

1-2000

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### Recommended Citation

Richard C. Bulman Jr. and Jorge R. Gutierrez, *Legal Audits for E-Commerce Ventures*, 61 Mont. L. Rev. (2000).  
Available at: <https://scholarship.law.umt.edu/mlr/vol61/iss1/5>

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## LEGAL AUDITS FOR E-COMMERCE VENTURES

Richard C. Bulman, Jr., Esq. and Jorge R. Gutierrez, Esq.\*

**This article is a blueprint for undertaking a legal audit of e-commerce ventures. From formation through operation, it details the fundamental components of e-commerce companies to enable the intelligent scrutiny of papers, processes and practices. This article also discusses legal issues underlying key elements of the e-commerce process, including Website development and operations, intellectual property strategies, advertising and marketing considerations and emerging trends affecting business tactics. However, this article is intended for general information purposes and should not be construed as legal advice. Further, please note that any references in this article to companies, products or services are purely illustrative and do not constitute an endorsement.**

### INTRODUCTION

As the first wave of electronic commerce (“e-commerce”) engulfs almost every commercial enterprise from “mom-and-pop” shops to multinational corporations, plenty of uncertainty prevails.<sup>1</sup> Anxious not to miss the most significant event since the Industrial Revolution, many smart business people are throwing caution to the wind, jumping into fast waters and being carried by strong currents to unknown destinations.<sup>2</sup> To the rescue go the lawyers, helping individuals and companies find safe ground.

Or do they? In today’s world, rightly or wrongly, the Internet appears to have become the sole province of a cadre of

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1. See WALID MOUGAYAR, *OPENING DIGITAL MARKETS* (2<sup>nd</sup> ed. 1998); *OECD Ministers Will Meet to Debate E-Commerce Rules*, REUTERS, Oct. 3, 1998; Maria Seminerio, *Study: U.S. Out Ahead On E-Commerce* (visited June 8, 1999) <<http://www.zdnet.com/zdnn/stories/news/0,4586,2272275,00.html>>.

2. See MOUGAYER, *supra* note 1, at 11-27.

technology experts. It also seems that many business lawyers whose savvy and skills have carried the day in more "traditional" business settings choose now to stand idly by as their clients get washed away by this tsunami of change.<sup>3</sup>

Whether luckless, hapless, clueless or powerless, the truth is that conscientious business lawyers can render valuable assistance to any e-commerce company. All it takes is some foresight, a bit of useful legal and business experience and a thirst for knowledge regarding the metes and bounds of e-commerce ventures in order to distinguish the good from the bad and the ugly.

Of these traits, unfamiliarity with e-commerce poses the greatest obstacle because rendering effective assistance to e-companies requires a keen understanding of the e-business environment. Fortunately, such "operational intelligence" can generally be derived through investigation and, more specific to any given enterprise, through the completion of a comprehensive legal e-commerce audit. Much like its accounting predecessor, the principle objective of a legal e-commerce audit is to thoroughly analyze business processes with a view toward identifying, managing and documenting legal concepts, practices and relationships.

In such an analysis, a lawyer needs to employ a 360 degree view - incorporating business objectives, business processes, commercial conditions, strategic and personal relationships, existing legal principles, business and industry requirements and emerging trends - to develop a clear picture of the e-commerce enterprise as it exists, and to the extent possible, as it may need to evolve.<sup>4</sup> The resulting insights can help management discern facts from assumptions and take precise actions in a coordinated manner to implement sound strategies for e-business growth.

Because a dynamic economic environment involving a wide variety of e-businesses and profit models precludes a single formula-based assessment, we developed the following "product to market" template to help uniformly analyze disparate e-businesses by functional category with an eye toward developing a management report that identifies concepts, relationships and practices in order to recognize worth, protect assets and reduce

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3. See Jennifer Reingold & Amy Barrett, *M&A Frenzy May be Scuttling Due Diligence*, BUSINESS WEEK, Aug. 17, 1998, at 72.

4. See Saul Hansell, *S.E.C. Signals Concern as Stock Prices of Internet Companies Ascend Toward Atmospheric Heights*, N.Y. TIMES, Aug. 10, 1998, at D2.

risk.

## I. E-COMMERCE DEFINED

Evaluating any e-commerce company requires an understanding of e-commerce basics.

Most simply, electronic commerce can be defined as a method of using computers, software and Internet access to enable people to electronically interact for the purpose of cultivating and growing commercial relationships.<sup>5</sup> E-commerce participants not only involve “e-business-only” companies, but subsidiaries, business units and profit centers of traditional companies (“brick and mortar” types) that conduct e-commerce activities within the scope of their normal business operations.

The business activity of e-commerce begins with an e-commerce site. At a minimum, e-commerce sites require: (1) hardware (a personal computer or more powerful “server”); (2) Internet access (an electronic interpreter (a “modem”) and telecommunication or wireless access to the Internet); and (3) specialty software that enables electronic communication and interactivity (a “Web site”). Together, these items constitute what we will call “supply,” or the ability of a Web site to operate a virtual business. The other half of e-commerce is “demand,” which is a dynamic group of visitors that at any time is ready, willing and able to interact on-line with the Web site. In tandem, the electronic exchange of goods and services can occur on a continuous basis.

These abstract elements have very tangible legal implications. Just like every other commercial enterprise, every e-commerce activity of any enterprise must form in accordance with applicable laws (i.e., shareholder agreements, intellectual property protection agreements, employment agreements and stock option plans); determine how it works (i.e., by-laws, operating agreements) and how it allocates resources (i.e., business plans and budgets); and be mindful of networking and strategic partnerships (i.e., accounting,<sup>6</sup> banking, legal, investor

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5. See Mougayar, *supra* notes 1, at 11-27; J. Neil Weintraut, *Gimme Three Steps*, BUSINESS 2.0, Oct. 1998, at 32; Thomas J. Smedinghoff, *ABA/ACCA Survey of Electronic Commerce Practices*, AMERICAN BAR ASSOCIATION SCIENCE & TECHNOLOGY SECTION, No. 254436 (visited June 2, 1999) <<http://www.abanet.org/scitech/abaacca.html>>; Gary Hamel & Jeff Sampler, *The E-Corporation*, FORTUNE, Dec. 7, 1998, at 80; GEORGE B. DELTA & JEFFREY H. MATSURA, *LAW OF THE INTERNET*, Intro. (1999) [hereinafter DELTA].

6. See James Ryan, *Build by Barter*, BUSINESS 2.0, Dec. 1998, at 108.

and business relationships). Also, every e-business activity is legally responsible for obtaining applicable licenses, hiring employees, accounting for revenues, expenses and certain taxes, obtaining, marketing, advertising, selling, processing and delivering products, and providing customer service.

Given the similarities between “brick and mortar” and e-commerce activities, it is not surprising that certain methods of performing due diligence on “brick and mortar” ventures - such as checking minute books and files, reviewing compensation schemes, licenses, corporate contracts and the like - are still relevant in evaluating the status of e-commerce companies. What is startling, however, is the leap in logic required to understand and value the intangible aspects of such commercial relationships in this new paradigm. In turn, such thinking requires a new perspective on old assessment methodologies necessary to properly protect “the franchise.”

E-commerce business activity, as a business model, is unique because of its capacity for multilevel efficiencies. In facilitating trade, traditional sales methods such as radio, television and catalogues employ one-way broadcasts to solicit sales using limited commercial reach (i.e., a particular product is offered to a given market at a given moment in time). Even assuming a favorable viewer response or in-store sales opportunity resulting in two-way communication, there is a limited ability to: (1) understand or replicate the buying environment; (2) cost-effectively collect or monitor consumer interest or buying experiences; (3) expand or alter the message to include a larger group at different times; or (4) integrate the sales and marketing process with operational activities (i.e., inventory, accounting processes).<sup>7</sup>

E-commerce business activities overcomes such limitations. It permits one-way broadcast with two-way communication and interactivity, twenty-four hours a day, seven days a week, on a global basis.<sup>8</sup> It enables a comprehensive array of customer data to be collected through e-commerce processes.<sup>9</sup> Whether it be customer profiles or the origination, path, frequency, duration or result of every consumer, e-commerce providers are afforded invaluable “stream of commerce” data to be pragmatically employed to precisely focus e-business resources on ideal

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7. See MOUGAYAR, *supra* note 1, at 11-27.

