. Cód. Civ., art. 1193. An exception is provided with regard to contracts of less than a certain value, but due to inflation such value is presently worthless.

15. Cód. Civ., arts. 1191, 1192. Such exceptional cases include, *inter alia*, situations in which it is practically impossible to enter into a written agreement, e.g., during a storm when certain valuable goods are immediately placed on a safe ship to prevent destruction.

16. Cód. Civ., art. 1192.

17. *Id.*

18. *Id.*

19. See DELPECH, *supra* note 1, at 251-52.

20. Cód. Civ., art. 1012.

and legal transactions, not just to contracts. Under the Argentine Civil Code system there was practically no scope for electronic documents.²¹

Nevertheless, the Internet and other electronic means became increasingly used in practice for contractual transactions, such as purchases of consumer goods. Thus, it became clear that it was necessary to introduce changes in the Civil Code system, so as to lend full legal enforceability to electronic contracts and documents. Legislation was passed to this effect recognizing the existence and validity of electronic documents in certain areas, particularly the federal public administration.²² The Digital Signature Law²³ (“DSL”) promulgated on December 11, 2001 granted full legal recognition of electronic documents and signatures.

The central element of the DSL is the recognition of digital signatures as valid signatures.²⁴ This implies that a valid document may exist in digital form²⁵ if it is executed by means of a digital signature.²⁶ This in turn implies that contracts may be entered in digital document form, executed by means of a digital signature.²⁷

“Digital signature” is defined by article 2 of the DSL as the result of applying to a digital document a mathematical procedure that requires information known exclusively²⁸ by and under the absolute control of the person whose signature is being placed. According to article 2, the digital signature must be verifiable by third parties in such a way that the verification permits the simultaneous identification of the person whose signature has been used and of any alterations made to the “digital document” to which the signature refers after the signature is placed. A “digital document” is defined by the DSL²⁹ as “the digital representation of actions or facts,³⁰ regardless of the instrument used for its fixa-

21. See DELPECH, *supra* note 1, at 251.

22. Law No. 24624, Dec. 29, 1995, [LVI-A] A.D.L.A. 59.

23. Law No. 25506, Dec. 11, 2002, [LXII-A] A.D.L.A. 6 [hereinafter DSL].

24. DSL, arts. 1, 3.

25. DSL, art. 6.

26. DSL, art. 3.

27. With the exceptions provided by DSL, art.4. See *infra* text accompanying note 31.

28. “Exclusivity” in this context should not be destroyed by the fact that another person has knowledge of the mathematical procedure described by article 2, provided such information remains confidential. No case law exists as to this issue at this stage.

29. DSL, art. 6.

30. Reference to “actions or facts” (*actos o hechos*) has legal significance since these are basic concepts used by some of the most general provisions of the civil law.

tion, storage or filing.”

Certain documents and transactions are excluded by article 4 of the DSL from the possibility of execution by means of digital signatures. This exclusion covers wills and other documents related to decedent estates, transactions related to family law, transactions of a strictly personal nature,³¹ and transactions that are subject to formalities which are incompatible with the use of digital signatures. This incompatibility may result from legal or contractual provisions. It results from legal provisions when a transaction must be entered into by means of a notarized deed. It results from contractual provisions if an agreement has previously required, for certain transactions, signatures or documents other than digital signatures or documents.

The DSL includes a rebuttable presumption to the effect that a digital signature corresponds to the person who is the owner of the digital certificate which permits the verification of such digital signature.³² From this perspective, the DSL distinguishes between digital signatures and electronic signatures. The latter are defined as a set of integrated, linked or associated electronic data, used as an identification medium, but lacking some of the necessary legal elements to qualify as a digital signature.³³ Electronic signatures do not create a presumption in favor of their validity, and if the purported user denies their use, the burden of proof as to the use of the electronic signatures bears on the persons alleging such use.³⁴

For a digital signature to qualify as more than an electronic signature certain certification requirements must be satisfied.³⁵ First, a valid digital certificate referring to the user of such signature must be used during the period of validity. This digital certificate is issued by an authorized certification agent and includes an initial date along with a date of expiration.³⁶ Second, the signature must be duly verified by means of a reference to the data

Thus, contracts are a type of “legal action” (*acto jurídico*), and the provisions applicable to “legal actions” are generally applicable to contracts.

31. These transactions are generally related to family law - e.g., adoptions - and are therefore excluded by other provisions of article 4 of the DSL. Non-family law transactions of a strictly personal nature include transactions related to the change of name or legal capacity of an individual.

32. DSL, art. 7.

33. DSL, art. 5.

34. *Id.*

35. DSL, art. 9.

36. DSL, art. 15.

included in the digital certificate.³⁷ Third, an authorized certification agent must issue the digital certificate used for this procedure.³⁸

Apart from the presumption of validity described above,³⁹ a digital signature has several specific effects. A digital document bearing the digital signature of the sender of such document creates a rebuttable presumption that the person whose signature was used has sent the document.⁴⁰ Digital documents bearing digital signatures are considered to be original documents, even if they are the digital reproduction of other originals extant in digital or another form.⁴¹ Furthermore, in the case of certain documents, files or data, the legal requirements are deemed satisfied by use of digital documents bearing digital signatures. Such documents must be accessible for consultation and allow proper determination of their origin, purpose, and the date and time of their creation, delivery and reception.⁴²

The DSL provides the necessary conditions the digital certificates must meet for the existence of valid digital signatures. An authorized certification agent must issue the digital certificates,⁴³ and they must comply with international standards, as determined by the Argentine authorities.⁴⁴ Digital certificates must, at least, identify with complete certainty the person the certificate refers to and the certification agent; indicate their period of validity; be open to verification with respect to possible revocations; distinguish clearly between verified and unverified information; include the necessary information for the verification of the certified signature; and identify the certification policy under which the certificate is issued.⁴⁵ Certificates issued by foreign certification agents are considered valid if they: comply with the requirements set by the DSL for digital certificates generally; the country where the foreign certification agents operate grants reciprocal treatment to Argentine certification agents; and the certificate issued by the foreign certification agent is ratified by a local certification agent in addition to the Argentine authorities.⁴⁶

37. DSL, art. 9(b).

38. DSL, art. 9(c).

39. *See supra* note 32 and accompanying text.

