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BUILDING FIRE-WALLS TO LIMIT YOUR COMPANY'S LIABILITY ON THE INTERNET

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by

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Many companies are already using the Internet for commercial purposes. Even more are considering it. Even more feel guilty because they think that they should be considering it.

We have heard this morning that there are certain legal difficulties and restrictions related to doing business on the Internet. Rather than taking a negative view and treating these matters as potential hurdles, I am going to suggest that you take a creative, management-oriented view. What I am presenting this morning is an approach to help you manage the legal problems that arise from the technology. After all, what your company needs to achieve is the advantage of doing business in a new commercial medium without suffering the disadvantages that can flow from inexperience in that medium.

If we are successful in business (as it has traditionally operated) it is because we know the most likely pitfalls and have developed strategies to manage and minimise those risks. We have implemented administration guidelines, behaviour codes, corporate training programs, standard terms of doing business, standard contracts, standard releases, and so on. Just for brevity's sake, let's call these various risk minimisation and effectiveness enhancing devices, "**risk protocols**".

If you already have risk protocols in place, it is likely that the need for these and the principles behind them, will remain relevant in the electronic business environment. Cyber-space is just another medium of social and commercial relationship. Accordingly, your liability issues are no less when using the Net than when using letters, newspapers, magazines, radio, television or billboards.

The reason is simple enough: The law inhibits certain behaviours and encourages others. This intent is based on social, ethical, economic or political rationales that rarely change with a mere change in the medium of expression or distribution. For example, if copyright is one way that society financially rewards creative risk-taking, that rationale is the same whether an unauthorised reproduction is by means of the Internet or a bootleg record. If there

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is a public interest in ensuring that an advertisement in a newspaper is not misleading or deceptive, that public interest is no less when the medium of expression is the Internet.

The test thus becomes: How do we use our existing skills and advantages so that they provide similar benefits in the new environment? I suggest that the answer lies in a simple five-step process.

MANAGING THE RISKS OF LIABILITY

REVIEW

AMEND

DEVELOP

IMPLEMENT

SUPERVISE

STEP ONE - REVIEW:

Review your existing procedures. If you are prudent you will already have developed risk management protocols for your existing business. The expansion or evolution of your existing business into this new medium will probably mean that your existing risk protocols will be relevant - but inadequate.

Intellectual Property and Other Valuable Rights

Let's take a review of copyright procedures as an example:

John Perry Barlow would have us all believing that the Internet has either killed copyright or at least is causing it to suffer a long and grotesque death. Please do not let this polemic affect your business judgment. It could be expensive.

Given the enormity of current and on-going investment in Intellectual Property, it is rather precipitous to follow the "Copyright is dead on the Internet" line of argument. If we want to encourage business onto the Net (and I know that this is far from unanimous) we must recognise that Intellectual Property makes a major contribution to a large number of corporate balance sheets and merely engaging in the rhetoric of anti-copyright nihilism is not the answer. Few companies are prepared simply to give away these assets. Many however, may be prepared to share them or trade them in return for some reciprocated benefit. It is a matter of devising the mutuality of benefit and establishing the systems and procedures, which will ensure that mutuality. (That process is something that we will look at in the next section.)

For example, if your business advertises its products or services using traditional media, you will have a procedure for ensuring that the words, art, film clips, music, used in your advertisements are free of copyright problems. To this end, if the work is done "in-house" you should already have reasonably detailed procedures to ensure that a

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nominated person is responsible for obtaining the copyright permissions needed or, that the company is using designs that are wholly created in-house and thus, no copyright clearances are necessary.

If you are going to use the Internet for similar purposes, you must review those procedures to ensure that they are effective when your advertising is intended for the new medium.

You see, the commercial problem remains the same: the laws of copyright applying to artistic works, designs, film and music, apply to uses in cyber-space just as they do to column-space. Some rules might be slightly different; some will remain unchanged; but rules there will be.

Let's expand this copyright theme and relate it to the use of on-line databases. A number of corporations, at considerable expense, maintain databases for use by their employees. Large corporations will maintain several. There is an increasing pressure from the clients of these corporations, to be given on-line access to these databases. In earlier years, the reaction to such a request would have been astonishment, followed by haughty rejection. The data would have been seen as part of that mystical body of dark secrets that made the database owner attractive to its clients. That was part of the secret "know how".

Nowadays, the mood has changed and companies are more attracted to doing business with those who share rather than those who play the game of, "You don't know what I know, so you must think you need me very much!"

Accordingly, if you are going to give clients access through the Internet to your databases, you will have to review radically your existing protocols.

