Cybercarriage of Goods: Implications for the Trucking Industry

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Year old partnership between Ford, UPS Logistics shakes 4 days from transport time, saves $1 billion.

"Sometimes it takes new thinking in the middle, coupled with web technology, to pull inefficiencies out of a supply chain. That is what the year-old alliance between Ford Motor Co. and UPS Logistics Group is demonstrating. The partnership has clipped four days off vehicle transport time and achieved annualized savings of $1 billion and more than $125 million in vehicle inventory and inventory carrying costs, respectively."[1]

This short news story reflects the impact of the marriage of transportation and technology in an era when the transmission of information has become the centerpiece of supply chain management and transportation has become the means to deliver the goods. In the past few years, much of the North American trucking industry has gone online in order to respond to ever-increasing demands for greater efficiency of service as well as accuracy and speed of information to the customer. Customers are now demanding the ability to track and trace cargo, book freight and

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1. Ken Contrill, *Rattling the Supply* Chain, TRAFFIC WORLD, Mar. 5, 2001, at 20.

check on cargo and equipment availability – all through one web site, in a real-time manner.[2] This is being provided not only by trucking companies that communicate with their customers over the Internet but also by new Cybertransport entities. These entities offer a variety of transportation services, from freight matching web exchanges for the purchase and sale of goods and transportation services, sophisticated logistics software, to an Internet-based transportation logistics company. Many of these new entities integrate procurement, supply chain management, logistics and specialized service and use web-enabled applications to offer a seamless service to a myriad of truckers, shippers and other businesses. This trend will become even more significant if the prediction of Deloitte Consulting is accurate, that by 2002 the number of companies buying most of their goods and services electronically will grow to 91% from 31% in October, 2000.[3]

The increasing competition within the transportation industry among all sizes of carriers has caused companies to move swiftly to offer services over the Internet, often without fully understanding the legal implications of their actions. This article will identify some of the legal issues facing motor carriers today, which plan to use the Internet either to complement their existing services or to start an Internet-based transportation company. Part I of the article will deal with legal issues related to protecting intellectual property. Part II will identify some fundamental legal issues for software license agreements. Part III will set out some specific legal issues for application service providers, which are being used as part of online exchanges, auctions, co-ops or other entities specifically created to manage transportation needs over the Internet. Part IV of the article will deal with contracting for services over the Internet, and Part V will provide a brief summary.

PART I PROTECTING INTELLECTUAL PROPERTY

1.1 Ownership

The first question for a company which intends to offer services over the Internet is, whether it wishes to develop a software program in-house and use its own hardware, license a software package from a third-party supplier but operate and manage the system in-house with its own hardware, or out-source all aspects of the service to an application services

2. Linda Rosencrance, *E-Commerce Speeds Business at U.S. Ports Technology Improves Cargo Flow, Provides Real-Time Information to Customers,* COMPUTERWORLD, Dec. 4, 2000, at 44.

3. Daniel L. Whitten, *E-Commerce Conferees Told Online Collaboration a* Necessity, TRANSP. TOPICS (Oct. 25, 2000), *available at* http://www.ttnews.com/members/printEdition/0005942.html.

provider (ASP) which will be responsible for handling all aspects of the information processing system. There are business advantages and disadvantages to each option. The internal development of software and management of the system offers the company ownership and control, but likely at a very high cost. Licensing software will reduce the cost significantly, but the company does not own it. An ASP results in even greater savings, as a result of its turn-key nature, but the operations of the trucking company could be seriously damaged if the ASP fails and the company is unable to access its data or if the ASP fails to deliver on its service level agreements to the detriment of the trucking company's reputation with its customers.

If the company decides to own its software rather than license the software from a third-party supplier or out-source to an ASP, it will have to take the necessary steps to ensure that no other party can claim an interest in the creation or modification of the software. A company may do this in two ways: it may either hire a software developer as an employee and stipulate in the terms and conditions of employment that the company owns all rights in the product, and the employee assigns all rights and waives all moral rights in the products being developed in favor of the company; or the company may retain an independent contractor and stipulate clearly in the terms of the contract that the intellectual property rights in all source code, object code and all proprietary information relating to the software program are owned by the company, and the contractor must assign its rights and waive its moral rights to the product in favor of the company.