40. DSL, art. 10.

41. DSL, art. 11.

42. DSL, art. 12.

43. DSL, art. 14(a).

44. DSL, art. 14(b).

45. *Id.*

46. DSL, art. 16.

The identity and operations of the authorized certification agents are defined and regulated by the DSL. Such agents may be public or private entities.⁴⁷ To operate as such they must be authorized to do so by the Argentine authorities.⁴⁸ The certification agents are subject to detailed regulations with regard to their operations, including inter alia, confidentiality and technological, informational, and filing obligations.⁴⁹ Although, certificates issued by authorized certification agents are presumed to be valid, they may be revoked for valid reasons,⁵⁰ and are not valid if used for unauthorized purposes⁵¹ or if they refer to transactions with a value in excess of that for which the certificate is valid.⁵²

The DSL also regulates the legal relationship between the certification agent and parties whose digital signature is certified⁵³ by requiring, inter alia, that the parties using digital signatures should maintain the exclusive control and confidential nature of the data necessary for the use of such signatures.⁵⁴ The relationship between the certification agent and the parties whose digital signature is certified is governed by a contract⁵⁵ and by the legal regulations applicable to that relationship.

The certification agent is liable for the damages caused by errors and omissions in the certificates issued by such agent, by the lack of revocation in due time of such certificates, and generally, by the violation of such agent's obligations pursuant to the legal regulations governing its activities.⁵⁶ The certification agent is not, however, liable in cases in which such liability has been excluded in the certificates issued by such agent or in the terms and conditions related to the use of such certificates, unless the law imposes such liability.⁵⁷ Also, the certification agent is not liable if certificates issued by such agent include misrepresentations or inexact information based on data supplied by the person whose signature is being certified, provided the agent has taken reasonable steps to prevent such misrepresentations or inexact

47. DSL, art. 17.

48. *Id.*

49. DSL, art. 21.

50. DSL, arts. 19(e), 23(c).

51. DSL, art. 23(a).

52. DSL, art. 23(b).

53. DSL, arts. 24, 25.

54. DSL, art. 25(a).

55. DSL, art. 37.

56. DSL, art. 38.

57. DSL, art. 39(a), (b).

information.⁵⁸

Although the DSL has implied a major improvement in the legal environment for electronic contracts and electronic transactions in general, it still leaves open a number of important issues related to such contracts and transactions. The solution must be found in the application of general contract law rules in conjunction with the provisions included in the DSL.

One of these issues relates to the existence of a contractual offer or acceptance in cases in which the text of such offer or acceptance originates in an electronic device not immediately activated by an individual. Before the DSL was enacted, doubts existed regarding the legal effectiveness of such offers or acceptances. One solution proposed to overcome such doubts was to enter into a written agreement, prior to the transmission of the offer or acceptance, stating the legal effectiveness of the texts originating in the electronic devices.⁵⁹ The DSL offers its own solution to this problem, providing that these messages are legally binding if they include the digital signature of the person to whom the message is to be legally attributed.⁶⁰

Another difficulty concerns the determination of the moment in which an electronic contract is legally perfected. Argentine contract law provides two basic systems in this respect. One applies to contracts between parties which are in immediate contact with each other ("*contratos entre presentes*"). In these cases, the contract is immediately perfected when both parties give their consent to the agreed text of the contract.⁶¹ The second system applies to contractual negotiations between parties which are not in immediate contact with each other ("*contratos entre ausentes*"). In these cases, a contract becomes perfected if a party accepts in full⁶² the offer sent by the other party.⁶³ The acceptance may be retracted up to the moment in which it becomes known by the offeror,⁶⁴ but if the acceptance is not thus retracted, the contract becomes retroactively valid as from the date in which the acceptance was sent to the offeror.⁶⁵

Electronic contracts do not fit clearly into either of these two

58. DSL, art. 39(c).

59. See LORENZETTI, *supra* note 1, at 176.

60. See DSL, art. 10.

61. See Cód. Civ., art. 1145.

62. See Cód. Civ., art. 1152.

63. See Cód. Civ., arts. 1152, 1154.

64. See Cód. Civ., art. 1155.

65. See Cód. Civ., art. 1154.

contractual categories. A reasonable solution which has been proposed for this categorization problem⁶⁶ consists of applying the rules on contracts between parties which are in immediate contact to the case where there is instant interactive communications between the parties leading to an electronic offer and an immediate electronic acceptance. In such cases, consent would not be retractable. In the absence of such immediate communications, the rules on contractual negotiations between parties that are not in immediate contact with each other⁶⁷ would be applicable.

A further legal issue in the area of electronic contracts relates to whether a web site can constitute a contractual offer. The general rule, under Argentine law, is that offers directed to the public in general, and not to a specific offeree, are not offers from a strictly legal point of view, but rather invitations for members of the public to make contractual offers.⁶⁸ This rule would apply to web sites,⁶⁹ to the extent that they do not result in an offer addressed to a specific party.