8. See generally DELTA, *supra* note 5, at ch. 9.

9. See Eric Hellweg ed., *What 100 Ideas*, BUSINESS 2.0, Apr. 1999, at 44.

customers and profitable commercial relationships wherever situated.<sup>10</sup> E-commerce systems also afford e-businesses the ability to integrate all company activities through the use of a harmonized array of computers, software and ancillary service providers.

The process by which any e-commerce company collects and harnesses streams of data to cultivate “intelligent customer relationships” and to generate information and product sales is collectively valued. Accordingly, to be effective, every e-commerce legal business activity audit must clearly recognize and investigate all relevant business processes, characteristics and factors. Further, business lawyers should be prepared to act to maximize such attributes in accordance with the wishes of e-commerce business managers.

## II. THE BASIC REQUIREMENTS

There are a number of specific items to consider in assessing core e-commerce components.

### A. Hardware

Operations are commenced by the utilization of one or more “servers,” powerful computers that use software in the operation of Web sites capable of managing the electronic interaction of thousands of people simultaneously. Typically, large entities lease or buy multiple servers to operate a Web site, while small “mom-and-pop” companies use PC’s and/or contract with Internet Service Providers (“ISP’s”) to lease server capacity to operate their e-commerce businesses in a cost-effective manner.

### B. Communications Access

Servers require an Internet connection for e-commerce. More specifically, it is necessary to have computer access to the World Wide Web (“WWW”),<sup>11</sup> that portion of the Internet permitting the electronic communication of text, audio and video files among computers transmitting information within a global

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10. See *The Etail Mall*, BUSINESS 2.0, Jan. 1999, at 43; Special Advertising Section, *Intranets & Extranets: Building the Web-Enabled Enterprise*, FORTUNE, Apr. 13, 1998, at 51; Jesse Berst, *Words That Wire Your Mind for the Web* (visited June 14, 1998) <[http://www.zdnet.com/anchordesk/story/story\\_2235.html](http://www.zdnet.com/anchordesk/story/story_2235.html)>

11. See BENJAMIN WRIGHT & JANE K. WINN, LAW OF ELECTRONIC COMMERCE, at 2-8 (3<sup>rd</sup> ed. 1999) [hereinafter WRIGHT].

network of telephone and cable lines, via wireless relay and/or satellite links.<sup>12</sup> Servers can be physically connected to telecommunication lines (i.e., T-1, T-3, DSL)<sup>13</sup>, or operate in conjunction with satellites to transmit and receive information. In order to move information “on-line,” data has to be electronically entered, packaged and shipped from point to point.<sup>14</sup> Each person using the Internet requires an electronic mailing address, and in the case of businesses, a Web site address (“domain<sup>15</sup> name”<sup>16</sup>), to have data properly sent and delivered on the WWW.

### C. The Web Site

A Web site is an electronic storefront where people meet on-line to interact. Many people have some familiarity with a home page or the “front door” to a Web site. A Web site is actually made up of a number of visible pages, as well as “invisible” software programming that coordinates the interactions that occur within and outside of the Web site. Web sites can simply be places to view content, or as is the case with an increasing number of sites, serve as places to research, market and sell products while permitting integrated traffic for in-house electronic order confirmation and tracking, inventory management, transaction accounting and customer-information systems. E-commerce companies frequently employ software developers to create unique, customized computer software programs with proprietary imaging and features for

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12. See Marc Gunther, *Interactive TV: It's Baaack!*, FORTUNE, July 20, 1998, at 136; Michael J. Himowitz, *TV on the PC? Cool! Sort Of*, FORTUNE, July 20, 1998, at 138; Will Rodger, *Congressmen Tackling Cable Access* (visited May 7, 1999) <<http://www.zdnet.com/zdnn/stories/news/0,4586,2254494,00.html>>; Julie Pitta, *Interactivity: the Great White Whale*, FORBES, Sept. 21, 1998, at 60.

13. See Eric Hellweg, *Speed on the Cheap*, BUSINESS 2.0, Jan. 1999, at 106; Michael Grebb, *Strange Netfellows*, BUSINESS 2.0, June 1999, at 34; *Operator, Get Me the Web!*, BUSINESS 2.0, Dec. 1998.

14. See DELTA, *supra* note 5, at ch. 1.

15. See *How the Internet Works: All You Need to Know*, BUSINESS WEEK, July 20, 1998, at 58.

16. See William A. Tanenbaum, *Rights and Remedies for Three Common Trademark-Domain Disputes: (1) Domain Name v. Trademark, (2) Shared Trademarks and (3) Domain Name Hijacking*, in REPRESENTING THE NEW MEDIA COMPANY 297, 299-310 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G4-4031, 1998); Stuart E. Levi et al., *The Domain Name System & Trademarks*, in SECOND ANNUAL INTERNET LAW INSTITUTE 9, 9-47 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G0-0001, 1998); Matthew Broersma, *Monopoly Ending For Domain Names* (visited Apr. 20, 1999) <<http://www.zdnet.com/zdnn/stories/news/0,4586,2244863,00.html>>.

interactivity within these virtual storefronts.

#### D. Operations

Both high-end developers serving owner-operators and full service ISP's<sup>17</sup> assisting small and mid-sized businesses may offer their customers an array of complementary business services to facilitate e-business on-line.<sup>18</sup> Such services can range from setting up and building out the virtual storefront ("creating and hosting a Web site"),<sup>19</sup> arranging for the company to have a domain name,<sup>20</sup> enabling electronic shopping to occur (working with credit services like CyberCash®<sup>21</sup> to take and process orders), and implementing security features (using authentication/encryption services like VeriSign®<sup>22</sup> and Thawte®<sup>23</sup>). Frequently, both high-end providers and ISP's provide ancillary Web marketing and advertising services (linking to other sites, tracking visitors, conducting on-line promotions) and hardware/software maintenance and technical support services. There are also a host of specialty services customized by industry, too numerous to mention here, that are provided by developers harnessing advances in telecommunication technology. Each link in this e-commerce chain requires some form of business agreement and legal attention.

17. See Grebb, *supra* note 13; Melissa Campanelli, *Site Anxiety*, ENTREPRENEUR, July 1998, at 41.

18. See Eric Goldman, *A Fresh Look at Web Development and Hosting Agreements*, in SECOND ANNUAL INTERNET LAW INSTITUTE 399, 399-422 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G0-0001, 1998)

19. See *id.*

20. See Levi, *supra* note 16, at 9-47; Gene Koprowski, *Cache and Carry*, BUSINESS 2.0, Oct. 1998, at 24; *Fed Writes 1<sup>st</sup> E-Check With Internet As Vehicle*, INVESTOR'S BUSINESS DAILY, July 1, 1999; Taylor & Jerome, *A Toll For E-Commerce* (visited May 5, 1999) <<http://www.zdnet.com/zdnn/stories/comment/0,5859,2248207,00.html?chkpt=zdnmsmsa>>; Don Sussis, *Accepting Credit Cards OnLine* (Apr. 4, 1999) <<http://e-comm.internet.com/resources/solutions/creditcard.html>>.

21. See <<http://www.cybercash.com/>>.

22. See Ky Henderson, *Castling the Net, Electronic Cash Just Waiting To Be Caught?*, BUSINESS LAW TODAY, Mar./Apr. 1998, at 8; Nikhil Huthesing, *HP's Giant ATM*, FORBES, Feb. 9, 1998, at 96; <<http://www.verisign.com/>>.

23. See Tony Kontzer, *Next Step In Network Security: Don't Get Mad - Get Even*, INVESTOR'S BUSINESS DAILY, July 1, 1998, at A9; <<http://www.thawte.com/>>.



