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Published in:
Corporate Governance eJournal

DOI:
[10.53300/001c.6928](https://doi.org/10.53300/001c.6928)

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Recommended citation(APA):
Svantesson, D. J. B. (2015). Legal risk management in online sales of food and wine. *Corporate Governance eJournal*, 1(1). <https://doi.org/10.53300/001c.6928>

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4-21-2015

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<http://epublications.bond.edu.au/cgej/31>

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Legal risk management in online sales of food and wine

Abstract

Most businesses have an online presence, but an online presence brings a legal risk exposure. The extent and type of risks that businesses expose themselves to vary depending on the industry as well as how they structure their online presence. This article examines a selection of legal risks facing businesses engaging in online sales and marketing of food and wine products. It also presents strategies for managing those risks.

Keywords

Online legal regulation, food and wine, cross-border laws, IP, data privacy law

Disciplines

Food and Drug Law

LEGAL RISK MANAGEMENT IN ONLINE SALES OF FOOD AND WINE

DAN JERKER B SVANTESSON*

Most businesses have an online presence, but an online presence brings a legal risk exposure. The extent and type of risks that businesses expose themselves to vary depending on the industry as well as how they structure their online presence. This article examines a selection of legal risks facing businesses engaging in online sales and marketing of food and wine products. It also presents strategies for managing those risks.

INTRODUCTION

The sale and marketing of food and wine products is associated with the same types of legal issues as the sale and marketing of any other product. Australian law, like the law in most countries, contains detailed provisions dealing with consumer contracts, as well as contracts in general. Sales result in tax obligations, product liability rules come into play when something goes wrong post-sale, and marketing laws regulate how the products may be portrayed to the public. Issues such as these are typical of just about all forms of commercial activity.

Furthermore, once sales and/or marketing initiatives cross borders additional legal complications such as customs regulations and overlapping competing trademarks may arise. Again, these issues manifest themselves in the same way in relation to the sale and marketing of food and wine products as they do in the sale and marketing of other products.

In a similar vein, we may conclude that the online sale and marketing of food and wine products bring into play the type of legal issues that are characteristic of all forms of Internet trade, for example the necessity of complying with data privacy laws and the risk of domain name disputes.

Against this background, it would be tempting to conclude that there is little reason to specifically consider the topic of legal risk management in online sales of food and wine. Such a conclusion would, however, be misguided.

The sale and marketing of food, and even more so wine, is associated with particularly strict regulation in many countries. As a consequence, once the sale and marketing of food and wine enters the online arena – characterised by a certain ‘borderlessness’ – it is immediately exposed to a particularly complex matrix of overlapping, and in some cases contradictory, legal rules. This makes it important to consider legal risk management in online sales of food and wine.

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EXAMPLES OF AREAS OF FOREIGN LAW THAT APPLY TO AUSTRALIAN BUSINESSES

It is pertinent to consider in more detail the areas of foreign law that may be of particular importance for Australian businesses engaging in online sale and/or marketing of food or wine products.

At the stage of planning for any form of commercial online presence, producers and sellers need to take account of general consumer protection law, such as the rules against misrepresentation or misleading and deceptive conduct, as well as laws relating to labelling. The details of the applications of all these laws vary across the globe, and in particular, labelling laws can be quite technical. One need only consider how Australian law approaches labels indicating that a product is 'Made in Australia' to recognise the complexity of this area of law.¹ One area of trade that may be particularly legally sensitive is the labelling of products as 'Organic' and 'Free Range'. And here, it must be stressed it is not sufficient to comply with Australian law if the products are marketed or sold outside Australia as well.

Given the fact that many Australian lawyers are ill-equipped to give advice on applicable foreign law, this imposes a considerable burden on producers, sellers and marketers seeking to comply with applicable foreign laws.

While many categories of goods and services can be sold across borders without much complication, certain products like pharmaceuticals and alcoholic beverages, as well as certain food products, may well be illegal in certain countries. And where the sales are legal, they may be restricted to certain sellers, or associated with age-restrictions. This implies a particularly strong need for caution in the online sale and marketing of food and wine.

In the context of intellectual property (IP) law, we can also find particular complications in relation to the (cross-border online) sale and marketing of food and wine. While IP issues may arise in relation to many different types of products, the food and wine sector is particularly affected given the additional layers of protection that apply to certain types of products. The restrictions on the use of the word 'champagne' is perhaps the best known example of how geographical indication affects what is, and what is not, allowed when it comes to the use of certain geographically-based names used to describe certain types of products.²

Other areas of law that should also be considered include:

- Product liability;
- Customs regulations;
- Tax law;
- Domain name laws;

¹ See Part 5-3 of the *Competition and Consumer Act 2010* (Cth) sch 2 [*Australian Consumer Law*] dealing with country of origin representations.

