Legal Environment

Randy Canis

CLASS 12

Torts and Civil Wrongs;
Contracts in Action
Torts and Civil Wrongs

Torts

• An action arises under torts when one party’s allegedly wrongful conduct causes injury to another
• Intentional – from intentional acts
• Unintentional – often as a result of carelessness

Basis of Tort Law

• Basis
  – Wrongs
  – Compensation
  – Compensate those who have suffered a loss or injury due to another person’s wrongful act
Protected Interests

Remedies for:
• Acts that cause physical injury or that interfere with physical security and freedom of movement
• Acts that cause destruction or damage to property
• Acts that violate intangible interests including personal privacy, family relations, reputation, and dignity

Compensatory Damages

• Compensate or reimburse a plaintiff for actual losses
• **Special Damages** – quantifiable monetary losses including medical expenses, lost wages, and benefits, and the cost of replacing damaged property
• **General Damages** – compensate individuals for nonmonetary aspects of harm (e.g., pain and suffering)

Special Damages Example

• “It is well-established that claims for attorneys’ fees constitute special damages, which must be specifically pleaded in order to be recovered. …The only mention of attorneys’ fees in Respondent's Petition, and in fact in any pleading prior to trial, is in the prayers following each count in the Petition. There, Respondent simply included a general request for attorneys' fees without citation to a contract, a statute, or any other alleged basis for the request. As a matter of law, these general requests are insufficient to satisfy Rule 55.19 and preserve Respondent's claim for attorneys' fees.”
• [http://www.courts.mo.gov/SUP/index.nsf/fe8ef6456f0b7e6b8625b99079edd6f42a3f4085ddca8625776100564308/$FILE/sc90771_landau_brief.pdf](http://www.courts.mo.gov/SUP/index.nsf/fe8ef6456f0b7e6b8625b99079edd6f42a3f4085ddca8625776100564308/$FILE/sc90771_landau_brief.pdf)
Punitive Damages

- Punish the wrongdoer and deter others from similar wrongdoing
- Appropriate when Defendant’s conduct was particular egregious or reprehensible
- Intentional torts or gross negligence

Punitive Damages MO Statute

- Limitations on punitive damages in certain cases. 510.265. 1. No award of punitive damages against any defendant shall exceed the greater of:
  - (1) Five hundred thousand dollars; or
  - (2) Five times the net amount of the judgment awarded to the plaintiff against the defendant.
- Such limitations shall not apply if the state of Missouri is the plaintiff requesting the award of punitive damages, or the defendant pleads guilty to or is convicted of a felony arising out of the acts or omissions pled by the plaintiff.
- 2. The provisions of this section shall not apply to civil actions brought under section 213.111 that allege a violation of section 213.040, 213.045, 213.070, or subdivision (3) of section 213.070 as it relates to housing.

Intentional Tort

- Must intend to commit an act, the consequences of which interfere with the personal or business interests of another in a way not permitted by law.
- Actor intended the consequences of his or her act or knew with substantial certainty that specific consequences would result from the act.
Assault and Battery

• **Assault** – any intentional, unexcused act that creates in another person a reasonable apprehension of immediate harmful or offensive contact

• **Battery** – an unexcused and harmful or offensive physical contact intentionally performed

---

Assault Mo Statute

• **Assault in the third degree**, 565.070. 1. A person commits the crime of assault in the third degree if:

  1. The person attempts to cause or recklessly causes physical injury to another person;
  2. With criminal negligence the person causes physical injury to another person by means of a deadly weapon; or
  3. The person purposely places another person in apprehension of immediate physical injury;
  4. The person recklessly engages in conduct which creates a grave risk of death or serious physical injury to another person;
  5. The person knowingly causes physical contact with another person knowing the other person will regard the contact as offensive or provocative; or
  6. The person knowingly causes physical contact with an incapacitated person, as defined in section 475.010, which a reasonable person, who is not incapacitated, would consider offensive or provocative.

