

# Emerging Legal Issues in a New Information Age

By W. Whitaker Rayner

## Introduction

Over the past few years the transformation of computer technology from a curious oddity to a staple of everyday life has caused dramatic changes in the way society works, plays, and thinks. This fact, coupled with the undeniable presence of the internet in our everyday lives, has transformed much of what we do to a different plane - so much so that the term "cyberspace" was coined to identify this plane, somewhere between the physical and the metaphysical.

As always, with the advent of new technology, existing legal doctrine has been strained. With the creation of this new cyberspace, many new challenges have arisen in the legal community, raising the issue of whether existing legal concepts and statutes adequately may address this new technology.

Over the past few years, it has become increasingly clear that for the most part, the existing legal framework has survived the test — placing this new technology within the boundaries of long-established principles. While cyberspace has created a new playing field for society, concepts spawned in technological environments much earlier have held up to the task.

The following issues have provided challenges to existing legal principles. For the most part, these challenges have been resolved under existing legal framework or analysis.

## Jurisdiction

Perhaps no other legal concept illus-

trates the transformative nature of cyberspace, as does the issue of jurisdiction. With the expansion of the internet, manufacturers and distributors may advertise their goods, make sales calls, and create and sign a contract, all without setting foot in the buyer's home state. Similarly, the buyer can review goods or services, make sales inquiries, purchase goods or services, and sign a contract, all without setting foot in the seller's home state. These phenomena raise two interesting legal questions. First, where is the site of the transaction for jurisdiction purposes? Perhaps more interesting is the issue of whether establishing a store-front presence on the internet is sufficient to confer general jurisdiction in a state merely because the seller's site on the internet is accessible throughout the United States and beyond.

The Fifth Circuit has addressed the issue of whether operation of an internet website was itself sufficient to confer jurisdiction within a forum state. In *Mink v. AAAA Development, LLC*, 190 F.3d 333 (5th Cir. 1999), the Court held that a determination of jurisdiction based upon an internet presence is dependent upon the "nature and quality of the commercial activity that an entity conducts over the internet." The Court described a spectrum of internet uses - from the actual entering of contracts and transmission of files relating to such contracts on the one end, and merely passive websites that do nothing more than advertising on the internet at the other end.

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The Court recognized that mere passive advertising was not sufficient to confer jurisdiction. The Court further recognized that entering into business contracts with residents of the forum over the internet was sufficient to confer jurisdiction in the forum state. However, the Court recognized a middle of the spectrum in which a user in the forum state may exchange certain information with a host computer located outside the forum. In this area, the Court held that "the exercise of jurisdiction is determined by the level of interactivity and the commercial nature of the exchange of information that occurs on the website." In denying jurisdiction, the Fifth Circuit found that the mere fact that the website at issue provided a printable mail order form, a toll-free number, a mailing address, and advertising, this information, without more, was not sufficient to confer jurisdiction. However, the Court inferred that if the website had included more interactivity, jurisdiction in the forum would likely be proper.

The issue of jurisdiction, and the related concept of enforcement of domestic laws, have likewise arisen within the context of offshore internet gaming. Frequently, federal, state and local law will prohibit gambling activities, or unregulated casino activities, within its jurisdiction. However, where "casino gaming" may take place over the internet, the question arises as to whether the virtual casino is located within the jurisdiction of the customer or within the jurisdiction of the provider of the gaming services. Many states, including Mississippi, have taken the position that unless gaming is regulat-

ed by the gaming commission and unless the type and location of gaming is specifically approved by statute, it is illegal for Mississippi residents to participate in gaming activities.

Furthermore, an array of federal statutes precludes use of wires to conduct or assist in gambling activities. For these reasons, the legality of internet gaming has been questioned in individual states and the United States. However, Congress is considering legislation to regulate and

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control internet gaming, and protests have been lodged by internet gaming entities who argue that the United States' statutes unfairly prohibit international trade in "gaming services." Accordingly, the issue of internet gaming and jurisdiction for regulation by the states and United States remains an unresolved issue.

### Electronic Discovery

Over the past several years, e-mail has rapidly overtaken paper memoranda as the primary source of communication, both

inner-office and beyond. Accordingly, electronic communications are becoming an increasingly important factor in obtaining discovery of relevant information in litigation. Often, important documentation may be transmitted and stored on computer hard drives, without ever being printed on paper or placed in a file. Accordingly, rules concerning the obtaining of electronic data will become increasingly significant in litigation discovery.

In May of 2003, Mississippi became one of the first states in the union to specifically address the discovery of electronic data in its Rules of Civil Procedure. Rule 26(b)(5) provides that to obtain electronic data in discovery, the requesting party must specifically request such documentation and specify the form in which the requesting party wants the data produced. If responsive data is readily available to the responding party, any such discoverable documentation must be produced. If, however, such data cannot be obtained through reasonable efforts, the responding party may object and if the court orders production of such information, the requesting party may be ordered to pay the reasonable expenses relating to any extraordinary efforts required to retrieve and produce the information.

The U. S. Judicial Conference's Committee on Rules of Practice and Procedure, the organization responsible for recommending new federal rules, is expected to make recommendations concerning electronic discovery in the next few months. Such proposals are expected to contain provisions addressing a party's routine deletion of e-mails from its computer system and, like Mississippi's rule, provisions for obtaining discovery of electronic data no longer available in the ordinary course of business.