- What level of access do you want to license to third parties?
- What use do you want them to be able to make of the data obtained from this access?
- What design factors need to be built into the database to promote your aims and minimise the attendant dangers?
- What hardware and software assistance can be built in?

What you are dealing with is a classic case of handling a major intellectual property issue by acknowledging the risks and adopting non-legalistic methods of meeting those risks.

What you are doing is pro-actively managing a major corporate asset rather than merely waiting for something negative to happen and hiring an expensive lawyer to tell you that there's not much that can be done.

<u>The Need to Take A Wide View</u>

In reviewing your liability exposures, do not be blinkered. Often clients are so focussed on one potential risk that they completely ignore another risk - one that can be even more dangerous.

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For example, I have just been discussing third party access to databases as a copyright issue. It could also raise a number of others. For example, one of the great risks these days is professional liability and negligent mis-statement. Put simply, you might be liable for errors contained in the database if the third parties rely on the defective data to their detriment. What a pity if you were to build beautiful risk protocols that protected your intellectual property asset but left your company exposed to another, equally dangerous risk.

Cyber-documentation

Another likely area of review is the way that you document the entering of **contracts** with your customers. As you know, for a contract to be binding you must be able to show that there has been an offer and that it has been accepted. It is fundamental to the operation that if you are offering services, or goods for sale, that the terms of your offer are controlled.

When this is happening in a traditional environment, that process is difficult enough but on the Net, you would be wise to audit the formal process by which you intend to bind your clients so that you are absolutely sure that you are achieving your commercial intention. We are used to having our contracts negotiated, drafted and reviewed by lawyers and we are familiar with the benefits of having this done. We are not so familiar with having our cyber-commerce transactions similarly vetted. Yet the need is no less.

So, the first principle is REVIEW your existing liability management protocols, to recognise their importance and acknowledge the rationales behind them. When you are tackling a new business environment such as the Internet, it is unlikely that the basic rationale behind the protocols will have much changed. Most of them will still be relevant, but “best practice” demands that you continually subject your risk protocols to review and criticism. The arrival of the Internet in your company should be merely a trigger for that standard process.

STEP TWO - AMEND

After you have reviewed, you must amend.

For example, if you have an established business, you will have already developed **standard contracts and standard forms** which were developed for non-electronic purposes. Review them to ensure that they still fit your commercial needs and have suitably expert legal advisers check them over to ensure that they legally achieve your business purposes. They will almost certainly need amendment.

For example, a review of your **releases** or **licences** or **permissions,** which were drafted for use in non-electronic media, will probably not be adequate for the digital age. Similarly, most **exclusion clauses** in agreements for the provision of goods or services will need to be varied. The courts take a restrictive interpretation of exclusion clauses and they must be very specific and precise.

Similarly, the internationalisation of commercial Internet transactions means it has become very difficult to determine in which country the contract is being entered (and therefore **which country’s laws apply**). You are

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going to have to amend your standard contractual terms so that it this important issue is clearly defined. Its not hard, but the consequences of not doing it can be financially disastrous.

It can even affect **employment** liability issues: Let's assume that instead of giving employees a pay slip you decide to save a lot of money by providing them with e-mail notification, thus saving a lot of administration and a lot of trees. As some employers have recently found, this may be the cause of considerable staff agitation because standard Microsoft e-mail does not guarantee the privacy, confidentiality or sensitivity of data. Given the possibility that such material may be read, changed or copied, is this an appropriate use of the technology? Is there a better way of doing it?

Extend this example to a larger issue. If you are using the Internet to communicate information, which is **commercial in confidence**, have you adopted software encryption program which guarantees the **security** of that data? If not, you are either being irresponsible with the company's core business information or being irresponsible towards your client's business information. Either way, you are exposing your business to potential damage and loss. The more important the information, the more disastrous the effect of security breach, the greater the effect on your business and the greater the priority of this management issue.

We also know that **defamatory statements** delivered via the Internet are just as defamatory (and expensive) as similar statements made in a newspaper. If you are an employer whose employees may use their Net access to voice potentially damaging views, you must look at your existing protocols to see that they are still relevant to a digital system of distribution.

For example, newspapers have highly developed systems for having potentially defamatory material proofed by company lawyers before an article goes to press. These systems are cumbersome and difficult enough when the publication and distribution mechanism is physical, but they become vastly more difficult when those mechanisms are digital. What does your company have in place? Have they been amended to take into account the extraordinary effect of making every Internet user a publisher of defamatory or injurious statements - for which injuries the employer can be held liable?

STEP THREE - DEVELOP:

Doing business in cyberspace is not just about making money: it is also about learning. None of us are experts, no matter what our promotional brochures tell the world. It is a brave person who purports to be aware of all of the latest developments because every day, the landscape changes.