Although normally there will be no legally binding electronic contract in the absence of a digital document including a digital signature, electronic communications which do not meet such standards may have certain legal effects in connection with the completion, performance or enforcement of contracts. The basic principle under Argentine law is that all types of evidence are admissible in connection with a conflict as to the existence of a contract.⁷⁰ In this context, it would be admissible to use e-mails as evidence of contractual negotiations or transactions.⁷¹ The requirement of written documents or of digital documents with similar effects means that e-mails will normally not be sufficient by themselves to prove the existence of a contract, but they may be part of the evidence used to show such existence.⁷²

Finally, reference should be made to the problem of determining the place of execution of electronic contracts. This determina-

66. See LORENZETTI, *supra* note 1, at 187.

67. See *supra* notes 62-65 and accompanying text.

68. See Cód. Civ., art. 1148; CÓDIGO DE COMERCIO [Cód. COM.], art. 454.

69. See LORENZETTI, *supra* note 1, at 187-88.

70. See Cód. Civ., art. 1190.

71. See *G., D.E. v. C. S.A.*; Commercial Lower Court of the City of Buenos Aires 16, Decision of Oct. 23, 2001.

72. An additional problem, not clearly solved to this date by Argentine courts, is how the existence of an e-mail is proved. In practice, several means are used to this effect: expert witnesses, statements by notary publics, etc.

tion has several implications in the area of conflict of laws.⁷³ The parties themselves may generally determine the place of execution in their agreement.⁷⁴ In the absence of a provision to that effect, several positions are possible. One position is an understanding that the place of execution is the location of the party who receives the acceptance of the contractual offer, since that reception determines the existence of the contract.⁷⁵ Another methodology consists of not locating the execution of electronic contracts in any particular location by means of disregarding the place of execution as governing the selection of the law applicable to the contract.⁷⁶ This second approach finds support in the vague contents of the Argentine law rules governing the determination of the applicable law in cases in which the parties are located in different jurisdictions.⁷⁷

IV. DOMAIN NAMES

The scope of this Article does not allow detailed analysis of the legal issues posed by domain names under Argentine law.⁷⁸ The basic statutory rules and judicial precedents will be outlined.

The right to domain names in Argentina is acquired by means of registration in a special registry known as NIC-Argentina. The Ministry of Foreign Affairs is in charge of that registry, created by the Domain Name Resolution ("DNR").⁷⁹ Priority is determined on the basis of the moment of filing the necessary application with NIC-Argentina.⁸⁰ The application is filed by means of an electronic form, whose contents are determined by NIC-Argentina's regulations.⁸¹

NIC-Argentina does not proceed to an analysis and determination of the rights of the person requesting a domain name registration.⁸² NIC-Argentina's control over registration applications is limited to certain aspects of such applications, namely whether

73. See Fernando Gago, *Contrato en Internet, Ley Aplicable, Autonomía de la Voluntad*, [2000-C] L.L. 1053, 1054.

74. See LORENZETTI, *supra* note 1, at 200.

75. *Id.*

76. See Gago, *supra* note 73, at 1054.

77. See CÓD. CIV., art. 1214.

78. On the legal issues of domain names under Argentine law see DELPECH, *supra* note 1, at 49.

79. See Ministry of Foreign Affairs Res. 2226, Aug. 8, 2000, [LX-D] A.D.L.A 4283, Basic Principles [hereinafter DNR].

80. DNR, Rules of Registry, 1.

81. DNR, Rules of Registry, 2, 3.

82. See DELPECH, *supra* note 1, at 69.

identical registrations already exist and whether the domain name is identical or confusingly similar to the name of public entities or international organizations.⁸³ No control is made by NIC with regard to the possible violation of other rights,⁸⁴ such as trademark, and the applicable regulations do not provide a procedure under which third parties could file opposition against a domain name registration application.⁸⁵ Registration of domain names has a one-year duration, and may be renewed indefinitely.⁸⁶

NIC-Argentina has no powers under the DNR to make decisions regarding conflicts arising between different applicants or between applicants and third parties.⁸⁷ Likewise, it is not allowed to act in such conflicts as mediator or arbiter.⁸⁸ NIC-Argentina is, however, invested with some degree of decision-making power, since it must decide which applications to accept and to reject. In this respect, NIC-Argentina may deny registration of a domain name if it considers such domain name makes reference to a well-known or publicly-recognized person, unless the authorization of such person is included with the application.⁸⁹

Domain name applicants must file a sworn affidavit stating that the registration of such domain name does not infringe the rights of third parties.⁹⁰ In some cases, if such infringements exist, NIC-Argentina has the power to deny registration or to revoke an already existing application, particularly in the case of domain names making reference to well-know or publicly-recognized persons.⁹¹ In other cases, it will be necessary to settle the conflict before the courts.⁹²

The DNR includes several rules excluding the liability of NIC-Argentina in connection with the registration of domain names, particularly in cases in which such registration infringes the rights of third parties⁹³ or causes other types of damages.⁹⁴ Given the statutory status of the DNR, a regulation issued by the Minis-

83. See DNR, Basic Principles.

84. See DELPECH, *supra* note 1, at 69.

85. *Id.*

86. DNR, Rules of Registry, 5.

87. DNR, Rules of Registry, 8.

88. *Id.*

89. DNR, Rules of Registry, 11.

90. DNR, Rules of Registry, 12.

91. See *supra* note 89 and accompanying text.

92. DNR, Rules of Registry, 8.

93. DNR, Rules of Registry, 10.

94. DNR, Rules of Registry, 16, 17.

try of Foreign Relations, the validity of these liability rules is at least doubtful. However, if an infringement of third party rights exists, the normal procedure is for the aggrieved party to obtain a court order requiring changes in NIC-Argentina's registration, and such registration will be modified accordingly.⁹⁵

Argentine law provides for the transferability of domain name registrations.⁹⁶ The registration resulting from a transfer, however, is deemed to be a registration of a new domain name "for all purposes."⁹⁷ This could affect the rights of the registrants depending on the priority given as determined by the time of registration.

