

## *Internet Taxes, UCITA, and Other Musings*

This column had its genesis in a couple of recent conversations. The first took place on an airplane. In my conversation with another passenger, he asked the question, "What exactly is technology law?"

The second conversation took place with a prominent lawyer in Michigan. He objected to the description of electronic commerce as a separate practice area. These two discussions made me think about what lawyers who work in the technology area actually do and what lawyers who want to work in this area need to think about for their training and development.

Before getting into the esoterica, however, let's turn to a couple of recent developments.

### **Internet Sales Tax Agreement**

Many of you will have heard of the Streamlined Sales Tax Project, which has been adopted by about 38 states. The purpose of that project is to promote a uniform system for the collection of sales taxes from Internet transactions. While the goal of that uniform system has not yet been reached, an interim ad hoc agreement among 37 states and several large retailers will lead to regular taxation of transactions that have previously escaped sales tax assessment and collection.

In early February 2003, an agreement was reached among a large number of retailers and these jurisdictions, resulting in the retailers agreeing to collect and remit sales taxes for Internet transactions. In consideration for this revenue boost and to avoid disputes about whether the retailers have the required tax nexus to the state, the states have agreed not to pursue the retailers who have signed the agreement for any back taxes. This amnesty gives a degree of relief to these retailers, although they remain subject to potential problems in other states that are not part of the pact. Because of this exposure, many of the retailers join-

ing the agreement have remained anonymous. However, several large retailers, including Wal-Mart Stores, Inc., Target Corp., and Toys-R-U's, disclosed that they would start collecting taxes on Internet transactions on a national basis.

While large retailers are certainly able to collect and remit taxes in all jurisdictions, smaller retailers are definitely at risk in the future. As any company that has sold goods in different jurisdictions has learned, sales and use taxes present a labyrinth of different processes, rates, exemptions, and exceptions. This will continue to be a challenge for all Internet retailers in the future. Stay tuned for more developments.

### **UCITA in the News**

Ever since the Uniform Computer Information Transactions Act (UCITA) was completed by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1999, the proposed model law has been the subject of widespread debate. Some consumer and special interest groups (such as the American Library Association) have led a spirited campaign against UCITA, calling it everything from anticonsumer to a sellout to the software industry. While the majority of UCITA provisions represent a fair balancing of the interests of users and vendors (in this author's opinion), some of the issues have created a substantial amount of controversy.

In August 2002, the NCCUSL approved a series of changes to the provisions of UCITA and sought to have the revised statute recommended by the American Bar Association (ABA). However, as a result of opposition from a number of sections at the ABA's midyear meeting in early February 2003, NCCUSL withdrew its request for a resolution recommending ABA endorsement. Whether UCITA is now dead or simply going back to the drawing board is an open question. Some opponents

have argued that the existing law is adequate, while proponents of UCITA have rightfully pointed out that current law requires an analysis of dozens of different statutes and common-law principles. Again, stayed tuned for further developments.

### **Is Technology a Practice or Just an Industry?**

This question is often posed by firms that are trying to grapple with the representation of technology companies and working on technology-related legal issues for other clients. If you consider the two questions raised at the beginning of this column, I would suggest that the answers are really in transition.

While lawyers doing work involving cyberspace law, including electronic commerce, licensing, privacy, and other disciplines, are seen as a specialized group, most consider themselves business lawyers at the core. (I do note, however, that many people come to this practice from other areas, such as litigation or intellectual property.)

I submit that the representation of clients in such transactions as electronic marketplace deals, intellectual property licensing, and system integration or outsourcing transactions requires specialized knowledge. However, it is no different than the lawyer who may specialize in financial services, real estate, commercial law, or mergers and acquisitions. In the end, I believe that lawyers have to recognize that practice in the technology field does require some special knowledge and experience but ultimately should become part of the business lawyer's stock and trade.

So what is special about doing a technology-related deal or representing a technology company? In our firm, we differentiate between the two areas. Within our business services group, there are a number of lawyers who are specifically involved in information technology, electronic commerce, and intellectual property matters. However, we also aggregate the services of many disciplines in our Technology Industry Group. The members of the Group

have experience not only in business law but also in the areas of tax, dispute resolution, life sciences, and venture capital. Firms that represent technology companies need to bring together multiple disciplines to represent the special interests of technology companies just as they bring together multiple disciplines to represent a real estate developer, a bank, a service organization, or a professional practice.

What, you may ask, are the skill sets that a technology lawyer should have? I would suggest that any lawyer who wants to represent technology companies or companies dealing with technology-related transactions, such as licensing or outsourcing, must have a good grounding in the following disciplines:

- contract law and commercial transactions
- intellectual property law
- an understanding of the business model of technology companies
- an understanding of what the customer will do with the product
- an understanding of the nomenclature used in the industry, which may vary dramatically from area to area
- a good understanding of some special financial issues such as the tax impact of transactions, revenue recognition rules under the accounting guidelines, and risk management issues related to the transaction.

Is this any different from any other subspecialty? Probably not, although the expectations of clients

can be quite different. If a technology client perceives you as someone who “doesn’t get it,” your likelihood of starting or continuing to do work for that company is limited.



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