### III. STRUCTURE

The structure of any e-commerce site revolves around “critical path” agreements - contracts involving software, hardware, communications access, security and integration - that help define specific functions and commercial relationships to ensure the continuous reliability and performance of any e-commerce enterprise.

#### A. Software

A Web site is controlled by the use of e-commerce software. E-commerce software is installed on a server kept on or off site and controlled by the owner-operator or some agent. In a standard telecommunications configuration, when a person with Internet access types a domain name on the page of a commercial browser (i.e., Microsoft Explorer, Netscape) or enters a search query into a standard search engine (i.e., AOL, Excite, Yahoo), the transmission proceeds from the user’s computer, through the browser or portal, through the Internet “backbone” and to the host server of the e-commerce company. It is this process of communication between the on-line visitor and the Web site which enables the e-commerce process.

The software that governs e-commerce for “mom-and-pop” companies may only consist of an over-the-counter package operating on a single home computer or an ISP server with access. In most cases, such software is a template, allowing limited communication features, storage space and speed. Where customized e-commerce software programming is provided by Web site developers, it may incorporate an almost unlimited array of text, graphics, sound, interactive programming and communication links, in-site architecture permitting sophisticated data collection and retrieval and integrated task management schemes utilizing lots of electronic space (“bandwidth”).<sup>24</sup>

While money changes hands with over-the-counter software, customers rent, but do not own, software pursuant to standard license terms and conditions noted on the boxes and disks. Web development agreements govern the creation of customized software by third parties to enable e-commerce companies to operate Web sites.<sup>25</sup> Much like construction contracts, Web

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24. See Adam R. Dell, *The Show Must Go Online*, BUSINESS 2.0, May 1999, at 38.

25. See J. Dianne Brinson, *Web Site Development Agreement*, in REPRESENTING

development agreements generally describe site attributes while setting forth specifications for the creation of the site to meet such requirements. Key elements of such agreements relate to the way the site and its features will function, how data will be collected and handled, how progress payments are made, and which software warranties will be enforced on work product (both software and documentation) to be delivered and owned.<sup>26</sup>

Interestingly, despite the usual transfer of ownership of customized software to purchasers, there are always software components (i.e., platforms from Microsoft<sup>®27</sup>, Lotus<sup>®28</sup>) incorporated into software by these third-party developers that makes it impossible to transfer a 100% ownership interest to the purchaser. As well, there are additional “contract” features like authentication and security add-ons that need to be licensed to operate with this software to ensure some degree of protection. Accordingly, it is always helpful to understand the limitations on the work product being conveyed, to have certainty about which software features are owned or licensed, and to obtain the necessary supporting documentation to evidence the ownership and operation of such products.

### *B. Hardware*

When people think of e-commerce, they frequently focus on computers. However, high-powered servers are the engines for e-commerce. The purchase of servers can be very complex, owing to the myriad technical specifications employed to maximize Web site communication, data flow and site traffic.

The purchase of a server entails the enactment/establishment of an agreement to define what is being bought, time and location of delivery set-up and operational specifications, price to be paid (including various related components, technical services, maintenance services, recurring license fees, shipping, handling, taxes and duties), software to be included (apart from the software to operate a given Web site) and its respective licensors (the server maker or software provider). Other issues to be considered are program

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THE NEW MEDIA COMPANY 329, 331-357 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G4-4031, 1998).

26. See *Forms File*, E-COMMERCE LAW REPORT, Oct. 1998, at 18; Goldman, *supra* note 18, at 399-422.

27. See <<http://www.microsoft.com/ms.htm>>.

28. See <<http://www.lotus.com/>>.

protections, license termination, ownership of software and intellectual property rights, expected performance levels, applicable warranties and limitations, and remedies for non-performance. At the same time, there are also terms that relate to the use of new and replacement parts, the location of the server and its interaction with other computers, ownership of machine code and additional services to be purchased on and off warranty that need to be addressed.

If an ISP provides services to an e-commerce company, the ISP will have executed agreements similar to the foregoing for the purchase of their servers. This forces the e-commerce company to probably rely upon the ISP's purchase terms and conditions, which will probably result in a less flexible ISP contract for services. Whether the company decides to purchase a server or contract with an ISP for such services, the e-commerce company would do well to review each of these documents with an eye toward ensuring and maintaining continuous use and reliability of the Web site.

### *C. Access*

The simplest of the critical path agreements is usually a telecommunications agreement to enable on-line access for a fee. ISP's offer many companies on-line access via "hosting" agreements, buying time in bulk and selling pieces on a sliding scale to e-commerce providers based upon Web site size and traffic. Contracting for Internet access through a hosting agreement entails contracting with a third-party to rent available server space to operate software, gain on-line access, facilitate on-line traffic and to store and secure data. Common features of these agreements relate to the architecture of the Web site operations, speed of response and space requirements, costs for use, expandability to accommodate increased traffic, remedies for down time, and the ownership, use and backup of data. Things to watch out for include the recourse for delays in response time, lost or damaged data caches, limitations on damages, and warranties against viruses and down time. Large telecommunication providers (i.e., Bell South, Telia) also afford direct access to major e-commerce/ISP players operating their own server arrays. Similar contract provisions apply to these agreements; however, many times these are direct supply agreements requiring a commitment with a minimum fee for a given bandwidth.

### D. Security

Serious e-commerce companies expend substantial resources to achieve secure communications. There are typically at least two levels of security: (1) security via the resident on the server associated with the Web site, which is frequently tied into communications access with customer, and (2) the security typically found with external communications to authentication agencies like Cyber Cash®, which are agencies contracted by Web sites to perform credit card authorizations and purchases. There are usually more levels of protection for specialty sites such as brokerages, banks and the like. Any arrangement by a third party provider to provide security - such as an ISP - merits scrutiny because the integrity of the system and its data are the lifeline of any e-business which needs management and protection at all costs. Important items to consider are the software license and encryption program rights, access codes, and public keys, firewall protections to protect against external hackers and to ensure internal security among employees, backup of data, the ease of use and management, applicable warranties and remedies upon breach.<sup>29</sup>

### E. Maintenance

The value of a Web site is only as great as its reliability.<sup>30</sup> Each aspect of the “product to market” process needs to be supported to ensure secure, reliable communication and e-commerce functions. Frequently, each facet of the e-commerce process will result in individual agreements with hardware or software vendors, ISP’s, telecommunication companies, and third party providers of technical support. When things go wrong for which a cause cannot readily be determined, much fingerpointing can occur. Because of the need for speed in an emergency, it is usually prudent to contract with a maintenance services company with authorized personnel who are familiar with all of the software programs and hardware being used. Thereafter, the warranty issues can be sorted out. Computer software and hardware maintenance or network maintenance agreements need to incorporate a level of urgency and assistance, whether it will be provided in-person or remotely via computer, what the response time will be, what actions will be

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29. See Kontzer, *supra* note 23, at A9.

30. See WRIGHT, *supra* note 11, at 17-1.

taken to correct or remedy defects (i.e., new or used parts, a substitute server, reinstallation of source or machine code), whether benefits are provided according to a warranty with authorized service people or otherwise, what the cost will be and how it will be billed.

### F. Information

Arguably, the main purpose for operating a Web site is the information to be collected.<sup>31</sup> Typically, this is found on files located on the server which may or may not be located on site at the e-commerce company. Because the main objective of such an operation is the acquisition of data, agreements to backup and transfer data are imperative. Such agreements usually call for off-site storage under the control of the e-commerce company but managed by third party service providers that keep the data secure and accessible to those with proper identification. Of obvious value are agreements with well-known service providers using secure, redundant systems insured against calamity or compromise due to hacking, viruses, etc.

### G. Integration

The value of computers in e-commerce, at least on the vendor side, is not found in the tangible, but in the intangible: the ability to facilitate regular electronic communication and purchasing decisions and to collect and harness information cataloguing purchasers, purchases and a stream of commerce.<sup>32</sup> In many cases, the e-commerce venture gets the privilege of buying equipment, software and the like with limited control and recourse in the event of defects or failure. As such, servers and networks enabling vendor interactivity, and the people standing behind them, are vital to the health of any e-commerce business. All the agreements that are used in any e-commerce configuration need to ensure that in the event of a problem, there is a responsible party who will promptly act to correct any difficulty.<sup>33</sup> The value of business interruption insurance cannot

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31. See WRIGHT, *supra* note 11, at 5-3.