1.2 Copyright

A company may believe that it owns the rights to software if it has paid, often a very substantial sum, for the development of software or a web site by an independent contractor. However, it would be gravely mistaken. As under existing Canadian and American copyright laws the person who originally creates the work holds copyright to it unless those rights are assigned in writing to the company. The assignment of copyright and waiver of moral rights should be clearly set out in the terms of the service agreement. In addition, while there is no requirement in Canada to register copyright under the *Copyright Act*, a company may wish to do so as it provides a presumption that copyright exists in the work, a presumption of ownership and entitlement to statutory damages.[4] While such presumptions may be rebutted, the registration of copyright puts the onus upon the defendant in any action for infringement. Registration may be done through the Copyright Branch of the Canadian Copyright

4. Copyright Act, R.S.C. ch. C-42 (1985) (Can.).

Intellectual Property Office.[5] The company may wish to register material related to web site development with the U.S Copyright Office as well.

Unlike the *Canadian Copyright Act*, the *U.S. Digital Millennium Copyright Act*, which was enacted in 1998, specifically addresses a number of Internet issues. It provides broader protection than its Canadian counterpart as it expands copyright protection for specific ways to protect copyrighted works from infringement through the use of technology, such as encryption or scrambling.[6] In addition, American law allows "fair use" of copyrighted material, which is considered to be broader than the Canadian standard of "fair dealing." As a result, any company, which intends to rely upon the respective copyright regimes to protect its intellectual property, should also understand that, while there are many similarities, the regimes are not identical.

1.3 Business Method Patents

1.3.1 United States

American patent law has continually expanded in scope, culminating with the decision of the U.S. Patent Office to grant a patent for computer-implemented business methods in *State Street Bank & Trust Co. v. Signature Financial Group Inc.*[7] Prior to that case the U.S. Supreme Court would not permit business methods to be patented for laws of nature, natural phenomena or abstract ideas.[8] In *State Street,* the invention claimed related to a data processing system which allowed mutual funds (the "spokes") to pool their assets together into a single investment portfolio (the "hub").[9] The system calculated the hub's daily income, expenses, and gains or losses, and allocated these on a daily basis to each spoke so that the net value of each spoke could be determined and a share price established.[10] This new process provided a number of benefits, including savings in administrative costs and tax advantages to the limited partnership.[11] The Court in *State Street* distinguished earlier cases, which had rejected attempts to establish business method patents

5. *See The Canadian Intellectual Property Office, available at* http://strategis.ic.gc.ca/sc_mrksv/cipo/cp/cp_main-e.html (last modified Sept. 24, 2001).

6. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2867 (1998), *available at* http://lcweb.loc.gov/copyright/legilsation/dmca.pdf.

7. State St. Bank & Trust Co. v. Signature Fin. Group Inc., 149 F.3d 1368, 1375-77 (Fed. Cir. 1998).

8. *See* Gottschalk v. Benson, 409 U.S. 63, 67 (1972).

9. State St. Bank & Trust Co., 149 F.3d at 1371.

10. *Id.*

11. *Id.*; *see also* Alec Porat, *The Availability of Business Method Patents and the Consequences Thereof*, Presented at the Fourth Annual Canadian IT Law Conference (2000) (a detailed review of the decision).

based upon mathematical algorithms.[12] It found that the practical application of the algorithm in *State Street* by the business process "transform[ed] data, representing discrete dollar amounts, . . . into a final share price."[13] This final share price was deemed by the court to be a "useful, concrete and tangible result" and, thus, created a new test for determining whether the claimed subject should be considered a practical application instead of an abstract idea.[14] The case has been interpreted to mean that a computer-implemented method of doing business should be patentable in the United States.

State Street has dramatically changed U.S. patent law by:

(a) increasing the scope of patentable subject matter now capable of patent protection in the United States;

(b) removing potential defenses to claims of patent infringement which increases the value of patents for business methods; and

(c) increasing the number of businesses affected by claims of infringement by patent holders.

