

New Technology

Legal Issues—Real Estate And The Internet

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Authors' Disclaimers

This article discusses hypothetical situations. In the real world the facts of a given case will always significantly influence the advice given and the business strategy chosen. Real estate counselors should be aware of the specific laws, regulations and contract language that govern a specific activity or transaction and seek appropriate legal or business counsel and advice for each situation.

With the Internet, a revolution in the method of conducting commerce is emerging in the United States and globally. It is now possible to conduct real estate business activities electronically often at lower cost and with potential worldwide access and exposure. Only in its infancy, the Internet and its applications in the business world are an unknown virtual frontier whose limits are seemingly the limits of our imagination and creativity.

Because the Internet provides industry with new and uncharted methods of conducting business, it is critical to explore and understand the evolving legal risks and issues associated with it. In some instances, familiar rules of law apply. Often, however, existing laws simply do not work in the context of a digital, cyberspace world. Thus, the law is seemingly lagging far behind the rapid-fire growth of how business is being conducted on the Net. All areas of the law are being re-examined and slowly revised to address a new world of commerce. The law on the Net is evolving from day to day; indeed law is being made and remade every day.

In this evolutionary and revolutionary environment, it is

extremely important to seek competent legal advice and to understand that there are many pitfalls and areas of uncertainty. As in other areas of real estate practice, legal advice should be sensitive to business as well as legal concerns. Lawyer and client must, together, decide how much risk to take in exploring the seemingly endless business possibilities and in weighing the potential legal consequences.

This article presents some of the common legal issues that might be confronted by real estate professionals who conduct business on the Internet. It describes a wide range of Internet activity—from e-mail messages, to newsgroup postings, to multimedia presentations and linked material on World Wide Web (WWW) pages. It also provides a sampling of issues such as securities offerings, libel and slander, freedom of speech, copyright, electronic data interchange and service provider responsibility. At this early stage, however, there are few clear answers to any of these issues, and sometimes the answer depends on the circumstances of individual cases. Often the wording of agreements between user and service provider, or employer and employee, will create a form of private law that governs the situation. As the reader, consider the listing and discussion below as a series of caution lights to be observed with a combination of common sense and legal advice. By the time you read this overview, it is probable that the law and/or new methods of conducting business on the Internet will have evolved even further.

Freedom Of Speech And Privacy

The Internet freedom of speech issue appears in a number of different contexts, including the relative rights of employers and employees vis-à-vis e-mail access and the presentation of information on WWW sites and through other means on the Net.

E-mail

The focus on e-mail differs somewhat depending on your status as an employer or employee. For employers, it is important to create a workplace environment without an expectation of privacy for the employee. A business is a business, and the employee should not be using e-mail for private purposes that may, in fact, be detrimental to business. Employers should develop policies which state that the employee will have no expectation of privacy. For the employee, your rights to "speak" on the Internet as an individual, versus your status as an employee of an organization, may well depend on what you signed when you joined the firm. In some cases people are able to use disclaimers, as in a signature file appended to the bottom of their e-mail messages, to note that their statements are "mine alone, and not those of my employer." That may satisfy some employers, but not others. Similarly, a personal WWW page may include information which would concern the employer or that the employer may find inappropriate.

Presentation Of Information On The WWW

What happens when you present information on the Internet and it crosses state lines and is read or used by people in different states? The American Civil Liberties Union is now arguing for freedom

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of speech in cases dealing with state regulations that would limit online utterances that might violate one or another state or local laws, but not others. It is unclear what law governs in a global environment such as the WWW or whether, and in what cases, an individual or local government has jurisdiction over you. And finally, your rights may differ from nation to nation. Acceptable discourse in the U.S. may be totally unacceptable in Singapore. It is important to remember always that use of the Net provides worldwide exposure and therefore, potential exposure to the laws of all nations.

More background on this subject can be found on the ANet@ at **The Center For Democracy and Technology**, <<http://www.cdt.org/privacy/contents.html>>, which includes information on current issues including electronic health information and legislation, and **The Electronic Frontier**, <<http://www.eff.org/>>, a non-profit civil liberties organization working in the public interest to protect privacy, free expression and access to public resources and information online and promotes responsibility in new media.

Copyright

Copyright issues need to be addressed in three contexts: your own articles, your own WWW page and the materials of others that you propose to link to, or incorporate in, your WWW page.

■ *Your own individual articles.* If you put your own material on the WWW, even with a copyright warning and request that people get your permission before re-using, assume it won't happen and that it may not be cost-effective to enforce your rights. Unauthorized reuse may take place all over the world with your material translated into many languages. But you probably should include a warning on your site if only to state your intent so the potential infringer knows the work was protected.

■ *Your own WWW page.* With a WWW page there's a better chance that you can require someone to cease and desist from copying the look, feel and layout of your page and the unique arrangement of material. There will likely be only one violator, and the copying would be more blatant, e.g., use of code, etc. Software now available allows you, in effect, to stamp your site as the original and distinguish it from those who would closely imitate it. See, for example, the parody sites which spoof and copy such sites as the White House, various political candidate sites and the site of the New York New Media Association (the parody site is <<http://www.nynma.com>>).

■ *Material written by others, for example, articles linked to your WWW page.* Theoretically, and often as a courtesy, you should ask permission before linking another person's WWW page to your own. In practice, however, this courtesy is often not observed. Realistically, anything on the WWW is generally regarded as fair game for links. A link can be easily deleted, of course, if the linked party protests, so damage done by linking is small and, in most cases, easily repairable. On a strategic level however, you should consider entering into linking arrangements with other sites. Often, these arrangements are beneficial to both parties and provide increased traffic.

