

E-commerce and the law

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Overview

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- IP in a website
- Contracting via the Internet
- Selling goods and services
- Consumer terms – what do they need to contain?
- User generated content – liability and defences
- Data, privacy and marketing
- Advertising - guidelines



Case Study

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- Bill is a 3rd year computer science student with an obsession with the boyband “One Dimension”.
- He designs and sets up a website where One Dimension fans can connect.
- There is the facility for fans to set up their own profile on the site, and privately message each other.
- Bill also decides to recoup some of his set-up costs for the site by selling One Dimension merchandise.
- As the site grows, Bill would like to further increase his revenue by selling advertising on the site.



Rights in a website

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- Copyright
- Trade marks
- Design rights/“look and feel”
- Domain name
- Patents?



Contracting over the Internet

The basic requirements

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- Basics of contract law
 - Offer
 - Acceptance
 - Consideration
 - Intention to create legal relations
- The website provider will want to structure its site as an “invitation to treat” (not capable of acceptance) and ensure the user is the party making an offer



Signing a contract via the Internet

- Admissibility of electronic signatures – **s7 Electronic Communications Act 2000**

“Digital signatures, scanned manuscript signatures, typing one’s name (or initials) and clicking on a website button are, in our view, all methods of signature which are generally capable of satisfying a statutory signature requirement. We say that on the basis that it is function, rather than form, which is determinative of the validity of a signature. These methods are all capable of satisfying the principal function: namely, demonstrating an authenticating intention.”*

**Some exceptions apply*



Electronic commerce: formal requirements in commercial transactions
Law Commission - December 2001

Transactional and Non-transactional Websites

Bill has to ensure he makes available to visitors “in a form and manner which is easily, directly and permanently accessible”:

- Name of service provider (e.g. BoyBandFanz Limited), place of registration, registered number and registered address
- Geographical address – where BoyBandFanz Limited is established
- Details of service provider, including email address (for rapid, direct and effective communication)
- VAT number (if subject to VAT)
- If referring to prices – indicate clearly and unambiguously, and state whether inclusive of tax and delivery costs

Electronic Commerce Regulations 2002, Companies Act 2006 and Consumer Contracts Regulations 2013 (coming into force 13 June 2014)

Prior to order

In a “clear, comprehensible and unambiguous manner”:

- What technical steps are required to conclude the contract (e.g. crumb trail)
- Will concluded contract be filed and accessible?
- How consumers can identify and correct input errors prior to placing order.
N.B. Failure to provide an “appropriate, effective and accessible means” to do this means a consumer can rescind their contract.
- Languages offered for contract
- Terms and conditions – users must be able to store and reproduce them (e.g. send by email)
- Any codes of conduct to which Bill subscribes

Contracting over the Internet Transactional Websites

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Prior to order

Additional obligations coming into force 13 June 2014:

- Any delivery restrictions
- Accepted means of payment

In a “clear and comprehensible manner...appropriate to the means of distance communication used”:

- Information about the supplier
- Characteristics of product or service, and rights of the consumer
- For apps and mobiles with limited space, only key information is required. Remaining information may be provided in another “appropriate way”

Consumer Contracts Regulations 2013

Contracting over the Internet Transactional Websites

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Placing an order

Bill must:

- Include an order button, labelled and easily legible, indicating an obligation to pay e.g. “Pay now”
- Avoid using pre-ticked boxes
- Disclose any additional charges
- Only provide basic rate customer helpline numbers



After the order has been submitted

Bill must:

- Acknowledge the receipt of an offer “without undue delay and by electronic means”
- Take care this acknowledgement of an offer is not “acceptance” – this can be done later
- Provide a copy or confirmation of the contract – on a “durable medium” (e.g. paper or email) including the characteristics of the goods or services, identity of supplier, total price including tax or monthly cost in the case of subscriptions, any additional charges, duration of contract or conditions of termination

- *the Consumer Protection (Distance Selling) Regulations 2000 (“DSR”) being replaced by the Consumer Contracts Regulations 2013 as of 13 June 2014;*
- *the Electronic Commerce (EC Directive) Regulations 2002 (“ECR”);*
- *the Consumer Rights Directive 2011 (“CRD”)*
- Delivery within 30 days
- Bill must state consumer’s cancellation rights
- Bill must provide a model cancellation form

Cancellation period extended to 14 days:

- Goods: Starting from the date that consumer takes possession
- Services: Starting from the date the contract is entered into
- Digital content: Bill must obtain consumer’s agreement to waive cancellation rights

Consumer terms – how are they different?