Conflicts between different domain names or between domain names and other rights –such as rights related to personal names, trade names, trademarks, etc. – are adjudicated by courts having jurisdiction over such conflicts or through the relevant arbitration mechanisms.⁹⁸ Litigation and case law in this area are significant, as illustrated by the following cases:⁹⁹

- a) In *Byk-Argentina S.A. v. Estado Nacional*,¹⁰⁰ registration of the domain name *byk.argentina.com.ar* was objected to by the Argentine government on the basis that use of the word "Argentina" was reserved to public entities and of regulatory provisions restricting the use of such word in domain names.¹⁰¹ The Federal Court for Civil and Commercial Matters sustained a lower court decision which ordered registration of the aforementioned domain name, on the basis that the applicant was previously the owner of the trade and corporate name "BYK Argentina." While the Federal Court did not invalidate the DNR, and the Ministry of Foreign Affairs' powers to enact such regulations were not attacked, the decision does indicate that the DNR may not validly conflict with legal rules which have a higher statutory status, such as those recognizing rights on trade and corporate names.
- b) In *Camuzzi de Argentina S.A. v. Arnedo, J.P.*¹⁰² a preliminary injunction was issued on the basis of Article 50 of the TRIPs

95. DNR, Rules of Registry, 15.

96. DNR, Rules of Registry, 19, 20.

97. DNR, Rules of Registry, 20.

98. See DNR, Rules of Registry, 8; DELPECH, *supra* note 1, at 118.

99. See DELPECH, *supra* note 1, at 97.

100. "Byk-Argentina S.A.," CNFed. Civ. y Com., Sala III [2000] L.L. 3.

101. See DNR, Rules of Registry, 7.

102. "Camuzzi de Argentina S.A.," Juzg. Fed. Civ. y Com. [1999] 4, cited in DELPECH, *supra* note 1, at 102.

Agreement¹⁰³ against registration of the domain name *camuzzi.com.ar*. Plaintiff was the owner of the registered trademark "Camuzzi Argentina." The court also allowed plaintiff to use the aforementioned domain name, by means of a registration with NIC-Argentina in plaintiff's name.

- c) In *Errepar S.A. c. Besana, G.A.*¹⁰⁴ a preliminary injunction was issued, also on the basis of Article 50 of the TRIPs Agreement, against use of the domain name *errepar.com.ar*, based on the existence of conflicting registered trademarks.
- d) In *In re Hotel Ava Miriva S.R.L.*¹⁰⁵ a preliminary injunction was issued allowing the owner of an unregistered trade name to use it as a domain name and ordered the suspension of the effects of a conflicting domain name registration. Thus, the court extended protection from domain name use and registration to trade names, which under Argentine law do not require registration for purposes of legal protection and ownership.¹⁰⁶
- e) In *In re Marcelo Tinelli*,¹⁰⁷ defendants had registered the domain name *marcelotinelli.com*. Marcelo Tinelli is a well-known television personality. Although there was no registered trademark involved, a preliminary injunction was granted in favor of Mr. Tinelli and the domain name was eventually transferred to him.

V. TRADEMARK AND TRADE NAME ISSUES RELATED TO THE INTERNET

The active use of trademarks in the Internet creates multiple legal issues, only some of which have been clearly dealt with by Argentine law. There are practically no statutory rules on the matter. The Argentine Trademark Law,¹⁰⁸ dating from 1980, includes no provisions on Internet practices.

One basic issue related to trademarks in the Internet is the

103. Law No. 24425, Dec. 23, 1994, [LV-A] A.D.L.A. 29 (Law No. 24425 enacted The World Trade Organization's TRIPs Agreement).

104. *Errepar S.A.*, Juzg. Fed. Civ. y Com. [1999] 3, *cited in* DELPECH, *supra* note 1, at 105, 106.

105. *In re Hotel Ava Miriva S.R.L.*, Juzg. Fed. de Rosario [2000] 1, *cited in* DELPECH, *supra* note 1, at 115.

106. *See* Law No. 22362, Feb. 1, 1981, [XLI-A] A.D.L.A. 58, arts. 27, 28.

107. *In re Marcelo Tinelli*, Juzg. Fed., *cited in* DELPECH, *supra* note 1, at 118.

108. Law No. 22362. With regard to trademark law in Argentina see LUIS EDUARDO BERTONE & GUILLERMO CABANELLAS, *DERECHO DE MARCAS* (1986); JORGE OTAMENDI, *DERECHO DE MARCAS* (1999).

determination of what constitutes trademark infringement in the Internet context. Not all conduct related to a trademark, unauthorized by the trademark owner, constitutes a trademark infringement. Argentine law distinguishes, in this respect between trademark-like uses (*usos marcarios*) and non-trademark-like uses (*usos no marcarios*).¹⁰⁹ Trademark-like uses are those in which a trademark is used to distinguish a product or service from other products or services, e.g., placing a trademark on a given product.¹¹⁰ Non-trademark-like uses are those in which a trademark is used in a manner other than to distinguish a product or service from other products or services, e.g., where a trademark is used to make derogatory statements about goods bearing such trademark.¹¹¹ Trademark-like uses may result in trademark infringements, which are subject to a special punitive regime and a determination of which trademark owner has the right to certain special preliminary measures.¹¹² Non-trademark-like uses do not strictly result in trademark infringements, but may be illegal if they constitute unfair competition or if they otherwise violate the trademark owner's rights, such as rights regarding such owner's reputation or goodwill.¹¹³

This distinction is especially relevant in the context of the Internet, since many of the practices related to trademarks in such context are non-trademark-like uses. The first instance of this situation arises in cases of domain name registration applications. Such applications, and the registrations themselves, do not imply a trademark-like use; no goods or services are immediately identified. This has not prevented Argentine courts from enjoining the registration or use of domain names, based on petitions by trademark owners.¹¹⁴ Courts have generally not stated expressly or clearly the legal foundation of such injunctions. The existence of registered trademarks has generally been considered to be enough to prevent the registration of a domain name including such trademarks.