Securities Offerings

When you provide information on the Internet about a real estate investment trust, a private placement or an initial public offering of a real estate company, when do you cross the line into inappropriate offering material? The Securities and Exchange Commission (SEC) is now developing regulations in this area. Meanwhile, a number of offerers have developed sample warning statements

which attempt to make it clear that their on-line presentation or trading activity is for certain limited audiences, and interested parties are referred to state law and regulations that apply. Clearly, this type of statement is only one step in securities law compliance and must be done in conjunction with a careful securities law analysis by your legal counsel.

The SEC is already mandating, through the use of its EDGAR system, electronic filings of all registration statements and periodic reports by public companies, such as Forms 10-K and 10-Q. Access via the WWW to public companies has never been easier. The SEC maintains a WWW site that includes an EDGAR search engine which enables any user to locate and access all such public company filings <<http://www.sec.gov/edaux/searches.htm>>.

For more details and examples of disclaimers, you can visit the following WWW sites: **Chicago Partnership Board** WWW site, which deals with transactions in limited partnership interests <<http://www.cpboard.com>> and the **Institutional Real Estate Clearinghouse** <<http://www.irec.org>>, which deals with exchange of interests in institutionally-owned real estate. Generally, for guidance in this area, visit the site of the venture capital publication **Red Herring** <<http://www.herring.com>> and the SEC <<http://www.sec.gov/>>.

Compliance With State And Federal Tax And Other Laws

Internet information is accessible in all 50 states and worldwide. People who advertise properties and provide services of different kinds may run afoul of various state laws. For example, are you doing business when you advertise property on a WWW page that is read in a given state? Must you comply with state real estate industry licensing laws? Might

you be engaged in unauthorized practice of real estate brokerage or law? Furthermore, when are you subject to taxation related to on-line transactions involving some kind of nexus with the state in question? For example, sales or transfer tax liability on goods sold in the state? Finally, regarding international transactions, when do U.S. federal taxation apply and at what point do foreign laws become relevant?

These issues regarding the rights of states and cities to regulate, limit and restrict Internet business activity are still evolving and are likely to continue as new issues and methods of doing business are created. There are no clear answers, and therefore real estate professionals should proceed with caution. Tax considerations should be discussed with sophisticated tax counsel. At this point, the Internal Revenue Service is working on regulations regarding the taxability of commerce on the WWW.

Electronic Data Interchange (EDI) And Electronic Commerce

Contract and commercial law, both within the U.S. and internationally, are being modified to recognize the increasing importance of electronic data interchange (EDI) and electronic commerce. What constitutes a valid electronic offer, acceptance, documentation or signature? Authentication: How do I know you are who you say you are? How do I know that the interior of the property shown (as, for example, on RentNet <<http://www.rent.net>>) is really the subject property? All these issues are the subject of emerging law and developing standards.

Exploring the issue of authentication in more detail is really a question of who can you trust in cyberspace? This involves at least two separate issues. The first has to do with the authenticity of information found on a WWW page. Who created the page, and

how can you be assured that it represents reality? As with investigation of real estate information in more traditional settings, you need to confirm independently and verify the sources. This will often involve use of offline contacts in person or by phone with trustworthy sources.

A related and more difficult issue is the citation issue: How do you accurately cite a WWW page when you're using it in a report? A site can be changed minute by minute, so you really need to note the date and time it occurred. By the same token, it's risky to create a link in a report to a property WWW page, since the content of the linked page can be altered at any time, perhaps making it differ significantly from the one you looked at earlier. It may be more prudent to back up WWW page references with print snapshots of the linked page which include date references.

Finally, EDI and electronic commerce are only as safe and reliable as the protections surrounding them. You should be aware of hackers who can often break through protective barriers in record time. Encryption and other devices should be put into place to ensure the integrity and privacy of any electronically transacted business.

Service Provider Responsibility

The subject of service provider (e.g., America Online, CompuServe, ATT WorldNet, Microsoft Network) responsibility for policing Internet activity is a current subject of intense legal and regulatory debate. The rights of the user, vis-à-vis the service provider, will most likely be defined by the agreement you sign when you enroll with that provider. Most of the responsibility for monitoring the content of e-mail messages, newsgroups and Web pages that are transmitted and hosted through these providers is falling more and more on the user

and/or the information providers that contract with the service providers to provide content.

Federal and state law is emerging on this issue with one focus being the level of oversight and editorial responsibility assumed by service providers. In many cases, the service providers are not responsible for knowing about or overseeing content that runs through their systems; practically, this would be impossible. The responsibility comes *after* they are made aware of potentially illegal or abusive content on their systems. In most contracts with content providers and users, the service providers insist on full indemnifications for any content of which they may be held responsible.

Web Disclaimers

It may be possible to use various types of disclaimer statements in an attempt to protect yourself from some of the potential problems described in this article. For example, a statement that "information is taken from sources believed to be reliable, and will be corrected as necessary" can indicate intent to maintain a clean WWW site. It is easier to make changes to electronic documents than it is to paper documents. Thus, the effects of errors are likely to be smaller.

The placement of disclaimer statements deserves mention. Disclaimers should be placed visibly, but not obtrusively, so they can be noted without deterring people from visiting the WWW site. In some cases, placement of a link leading to a disclaimer may be sufficient. There is one caveat. Disclaimers are not the end all of protection against liability. You should remain aware that there are instances in which, notwithstanding the prominent display of a disclaimer, you may have responsibility and liability for your actions and use of the Internet.