### Electronic Signatures

For transactions occurring entirely over the internet, an issue may arise as to whether such electronic transmissions are "writings" sufficient to satisfy the statute of frauds. Issues may also arise as to whether mere transmission of a document can ever be sufficient to constitute a "signing" of the document.

Fortunately, Mississippi is one of forty-four states which has now enacted



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some or all of the Uniform Electronic Transaction Act, codified at Miss. Code Ann. §§ 75-12-1, *et seq.* The UETA generally gives electronic transmissions the same status as a separate writing. The UETA also provides that an electronic signature is given the same status as an actual written signature of a party. Furthermore, the Act provides that an electronic signature can be any electronic sound, symbol, or process attached to or logically associated with a record when such is used by a "signing party" with the intention to sign the record.

Thus, a typewritten name sent electronically or even the clicking of an "I agree" button will likely constitute the signature of the submitting party. Of course, to the extent that such action was not the action of the "signing party" or to the extent that the signator did not intend for the action to constitute his or her signature, such defenses would still be available. However, with implementation of the Uniform Electronic Transaction Act, the conduct of business through the internet and through other electronic means is greatly simplified.

## Internet Service Provider Liability

Those who provide internet access or provide forums for discussion groups or "chat rooms" have faced claims that content submitted by others may nevertheless constitute defamation on the part of the provider. Additionally, such providers have been accused of contributory copyright infringement when music, video or other protected works have been copied by third parties on the internet. Internet service providers have successfully argued that because they merely provide a forum for communication between parties, and because they do not edit the content of such information, which, in most instances, is transmitted instantaneously, they should be immune from liability under defamation, copyright or other laws.

Indeed, Congress has passed the Communications Decency Act which provides immunity for internet service providers who merely provide a location for the dissemination of communications. However, under the CDA, if an entity does more than simply provide a forum, but instead provides its own information and

content, such provider will not be immune from claims relating to the content of that information. Additionally, the Digital Millennium Copyright Act gives immunity to internet service providers, under most circumstances, from claims of contributory copyright infringement. Both such acts seek to balance the creation of public forums for the dissemination of constitutionally-protected speech while, at the same time, protecting third parties from defamation or infringing activity.

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## Identity Theft

With the advent of electronic transactions, coupled with skyrocketing computer hacking activity, identity theft is on the rise. Indeed, an FTC study indicates that almost 5% of the nation's adult population was a victim of identity theft in the previous twelve months. The survey further discovered losses to banks and businesses of almost 50 billion dollars and losses to individuals of almost 5 billion dollars.

In addition to increased focus by law

enforcement officials on the state and federal levels, Congress enacted the Fair and Accurate Credit Transactions Act, passed in December, 2003. Many provisions of the Act will take effect in the latter part of 2004. Among the provisions of the Act, merchants will be required to truncate the full card numbers on credit card receipts. Additionally, creditors or other businesses must, at the request of a victim of identity theft, give victims copies of applications and/or business records relating to the theft. Other provisions regulate the manner in which credit reporting agencies may report transactions suspected to be fraudulent, so that acts of fraud are not compounded. Additionally, through the 1998 Identity Theft Assumption and Deterrence Act, the Federal Trade Commission has been appointed to serve as the principle clearing house for investigation of evidence of identity theft. The FTC maintains a toll-free hotline at 1-877-IDTHEFT or online at [www.consumer.gov/idtheft](http://www.consumer.gov/idtheft).

## Copyright Protection for Digital Data

Movies, music, photographs, and other media, through the process of digitization, are reduced to nothing more than a series of ones and zeroes on hard drives, compact discs, and DVDs. Accordingly, the process for making copies of such works, particularly over the internet, has been greatly simplified when compared to the analog storage of past generations. Early efforts to set up wide scale forums for exchanging infringing copies of copyrighted materials were met with prompt

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and decisive action from the record and movie industries. Napster, for example, was forced to change the way it did business, becoming a pay-for-play site. Furthermore, a series of litigation involving MP-3 technology likewise dealt a blow to mass copying.

The Digital Millennium Copyright Act further limits the means for copying copyrighted music or movies. The DMCA specifically brings the internet under the umbrella of copyright protection. Furthermore, DMCA prohibits persons from tampering with any encryption mechanism or any other feature added to prevent copying of software, digital audio or digital video.

This Act, coupled with the early and concerted actions of the music and movie businesses and the application of traditional copyright law to such technology, has revolutionized the industry. Today numerous internet sites are available which provide for the downloading of music or movies with both the payment of royalties and the express permission of intellectual property owners. This procedure may soon displace record and video stores as the primary means of distribution of music and films.

## Conclusion

As with any new technology, a balance must be struck between the rights of intellectual property owners and the rights of the public. While in the early days of internet technology, "lawlessness" may have been the rule, over the past several years existing legal principles pertaining to copyrights, privacy, jurisdiction, as well as other issues, have slowly caught up with this new technology.

Although new statutes may have been enacted in order to facilitate this transition, by and large, existing concepts have held their own with the new technology. Just as the widespread sale and use of xerographic machines placed a strain on copyright law in the 50's and 60's and just as the advent of portable cassette recorders placed a similar strain on the same concept in the early 70's, cyberspace has created its own strains in each of the areas described above. However, as the new technology has become widespread and the public understands such technology as an everyday part of life rather than a strange new oddity, the law, as always, will continue to strike a balance between all interests represented. ■