Accordingly, be prepared to continually develop your procedures. Be critical not self-congratulatory. What worked for the business last week will not necessarily be "best practice" next week.

Always seek to develop and improve the procedures you use to transact business on the Net. We often concentrate on making our Web Site more attractive, on making it fun, zany, cool and easy to use but forget that underneath that friendly attractive customer inter-face there is a real commercial purpose. Just as we keep working

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on the user-friendly aspects of our relationship with our cyber-customers we must spend similar attention and resources on ensuring that the commercial and legal imperatives of our business are well protected.

Let's use some examples that concern that essence of any successful business: quality communication with our clients:

1. There is little guarantee that a message on the Internet has been (a) received, or (b) received in the form it was sent. If you are presently operating an Internet business, it is quite likely that the system you are using has no protocol to check whether clients' communications actually get to you - and vice versa. If not, you should develop one.

2. Similarly in a commercial world when time is frequently of the essence, can you tell when a communication was actually sent or when it was actually received?

3. Can you prove who sent the message?

If you can't be sure of who, you are dealing with, what they are saying, when it was said, or even whether you are communicating at all, the long term foundation of your commercial enterprise on the Net, is fundamentally flawed. Forget about **enforceable contracts**; you have chosen to base your business solely on goodwill and mateship.

Ask any business affairs manager how many contract problems arise from poor communication levels and you will find that it is one of the most important factors in deals that go bad. Whether you see the consequences through the eyes of a lawyer or those of a marketing manager, the consequences go straight to your bottom line.

STEP FOUR - IMPLEMENT:

All the other steps were about identifying the threats and designing your firewalls to protect you from liability. This step is about actually building that firewall.

This is really a management issue. There is no point in developing risk management protocols if you don't have a system for implementing them. There is no substitute for developing clear, fully articulated implementation procedures and ensuring a high-level of staff training so that all staff members are absolutely clear as to their responsibilities. Again, this might seem obvious, but it is my experience that, all too often, the implementation issues are left to one or two people within the company who are marginalised. We all like to leave responsibility to others but it is important that we find ways of having all of the staff aware of the risk management protocols and, more than that, accept a degree of responsibility for their effectiveness.

STEP FIVE - SUPERVISE:

Supervision is that ongoing responsibility of management to ensure that the processes of Review, Amendment, Development and Implementation are an organic feature of the administration of the company.

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Not only is this a basic characteristic of any efficient management regime; it is also a basic feature of the company's legal regime. It is the only way that you can be sure that the commercial transactions and communications that you undertake will have the legal effect that you intend: maximising your commercial opportunities and minimising the attendant threats.

CONCLUSION

None of this legal and management stuff is revolutionary. The revolution is happening elsewhere. The Internet has created a new way of communicating. The importance of this is that when we change the way we communicate:

(i) a new cultural environment is created;

(ii) new economies are created; and

(iii) organisations are changed both in their internal and external function.

Why is this? Because information is affected by the technology by which, it is communicated. The means of communication affects the way we perceive the information being communicated and thus, inevitably, affects the information itself. It also affects the way we perceive the person with whom we are communicating and the way that we are perceived.

On the Net there is a certain atmosphere of digital anonymity. It is perhaps this characteristic that gives as much strength to the poor as to the rich, makes us blind to the beautiful as well as the ugly, which creates an environment in which there is no hunger or homelessness and responsibilities are only recognised according to the rules of the cyber-club.

But we must not let that illusion of digital anonymity trap us into believing that cyber-space is not just another part of our community. At the moment there are few laws and international treaties, which specifically cover cyber-space. These will increase. Ten years ago there were no court decisions about it; now there are. The law is not going to ignore cyber-space or the Net. Society cannot afford to allow that. In my view, it is not the issue of **defamation** or **pornography** or similar issues which will push governments to act, it will be in response to the corporate users of the Net.

That said, laws apply now; laws will continue to apply. These will not greatly affect your ability to undertake commerce on the Net. After all, pedestrian crossings don't actively save lives; they are merely social mechanisms of mutual convenience. Similarly, the laws of cyber-space will not stop you being hurt or stop you hurting others. Rather, it is a matter of ensuring that as corporate users of the Internet, you protect your own bona fide commercial interests whilst at the same time respecting the interests of those with whom you relate.

If change is a fundamental characteristic of the medium it is hardly surprising that effective commerce requires new approaches to familiar issues. The adoption of protocols to minimise the legal risks and maximise the commercial opportunity is going to be one of the characteristics of companies that successfully conduct profitable, long term, commerce on the Internet.