Within 1½ years of the *State Street* decision, the number of business method patents issued by the U.S. Patent Office increased from 39 in 1997 to 301 in 1999.[15] There were also 2600 patent applications filed for computer-related business methods in 1999.[16] Included in those are business method patents of a questionable nature.[17]

Examples of business method patents, which are now used as part of the Internet mainstream include: Amazon.com's patent for a one-click method for purchasing items on-line, Doubleclick.com's patent for Internet banners, Priceline.com's patent for a reverse auction system and Netcentive's patent for an on-line loyalty or rewards program. The validity of many of these patents is now being challenged in litigation, either by companies which seek to declare the patent invalid or by the patent holders suing competitors, claiming patent infringement for the use of a patented business method.

A problem that could be faced by transportation companies which may be introducing one or more new business methods as part of their enhanced or new services is that they may be unknowingly infringing an-

12. State St. Bank & Trust Co., 149 F.3d at 1373.

13. *Id.*

14. *Id.*

15. William C. Smith, *Patent This*, 87 A.B.A. J. 48, 51 (2001).

16. *Id.*

17. *See* U.S. Patent No. 6,025,774 (issued Feb. 15, 2000) (A patent for securing collateral for a loan where the collateral is a leased vehicle. This patent consists of installing a GPS system in the leased vehicle, monitoring the status of the loan, determining the position of the vehicle through the GPS if the loan is in default and repossessing the vehicle.); *see also* U.S. Patent No. 5,851,117 (issued Dec. 22, 1998) (a method of training janitors to dust using pictorial displays).

other party's patent. The U.S. Patent Office permits a party to file a provisional patent application, with an estimated cost of USD $1-2,000, which establishes a priority date. The applicant then has a further year to complete and file its full patent application. If the applicant is eventually granted the patent (which could take at least another year, possibly longer), the grant will be retroactive to the priority date. The patent holder may then attempt to pursue a claim of infringement against a party that developed its business methods without any knowledge of the patent because of the delay in the issuance of the patent by the Patent Office. Under these circumstances, a transportation company could realistically spend hundreds of thousands if not millions of dollars to develop its own system, and then one day receive a letter claiming patent infringement and demanding licensing fees for a business process the company never knew existed.

In order to counter this apparent anomaly as well as the precedent established by *State Street*, the U.S. Congress included a provision in the *American Inventors' Protection Act* (AIPA) that provides a "prior use" defense to a claim of infringement.[18] However, the defense provided is significantly limited as a defendant must meet all of the following tests: (i) the method used by the defendant must have been in working form; (ii) it must have been used internally and externally at least one year before the effective filing date of the patent; and (iii) its commercial use must have taken place in the United States.[19] This last ground means that companies doing business in Canada which wish to operate in the United States may not rely upon the defense.

1.3.2 Canada

Canada does not yet recognize business method patents, although the recent decision by the Federal Court of Canada in the *Harvard College* case[20] may have a significant impact on whether software and business methods will be patentable in Canada as in the United States. The only previous Canadian case that focussed on patentability of computer software was *Schlumberger Canada Ltd. v. Commissioner of Patents,* where measurements from boreholes drilled through geological formations were recorded on magnetic tape and transmitted to a computer which converted the information into charts, graphs and tables.[21] In rejecting the application for patent, the Federal Court of Appeal viewed the mathematical formula used to convert the information as a "mere scien-

18. Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501A-521, 556 (1999).

19. *Id.*

20. Presidents and Fellows of Harv. Coll. v. Canada Comm'r of Patents, [2000] 4 F.C. 528.

21. Schlumberger Can. Ltd. v. Comm'r of Patents, [1981] 1 F.C. 845.

tific principle or abstract theorem" and therefore not patentable.[22] The decision was reflected in guidelines established by the Canadian Patent Office in 1995 which state:

1. Unapplied mathematical formulae are considered equivalent to mere scientific principles or abstract theorems which are not patentable under Section 27(8) of the *Patent Act.*

2. The presence of a programmed general-purpose computer or a program for such computer does not lend patentability to, nor subtract from, an apparatus or process.

