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Practitioner's Perspective

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Re The E-Overlay on Modern Commercial Law

This month CCH and Aspen are launching a new product that illustrates how the world of commercial law has changed for the modern lawyer. Before the advent of our e-information economy, lawyers engaging in "general practice" had all but disappeared and specialties had taken over. Thus, the average mid-sized or large law firm had specialists in securities, consumer law, the Uniform Commercial Code, real estate, lending, environmental law, and so on.

Each of those disciplines still exists, but increasingly can no longer be practiced in the traditional way. In our information economy, each area has become subject to an overlay created by the explosion of new laws, or the application (or misapplication) of old laws, in new contexts.¹ These laws include, for example,

- new laws regarding electronic records and production of documents in lawsuits;
- intellectual property laws as applied to the average business (*e.g.*, a business obtaining licensed software or other information, or venturing onto the Internet);
- new laws regarding how customer identifying information is kept, used, and discarded;
- old laws that have always applied to "retailers," but that now apply to manufacturers using their websites to make direct sales to end-customers (whether or not the manufacturer realizes that the change in distribution changed what laws would apply);
- new laws creating multiple different and complex ways to take a plain old paper check and "clear" it electronically or imposing significant security obligations on retailers participating in payment card systems;
- old laws that no longer work for information economy items (*e.g.*, UCC Article 2 regarding sales of goods);
- new laws impacting what to look for in merger or acquisition due diligence (is there "open source" software code in that acquired product that will, unbeknownst to the acquiror, force disclosure of its inner secrets?);
- new opportunities and defenses for online activities; and so on (and on).

In short, it's a different ball game that, ironically, almost requires a return to general practice. But not your father's general practice. Today, the need is for an "information and e law" overlay on top of the other law at issue. Call it "e-commerce" and people will claim that they don't do "e-commerce." But they do, because everyone is doing something with a

computer and that means they are impacted by what I will call “e-commercial law” or “modern commercial law”—the name does not matter. If electronics are involved, the new world applies.

Which brings me back to CCH and Aspen. The publishers asked their practitioner advisors for their Computer Law Advisory Council what would be helpful to them in their practices. Our request was for a practical way into the “information and e law” overlay on modern commercial law, *i.e.*, a way to access the myriad legal developments impacting any transaction touched by electronics or information laws (“E-Overlay”). That is what CCH and Aspen have tried to produce with its new service, The CCH Computer and Internet Law Integrated Library. You will be hearing more about this electronic library from the publishers. My goal is briefly to explain why it’s relevant.

Whenever a digital system is used to create or perform commercial transactions, parts of the E-Overlay will kick in. Want to convert all of your paper records to e-records? Great—there are old and new laws on doing that and your records can be challenged for invalidity if you do it the wrong way.² That exposure would not exist if you kept the records on paper. Want to supply a consumer disclosure electronically instead of on paper? You can do that now—but only in compliance with detailed rules in the E-Overlay. Not worried about having to give one of those “data security breach notices” that seem to dominate the media these days, all because the last time a paper file containing personal data was taken, locks were added to the file cabinets and that was the end of it? If those files have been converted to electronic form, you should worry because the electronic status triggers coverage of those new statutes. Trying to decide whether to distribute a new information product (such as software or data) online or offline? Well, if you decide to do it online you can take advantage of new defenses that are not available offline.³

What about intellectual property? That used to be an area only lawyers for book and newspaper publishers or movie producers cared much about. But no longer. Copyrights, trademarks, and patents are now front and center in the lives of most businesses and individuals because everyone is using software, using the Internet, or making information products. If a business didn’t like the contract it made for a load of grain, it might well claim that the contract was invalid. If it tries that with a load of genetically licensed and patented corn, it might find itself wishing it had taken

another approach: it is the license contract that enables use without infringement. What if no intellectual property laws apply? After all, facts are part of the public domain so does that mean any business can “scrape” the Internet for facts and save itself the bother of gathering them itself? That would be a bad idea absent close examination of the contracts and “no trespass” signs posted for the facts being scraped. And cutting “fences” around a copyrighted product will do more than jolt you these days—it may be circumvention that violates a new federal law.⁴

And what about that old saying that with the advent of the Internet, every tiny business can be the corner drugstore to the world? True enough. But there are over 160 countries in the world and many of them are staking claims and litigating over when their laws apply not only to transactions, but also to data transferred about the transaction. Even within the United States, each state seems intent on enacting its own stable of new, non-uniform, and increasingly regulatory laws that are expanding the E-Overlay.⁵ How is one supposed to find, understand, and deal with these laws? My own answer was to write down the ones that impact my practice most directly.⁶ But that’s not all of them.

Hence, CCH and Aspen. Their new collection seeks to gather myriad resources from a number of specialized areas and make feasible “one stop shopping” both in and outside of the E-Overlay. This is a welcome step for those trying to navigate the waters of the E-Overlay.

Endnotes

- ¹ For a graphic illustrating this point and listing many of the new laws (or old laws with new applications), see <http://www.prestongates.com/practices/practice.asp?parentPracticeID=25&practiceID=7&showPage=detail>
- ² See *e.g.*, 15 USC § 7001(e) (if a law requires a document to be in writing, “the legal effect, validity, or enforceability of an electronic record of such contract or other record may be denied” if the electronic version does not meet certain requirements).
- ³ See *e.g.*, *Assoc. Bank-Corp v. Earthlink, Inc.* 2005 WL 2240952 (WD Wis).
- ⁴ See *e.g.*, 17 USC § 1201.
- ⁵ For example, an electronic search in 2006 of California statutes revealed almost 200 mentioning the word “Internet,” while many others mentioned “online” activities. Holly K. Towle and Raymond T. Nimmer, *The Law of Electronic Commercial Transactions*, 1-15 (2003, A.S. Pratt & Sons).
- ⁶ See *Id.* generally.