² Madeline Taylor and Tim Jay, 'A Case of Champagne: a Study of Geographical Indications' (2013) *Bond Corporate Governance eJournal* 2
<http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1028&context=cgej>.

- Trademark law;
- Copyright law; and
- Data privacy law.

In the next section, I will pay particular attention to the last of these areas – data privacy law – to illustrate the complicated legal framework which operates in the sale and marketing of online food and wine products.

DATA PRIVACY LAW AS AN EXAMPLE

The sale of food or wine online typically necessitates the collection of what the law may deem to be ‘personal information’. For example, to deliver the product, the seller will usually need to collect details such as the buyer’s name and address. Further, to process the payment, credit card details are commonly collected.

Indeed, the online marketing of food and wine products also may involve the collection of types of information that may be regarded as personal information, such as the IP address of the user’s computer, alone or in combination with other data, including ‘cookies’ which may monitor online behaviour.

The conclusion that some online marketers and sellers of food and wine products may be subject to the *Privacy Act 1988* (Cth) is inescapable. But from the discussion above, it should be clear that, although most Australian lawyers would only consider Australian law, we cannot actually stop there. If the sale is to a person outside Australia, or indeed if personal information of a non-Australian is collected as part of marketing, the Australian business responsible may well have to comply with foreign data privacy laws.

For example, the world’s strictest data privacy laws – those of the European Union – apply in an extra-territorial fashion where certain conditions are met. Thus, even in the case of a one-off sale to a European customer, an Australian business may need to follow Europe’s strict data privacy law.

This is a serious matter, given that one of the key features of the proposed reform of EU data privacy law is that violations of the forthcoming Data Protection Regulation can result in fines of 2-5% of the offending company’s annual global turnover – a serious amount of money for most Australian businesses. Others will seek to impose even higher penalties. For example, Trinidad and Tobago’s *Data Protection Act 2011* imposes fines up to 10% of the offending party’s annual turnover.⁵

The EU has specifically stated that one aim of the reform is to ensure that companies based outside Europe will have to apply the same rules as European companies when they do business in the European market.

³ For more information about this Act, see Edmund D Christo, ‘Data Protection in Trinidad and Tobago’ (2013) 3(3) *International Data Privacy Law* 202-9.

In a speech on 4 March 2014, European Commission Vice-President Viviane Reding stressed that the proposed Data Protection Regulation, 'is about creating a level playing-field between European and non-European businesses. About fair competition in a globalised world'.⁴ Other countries around the world adopt a similar reasoning to justify why their laws ought to apply to foreign businesses.

This argument does not lack merit. However, the idea that the regulation's wide reach creates 'fair competition in a globalised world' is questionable. In fact, complying with the complex EU data privacy law is likely to be prohibitively expensive for small and medium-sized non-EU businesses interacting in the European market on an irregular basis. The result will be that only large foreign businesses, and foreign businesses that do not intend to comply with EU law, will be able to afford to enter the European market.

The true scope of the complexity becomes clear when one considers that by mid-2014, 103 countries across the globe had enacted national data privacy laws.⁵ Hence, focusing on data privacy law alone, any Australian online business that does not geographically restrict its customer base may need to take account of more than 100 different national laws.

PROTECTIVE MEASURES

The above has illustrated that any cross-border sales or marketing exposure is accompanied by a corresponding potential legal risk exposure. In other words, the more countries you interact with, the greater your legal risk exposure measured in the number of countries' laws you need to consider and the number of countries in which you may be sued.

So how can those engaging in online sales and marketing of food and wine products cope with this? One obvious option is to include 'choice of forum' and 'choice of law' clauses in the contracts they enter into with buyers. A wine retailer from Queensland may, for example, include in its contract a clause specifying that any litigation relating to that contract must be undertaken in the courts in Queensland. Similarly, the wine retailer may stipulate that any dispute arising under the contract is to be governed by the laws of Queensland.

Measures such as these are common and sensible, but of limited effectiveness. First of all, not all online contracting forms are equally effective. For example, so-called 'browse-wrap' agreements which typically display 'terms and conditions' on a website may not always be held as binding since there is no positive act affirming the user's consent to those terms.⁶ The better alternative is to use so-called 'click-wrap' agreements where the user has to actively indicate their consent by clicking on a button labelled 'I agree', or similar terms requiring the consumer to choose and action a response.

