

## e-commerce update

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*Mrs M.B., Mr P.T. and Mr F.D. v Wikimedia Foundation Inc.* (Tribunal de grande instance de Paris - 29 October 2007)

A French court has determined that Wikimedia Foundation Inc. (the **Foundation**), the non-profit organisation which operates Wikipedia, is not responsible for the information posted on the popular reference website.

Wikipedia is an online encyclopaedia of more than 8 million articles written collaboratively by volunteers. The majority of the articles can be edited anonymously by anyone who has access to the internet. The role of the Foundation is to provide the infrastructure and organisational framework for the support and development of the Wikipedia website.

The plaintiffs, 3 French nationals, sued the Foundation for invasion of privacy and defamation after an article revealing that they were homosexuals appeared on the Wikipedia site. Each plaintiff sought €69,000 (\$A110,000) in damages.

Judge Emmanuel Binoche’s ruling was based on a French law that distinguishes internet hosts from content publishers, and provides a protection from liability for hosts who are unaware of illicit content. Binoche found that the Foundation did not have actual knowledge of the litigious words and, therefore, could not be held responsible for the information that was posted on the website.

Moreover, Binoche ruled that web site hosts such as the Foundation are not subject to a general obligation to monitor or investigate the origin of information they store.

Under the French law, service providers are deemed to have knowledge of illicit information if they are notified in a prescribed manner and specific proof of this notification can be provided. In the present case, an email was sent from one of the plaintiffs to Wikipedia informing them of the illicit material. However, as the communication was not in the form required, and did not satisfy the provisions specified in the legislation, it was ruled that the plaintiffs had not given the Foundation notification of the illicit content.

#### Application of this concept in Australia

In Australia, the Broadcasting Services Act 1992 (Cth) (the **Act**) grants a similar protection to internet content hosts (**ICH**) and internet service providers (**ISP**). By virtue of clause 91(1) in Schedule 5 of the Act, which was introduced in 1999, a law of a state or territory has no effect to the extent that it subjects an ICH or an ISP to criminal or civil liability in respect of Internet content hosted or delivered, if the ICH or ISP was not aware of the nature of the content. Furthermore, a law of a state or territory has no effect to the extent that it requires an ICH or an ISP to monitor, make enquiries about or keep records of the Internet content hosted or provided.

The first problem with this provision is the lack of clarity in terms of the types of entities which it

protects. The Act defines an ICH as a person who does or proposes to host internet content in Australia. "Internet content" is defined as information that is kept on a data storage device and is accessed, or available for access, using an Internet carriage service, but it does not include "ordinary electronic mail" or "information that is transmitted in the form of a broadcasting service" (i.e. television or radio). The term "host", on the other hand, is not defined within the Act. It is thought, though, that an ICH is a person who provides the physical and technical facilities to enable information to be stored on a server and disseminated over the internet.

An ISP, on the other hand, is a person who supplies or proposes to supply an internet carriage service to the public. A broad interpretation of this

class would include such operators as internet kiosks, libraries and schools, whilst a narrow view would only take into account wholesalers and retailers of internet connectivity. A common sense approach would be to include the latter class of operators only as they are the more widely used means by which end users obtain a connection to the internet.

There has also been speculation as to the breadth of the provisions limiting the liability of ICHs and ISPs under the Act, such as whether the wording would provide a defence to defamation. As there is yet to be a decided case concerning the provisions of the Act mentioned above, it is unclear as to whether the result of the French Wikipedia case would have differed if it was tried under Australian law. It seems only time will tell.

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## Electronic contracting

Electronic transactions on the internet have become an increasingly popular way for individuals and business to buy and sell goods and services. However, this practice requires that traditional contractual principles are able to be adapted to electronic transactions. The main way in which electronic contracts are entered into on the internet is through "click-wrap" contracts (sometimes called "click and accept"). Click-wrap contracts are usually hypertext order forms which contain the terms and conditions of purchase and they will require the clicking of an "I accept" button before the goods can be ordered, services procured or information accessed. The key question is whether these electronic transactions are legally binding. The following discussion will examine the judicial and legislative response to electronic contracting.