32. See Margaret Kane, *Startup Measuring the Web*, ZD NET NEWS (visited Mar. 4, 1999) <<http://www.zdnet.com/zdnn/stories/news/0,4586,2219595,00.html>>.

33. See *Life, Health, Auto, Hackers*, BUSINESS 2.0, Dec. 1998, at 16; Lorelie S. Masters, "IP" Also Stands for "Insurance Protection," E-COMMERCE LAW REPORT, Feb. 1999, at 33; Lorelie S. Masters, *Did a Bug Eat Your Data? Insurance Protection in the Information Age*, E-COMMERCE LAW REPORT, Vol. 1 No. 2, at 7; WRIGHT, *supra* note 11,

be overstated in helping minimizing losses and damages, particularly since the value of warranties can be dubious.<sup>34</sup>

#### IV. FUNCTION

Web sites are “virtual” store fronts. Such sites are customized by e-commerce companies to reflect their unique business functions, products, services, interests and relationships. It is typical to see the following information in any site: the company name, address, telephone contact, logo, trademark and copyright notice, a statement of company policies and disclaimers governing use of the site and information generated by it,<sup>35</sup> trade group/association logos, original and “borrowed” content, (including news, articles, commentary and proprietary product information), electronic tools to buy goods using specialized purchasing, fulfillment and delivery processes, and permissive, automatic connections to other sites (“hypertext links”) in a specific presentation format (“look and feel”).<sup>36</sup>

##### A. Copyright Protections

Many companies contract with graphic artists and Web designers to create the overall look for their Web site. Such creations are usually governed by advertising or Web services agreements and the resulting work product is subject to patent, trademark and copyright laws. E-commerce vendors paying for such work product need to be aware that ownership of the work product containing visual, audio, software is not automatic. These rights need to be specifically cited and retained by the company.<sup>37</sup> “Work-for-Hire” provisions among service providers

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at ch. 17.

34. See Chad E. Milton, *Insurance For Internet Content and Services*, in SECOND ANNUAL INTERNET LAW INSTITUTE 437, 440 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G0-0001, 1998).

35. See WRIGHT, *supra* note 11, at ch. 5.

36. See Eric Beck, *Calling for 3-D Web Delivery: As New as it May be, VRML is Taking a Backseat to Emerging Technologies that Enable Web-delivered 3-D Imaging* (visited June 15, 1999) <<http://www.zdnet.com/computershopper/edit/cshopper/content/9907/406140.html>>.

37. See Mark Radcliffe, *Digital Millennium Copyright Act: Forging the Copyright Framework for the Internet: First Steps*, JOURNAL OF INTERNET LAW, Mar. 1999, at 1; Jonathan C. Parks, *Should You Patent Your Software or Method of Doing Business?*, INTELLECTUAL PROPERTY ALERT (Kirkpatrick & Lockhart LLP, Pittsburgh, Penn.) Jan. 1999; Carey R. Ramos & David S. Berlin, *Three Ways to Protect Computer Software*, THE COMPUTER LAWYER, Jan. 1999, at 16; WRIGHT, *supra* note 11, at ch. 5; Mark Stefik & Alex Silverman, *The Bit and the Pendulum: Balancing the Interests of Stakeholders in*

are a must to ensure control over intellectual property. Copyright protections may extend to only parts of such a work, dramatically limiting the ability of any company to own and control what they have created. Again, it is vital to spell out who owns what and the extent of any permissions which may govern the use of any features. Most importantly, owners must view the entirety of work product to ensure all persons participating in any creative project are covered by the appropriate agreements.

### B. Licenses

Web sites use embedded software programming that enables visitors to see, hear, move, import or export audio, images, text, or other programs within and without a site. All these forms of multimedia may be owned by others. Sometimes it is impossible to determine which among the many elements of a site are distinguishable as the property of another so as to require a license of use.<sup>38</sup> With embedded sound files containing songs, for example, this determination is quite easy. Suffice it to say, any situation where the property of others is used to develop or operate a site requires a license to the extent it can be identified and acquired.

### C. Patents

E-businesses have focused a great deal on protecting their rights to uniquely conduct business on the Internet after the U.S. Supreme Court's affirmation in January 1999<sup>39</sup> of the ability of inventors to be granted patents for mathematical algorithms<sup>40</sup> and business methods.<sup>41</sup> Market leaders like *Amazon.com*, *Priceline*, and *Marimba* have quickly acted to

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*Digital Publishing*, THE COMPUTER LAWYER, Jan. 1999, at 1.

38. See WRIGHT, *supra* note 11.

39. See *State Street Bank and Trust Co. v. Signature Fin. Group*, 525 U.S. 1093 (1999).

40. See *Software-Related Inventions as Patentable Machines and Manufactures*, E-COMMERCE LAW REPORT, Nov. 1998, at 4; John R. Harris, *The Silicon Rush: Staking Claims on the Internet Frontier*, CYBERSPACE LAWYER, Apr. 1999, at 11; WRIGHT, *supra* note 11.

41. See David Bender, *Patents: The Forgotten Problem*, in REPRESENTING THE NEW MEDIA COMPANY 779, 783 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G4-4031, 1997); Richard Overton, *Patent Absurdity*, BUSINESS 2.0, Dec. 1998, at 51; Michael Joel Schallop, *Protecting E-commerce Technology Now that Software Patents are in Business*, E-COMMERCE LAW REPORT, Nov. 1998, at 2; *Technology Update*, CYBERSPACE LAWYER, Apr. 1999, at 22.

solidify their competitive advantage through patent applications.<sup>42</sup> Notwithstanding the debate over the enforceability of such protections, competitive pressures, as well as recognition of the value of intellectual property by investors, compels the identification and protection of novel ways of doing business.

#### D. Disclosures

Many sites employ hypertext links on the home page and other conspicuous places to post public notices to clarify the "rules of engagement" on any site. Among commercial sites, it is common to try to create de facto agreements governing site use areas such as terms and conditions of use and privacy. Such disclosures may vary by service provider, target market, product and service offering, and regulatory environment.

##### 1. Terms and Conditions of Use

The following general terms have been seen on a number of sites: acceptance of use; intellectual property rights; content ownership and use; operations; use of message boards; content and editing; registration and password; public comments; e-mail storage; contest information; shopping information; advertising terms; security; disclaimers; limits on liability; fees; links; indemnification; applicable law; waivers; remedies for breach; and termination.<sup>43</sup>

##### 2. Privacy

Internationally, there is battle raging over the collection and use of information acquired through on-line activities.<sup>44</sup> A

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42. See John T. Aquino, *Patently Permissive: PTO Filings Up After Ruling Expands Protection for Business and Net Software*, ABA JOURNAL, May 1999, at 30; Parks, *supra* note 37; Ramos & Berlin, *supra* note 37.

43. An internal review of approximately 20 cites was completed, including but not limited to: <<http://www.abcnews.go.com>> through <<http://www.zdnet.com>>.