Under general trademark law rules, however, there are limits to the rights of trademark owners in the Internet context, which may have effects in the future upon the possibility of preventing

109. See generally Guillermo Cabanellas, *El Uso Atipico de la Marca Ajena*, 3 TEM. DER. INDUST. Y COMP. 31 (Arg. 1999).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. See *supra* notes 102-104 and accompanying text.

the registration or use of domain names on the basis of registered trademarks. Thus, trademark registration does not create an unlimited right with regard to the use of the registered trademark, but rather an exclusive right related to certain goods and services defined by such registration. Therefore, the owner of a domain name could argue that such a domain name will be used only in connection with goods and services not related to a preexisting trademark registration and that neither the domain name nor the domain name registration will be used to infringe upon the registered trademark owner's rights.

Argentine courts have not established the validity of this type of argument, particularly because the litigation which has taken place so far in the domain name-trademark interface area has dealt with well-known trademarks. In this context, the courts have reasonably concluded that the domain name registration was illegal not only because it violated the rights resulting from trademark registrations, but also because it violated other rights of the trademark owner, such as its general goodwill and reputation and its right to use its trademark in the Internet.¹¹⁵ Also, courts have correctly inferred an intention of the domain name owner to appropriate for itself the prestige and customer-attraction power of a well-known trademark.¹¹⁶

Another issue arises when the domain name is the trade or corporate name of a person other than the domain name owner, regardless of whether the domain name is also protected by trademark rights. In such cases, the domain name registration creates an obstacle to the proper use of the preexisting trade or corporate name, since the owner of such name will be prevented from using it in the Internet without confusion. Also, the domain name registration and use will create a degree of confusion as to the identity of the person making such registration and use. Several types of cases should be distinguished in this context:

- a) In the case of domain names that include names of individuals, Argentine case law has protected individual names against domain name registrations made without authorization of the individual whose name was used.¹¹⁷ However, the cases decided so far have dealt with the name of public figures so that the intention of appropriating the prestige of the individual involved was clear. In cases not involving public

115. See generally DELPECH, *supra* note 1, at 102-106.

116. *Id.*

117. See *supra* note 107 and accompanying text.

figures, individuals would be protected by the rules on individual names, which grant protection to the individuals involved against unauthorized use of such names.¹¹⁸

- b) In the case of domain names which include corporate names that are normally used also as trade names, protection is generally possible on the basis of the protection granted to trade names.¹¹⁹ If that were not the case, protection would still be possible to the extent that use of a corporate name as a domain name by an unauthorized person creates a potentially significant level of confusion in the public. In addition, it frustrates the proper functioning of corporate names, and prevents the rightful use of corporate names in the Internet.
- c) In the case of trade names, such as names used to identify an activity,¹²⁰ the trade name owner has the exclusive right to use such trade name in connection with the goods and services and the market in which the identified activity takes place.¹²¹ However, once a protected trade name is identified as such, registration of such trade name as a domain name may be prevented without limits. Although courts have not been totally explicit about the grounds for the extension thus granted to trade names,¹²² they appear to have taken into account the need to prevent confusion as to the identity of the domain name owner, as well as the need to allow the trade name owner proper access to the Internet.

Another set of issues in the trademark-domain name interface area relates to conflicts between similar but not identical names. Trademark law has developed a complex system to determine the scope of protection granted to trademarks against similar but not identical trademarks. This system takes into account several elements, such as the nature of the goods and services involved, and the possibility of visual, audible or ideological confusion, etc. In principle, this system would also be applicable to possible violations of trademark rights through the Internet and by means of domain names. Domain names have certain special characteristics, however, that should be taken into account when determining the scope of trademark rights in the Internet. Thus, domain names are generally not used in connection with specific

118. See Law No. 18248, June 10, 1969, [XXIX-B] A.D.L.A. 1420, art. 21.

119. See *infra* Part V.c.

120. See Law No. 22362, art. 27.

121. See Law No. 22362, art. 28.

122. See *supra* note 105 and accompanying text.

goods or services, but rather are instruments that make possible a continuous flow of information about multiple goods, services and activities. The possibilities for consumer confusion in this context are very different from those arising in more traditional forms of trading.

Argentine courts have not yet settled other aspects of trademark practices in the Internet area. In the case of meta-tagging,¹²³ an initial difficulty results from the fact that normally such practice will not result in the identification of specific goods or services. Therefore, there is no immediate violation of trademark rights, since there is no trademark-like conduct.¹²⁴ However, as in other cases of non-trade-mark-like use of trademarks, it will be possible to prevent this type of conduct to the extent that it implies unfair competition, particularly if it deviates or damages the trademark owner's goodwill.¹²⁵

A similar situation arises with regard to linking. Links are the connections between one Web page with a different Web page by means of a hypertext reference. If trademarks are included in the linked Web page, this will normally not result in a direct trademark violation, since normally there will be no identification of goods and services with such trademarks.¹²⁶ There may be other illegal results, however, particularly if the linking results in the possible deviation of goodwill or clients, or in the appropriation of the trademark owner's efforts, and thereby creating a situation of unfair competition.¹²⁷

VI. PATENT LAW ISSUES RELATED TO THE INTERNET

Argentine Patent Law ("APL") is substantially less developed than Argentine trademark law.¹²⁸ Likewise, statutory law is

123. F. LAWRENCE STREET & MARK P. GRANT, *LAW OF THE INTERNET* 4-96 (2002). Street and Grant state: "Metatags are keywords that can be inserted into the source code of Web sites. Search engines read metatag keywords and use them as references for a Web site. You cannot view a Web site's metatags through ordinary viewing of a site. However, you may be able to view them through Web browser functions" *Id.*

124. See José Massaguer, *Conflictos de Marcas en Internet*, 648 REV. GEN. DER. 11,107, 11,133 (Sp. 1998) (Spanish trademark law provisions are similar to those of Argentine law).