3. It follows from 2, that new and useful processes incorporating a computer program, and apparatus incorporating a programmed computer, are directed to patentable subject matter if the computer-related matter has been integrated with another practical system that falls within an area which is traditionally patentable. This principle is illustrative of what types of computer-related applications may be patentable, and is not intended to exclude other computer-related applications from patentability.

Claims beginning with the phrase "A program" or "A program for" are unpatentable for failure to adhere to Section 2 of the *Patent Act* as not falling into a useful art, process, machine, manufacture or composition of matter.[23]

In *Harvard College*, the Federal Court of Appeal approved the patentability of Harvard's transgenic mouse, adopting the reasoning of the U.S. Supreme Court in *Diamond v. Chakrabarrty,*[24] one of the leading American decisions which formed the basis of the reasoning in *State Street.* By relying heavily on the majority interpretation of "invention" in *Chakrabarrty* and construing it broadly, the Federal Court of Appeal appears to have adopted the test in *State Street* in distinguishing practical applications from abstract theorems. In so doing, the Court may have laid the groundwork for permitting computer software and business methods to be patented in Canada. Leave to appeal the *Harvard College* decision has been granted by the Supreme Court of Canada, and the Canadian Patent Office is not processing any applications which could be affected by the decision until the Supreme Court issues its ruling.

1.3.3 United Kingdom

At the time of writing this article the U.K. Patent Office has released a report that concludes that software should only be patentable where

22. *Id.*

23. CAN. INTELLECTUAL PROP. OFFICE, MANUAL OF PATENT OFFICE PRACTICE CH. 16.08 (1998).

24. Diamond v. Chakrabarty, 447 U.S. 303, 308 (1980).

there is technological innovation and it rejects the business method patent approach.

PART II SOFTWARE LICENSE AGREEMENTS

2.1 Purpose of Software License

A license agreement will be required where the company (the "licensee") intends to use software developed by a third-party supplier (the "licensor"). Under the software license, the licensor grants the licensee the right to use the software without transferring any ownership or property interest in the intellectual property inherent in the software. Licensing software has become the dominant approach adopted by companies: for the licensor it is a means to maximize the market value of the software product, and for the licensee it provides access to a product for considerably less than it would cost to develop or purchase its own product.

To a great degree the ability of an end-user to negotiate the terms of the license agreement will depend upon its respective bargaining position vis-à-vis that of the licensor. For example, a small transportation company which licenses a standard commercial off-the-shelf (COTS) software package will have virtually no bargaining position with the licensor, especially if it is a computer giant like Microsoft, Oracle or SAP. However, a large company, which may be an early licensee that would provide the licensor with credibility in the market place for subsequent licensing transactions, may be able to negotiate much more favourable terms.

2.2 Types of Software License Agreements

There are several different types of software licensing agreements, notably "standard form," "shrinkwrap" and "clickthrough" (or "clickwrap"). Each of these is discussed below.

2.2.1 Standard Form

A standard form licensing agreement is typically used for software which is generally not mass-produced and is developed for a specific purpose. It is often on paper and requires signatures because the cost of the service or product is usually quite significant. It is also the type of agreement where there may be true negotiations between the licensor and licensee. It would be governed by the standard rules of contract law.

2.2.2 Shrinkwrap

The shrinkwrap software licensing agreement is used for mass-produced software which is sold on diskettes or CD ROM. The shrinkwrap agreements are not signed and are non-negotiable. The package containing the diskette or CD ROM is covered by shrinkwrap cellophane, be-

neath which there is normally standard wording that provides that tearing the cellophane or opening the package binds the user to the terms and conditions of use. However, to be enforceable, the owner of the software must provide the user, who has not had an opportunity to review the terms and conditions before opening the package, an opportunity to return the software if the contractual terms are unacceptable.[25] The courts would likely not enforce a contract where the licensee is unable to return the software after reviewing the terms and conditions inside the package.