### Judicial Response

Although there have not yet been any Australian decisions dealing specifically with click-wrap contracts, a recent Supreme Court of NSW decision has confirmed that these contracts are legally binding. In *Peter Smythe v Vincent Thomas* (2007) NSWSC 844 the court held that agreements entered into by those using the online auction website, 'eBay', are legally binding.

**Facts:** The defendant listed a World War 2 plane on eBay for 10 days with a notation of a minimum bid of \$150,000. The plaintiff made a bid of

\$150,000 and both the plaintiff and the defendant received notification from eBay that the plaintiff had won the auction for the plane. However, the defendant refused to sell the plane to the plaintiff and argued there was no binding contract.

The central argument made by the defendant was that the only contracts in existence were between eBay and the plaintiff and eBay and the defendant, those contracts never crossed over into an agreement between the plaintiff and the defendant. The defendant was not disputing that the terms of eBay were not binding, but rather that the consequences of his breach were only that eBay could remove him as a registered user.

**Decision:** The court held that a binding contract existed between the plaintiff and the defendant and that it should be enforced. The court found that usual contractual principles apply to eBay and when people register with eBay they agree to accept its terms and conditions, including requiring parties to complete transactions where the terms of the auction are satisfied. The court pointed out that both the defendant and plaintiff had accepted, by clicking on an "accept" button, the terms and conditions of eBay. Thus, the court has confirmed the legally binding nature of click-wrap contracts.

### Overseas authority

In the United States there have been several cases

dealing with the enforceability of click-wrap contracts. The courts have confirmed that click-wrap contracts will only be enforced where the purchaser is required to affirmatively assent to the terms and conditions of the website. This approach is demonstrated by the following 2 cases.

In *Groff v America Online*, the court had to consider the validity of AOL's terms of service agreement and whether it was binding on the plaintiff. The AOL website required a user to proceed through a screen containing the terms of service and to affirmatively click on a button signalling the user's assent to the terms before the user could further proceed to the website. The court found that as the plaintiff had affirmatively clicked on the 'I agree' button he was bound by the terms of the website.

Alternatively, in *Ticketmaster Corp. et al v Tickets.Com, Inc* one of the issues considered by the court was whether or not the terms and conditions of site use on the Ticketmaster site were binding on site visitors, in this instance Tickets.com. The court found that because the site did not mandate that a user affirmatively click on the "I Agree" button before accessing the site, the terms and conditions were not binding.

### **Legislative response**

The *Electronic Transactions Act 1999 (Cth) (ETA)* was enacted to create a regulatory regime governing electronic transactions. Although the ETA does not specifically deal with the enforceability of click wrap contracts, it broadly removes existing legal impediments that may prevent a person using electronic communications to satisfy legal obligations.

The ETA adopts the following principles:

- functional equivalence –as far as possible, paper based commerce and electronic commerce should be treated equally under the law; and
- technology neutrality – the law should not discriminate between different forms of technology.

Some of the key provisions include:

Section 8: Validity of Electronic Transactions:

For the purposes of other laws, a transaction is not

invalid because it took place wholly or partly by means of one or more electronic communications.

Section 9: Writing:

If a Commonwealth law requires information to be given in writing, the requirement is deemed to be met if the information is given electronically, provided:

- the information must be readily accessible for subsequent reference (ie recipient must be able to decipher it);
- if given to a Commonwealth entity, any particular technology requirements or receipt verification are able to be complied with; and
- if given to a non-Commonwealth entity, the recipient consents to the information being provided electronically.

Section 14 Time and Place of Dispatch and Receipt of Electronic Communications:

An electronic communication is taken to have been dispatched by the sender when it first enters an information system outside the control of the originator.

An electronic communication is taken to have been received by the addressee when it enters an information system designated by the addressee for that purpose. If no such system is designated the electronic communication is taken to have been received when it comes to the attention of the addressee.

The parties can agree to exclude or modify these default rules. In line with the principle of technology neutrality, the expression electronic mail is avoided to give way to generic expressions.

### **Conclusion**

In Australia, the courts have confirmed the legality of click-wrap contracts.

In the United States, the courts will not enforce click-wrap contracts unless affirmative assent to contractual terms is shown.

The major purpose of the ETA is to enable people to use electronic communications in the course of business operations and in satisfying their legal obligations.

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