44. See Alexandra Samuel, *German Shepherds*, BUSINESS 2.0, May 1999, at 30; *On-Line Privacy Alliance/Privacy Policy Guidelines*, E-COMMERCE LAW REPORT, Nov. 1998, at 25; Daniel Cruise, *US -EU Privacy Talks Continue Ahead of June 21<sup>st</sup> Summit* (visited June 7, 1999) <<http://www.ita.doc.gov/media/privacy61.htm>>; *Surfer Beware II: Notice is Not Enough* (visited June 7, 1999) <<http://www.epic.org/reports/surfer-beware2.html>>; *Summary of the Georgetown Internet Privacy Policy Survey* (visited June 7, 1999) <<http://www.cdt.org/privacy/georgetownsummary.shtml>>; *CDT's Guide to Online Privacy* (visited June 7, 1999) <<http://www.cdt.org/privacy/guide/basic/topten.html>>; *EU to Enforce Strict Personal Web*



number of other nations have already adopted privacy measures limiting the use of consumer data by e-commerce providers and the prospect of American federal regulation is on the horizon.<sup>45</sup> As a consequence, many American e-commerce companies have voluntarily adopted policies regarding the collection and use of personal data to compete in global markets.<sup>46</sup> While it is yet to be seen what, if any, laws will be adopted in the United States and elsewhere, it is important for American companies to reduce obstacles and minimize risks by adopting such policies.<sup>47</sup> Such disclosures would ideally include: (1) what personal information is required to interact and which data is voluntarily provided; (2) how the information will be collected, segmented and used; (3) whether or not it will be sold or transmitted to any third party; (4) what limits may be placed on such conveyances; and (5) retroactive rights or remedies a discloser may have to limit the transfer or to remove the user from data banks or marketing lists.

### *E. Regulatory Issues*

In evaluating the content of any e-commerce site, attention must be paid to regulatory issues impacting the “product to market” process. Attention needs to be focused on privacy, security, trademarks, copyrights, patents, and control of site issues. Such attention includes, but is not limited to, who owns or may use, in whole or part, the site; domain names; trademarks; copyrights; operating software; on-line interactive processes and displays, including comparative buying and shopping-cart features; e-mail and chat features; payment systems; fulfillment mechanisms; integration features; and resulting consumer data and content.

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*Privacy Law*, REUTERS, Oct. 26, 1998, available in <<http://www.zdnet.com>>; Matthew Broersma, *Study: Spam Delivers Bad News for ISPs* (visited June 15, 1999) <<http://www.zdnet.com/zdnn/stories/news/0,4586,2274634,00.html>>.

45. See Huaiqing Wang et al., *Consumer Privacy Concerns about Internet Marketing*, COMMUNICATIONS OF THE ACM, Mar. 1998, at 63.

46. See John Simons, *New Internet Privacy Laws Appear Less Likely with Release of Survey* (visited May 13, 1999) <[http://www.infowar.com/class\\_1/99/class1\\_051399a\\_j.shtml](http://www.infowar.com/class_1/99/class1_051399a_j.shtml)>; William Fulwider, *Thrifths Urged to Post Privacy Policies as Part of Transactional Web Sites* (visited June 14, 1999) <<http://www.ots.treas.gov/docs/77939.html>>.

47. See Information Technology Practice Group, Cooley Godward, LLP, *Privacy Limits on Collecting Personal Information Via the Internet*, THE COMPUTER LAWYER, June 1998, at 17; *EU, U.S. Will Not Sign Data Privacy Pact at Upcoming Bonn Summit, Officials Say*, INT'L BUS. & FIN. DAILY, June 2, 1999, at D4.

## V. ADVERTISING/MARKETING

Branding, the way in which an e-commerce company is able to create and project its name, image and reputation on a global basis, is critical to building site traffic and significant long-term value for any company.<sup>48</sup>

### A. Domain Names

Every e-commerce company uses at least one proprietary domain name. Not unlike corporate names, a domain name is frequently used to build a brand name. Similar to registration, such name is owned and can be transferred, provided however, that domain names must be periodically renewed to remain on a government Internet registry managed by any select service provider (i.e., Network Solutions).<sup>49</sup> Net names frequently change hands and are evidenced by valid assignments and formal changes in the international domain registry (Whois).

### B. Trademarks

Trademark law has been unsettled by the advent of domain name registrations. It is generally recognized that because the criteria for owning a domain name and registered trademark are different, and the concepts of trademark are recognized by most nations, every domain name should be protected with a registered trademark to maintain long-term rights and facilitate corporate branding.<sup>50</sup> The United States Patent and Trademark Office enables companies to submit "intent-to-use" and trademark registration applications to protect their marks. In addition to traditional trademark categories, e-commerce

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48. See generally Walid Mougayar, *Take Nothing for Granted*, BUSINESS 2.0, Dec. 1998, at 2; Andrew M. Riddles et al., *Start-Up Companies Should Devise IP Strategies* (visited Feb. 4, 1999) <[http://www.ljx.com/cgi-bin/f\\_cat?prod/ljextra/data/texts/1999\\_0131\\_64.html](http://www.ljx.com/cgi-bin/f_cat?prod/ljextra/data/texts/1999_0131_64.html)>; Marc Gunther, *The Internet is Mr. Case's Neighborhood: Techies Hate it, But in Cyberspace America Online is the Only Brand That Counts*, FORTUNE, Mar. 30, 1998, at 68; Matthew Benjamin, *Portal King Continues Reign Via Branding*, INVESTOR'S BUSINESS DAILY, Nov. 17, 1998.

49. See Broersma, *supra* note 16; Levi, *supra* note 16; Steven J. Pena, *Legal Issues for Audio and Video-Enabled Internet Sites*, in SECOND ANNUAL INTERNET LAW INSTITUTE 425, 429-435 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G0-0001, 1998); Todd Lappin, *Playing Monopoly*, BUSINESS 2.0, May 1999, at 32; William A. Tanenbaum, *The Challenge of Cyberspace Intellectual Property*, THE COMPUTER LAWYER, Feb. 1998, at 14, 18.

50. See Mark D. Robins, *A Guide to Internet-Based Trademark and Unfair Competition Decisions (Part II)*, JOURNAL OF INTERNET LAW, Mar. 1999, at 10; Tanenbaum, *supra* note 49, at 17.

companies frequently protect items in international classes 9 (software); 16 (hard copy publications); 35, 36, 37, 40 and 41 (services of all kinds with delivery via global computer network); 38 (telecommunications via global network); and 42 (multiple-user access, electronically downloadable publications). Increasingly, legislation such as the Trademark Dilution Act of 1995 and litigation trademark infringement actions, based upon the Lanham Act, have been used to sort out conflicts among parties' domain names.<sup>51</sup> Accordingly, the review of the legitimacy of domain names and trademarks is a must for any e-commerce company to ensure protection of its name, logo and other domain rights.

### C. Advertising

The ability to attract visitors ("eyeballs") and to convert surfing into sales are central tasks in promoting e-commerce. Operationally, the way the e-commerce company promotes itself - whether on-line, via business-banner ads, hypertext files, chat rooms and audio-and-visual settings, or through the traditional media such as print, radio and television - has a tremendous impact on institutional and product awareness efforts.<sup>52</sup>

#### 1. Traditional Contracts

With on-line advertising, lawyers need to be aware of a few different kinds of agreements. There is the traditional advertising agency agreement, where a provider may create logos, promotional materials and the like, as well as purchase media (TV, radio, print ads) on behalf of a client.<sup>53</sup> With regard to these advertising services agreements, there should be a clear understanding of the services required to be delivered, costs involved, the ownership or license rights conveyed, and the risks to be allocated between the parties and the consideration for

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51. See Robert La Franco, "The Patent Terrorist", FORBES, May 17, 1999, at 55.

52. See James Ryan, *How to Be a Prize Fighter*, BUSINESS 2.0, May 1999, at 53; James Ryan, *Not So Fast*, BUSINESS 2.0, Apr. 1999, at 38; Kaitlin Quistgaard, *Keeping Up with the Nielsens*, BUSINESS 2.0, Feb. 1999, at 63; G. David Doran, *Search Engines*, ENTREPRENEUR, July 1998, at 18; Ilan Greenberg, *Go the Spoils*, BLOOMBERG PERSONAL FINANCE, Oct. 1998, at 65, 67; Elaine Walker, *Retail Challenge: Turning Browsers Into Buyers*, THE MIAMI HERALD, May 11, 1998, at 11; *Internet Ad Spending Up 112 Percent in 1998* (visited May 3, 1999) <[http://www.internetnews.com/business/article/0,1087,3\\_23212\\_Ext,00.html](http://www.internetnews.com/business/article/0,1087,3_23212_Ext,00.html)>.