2.2.3 Clickthrough or Clickwrap

These agreements are used to license software which is downloaded from or used on the Internet. They are similar to the shrinkwrap agreement as they are for wide usage, not signed by the parties and non-negotiable. The user is normally required to agree to the terms and conditions set out in the license by clicking on the "I Agree," "I Accept" or "Submit" box. Some clickthrough contracts force the user to scroll through the agreement before clicking their acceptance while other web sites put the onus upon the user to first click on the "Terms and Conditions" box.

2.3 Checklist of Issues[26]

The following are some of the issues that should be considered by counsel required to review a software license agreement of any type, to negotiate amendments to a standard form software license agreement, or to draft a software license agreement:

(a) Description of the Software

• Software should be thoroughly and clearly described (including reference to release or version) so as to leave no doubt as to what is the subject matter of the license.

• Description should specify whether the license applies to the object code alone or to both the object code and source code versions of the software. Source code is typically not provided.

• If the license is limited to object code, then the licensee should consider entering into a source code escrow arrangement.

• If the source code remains with the licensor, then the licensee should consider the inclusion of maintenance and support provisions in the software license agreement or in a separate agreement. Maintenance

25. ProCD, Inc. v. Zeidenberg, 86 F. 3d 1447, 1452-53 (7th Cir. 1996); Hill v. Gateway 2000 Inc., 105 F. 3d 1147,1148 (7th Cir. 1997).

26. This checklist came from an article written by my colleague, Graham Robson, of Aikins, MacAulay & Thorvaldson. *See* Graham Robson, *License and Purchase Agreements in Technology Transactions,* The Law Society of Manitoba (Feb. 2000).

and support may be critical to the licensee, and may over time exceed the cost of the license itself, so careful attention should be given to the needs of the licensee in this regard.

• All operating manuals and related documentation required for the effective use of the software should be thoroughly and clearly described. The licensee should receive updated documentation if it receives updates to the software.

(b) Grant of License and Restrictions

• A bundle of rights granted to the licensee, and restrictions thereon, is an integral part of the license. The licensee must carefully consider whether the permitted uses granted will allow the licensee's intended use of the software.

• A license may be non-transferrable or transferrable, non-exclusive or exclusive, indefinite or definite, fully paid or ongoing license fees, and otherwise limited or full rights.

• If the license is limited to a definite term, the licensee must ensure that the term is sufficient for it to make full and effective use of the software.

• Unlimited license is rare. Some rights of use and restrictions include the following:

• Right to use software only in object code format.

• Right to make one copy of the software only for back-up purposes.

• Right to use the software for internal business purposes only.

• No right to assign the license or sublicense the software.

• No right to modify the software.

• No right to reverse engineer, decompile or disassemble the software.

• No right to use the software on a network.

• The licensee should consider modifying restrictions on use to allow for it to make modifications to the software (i.e., to allow it to make "minor" custom modifications as its needs change), and to permit it to assign the license to affiliates.

(c) Pricing

• Pricing and payment terms can be as creative as the parties require and agree to.

• It is often advantageous to carve up the license fee into payments upon the successful occurrence of specified milestones (e.g., upon execution of the agreement, upon delivery of the software, and upon final acceptance of the software).

• Maintenance and support, if included in the software license agreement, should similarly address fees and payment. If maintenance and support is for a longer term, then the licensee should consider restricting the licensor's ability to freely increase maintenance and support fees.

(d) Representations, Warranties and Limitation of Liability

• Generally software is licensed on an "as is" basis with extensive exclusions and limitations of liability for all types of losses.

• The licensee should request the following representations and warranties:

• The licensor is the owner of the intellectual property rights in the software and/or has the right to license the software to the licensee.

• The software does not infringe the intellectual property rights of any third party.

• The software will perform in all material respects with its performance and functional specifications for at least 90 days from the date of final acceptance.

• The licensor has used all commercially reasonable efforts to ensure that the software is free from computer viruses.

• The software does not contain any clocks, timers, counters, or other limiting or disabling devices.

• The media on which the software is recorded shall be free from material defects upon delivery and for a period of 90 days from the date of final acceptance.