125. See *id.* at 11,134.

126. *Id.* at 11,136.

127. Unfair competition claims require other elements unrelated to the practice of linking in itself, such as the fact that defendant and plaintiff are competitors in the same market, and that the practice has a significant possibility of deviating clients from plaintiff to defendant. See Cód.PEN., art. 159.

128. Law No. 24481, March 20, 1996, as amended, [LV-D] A.D.L.A 5635

poorly drafted and clearly biased against strong patent protection, and case law is scarce and technically inadequate.

Several provisions of the APL bear on the issue of patentability of technologies related to the Internet, namely:

- a) Article 4 of the APL requires, as a condition for patentability, that the invention be "susceptible of industrial application."¹²⁹ "Industrial application" is a term of art, which, under Argentine law requires that the patented technology should have clearly identifiable physical elements or results, such elements or results being part of the patent claims.¹³⁰
- b) Article 6(a) of the APL declares that "mathematical methods" are not inventions for purposes of this Law.¹³¹
- c) Article 6(c) of the APL declares that "plans, rules and methods for the exercise of intellectual activities, for games or for economic-commercial activities, as well as computer programs" are not inventions for purposes of this Law.¹³²

These provisions have a highly restrictive effect on the patentability of Internet-related technologies. In the case of software used for the implementation of Internet activities, such software is excluded from patentability by Article 6(c) of the APL, regardless of its inventive level or novelty. Under Argentine law, the proper mechanism for the protection of software is copyright.¹³³ Patentability is not prohibited if software is part of a more complex invention, provided such invention meets the "industrial application" requirements described above.¹³⁴ Software technologies related to the Internet may satisfy these requirements when they are related to hardware innovations.

With regard to business method patents, the language of the APL is clearly contrary to their validity, since Article 6(c) expressly prohibits "plans, rules or methods . . . for economic-commercial activities."¹³⁵ Even in the absence of this express prohibition, business methods would not be patentable due to the industrial application requirements discussed above.¹³⁶

[hereinafter APL] (the basic Argentine patent law statute). See GUILLERMO CABANELLAS, *DERECHO DE LAS PATENTES DE INVENCION* (2001); CARLOS MARÍA CORREA, *DERECHO DE PATENTES* (1996).

129. APL, art. 4.

130. See APL, art. 4(e), for a definition of "industrial application" in this context.

131. APL, art. 6(a).

132. APL, art. 6(c).

133. See ACL, art. 1.

134. See CABANELLAS, *supra* note 128, at 819-20.

135. APL, art. 6(c).

136. See *supra* note 130, and accompanying text.

VII. COPYRIGHT ISSUES RELATED TO THE INTERNET

Argentine copyright law has shown little adaptation to the huge practical impact of the Internet on the content and effectiveness of copyright. Although the principal Argentine copyright statutes are generally broad enough to permit their use with regard to new technological developments, this flexibility is not infinite, as was shown in the case of software, which required an amendment to the ACL to overcome certain limitations read into the law by court decisions.

Argentine law does not have an express private use exemption.¹³⁷ Criminal liabilities tend to apply only if intent to profit is determined,¹³⁸ but this requirement generally does not apply for purposes of determining civil liabilities.¹³⁹ Therefore, distribution of musical or literary works through the Internet without the copyright owners' authorization may constitute a civil infringement by the persons downloading or using such works,¹⁴⁰ and a criminal infringement by the person who, for profit, participates in the illegal distribution of such works through the Internet.¹⁴¹

With regard to literary works, a distinction has been made based on whether the work was included initially in the Internet legally or not. If the work was included in the Internet by its author or by a person deriving rights to the work from the author, it may be understood that use of such work within the normal bounds of the Internet is legal, since it must be deemed that such use has been authorized by the author or by the person deriving rights from the author. In this context, users may not only have legal access to the work but they may also download it in printed or electronic form, provided this is done within the limits of personal use.¹⁴² If, however, users exceed the limits of personal use, and use downloading or other mechanisms to transmit the work to third parties in electronic or other forms, this may be deemed to exceed the implied authorization granted by the person who legally included the work in the Internet.¹⁴³

In the case of non-duly authorized inclusion of a literary work in a Web site, the person making such inclusion undoubtedly

137. See DELIA LIPSZYC, *DERECHOS DE AUTOR Y DERECHOS CONEXOS* 223 (Ediciones Unesco, Cerlac, Zavalía 1993).

138. See ACL, arts. 72, 72 bis.

139. See DELPECH, *supra* note 1, at 191.

140. *Id.*

141. See ACL, art. 72 bis.

142. See DELPECH, *supra* note 1, at 201.

143. *Id.*

infringes the copyright owner's exclusive rights. The electronic medium used for this purpose does not alter the identity of the infringement since Argentine copyright law prohibits all types of infringements of the copyright owner's exclusive rights, regardless of the medium or instrument used.¹⁴⁴ The situation of users of such illegally reproduced works is less clear. If use involves transmission of the work to third parties, this will be a tort or a criminal copyright violation, since such use cannot be placed in a better legal position than that derived from works legally introduced into the Internet.¹⁴⁵ If use does not involve transmission of the work to third parties, the existence of civil or criminal liabilities for the user will depend on whether such user acted with good or bad faith, such as with knowledge regarding the illegality of the inclusion of the work in the Internet.