53. See Tanenbaum, *supra* note 49, at 15.

same.<sup>54</sup> In the event that any services are provided by outside providers (i.e., public relations and media providers), similar to any other contract for services, there needs be clarity regarding what services are expected and being paid for, when they should be delivered, who owns the work product and what remedies are available if the client is dissatisfied.

## 2. On-line Agreements

For on-line advertisers, statistics estimate that 80% of all on-line advertising is now bartered and only 20% is paid. Such on-line ads are usually done pursuant to a license or agreement.<sup>55</sup> Specialty promotions and other Web site ad programs (i.e., contests, sweepstakes) are increasingly employed by Web site owners to generate revenues, and they are also popular with advertisers looking to use the Web site to post their ads.<sup>56</sup> Ad agreements usually contain terms related to cost, size, placement, frequency, and use of "cookies" ("demographic identification mechanisms").<sup>57</sup> The use of search engines, which enables people seeking information to identify relevant sites, can dramatically enhance site traffic by frequency and placement of appearance.<sup>58</sup> In past years, these searches returned topics at site addresses solely tied to the relevance of the topic to the visitor's search.<sup>59</sup> More frequently, search engines use some combination of paid site placement and data relevance to respond to queries. Ad contracts govern such preferential placement.<sup>60</sup>

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54. See Jonathan I. Ezor, *Representing the New Media Company: Advertising on The Web*, THE COMPUTER LAWYER, May 1998, at 6.

55. See Luisa Kroll et al., *World Weary Web*, FORBES, Dec. 1998, at 98; Jane Weaver, *New Nielsen Net Rating System Debuts* (visited Mar. 22, 1999) <<http://www.zdnet.com/zdnn/stories/news/0,4586,2229197,00.html>>.

56. See DELTA, *supra* note 5.

57. See, e.g. Janet Rae-Dupree, *A Real Shot in the Arm For a Virtual Pharmacy*, BUSINESS WEEK, Mar. 8, 1999, at 40.

58. See Matthew Broersma, *Web Growth Slows But Gains In Usage* (visited May 4, 1998) <<http://www.zdnet.com/zdnn/content/zdnn/0504/312890.html>>.

59. See Darren Chervitz, *Media Metrix Aims To Be Net's Standard* (visited May 7, 1999) <<http://cbs.marketwatch.com/archive/19990507/news/current/mmxi.htx?source=.Jyhoo&dist=yho>>.

60. See Steven Vonder Haar, *Interactive TV is Dead! Long Live Interactive TV!*, (visited July 30, 1998) <<http://www.zdnet.com/intweek/filters/svonderh.html>>.

### D. Linking

One big appeal of the Internet is “connectivity,”<sup>61</sup> which is the ability to freely move in a relational manner, from site to site and subject to subject, with the click of a mouse or button.<sup>62</sup> Because of the nature of on-line technology (“framing”), such connectivity also enables “omnipresence,” which is the ability of one person to be in multiple sites and places at the same time.

Web features like framing and omnipresence enhance lines of thought and communication, but blur the connections separating the environments. Thus, a visitor seeking information may never be sure exactly with whom they are conducting business, even with branding and on-line notices. Consequently, it is also up to e-commerce companies to define relationships and draw boundaries using site design and shrink wrap agreements, both formal (site terms and conditions, licenses)<sup>63</sup> and informal (policies). Web linking agreements are one tool to help sites manage the process of granting permission for competing sites to coordinate displays of content and offer for services.<sup>64</sup>

Typical provisions in such agreements establish free or bartered linking arrangements and, in a growing number of circumstances, paid or royalty-based fee arrangements.<sup>65</sup> Key features to focus on are the use of intellectual property, the location of the link, the ability to sever a link, the consideration for such benefit and the reproduction rights or third-party rights to access content.

### E. Affiliate Programs

Like stores that carry the branded merchandise of others, affiliate programs permit any Web site to offer products owned and controlled by others. Web sites market product availability from their sites and re-direct their visitors to the product provider’s site for purchase and sale. The e-commerce company

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61. See WRIGHT, *supra* note 11, at ch. 5.

62. See Patricia Seybold, *Putting The Action In Interaction*, BUSINESS 2.0, June 1999, at 37.

63. See Jerry C. Liu et al., *Electronic Commerce: Using Clickwrap Agreements*, THE COMPUTER LAWYER, Dec. 1998, at 10.

64. See David M. Mirchin, *Can You Be Held Legally Liable for Hypertext Linking?*, CORPORATE LEGAL TIMES, Oct. 1998, at 22.

65. See ABA Subcommittee on Interactive Services, Committee on the Law of Commerce in Cyberspace, *Web-Linking Agreements: Contracting Strategies and Model Provisions* (1997) <[www.abanet.org/buslaw/catalog/5070311.html](http://www.abanet.org/buslaw/catalog/5070311.html)>.

then receives commissions at a predetermined rate for sales generated through these electronic leads. Such affiliate agreements<sup>66</sup> are becoming more widespread and typically include language such as: tracking terms; reporting; commission rates; payment terms; indemnification; and termination provisions. It is important to distinguish, for consumer purposes, the rules governing the purchase of products through a site from those that apply to site sales. Site terms and conditions can help illuminate such relationships.

## VI. OPERATIONS

E-commerce operations can be differentiated in any number of ways, including: by type (product sellers and service providers); by kind (traditional, on-line<sup>67</sup> or hybrid); by industry; by geography; and by target market. These variations will be reflected in the business arrangements entered into by any e-commerce company. The legal audit, to be effective, must investigate the applicable regulatory environment to make certain that the advertising, marketing, sale and delivery of products and services occurs within the existing legal framework.

Notwithstanding such variations, business arrangements typically mirror their "stream of commerce."<sup>68</sup> For example, contracts to supply goods typically will run from third-party manufacturers or suppliers to the e-tailer, and there will be terms and conditions governing sales transactions between the e-tailer and B2C ("Business-to-Consumer") and B2B ("Business-to-Business") visitors.<sup>69</sup>

### A. B2B

Business-to-business agreements will generally be governed by basic rules of contract found in commercial settings, though obviously the global nature of such activities can dramatically alter any transaction. For traditional goods and services

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66. See Martha L. Stone, *Affiliate Programs Greasing E-Business* (visited Mar. 3, 1999) <<http://www.zdnet.com/zdnn/stories/news/0,4586,2219815,00.html>>; Hellweg, *supra* note 9.

67. See Neil Gross, *The Supply Chain: Leapfrogging A Few Links*, BUSINESS WEEK, June 22, 1998, at 140.

68. See Ron Ben-Yehuda, *Selling Products and Services Over the Internet*, E-COMMERCE LAW REPORT, Feb. 1999, at 2.

69. See Daniel Eisenberg, *The Amazon Rx: Drugstores Go Online*, TIME, Mar. 8, 1999, at 48.

supplied through regular channels of distribution, agreements to supply products to Web sites may not differ much from conventional deals. With goods that may be fully delivered on-line (i.e., downloaded software or content), contracts take on the vestiges of a publishing environment. For example, “click-wrap” agreements - disclosures that require on-line assent to permit continued access - have yet to be legally sorted out, but many sites employ these items with hypertext links to clarify the licenses and terms and conditions under which transactions will occur.<sup>70</sup>

### B. B2C

Business-to-consumer sales can be startlingly complex. Almost endless permutations of Web site interactivity exist.<sup>71</sup> For example, a Web site may be owned by one entity but operated by others. Further, Web sites may contract for services, borrow content, piggyback, interconnect or interact with other Web sites in an infinite number of ways. Such features frequently confuse consumers, legal professionals and even e-commerce providers themselves<sup>72</sup> regarding the rights and responsibilities of the parties involved in the e-commerce process.<sup>73</sup> Unlike “caveat emptor” of days gone by, special rules and regulations exist to protect consumers in many jurisdictions worldwide.<sup>74</sup> Add to that variations involving the nature of goods sold, currency used, the audience and the process of offer, sale and acceptance, and we have a formula for disaster should care not be taken.

