

Computer Games In Cyberspace?

UNITED KINGDOM

By Bristows, a London law firm specializing in intellectual property

The Internet seems at first glance to be the perfect medium for selling PC game-related information. Code patches, upgrades, power-ups, cheats and other digital goods can be distributed over a single world-wide channel – and your punters picks up the network bill when they download, rather than you having to pay expensive postage and packaging charges.

Now the *caveat*: numerous and nasty legal pitfalls await those seeking to exploit this new medium. Your exciting new initiative could become a nightmare of overseas litigation and legal costs. If you want to avoid the worst, heed the following simple tips:

Don't Lie, Even By Mistake

Prices and other relevant information must be kept up to date in order to ensure that the customer receives the correct information. If a statement made in your “virtual store” misleads a customer, even innocently, the buyer may be able to claim damages or rescind the underlying contract under the law of misrepresentation.

Consideration should also be given to the latest editions of the UK Advertising Code and the Sales Promotion Code (available at www.as.org.uk). The codes set out a number of principles, aimed at consumer protection, such as the general requirement that advertisements must be legal, decent, honest and truthful. This will only help so far as the UK is concerned. Other countries will have different and possibly stricter requirements.

Don't Tread On Other Companies' Toes

Or rather, avoid infringing the intellectual property right of third parties. For example, despite frequent discussion in the international community, no international register of trade marks has yet been established. You should probably consider carrying out searches in your principal target countries against the company names and brands you wish to use. Copyright should also be carefully examined. The UK Publishers Association is considering using UK copyright law to prevent the sale of US editions over the Internet to UK consumers.

Also, avoid making adverse comments or comparison with competitors' games unless you enjoy paying lawyers.

Who's The Punter?

If you don't know who your customer *really* is (as opposed to who they claim to be) you can hardly enforce a contract with them, can you? And in what "capacity" are they acting? In the case of an individual, probably the most important use is to establish whether he or she is an adult, as under the law of many jurisdictions minors do not have the capacity to contract, or they have the right to avoid performance of their obligations. Clearly, you are at an advantage if you do not supply until you have banked payment. If you are selling to a company, make sure that the individual making the contract has actual or ostensible authority to enter into a contract. This means having a rock-solid means of identifying your customers and their status. Until electronic signatures become the norm, you may consider verifying your customer's identity in high value transactions by more traditional means, although this may not be a very exciting prospect in view of the time involved in doing so.

They Buy: You Don't Sell

Your website itself should not constitute an offer by you to sell your products. If it does, you may have problems, for instance, if you have insufficient stock to meet demand or receive an order from a country into which your client does not want to sell.

In order to avoid these problems, a website should be set up like a shop window with an order form available for the buyer to complete. If a website is treated as an "invitation to treat" as opposed to an "offer" the *buyer* is deemed to be the person making the offer and you will be free to decline it. This again applies to English law, and foreign jurisdictions may have different rules.

"... Our Terms and Conditions of Sale ('T&Cs')"

As is normally the case, the terms of the contract between you and "Joe Public" will be those expressly agreed or implied by law. The general rule is that he is not bound by a term unless it is brought to his notice prior to the conclusion of the contract. If it is not, he can hardly be blamed for breaching it later. Include a prominent and clear link to your T&Cs, or even better, integrate them into the web page so that the punter has to scroll through and "accept" them before placing an order. It is good practice to include a statement on the web page to the effect that any order placed or offer made by the buyer must be submitted on your standard terms and conditions, which cannot be amended without your consent in writing. Go further: highlight the terms and conditions in BOLD. As far as possible an order form should not give the punter any chance to vary the terms of the offer. Instead of typing "I accept" into a box at the bottom of the Terms and Conditions he may type "I do not accept". You will have a problem if you or your server automatically process the order without picking this up. Where orders have been meddled with they should be bounced back with a statement that you will only supply on your stated terms.

They Say Yes, But Do They Mean It?

Essentially, contracts are formed when the punter says “I’ll take it”. When dealing over the murky and indirect Internet, it is best to include a clear statement in your Terms and Conditions regarding how offers and acceptances are to be communicated, and when and where the contract will be made.

“...According To The Law Of A Lesser Known Ukrainian Province”

This is a world-wide market, so your Terms and Conditions should specify the applicable law which you want to cover any contract you make over the Internet and which courts will have jurisdiction to hear any disputes. This policy will help you avoid those fascinating problems so beloved of international lawyers, such as determining the governing law, which would apply to, say, software bought in Euros from a Japanese distributor by a Swedish punter logging on from a vessel registered in Liechtenstein. Even so, remember that, since no matter what jurisdiction is chosen, consumers within EU or EFTA countries can only be sued in their own countries, your choice of jurisdiction may be of no great or practical consequence and your choice of law does not give you the right to break any mandatory rules, such as consumer protection laws, set by any country in which you might do business. You should consider targeting the principal countries in which you intend to trade and ensuring that your web page and offer page do not break the local laws. To prevent breach of other local laws, you might want to programme your site so as not to accept orders from certain countries with whose laws you are not familiar and to expressly states this policy at your site.

The Future

The UK Government and the European Commission are developing legislation to deal with the legal complexities of the Internet. The most important of these is probably the EU’s latest draft of the E-Commerce Directive. This includes various proposals for electronic contracts, such as the time when an electronic contract will be taken to be concluded. This will only be when the acceptance is sent, received and acknowledged, and receipt of that acknowledgement is itself confirmed. Professional persons may agree to make alternative arrangements, and no doubt many will.

The draft EU Directive on Distance Selling, to be implemented by June 2000, will also impose a number of requirements which may have implications for organized “distance” sales or service schemes. For example, punters will get a seven-day cooling-off period from any contracts concluded at a distance and orders must be executed within 30 days of receipt unless otherwise agreed. However, exceptions will exist regarding software and audio and video recordings. If they are “unsealed”, the right to withdraw from the contract will not apply. This exception may be available if products delivered online have to be unsealed in some way before use. For example, a game might be supplied with a description or demo of its contents. The punter would then click on an icon and type in a password to unseal the game, after being warned of the implications of this.

Copies of papers from Bristows’ June 1999 seminar entitled “Developments in E-Commerce” can be found on Bristows’ web-site at www.bristows.com.