Certain aspects of the methodology of Argentine copyright law may facilitate the solution of certain problems created by the Internet-copyright interface under other legal systems. Such is the case, in particular, of the low significance of the concept of fixation under Argentine copyright law. Fixation is not legally required for either the existence of a work protected by copyright¹⁴⁶ or for a copyright infringement.¹⁴⁷ Thus, fixation cannot be validly argued under Argentine law so that a work susceptible of copyright protection may be used or copied because it only has an "evanescent"¹⁴⁸ existence on a screen, a random access memory or other electronic instruments, or because it has been copied or used by similar "evanescent" means. Therefore, since a copyright owner has an exclusive right to use and reproduce material protected by copyright,¹⁴⁹ this exclusive right would extend against use and reproduction through electronic means such as the Internet.

Copyright includes, under Argentine law, the exclusive right with regard to the public performance and display of protected works.¹⁵⁰ The rules in this respect are broad and abstract enough to include, as copyright violations, displays in Web pages and other public transmissions through the Internet. The fact that the

144. See ACL, arts. 1, 71.

145. See DELPECH, *supra* note 1, at 201.

146. See LIPSZYC, *supra* note 137, at 68.

147. See ACL, arts. 1, 71.

148. H.R. Rep. No. 94-1476, at 52-53 (1976) (noting legislative history of U.S. copyright statutes pertaining to the use of the word "evanescent").

149. See MIGUEL ÁNGEL EMERY, LA PROPIEDAD INTELECTUAL 65 (Astrea 1999).

150. See ACL, art. 2.

“public” is not physically present with occasion of the “performance” or display should not alter the applicability of the copyright owner’s exclusive rights in these cases.

With regard to Internet transmissions, the breadth of a copyright owner’s exclusive right under Argentine law – covering disposal, publication, and “any form of reproduction,” among other rights¹⁵¹ – makes the possibility of a valid Internet transmission without the copyright owner’s authorization unlikely or impossible. Hence, no need has arisen in this context for a separate “right of transmission.”

Alternatively, the issue of implied licenses is not as well settled. Such licenses are undoubtedly effective,¹⁵² as was indicated above in connection with certain possible copyright infringements.¹⁵³ However, once it is admitted that implied licenses are valid, specific difficulties may arise, particularly in connection with limitations applicable to the implied licenses, especially in consumer transactions. Thus, if an implied license, such as in the context of consumer transactions, includes restrictions on consumers rights supported by public policies,¹⁵⁴ or if it limits the warranties legally provided in favor of consumers,¹⁵⁵ or if it otherwise limits consumer rights protected by consumer protection law,¹⁵⁶ the license may be considered valid, but the inadmissible clauses or provisions shall be considered void.¹⁵⁷

Although in principle it is possible to overcome the limitations on the effectiveness of provisions attached to implied licenses by means of adequately drafted express licenses, in practice this is not the case due to the difficulties in meeting the conditions necessary for binding electronic contracts in the context of copyright licenses related to the Internet.

VIII. PRIVACY IN THE INTERNET

There are several statutory provisions of Argentine law that bear on the scope of privacy rights in the Internet. Some such provisions are as follows:

a) Article 1071 bis of the Civil Code provides that any person

151. *Id.*

152. See LORENZETTI, *supra* note 1, at 205.

153. See *supra* notes 144-145 and accompanying text.

154. See Law No. 24240, Sept. 22, 1993, as amended, [LIII-D] A.D.L.A. 4125, art. 37(a), (b) [hereinafter CPL].

155. *Id.*; See also LORENZETTI, *supra* note 1, at 252.

156. CPL, art. 37(a), (b).

157. See CPL, art. 37.

- who arbitrarily intrudes into another person's life, publishes portraits, publicizes correspondence, mortifies another person with regard to one's habits or feelings, or otherwise damages his or her intimacy, shall be forced to cease such activities and to indemnify the damages caused.¹⁵⁸
- b) The Criminal Code includes various provisions punishing libel, slander and defamation.¹⁵⁹
 - c) The Argentine Copyright Law provides that the photograph of a person may not be the subject matter of commerce without the express consent of that person.¹⁶⁰ In the event that the person is deceased, the law requires consent from the deceased's spouse and son(s) or direct descendants, or in their absence, from the deceased parents.¹⁶¹ Consent may be revoked if any damages caused by such revocation are indemnified. Personal letters are also granted a similar protection because the right to their publication belongs to the author.¹⁶² However, no consent is necessary when the use of protected attributes appears in a publication related to scientific, educational or cultural purposes, nor is consent necessary in relation to facts or events of public interest or that have taken place in public.¹⁶³
 - d) Article 21 of the Law of Names¹⁶⁴ prohibits the use of a physical person's name, including the malicious use of the name to designate a fictitious character or thing, without that person's consent.¹⁶⁵ According to Article 21 of the Law of Names, if a person's name is used by another person for the latter's designation, the person entitled to the name may obtain damages and an injunction against further illegal uses of the name involved. Additionally, Article 23 of the Law of Names provides similar protection for pseudonyms.¹⁶⁶
 - e) Law 25,326 provides a general system of protection for personal data, regardless of the means used for the storage or treatment of such data.¹⁶⁷ Thus, protection extends to data

158. See María Delia Pereiro, *El Derecho a la Intimidación en el Código Civil y su Raíz en el Artículo 19 de la Constitución Nacional*, [1990-A] L.L. 174.