• The licensor normally will seek extensive limitations on its liability, but it should be responsible for at least direct damages in an amount equal to the license fee for the software. There should be no limits on liability for claims regarding intellectual property, unauthorized disclosure of the licensee's confidential information or personal injury or property damage.

(e) Confidentiality

• Although the software constitutes the confidential information of the licensor, the agreement should include an obligation on the licensor to keep confidential any of the licensee's confidential information provided to the licensor. Typically both parties agree to keep the confidential information of the other confidential.

• The licensor may include a clause whereby the licensee agrees to the granting of an injunction in the event it breaches the confidentiality covenant.

• The licensee may want to include an obligation on the licensor to

obtain the licensee's permission to use its name in promotional materials and in other publicity.

(f) Delivery and Installation

• It is beneficial for both parties to designate a project manager who is responsible for delivery and installation and can make decisions about the rights and obligations of that party.

• Ideally, delivery and installation of the software should be carried out in accordance with an implementation schedule agreed to by the parties. The licensee should carefully consider the ramifications to it if the software is not delivered and installed on time. The agreement should clearly indicate who is responsible for installation.

• The implementation schedule should specify a date for the completion of each key milestone. If the licensor fails to meet any of the milestones, the licensee may be provided with remedies (e.g., license fee reduction, liquidated damages, termination and refund).

• Milestones commonly include successful completion of acceptance testing.

• Acceptance testing is a critical checkpoint for the licensee as it permits the licensee to satisfy itself that the software functions and performs according to agreed to specifications. Acceptance testing generally provides the licensee with a limited time to test and identify problems with the software and time for the licensor to rectify problems brought to its attention.

• If the licensee's data needs to be converted to make use of the new software, then the agreement should set out details as to who does what and the associated costs.

(g)T raining

• The licensee's initial and ongoing training requirements for its personnel to effectively use the software should be carefully considered and clearly described.

• Cost of initial training should be set out, as well as limits on the cost of future training.

(h) Dispute Resolution

• Given the continuing and possibly long-term relationship between the parties, a dispute resolution mechanism, typically an arbitration provision, should be included in the agreement for the benefit of the parties.

(i) Termination

• It is typical for the agreement to permit termination on breach of the other party's obligations, and possibly on change in control.

• The licensee should seek to limit termination by the licensor only for "material" breaches by the licensee, and provided the licensee received written notice of the breach and a period of time to cure same prior to any termination.

• Upon termination, the licensee is typically required to cease using the software and to return or destroy all copies of it. Parties would be required to return the confidential information of the other.

PART III APPLICATION SERVICE PROVIDERS

Transportation companies which provide services over the Internet generally fall into several categories of service providers: single source providers which have brought their offline services online; auctions and exchanges, the majority of which serve primarily one mode of transport; third party logistic providers which provide outsourcing services to shippers and carriers which seek transactions; and marketplaces which provide online transportation procurement and a marketplace to match services. Many of these service providers consist of strategic alliances of transportation companies, logistic providers and software and hardware companies (such as Microsoft, Oracle, Sun Microsystems, Commerce One and SAP).

Most of the alliances have chosen to use an ASP to rent access to outsourced customized software in a hosted application environment. The advantages of using an ASP include significant cost savings (the Gartner Group estimates 50% savings) and highly specialized software which is customized to service a wide range of locations. While ASPs have required enormous amounts of capital to license or create (and then integrate) the software and to build the enormous data centers required to offer their services,[27] the Gartner Group has predicted that the worldwide market for ASPs will reach more than $25B by 2004.

Unlike earlier models, such as enterprise resource planning (ERP) software, which are used to handle all company functions, from sales and procurement to finance and marketing, and which reside internally, an ASP provides compiling, ordering, managing, storing and reporting services and resides *online.* This allows the data to be available over the Internet anywhere in the world at the same time.

27. *See* Jim Kerstetter, *Software Stakeout: Application service providers promised to transform the way business is done. What happened?,* BUS. WK., Mar. 5, 2001, at 72 (US Internetworking Inc. received $500M in venture capital and had a "burn rate" of $80M a quarter).