---

Defenses to Assault and Battery

• **Consent** – when a person consents to the act that is allegedly tortuous, there may be a complete or partial defense to liability

• **Self-Defense** – an individual who is defending her or his life of physical well-being can claim self-defense.

• **Defense of others** – an individual can act in a reasonable manner to protect others who are in real or apparent danger

• **Defense of property** – reasonable force may be used in attempting to remove intruders from one’s home
Example Self Defense Mo Statute

- Justification generally. 563.026. 1. Unless inconsistent with other provisions of this chapter defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute any crime other than a class A felony or murder is justifiable and not criminal when it is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability of avoiding the injury outweighs the desirability of avoiding the injury sought to be prevented by the statute defining the crime charged.
- ...
- 3. The defense of justification under this section is an affirmative defense.

False Imprisonment

- Intentional confinement or restraint of another person’s activities without justification

Intentional Infliction of Emotional Distress

An intentional act that amounts to extreme and outrageous conduct resulting in severe emotional distress to another
1) Conduct was intentional or reckless
2) Conduct was extreme and outrageous
3) Conduct caused the plaintiff’s emotional distress
4) Emotional distress was severe
Defamation

• Defamation occurs when one’s words reflect negatively upon another person’s integrity, character, good name and standing in the community and those words tend to expose the other person to public hatred, contempt or disgrace. ... Defamation includes both libel and slander.
• Libel – writing or other permanent form
• Slander – orally
• See Missouri Bar’s News Reports Handbook.

Libel Requirements

1. Libel was published,
2. Words were of and concerning plaintiff, [identification]
3. Material is defamatory,
4. Material is false, and
5. Defendant was at fault.

Publication Requirement

• Defamatory statements are communicated to persons other than the defamed party.
• Court will presume communication from inclusion in the newspaper, on television, or on the Web
• Distributors of the final product ordinarily cannot be held liable
Communications Decency Act

• Immunizes online service providers from postings, e-mails, and other Internet contributions made by others
• Section 230 of CDA “No provider … of interactive computer services shall be treated as the publisher or speaker of any information provided by another information content provider”

Identification

• Plaintiff may be explicitly named
• Use of a similar name that suggests the plaintiff’s name
• Descriptive circumstances where a sufficient number of people will understand that the person being referenced is the plaintiff

Defamatory Material

• Focus on words
  – Words that are libelous on their face
  – Innocent on their face but becomes defamatory by knowledge of other facts
• Are the particular words capable of conveying a defamatory meaning, and would a reasonable person interpret the words as being a defamatory comment?
Falsity

- Public Person v. Private Person
  - Public – must prove the statement is untruthful
  - Private – must prove falsity only when the statement of the subject is a matter of public concern
- Evidence provided to court must go to the heart of the charge

Public Figures

- Public figures are “fair game” and false and defamatory statements about them that are published in the press will not constitute defamation unless the statements are made with actual malice
- Actual malice – with either knowledge of its falsity or a reckless disregard of the truth

Damages for Libel

- General damages are presumed
- Need to prove actual injuries
Damages for Slander

• Plaintiff must prove special damages-
  actual economic or monetary loses

Slander Per Se

1. Statement that another person has a
   loathsome disease
2. Statement that another has committed
   improprieties while engaging in a
   profession or trade
3. Statement that another has committed or
   has been imprisoned for a serious crime
4. A statement that a person is unchaste or
   has engaged in serious sexual
   misconduct

Defense

• Truth is normally an absolute defense
• Privilege
  – Absolute – judicial proceedings and
    certain government proceedings
  – Conditional – certain statements made
    in good faith and the publication is
    limited to those who have a legitimate
    interest in the communication
SLAPP and Anti-SLAPP

• **SLAPP**
  – Strategic lawsuits against public participation
  – Purpose of the lawsuit is to block defendant from making further criticism