159. See Cód. PEN., arts. 109, 110.

160. ACL, art. 31.

161. *Id.*

162. ACL, art. 32.

163. *Id.*

164. Law No. 18248.

165. Law No. 18248, art. 21.

166. Law No. 18248, art. 23.

167. Law No. 25326, Oct. 4, 2000, [LX-E] A.D.L.A. 5426, art. 1 [hereinafter PDPL].

kept by either public or private entities.¹⁶⁸ This system protects the honor and privacy rights of both physical and corporate persons.¹⁶⁹ The Personal Data Protection Law ("PDPL") includes provisions as to the truthfulness of stored personal data, the means that are admissible for the collection of such data, the use to which such data may be put, the right of access to such data, and the instances when the data must be destroyed.¹⁷⁰

This complex legal system has multiple effects on the Internet. Use of a person's name or image in the Internet without that person's authorization is severely restricted. This restriction is partially lifted when the person is publicly known and its name or image is used for normal news coverage.¹⁷¹ Even this use is limited, however, if the name or image of a public person is used maliciously or in a way unrelated to the person's public activity.¹⁷²

Control by the employer of e-mails or other Internet material to which the employee has access is a debatable issue.¹⁷³ The activities of certain employees, in banks for example, may be validly subject to special surveillance by the employer for security reasons. Private correspondence, however, is generally beyond the employer's reach in the absence of special circumstances such as those discussed above.¹⁷⁴ Confidentiality obligations and the liabilities applicable to private correspondence, have been successfully applied to e-mails in commercial¹⁷⁵ and criminal¹⁷⁶ litigation.

Argentine law does not grant a direct action against such practices as "spamming." However, the law grants some degree of protection to the "victim" by granting the person included in a database for marketing purposes the right to demand deletion from the data base.¹⁷⁷ Alternatively, Article 27(1) of the PDPL makes the use of "cookies" illegal,¹⁷⁸ if not authorized by the Internet user subject to such use.

168. *Id.*

169. *Id.*

170. PDPL, art. 4.

171. *See* ACL, art. 31.

172. For example, publishing the photograph of a politician on his death-bed. *See* Ponzetti de Balbín, CSJN [1985-B] L.L. 114, 120.

173. *See* DELPECH, *supra* note 1, at 231.

174. *See infra* notes 169- 170, *infra*, and accompanying text.

175. *See* G., D.E. v. C. S.A., *supra* note 71.

176. *See* Lanata, C.N.C.P. [2000], *cited in* DELPECH, *supra* note 1, at 23-33.

177. *See* PDPL, art. 27.

178. *See* DELPECH, *supra* note 1, at 238.

IX. CRIMINAL INFRINGEMENTS IN THE INTERNET

Argentine law shows two types of reactions towards criminal infringements taking place in the Internet. One is to adapt pre-existing criminal law provisions to the new realities created by the Internet. For example, criminal provisions related to mail offenses are applied to e-mails.¹⁷⁹ The second approach calls for the enactment of rules specific to crimes committed in cyberspace. In this way, the DSL¹⁸⁰ included a new Article 78 bis to the Criminal Code, extending the rules applicable to written signatures and documents to digital signatures or documents. Furthermore, the PDPL¹⁸¹ has added two new articles in the Criminal Code, Articles 117 bis and 157 bis, both applicable to the inclusion of false information in data banks and to the violation of the confidentiality of these banks. The new laws extend to all types of data banks including those in electronic form.¹⁸²

A broad array of additional criminal provisions have been considered to be applicable to conduct taking place through the Internet.¹⁸³ Some of these provision affect:

- a) Slander, libel and defamation.¹⁸⁴ The Internet is a particularly apt instrument for these types of conduct, and the Criminal Code provisions make no distinctions on the means used.¹⁸⁵
- b) Trade or personal secrets.¹⁸⁶ The applicable criminal law provisions are broad and make no distinctions on the type of document by means of which secret information is kept or on the mechanism used to have access to such information.
- c) Obscene publications or corruption of minors.¹⁸⁷ Although the constitutional provisions on freedom of the press are fully applicable in the Internet,¹⁸⁸ the limits on obscene or corrupting publication are also applicable therein.¹⁸⁹

179. See Lanata, *supra* note 176.

180. DSL, art. 51.

181. PDPL, art. 32.

182. See DELPECH, *supra* note 1, at 167-68.

183. *Id.* at 158; See also Antonio Coghlan & Alejandro Anderlic, *When Web Content is Illegal*, INT'L INTERNET L. REV. 48 (2001).

184. See Cód. PEN., arts. 109, 110.

185. Argentine case law has not yet decided the liability of Internet service providers. The matter should be dealt with on the basis of general criminal law principles, which would normally exclude the civil or penal liability of such providers.

186. See Cód. PEN., arts. 153-56.

187. Cód. PEN., arts. 125, 128.

188. See Executive Decree 1279, Nov. 25, 1997, [LVII-E] A.D.L.A. 5667.

189. See Coghlan & Anderlic, *supra* note 183, at 48.

- d) Fraud.¹⁹⁰ These are extremely broad in the Argentine Criminal Code and clearly permit their extension to activities in the Internet.¹⁹¹
- e) Instigation to criminal conduct and on race crimes. These are also applicable to conduct taking place through the Internet.¹⁹²

However, because criminal provisions must be construed narrowly, significant sets of conducts, taking place through the Internet, go unsanctioned. Activities such as spreading computer viruses and "hacking," which cause the types of damage generally punished by criminal sanctions often escape because of the inadequacy of the statutes in force. Argentine criminal law has not adequately adjusted to the evolution of the Internet phenomenon.

190. CÓD. PEN., art. 172.

191. See Delpéch, *supra* note 1, at 161.

192. See Coghlan & Anderlic, *supra* note 183, at 48.