However, there is a major concern with using an ASP. The Gartner Group predicts that 60% of the ASPs presently operating will be out of business by the spring of 2002 by virtue of consolidation within the industry or lack of funding.[28] There are examples of ASPs which have already ceased to operate: Red Gorilla, which had 33,000 active clients and went out of business with little notice to those clients, hotoffice.com and Pandesic, which were jointly owned by Intel and SAP.[29]

3.1 Things to Consider Before Proceeding With an ASP

Any transportation company considering a relationship with an ASP must first undertake a serious due diligence exercise with a focus on who owns and controls the data that is generated, and what guaranteed access rights will there be. For example, one existing exchange states on its web site that the data may be shared with its subsidiaries and joint venturers. It also provides that all of the exchange members may access other users' contact information and licenses them to use the information for related exchange communications services and member interaction. It does not indicate how it will enforce these. Other exchanges do not disclose customer transaction-specific data. Before a trucking company enters into this kind of relationship, it must determine how much of its (and its customers') information it wishes to disclose to a potential competitor.

The company should also ensure that it will regularly receive copies of data files, and a copy of the source code for the application should be put into escrow in the event the ASP ceases to operate.

The next issue which must be addressed, is the nature and extent of service level commitments. How frequently will the data be backed up? Will the ASP provide training and in what form? Will the ASP also provide maintenance and support functions or will the company be required to do that? What is the anticipated response time in the event that the system does not function properly? Will the service be offered 24 hours a day on a year round basis? Is the ASP capable of providing complete service during peak periods? Will there be a back up on a regular basis? Does the ASP offer insurance if there are service interruptions? What is the ASP's disaster recovery plan? Finally, the contract should stipulate whether the company has the rights to terminate the agreement with the ASP early if certain events occur.

The ASP will be working with other software which will be continually upgraded. It is important that the service level agreement include the upgraded software and the ability to integrate the software capabilities.

28. *Id.*
29. *Id.*

The agreement must specify all of these performance levels as well as all of the related costs.

The company must also determine who else will be utilizing the services of a particular ASP before proceeding with that ASP. This is an important consideration from the perspective of minimizing inadvertent commingling of information between or among competitors.

As well, the company must determine whether or not the application that will be utilized by the ASP can be customized to provide the company with the functionability that it requires and, if so, who will own the customizations. The agreement must also address whether there will be upgrades and enhancements available throughout the term of the agreement and, if so, the cost and who will control the product after it is released.

Finally, the company must have a back-up plan should its ASP suddenly go out of business or be otherwise incapable of providing the services required by the company in order to survive. Such a plan is critical to ensure that the company can operate and move its information in-house or to a different service provider without affecting the service it provides to its shipping customers. This plan may include a back-up host with compatible expertise, equipment and the necessary systems to provide the services. The company should also determine what rights it will have to the software, including the source code, in the event that the ASP ceases to operate or goes bankrupt.

PART IV CONTRACTING ON THE INTERNET

4.1 Electronic Agreements

Both the Canadian and American governments recently introduced legislation to establish the legal validity and enforceability of electronic agreements created over the Internet and to permit the use of electronic signatures. In Canada, the work of the Uniform Law Conference on Electronic Agreements has been the model of *Canada's Personal Information Protection and Electronic Documents Act*,[30] which came into effect January 1, 2001, and similar provincial legislation, introduced to date in Saskatchewan, Ontario, Manitoba and Quebec. *The Manitoba E-commerce Act* specifically contemplates the use of electronic commerce for carriage of goods.[31]

In the United States, the *Electronic Signatures in Global and Na-*

30. *See* Personal Information Protection and Electronic Documents Act, S.C. 2000, ch. 5 (2000) (Can.).