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- *the Unfair Terms in Consumer Contracts Regulations 1999*
- *Implied terms under: Sale of Goods Act 1979, Supply of Goods and Services Act 1982; Sale and Supply of Goods to Consumers Regulations 2002*
- Consumer terms must be:
 - Fair
 - Reasonable
 - Written in plain English
- Unfair terms will be unenforceable
- Ambiguous drafting will be construed in favour of consumer



- ***the Consumer Protection From Unfair Trading (“CPUT”) Regulations 2008***
- Promotional material which appears to be editorial or user generated content, and which does not make clear that it is promotional, is an automatically unfair practice under CPUT Regs.
- Describing something as “free” when there are costs other than the unavoidable cost of delivery/collection

- ***Enforced by the Competition and Markets Authority (“CMA”), and Trading Standards***
- CMA and Trading Standards have the power to issue a fine or can bring criminal charges

CMA principles for apps and web-based games

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- **Guidance for studios and platforms**

- Be transparent and accurate about costs associated with a game (including the costs of any in-game purchases)
- Make the commercial intent of any in-game message clear – distinguish commercial messages from gameplay
- Don't include direct exhortations to children to make purchases or otherwise pressure them to make purchases (or persuade a parent to make purchases for them)
- Make it clear payments should not be made without the informed consent of the person who owns the bank account - opt-out consent not sufficient

- **Compliance**

- Both studios and platforms must comply
- Range of actions in case of breach, including court proceedings

- A civil wrong
- Law of tort demands that, in certain circumstances, we are answerable for our actions.

Negligence

Trespass

Defamation

Interference

Misstatement

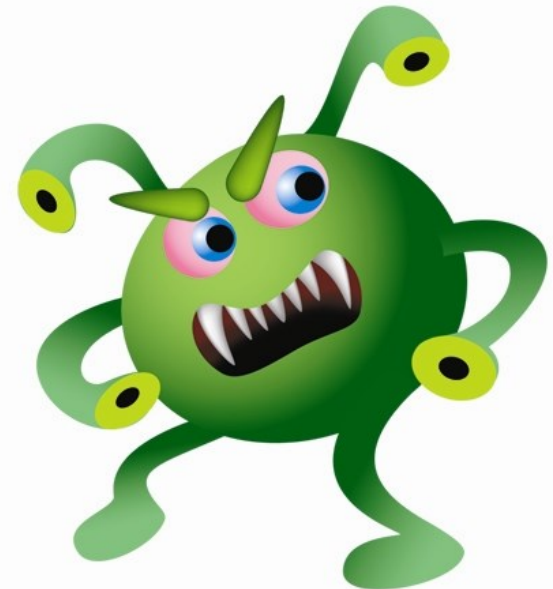
**Product
liability**



Bill offers via his website various “One Dimension” related files, such as screen savers and videos that registered users of the site can download for free. He doesn’t use anti-virus programs to check the files. The files infect his users’ computers with a virus. Bill’s website contains no disclaimers or exclusions of liability for damage or loss caused by malicious code, viruses, worms etc.

What would his users need to prove to sue him for negligence?

- Duty of care is owed
- Breach of duty
- Breach of duty caused damage
- Damage was reasonably foreseeable



A user of Bill's website posts a statement on the public message board stating that the lead singer of "One Dimension", Barry Smyles, is having an affair with Taylor Sluggish. Barry is married to Caroline Smack. Bill doesn't moderate his forums and had no idea the post was there. The post gets thousands of hits and Barry Smyles' lawyers get in touch with Bill to ask him to remove the post.

Can Bill be liable for the post?

s1. The Defamation Act 1996, s5 Defamation Act 2013, Electronic Commerce Regulations

Data protection – Key legislation and principles

- ***the Data Protection Act 1998***
- Eight principles:
 - “Fair and lawful” processing
 - Obtained only for one or more specified and lawful purposes
 - Adequate, relevant and not excessive
 - Accurate and up-to-date
 - Not kept for longer than necessary
 - Processed in accordance with data subject’s rights
 - “Appropriate” security measures
 - Not transferred outside the EEA unless “adequately” protected
- ***Regulated by the Information Commissioner's Office***
 - ICO has the power to fine up to £500,000 for breach
- ***Incoming EU Regulation – fines of up to 5% of global turnover***

Privacy and Electronic Communications Regulations 2003

- **Cookies (and similar technologies)**
 - Consent required to set cookies
 - Exception for cookies which are “strictly necessary” (e.g. “add to basket”)
 - Must give clear and comprehensive information about cookies
- **Consent to unsolicited email marketing**
 - Opt in consent vs. soft opt in
 - Opt-in consent is required for email marketing, unless:
 - Email address obtained during course of sale or negotiation for sale for goods/service + marketing relates to your similar goods and services
 - Recipient was provided with a means of refusing marketing when they gave their email address
 - Must give a method to unsubscribe in each communication sent.

Regulation of Investigatory Powers Act 2000

Can Bill monitor the private messages users send to each other on his site?

- Criminal offence to intercept communications in the course of their transmission via postal, public or private telecommunications systems
- Exceptions:
 - Consent
 - Lawful authority
 - Lawful Business Practice Regulations:
 - authorises specified interceptions carried out for business purposes (e.g. training purposes)
 - must use all reasonable efforts to inform of the interception

- *Committee of Advertising Practice (CAP) Code, enforced by Advertising Standards Authority*
- Advertising must be legal, decent, honest and truthful



You can find more information on specific topics on the following websites:

Black letter law

- www.legislation.gov.uk

Intellectual property

- www.ipo.gov.uk

Data protection, privacy, marketing

- www.ico.org.uk

Distance selling

- <http://dshub.tradingstandards.gov.uk/>

Advertising

- www.asa.org.uk

Consumer law

- <https://www.gov.uk/government/organisations/competition-and-markets-authority>

Any questions?

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