On the bright side, the elements of many commercial agreements are governed by traditional notions of contract: who is buying; what is being bought; price; terms of delivery;

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70. See Melissa Campanelli, *Delivering The Goods*, ENTREPRENEUR, Mar. 1999, at 49; Mougayar, *supra* note 1, at 11-27; Janet Rae-Dupree, *A Real Shot In the Arm For A Virtual Pharmacy*, BUSINESS WEEK, Mar. 8, 1999, at 40; DELTA, *supra* note 5, at ch. 9.

71. See Steven Vonder Haar, *Web Metrics: Go Figure*, BUSINESS 2.0, June 1999, at 46; James Ryan, *Your Online Shadow Knows*, BUSINESS 2.0, June 1999, at 49; Robert M. O’Keefe & Tim McEachern, *Web-Based Customer Decision Support Systems*, COMMUNICATIONS OF THE ACM, Mar. 1998, at 71; Mougayar, *supra* note 1, at 11-27.

72. See Peter Burrows, *Instant Info Is Not Enough*, BUSINESS WEEK, June 22, 1998, at 144.

73. See Gross, *supra* note 67, at 140.

74. DELTA, *supra* note 5, at 8-31; James F. Brelsford & Nicole A. Wong, *Online Liability Issues: Defamation, Privacy and Negligent Publishing*, in SECOND ANNUAL INTERNET LAW INSTITUTE 707, 707-790 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G0-0001, 1998).

warranties; and protections in place for disputes.<sup>75</sup> On a global basis, e-commerce providers frequently focus on domestic compliance. Site terms and conditions that mandate that all transactions shall occur at a particular domestic site are being used to try and avoid foreign jurisdictional variations. While the law is still unsettled, American courts seem to be recognizing such disclaimers (depending on the active or passive nature of the site) to help simplify and promote trade.

Apart from domestic compliance, the global reach of the Internet requires vigilance. To the extent that e-commerce companies actively conduct business in various locales, they should be familiar with unique laws in these regions and closely monitor emerging e-commerce developments. In particular, e-commerce businesses can act to minimize obstacles and reduce risks by enacting language requirements and employing self-regulation and privacy screens, and by undertaking visitor/buyer tracking by geographic location and modifying their sites to comply with the basic tenets of American laws, international treaties and major market regulations. Be advised, however, that there is no magic bullet to protect against all international problems - it's simply the cost of doing e-business.

### *C. Payment and Fulfillment Systems*

Clearly, one of the most critical aspects of any Web site is the mechanism by which on-line payments are processed and goods delivered. Payment agreements with on-line vendors such as Ecash<sup>®76</sup> and Millicent<sup>®77</sup> are becoming more popular and function like the familiar Visa<sup>®/MasterCard<sup>®78</sup></sup> process. Except on the Web, the necessary information and authentication required for sale doesn't permit the scrutiny of in-person retailing. One leading provider estimates that up to 35% of all purchases on-line are problems waiting to happen. Since merchant credit agreements usually provide for a transaction fee up front, e-commerce companies can get stuck in the event of bad credit, rejected deliveries and/or lost, stolen or damaged goods. Closely comparing the policies among credit providers may help to better manage possible losses or currency

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75. See DELTA, *supra* note 5, at ch. 9.

76. See <<http://www.ecash.com/ecash1.asp>>.

77. See <<http://www.millicent.com/>>.

78. See <<http://www.visa.com>>; <<http://www.mastercard.com/>>.



fluctuations that can also reduce margins. Having progressive agreements with trusted delivery services to monitor products to ensure conveyance may well stem the tide against growing losses suffered at the hands of fraud artists. At the same time, striking such agreements can reliably extend the worldwide reach of any company with less risk.<sup>79</sup>

#### *D. Tracking*

The very reason for the popularity of e-commerce is one of its most vexing problems: efficiency. Notwithstanding the value of “eyeballs,” “stickiness” and “fingertips” to advertisers and content providers alike, the present mechanisms available to properly monitor site visits and the activities of visitors are inadequate. While Web sites universally employ some form of software product (i.e., WebTrends<sup>80</sup>, MediaMetrix, Nielsen<sup>81</sup>) to track traffic, and such programs can generally determine the volume of visits and places from which these contacts emerge, there is no real data reliability since the Web’s interactivity far exceeds the present ability of any one system to track its many facets. However, that does not mean the data generated by the present arbiters of the Net are useless. In fact, just the opposite is true. At a minimum, it provides some rough form of comparative data to be used among all sites. At best, it acknowledges the fuzziness underlying the valuation of advertising agreements, the dollars spent in attracting site visitors, and the contracts to be entered into with Web consultants (i.e., Personify, AndromediaIn2.com) who employ data mining, blind tracking and predictive models to detail Web site forensics.

### VII. INTANGIBLES

#### *A. Management*

There is a reason that most venture capitalists put a premium on management: the business plan is only a plan until

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79. See Koprowski, *supra* note 20, at 24; *Fed Writes 1<sup>st</sup> E-Check With Internet As Vehicle*, *supra* note 20; Taylor & Jerome, *supra* note 20; Sussis, *supra* note 20; Henderson, *supra* note 22, at 8; Hutheesing, *supra* note 22, at 96.

80. See Steven Vonder Haar, *Online Ad Group Publishes Guidelines* (visited Mar. 3, 1999) <<http://www.zdnet.com/zdnn/stories/news/0,4586,2218927,00.html>>.

81. See Vonder Haar, *supra* note 60.

executed, and there are no assurances that life will not intrude on the plan. An audit of management has as much to do about the public perception of a company as it does about the financial impact of the length and cost of employment commitments. That said, the focus of any evaluation should be to see if the people behind the paper are legitimate.

### *B. Strategic Partners*

E-commerce, like any other business, generates relationships, the value of which may not be readily ascertainable by outsiders. While speculative, key strategic partners backing a venture can make the difference between success and failure. Whether it is by sheer force of reputation or financial prowess, acquiring and working with successful people and companies can provide the leverage necessary to open the doors and wallets of investors. In auditing any venture, it is important not to miss the value provided by "smart money" and to catalogue the opportunities such associations present.<sup>82</sup>

### *C. Associations*

The on-line equivalent of the Better Business Bureau, programs such as WebTrust<sup>®83</sup> and TRUSTe<sup>®84</sup>, are designed to create security and integrity within the e-commerce marketplace.<sup>85</sup> E-commerce companies in such programs commit to a voluntary set of guidelines to operate their ventures, with an emphasis on good customer relations, truthful disclosures, security features and reasonable dispute resolution procedures.<sup>86</sup> Participation by e-commerce companies in such programs reduces business risk, increases consumer trust and projects an image of corporate responsibility.<sup>87</sup>

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82. See Tanenbaum, *supra* note 49.

83. See <<http://www.webtrust.com/>>.

84. See <<http://www.truste.org/>>.

85. See Win Farrell, *Pamper the Early Birds*, BUSINESS 2.0, Jan. 1999, at 12.

86. See *Web Trust Introduction: A Unique Seal of Assurance for Electronic Commerce*, (visited Mar. 10, 2000) <<http://webtrust.net/webtrust-introduction.html>>.

87. See Jacob Nielsen, *Trust Is a Must*, BUSINESS 2.0, June 1999, at 6; Connie Guglielmo, *Study Tracks 'Trust' In Web Design* (visited Feb. 8, 1999) <[http://www.zdnet.com/intweek/stories/prtarchivestory/0\\_4356387393,00.html](http://www.zdnet.com/intweek/stories/prtarchivestory/0_4356387393,00.html)>; Glen L. Gray & Roger Debrecey, *The Electronic*, JOURNAL OF ACCOUNTANCY, May 1998, at 32.

## VII. EMERGING ISSUES

Significant developments are occurring within the field of e-commerce regulation that are impacting (1) the ways in which e-commerce will develop, and (2) the strategies employed to meet such developments.