31. Electronic Commerce and Information, Consumer Protection Amendment and Manitoba Evidence Amendment Act, R.S.M. 2000, ch. E-55 (2000) (Can.) *available at* http://www.gov.mb.ca/chc/statpub/free/pdf/b31-1s00.pdf.

tional Commerce Act, effective as of October 1, 2000, provides that a signature, contract or other record relating to a transaction cannot be denied legal effect, validity or enforceability solely because it is in electronic form.[32] In addition, a contract relating to a transaction cannot be denied legal effect, validity or enforceability solely because it contains an electronic signature.[33] The "E-Sign Act" also provides that if a transaction must legally be in writing, the electronic record must be in a form that is capable of being retained and accurately reproduced for later reference.[34] There are also provisions in the Act to force states to apply uniform standards for any commercial transactions which may transcend state boundaries.

4.2 Form of Web Site Agreements

There are two ways to contract on the Internet, either through a clickthrough (or clickwrap) agreement or reverse unilateral agreements. In addition to being used to download licensed software, the clickthrough agreement is used to sell goods and services over the Internet. The reverse unilateral contract is also used to contract over the Internet. However, this form of agreement does not require the user to click his/her acceptance on any box. Instead, the user is deemed, by continuing to use the web site, to have read and accepted the terms and conditions set out in it. Recent case law indicates that the courts may be reluctant to enforce a contract where a user is not required to confirm acceptance by clicking the "I Agree" or "I Accept" icon.[35]

4.3 Terms and Conditions of Use

Every web site should contain the fundamental terms and conditions governing its use, thereby limiting the liability of the web site owner. The amount of protection that the owner can expect may depend upon a number of factors:

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32. Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, 114 Stat. 464, 464 (2000).

33. *Id.*

34. *Id.* at 466.

35. *See* Specht et al. v. Netscape Communications Corp. and America Online Inc., No. 00 Civ. 4871 (S.D.N.Y. 2001) *at* http://www.nysd.uscourts.gov/courtweb/pdf/D02NYSC/01-07482.PDF (The Netscape website featured a link which read "Please review and agree to the terms of the Netscape Smart Download software license agreement before downloading and using the software. The judge cited the following deficiencies in rejecting Netscape's motion to enforce the provisions of the agreement: 1) the link did not require visitors to affirmatively indicate their assent; 2) the permissive wording of the link was a mere invitation rather than an obligatory condition; and 3) the link was located before the area of the site where visitors could download the software and was not visible without further scrolling.).

4.3.1 General terms – same as off-line contracts

- parties to the agreement
- identification of the products and/or service
- payment
- delivery
- risk of loss allocation
- returns
- currency
- warranties
- termination
- liability
- governing law

4.3.2 Additional terms

- specifics of the transaction
- the parties who are permitted/or not permitted to use the site
- details of when an offer will be deemed to be accepted
- the set of symbols or codes that constitute an electronic signature
- acknowledgement that the parties intend to be bound by the terms of the electronic transaction and that they will not later challenge the transaction on the basis of its electronic nature
- security procedures to be followed
- privacy statements and permitted use of the information
- warnings about misuse of proprietary information
- who bears the risk in the event of an error in transmission, and procedures to correct
- dispute resolution
- limitations of liability
- hyperlink disclaimers
- other industry specific terms

4.3.3 Checklist

- make the users (trucking companies and shippers) register and accept the terms by clicking on "I Accept" or "I Agree" box before permitting a transaction
- retain record of registration and all transactions
- post notices for protection (copyright, trade-mark, privacy and hyperlink policy)
- ensure terms are in clear, unambiguous language
- key, unusual or onerous terms including disclaimers (e.g. payment,

delivery, returns, liability, currency) should be highlighted by CAPITALIZING, BOLDING or *italicizing*)

PART V SUMMARY

The demand for more efficient and cheaper transportation services will continue to force trucking companies to use the Internet to communicate with clients and to consider offering new web-based services. There are tremendous opportunities to compete effectively and, in certain cases, to integrate a wide variety of services through new web-based applications. However, there are a number of legal issues which must be identified and addressed relating to the ownership and control of the data that has now become so essential and so valuable, and to doing business in an electronic environment. A significantly greater understanding of these issues must be obtained before the tires hit the cyber-highway. Carriers which race into this new arena without first considering the legal implications face the possibility that their reliance on these new systems, without the proper precaution and planning, could be their undoing.