⁴ Viviane Reding, 'The EU Data Protection Regulation: Promoting Technological Innovation and Safeguarding Citizens' Rights' (Speech delivered at European Commission Intervention at the Justice Council, 4 March 2014) http://europa.eu/rapid/press-release_SPEECH-14-175_en.htm.

⁵ Viviane Reding, 'The EU Data Protection Regulation: Promoting Technological Innovation and Safeguarding Citizens' Rights' (Speech delivered at European Commission Intervention at the Justice Council, 4 March 2014) http://europa.eu/rapid/press-release_SPEECH-14-175_en.htm.

⁶ *Ticketmaster Corp et al v Tickets.com*, US Dist Lexis 4553 (CD Ca, 27 March 2000).

Second, the laws of various countries typically include mandatory provisions – for example, certain provisions that protect weaker parties such as consumers – which the parties cannot exclude by contract. In relation to such mandatory legal provisions of a particular country, there is nothing the contracting parties can do unless they avoid the application of the law from that country altogether.

Finally, while the sale of wine or food products, whether online or offline, always involves a contract, there is typically no contract between those marketing such products and the objects of the marketing. And obviously, where there is no contract at all, the marketer cannot rely on contractual provisions to limit her legal risk exposure.

These observations highlight a need for those engaging in online sales and marketing of food and wine products to consider taking steps to limit the number of countries in which they have customers.

Currently, the most effective way in which to restrict the geographical exposure of a website is to use so-called ‘geo-location technologies’: that is, technologies that allow the identification of the geographical location of Internet users. Such technologies have become a rather pervasive aspect of modern Internet use:

Geolocation services and location-aware software applications have become increasingly popular over the last decade both online and on mobile phones. They cover a vast array of services that include mapping and navigation (such as Google Maps and Ovi by Nokia), social networking (such as Facebook and Foursquare) and security for lost or stolen mobile phones (such as HTC Sense.com). Such services can tell users (and if they wish, others) where they are and allow them to receive content relevant to their location without having to manually enter the address or postcode. Such are the benefits and convenience of geolocation services and location-aware applications, they are fast becoming an essential and expected aspect of being online for many users.⁷

These technological advancements are, in large part, motivated by perceived business advantages. For example, if a website operator can ‘see’ where access-seekers are located, ‘suitable’ advertising can be specifically targeted at those individuals. Other perceived advantages include, for example, spam minimisation, reducing fraud risk, keeping licensed content within geographical boundaries and, as discussed here, ensuring regulatory compliance. Finally, introducing location-sensitivity into online services may make them more user-friendly, thereby improving the users’ experience.

One of the most important cases, in this context, is the now somewhat dated French Court’s judgment in the Yahoo! case.⁸ In this example, experts concluded that ‘it may be estimated in practice that over 70% of the IP addresses of surfers residing in French territory can be identified as being French’.⁹ These days, the claimed accuracy rates are considerably higher. Having surveyed a range of geo-location services, Shavitt and Zilberman note that, ‘All the databases

⁷ Mark Watts et al, ‘Do European Data Protection Laws Apply to the Collection of WiFi Network Data for Use in Geolocation Lookup Services?’ (2011) 1(3) *International Data Privacy Law* 149, 149.

⁸ *International League Against Racism & Anti-Semitism (LICRA) and the Union of French Jewish Students (UEJF) v Yahoo! Inc* County Court of Paris, interim court order of 20th of November 2000.

⁹ Ibid.

claim to have 97% accuracy or more at the country level and 80% or more at the city level'.¹⁰ For example, as of 13 March 2015, one producer claims an accuracy rate of 82% within Australia when it comes to locating an Internet user within a 100km radius.¹¹

CONCLUDING REMARKS

Those engaging in the online marketing or sales of food and/or wine products need to consider a wide variety of laws such as labelling laws, intellectual property laws and customs regulations. Broad online exposure brings broad legal risk exposure – sellers and marketers need to consider the laws of all the countries to which they expose themselves.

Further, reliance on contractual terms such as choice of forum and choice of law clauses may not always create a sufficient level of defence. Currently, the most effective way to restrict the geographical exposure of a website is to use geo-location technologies.

¹⁰ Yuval Shavitt and Noa Zilberman, *A Study of Geolocation Databases* (1 July 2010 Cornell University Library) 3. <http://arxiv.org/abs/1005.5674>.

¹¹ MaxMind, *GeoIP2 City Accuracy* <https://www.maxmind.com/en/geoip2-city-database-accuracy?country=&resolution=100>.