A. *Child Protection Acts*

Many countries are acting to adopt stringent requirements, including criminal and financial penalties, to enjoin improper interaction and disclosures that may occur with children on adult sites, and adults on children's sites. Web operators have acted to avoid governmental intervention where children improperly access adult sites by employing "closed" sites accessible only by adults with credit cards and special access identifications. Regulators are also restricting data collection and monitoring by marketers targeting children on-line.<sup>88</sup>

B. *Disclosures*

Fraud is a growing problem on the Net.<sup>89</sup> Notwithstanding the present laws that limit misrepresentation in any form of advertising, governmental entities like the United States Federal Trade Commission are placing more attention on truthful, ethical and meaningful disclosures over the Internet.<sup>90</sup>

88. See *District Court Extends COPA Injunction*, JOURNAL OF INTERNET LAW, Apr. 1999, at 26; Thomas J. D'Amico & June E. Cohan, *New Internet-Related Laws*, E-COMMERCE LAW REPORT, Dec. 1998/Jan. 1999, at 15; Victoria Streitfeld, *Young Investor Website Settles FTC Charges* (visited June 7, 1999) <<http://www.ftc.gov/opa/1999/9905/younginvestor.htm>>; *Internet Privacy* (visited June 7, 1999) <<http://www.ftc.gov/os/1998/9803/privacy.htm>>; *CDT's Guide to Online Privacy*, supra note 44; Mike Glover, *ISPs Agree to Safety Plan*, THE ASSOCIATED PRESS, May 5, 1999, available in <[http://www.abcnews.go.com/sections/tech/DailyNews/internet\\_kids990505.html](http://www.abcnews.go.com/sections/tech/DailyNews/internet_kids990505.html)>; *Web Porn Law Faces Courtroom Test* (visited Jan. 20, 1999) <<http://www.zdnet.com/zdnn/stories/news/0,4586,2189558,00.html>>; Children's Online Privacy Protection Rule, 64 Fed. Reg. 59887 (1999) (to be codified at 16 C.F.R. pt. 312).

89. See Rebecca Quick & Ken Besinger, *The Dark Side of E-Commerce*, WSJ INTERACTIVE EDITION, May 14, 1999, available in <<http://www.zdnet.com/zdnn/stories/news/0,4586,2259081,00.html?chkpt=zdnnmsa>>; Margaret Kane, *Overcoming the Web's Credibility Gap* (visited May 14, 1999) <<http://www.zdnet.com/zdnn/stories/news/0,4586,2259085,00.html>>.

90. See Masters, supra note 33, at 7; Maria Seminerio, *FTC Planning to Regulate E-Commerce?* (visited June 10, 1999) <<http://www.zdnet.com/zdnn/stories/news/0,4586,2272788,00.html>>; Elliot Zaret, *FTC to Launch E-Commerce Division* (visited Apr. 21, 1999) <<http://www.zdnet.com/zdnn/stories/news/0,4586,2245064,00.html>>; Information Technology Practice Group,

Acting now to correct deficiencies and to aggressively meet higher standards will help enhance visitor confidence and avoid possible enforcement actions.

### C. Standardization

There is a need for certainty among nations conducting trade over transnational boundaries. As e-commerce sweeps the globe, pressure will grow to find a uniform set of laws upon which to rely to conduct electronic commerce. Proposals from the EU, UNCITRAL and W3C stand in testament to the political force now being generated to provide businesses with a foundation for trade.<sup>91</sup> This tide will grow as the flow of traditional commerce increasingly moves on-line and parochial nation-state decisionmaking threatens to disrupt the promise of growth and economic expansion that e-commerce portends.

### D. Taxation

Many governments are contemplating the levy of taxes on the Internet. To the extent that e-commerce now enjoys a "tax holiday," Web site operators should be prepared to employ software that will enable taxing authorities to track purchases and obligations. At the same time, relying upon the present modes of moving goods globally, e-commerce companies would do well to explore alternative jurisdictions and separate Web locations<sup>92</sup> to minimize the affects such actions may have on financial monitoring and reporting.<sup>93</sup>

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Cooley Godward, LLP, *supra* note 47; Marie Aglion, Perkins Cole LLP, *The Government Wants to Know if Cyber Customers Are Happy: Moving Consumer Protection Online*, E-COMMERCE LAW REPORT, Feb. 1999, at 30; Deborah K. Owen, *Legal Issues in Internet Advertising*, in SECOND ANNUAL INTERNET LAW INSTITUTE 642, 643-704 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G0-0001, 1998); Steven E. Bochner & Anita S. Presser, *Corporate Disclosure Practices in the Electronic Age: The Web Site-Opportunities and Pitfalls*, WALLSTREETLAWYER.COM, Apr. 1998, at 52; *Internet Privacy*, *supra* note 88; Maria Seminerio, AOL, *Disney Oppose Privacy Plan* (visited March 16, 1999) <<http://www.zdnet.com/zdnn/stories/news/0,4586,2226769,00.html>>.

91. Fred H. Miller & Raymond T. Nimmer, *Proposed UCC Article 2B: A Good Law*, E-COMMERCE LAW REPORT, Nov. 1998, at 10; WRIGHT, *supra* note 11, at ch. 5, ch. 12; Margaret Kane, *Rivals Agree On Web Buying Standard* (visited June 15, 1999) <<http://www.zdnet.com/zdnn/stories/news/0,4586,2274926,00.html>>.

92. Richard Prem, *Plan Your E-Commerce Tax Strategy* (visited May 17, 1999) <<http://www.advisor.com/wArticle.nsf/wPages/EA9904.PREMR01>>.

93. See Howard Gleckman, *The Tax Man Eyes The Net*, BUSINESS WEEK, Apr. 6, 1998, at 131; Alan M. Gahtan, *Government Releases Report on Electronic Commerce and Internet Taxation*, E-COMMERCE LAW REPORT, Oct. 1998, at 31; Leslie Walker, *U.S.*

### E. Technological Advances

There is an ever-growing array of devices now able to facilitate Internet access and e-commerce including wireless pagers, set top boxes with cable television systems, and advanced cell telephone systems.<sup>94</sup> Each Internet device, and the technology underlying its use, provides Internet access in a different way, requiring e-commerce companies to use software and to design their Web sites and their businesses to accommodate different technology, information systems, location and cultures.<sup>95</sup>

## IX. SUMMARY

The foregoing “product to market” template outlines many material issues worthy of consideration in the legal audit of any e-commerce company. Remember, e-commerce is not developing in a vacuum. The legal audit does not address each and every possible issue nor can it adequately do so with so many fundamentals in flux. Notwithstanding this environment of change, legal audits can be a valuable way to understand any e-business with a view toward enhancing its future business prospects.

When confronting the new world of e-commerce, there is a temptation to believe that the old ways of doing business no longer matter. Nothing could be further from the truth. By focusing on the legal fundamentals, learning about the building blocks of technology, focusing on the “product to market” process and anticipating trends, lawyers can employ a blueprint for action to assess and critically analyze the relevant features of any e-commerce business.

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*Internet Revenue Put at \$301 Billion*, WASHINGTON POST, June 10, 1999, at E7; Maria Seminario, *Net E-Commerce Taxes Called Inevitable* (visited June 23, 1999) <<http://www.zdnet.com/zdnn/stories/news/0,4586,2279111,00.html?chkpt=zdnnmsa>>; John Taschek, *Avoiding The Tax Issue Will Kill E-Commerce* (visited June 23, 1999) <<http://www.zdnet.com/pcweek/stories/columns/0,4351,406950,00.html?chkpt=zdnnmsa>>; John Moore, *E-Commerce Tax Panel Ends With A Bang* (visited June 23, 1999) <<http://www.zdnet.com/zdnn/stories/news/0,4586,2280705,00.html>>.

94. See *Web Content Accessibility Guidelines 1.0* (visited May 7, 1999) <<http://www.w3.org/TR/1999/WAI-WEBCONTENT-19990505/>>; Maria Seminario, *W3C Issues Web Handicap Guidelines* (visited May 7, 1999) <<http://www.zdnet.com/zdnn/stories/news/0,4586,2254733,00.html>>.

95. See *supra* notes 88-94 and accompanying text.