• **Anti-SLAPP**
  – Ask the judge to dismiss the lawsuit quickly on two-step basis

Invasion of Privacy

• **Appropriation of identity** – using a person’s name, picture or other likeness for commercial purposes without permission

• **Invasion into an individual’s affairs** – eavesdropping by wiretap, unauthorized scanning of a bank account, compulsory blood testing, and window peeping

• **False light** – publication of information that places a person in false light

• **Public disclosure of private facts** – publicly discloses private facts about an individual that an ordinary person would find objectionable or embarrassing

Public Disclosure of Private Facts

Publicizing private information about a person if the matter being publicized
1) would be highly offensive to a reasonable person, and
2) is not of legitimate public concern or interest
Fraudulent Misrepresentation

• Intentional deceit for personal gain
• Elements
  1) A misrepresentation of material facts or conditions with knowledge that they are false or with reckless disregard of the truth
  2) An intent to induce another party to rely on the misrepresentation
  3) A justifiable reliance on the misrepresentation by the deceived party
  4) Damages suffered as a result of that evidence
  5) A casual connection between the misrepresentation and the injury suffered

Abusive Litigation

• Malicious prosecution – a party that initiated a lawsuit and did so out of malice and without probable cause and losses the suit
• Abuse of process – applies to a person using a legal process against another in an improper manner or to accomplish a purpose for which the process was not designed

Wrongful Interference with a Contractual Relationship

1) A valid, enforceable contract must exist between two parties
2) A third party must know that this contract exists
3) This third party must intentionally induce a party to the contract to breach the contract
Wrongful Interference with a Business Relationship

- Defendant used predatory methods to intentionally harm an established business relationship or prospective economic advantage

Intentional Torts against Property

- Trespass to Land
- Trespass to Personal Property
- Conversion
- Disparagement of Property

Trespass to Land

- Any time a person, without permission, enters onto, above, or below the surface of land that is owned by another
- Causes anything to enter onto the land
- Remains on the land or permits anything to remain on it
Trespass Criteria, Rights, and Duties

• Must establish that a person is a trespasser (e.g., by notice)
• Enter onto another’s property to commit a crime

Trespass to Personal Property

• When an individual, without consent, takes or harms the personal property of another or otherwise interferes with the lawful owner’s possession and enjoyment of personal property

eBay v. Bidder’s Edge

Factual Background
• Parties
  – eBay – online auctioneer
  – Bidder’s Edge – “BE is an auction aggregation site designed to offer on-line auction buyers the ability to search for items across numerous on-line auctions without having to search each host site individually.”
• “The current version of the User Agreement prohibits the use of “any robot, spider, other automatic device, or manual process to monitor or copy our web pages or the content contained herein without our prior expressed written permission.” (Id.) It is not clear that the version of the User Agreement in effect at the time BE began searching the eBay site prohibited such activity, or that BE ever agreed to comply with the User Agreement.”
Factual Background

• “A software robot is a computer program which operates across the Internet to perform searching, copying and retrieving functions on the web sites of others. A software robot is capable of executing thousands of instructions per minute, far in excess of what a human can accomplish. Robots consume the processing and storage resources of a system, making that portion of the system’s capacity unavailable to the system owner or other users. Consumption of sufficient system resources will slow the processing of the overall system and can overload the system such that it will malfunction or ‘crash.’ A severe malfunction can cause a loss of data and an interruption in services.”

Factual Background

• “The eBay site employs ‘robot exclusion headers.’ A robot exclusion header is a message, sent to computers programmed to detect and respond to such headers, that eBay does not permit unauthorized robotic activity. Programmers who wish to comply with the Robot Exclusion Standard design their robots to read a particular data file, ‘robots.txt,’ and to comply with the control directives it contains.”

• “eBay identifies robotic activity on its site by monitoring the number of incoming requests from each particular IP address. Once eBay identifies an IP address believed to be involved in robotic activity, an investigation into the identity, origin and owner of the IP address may be made in order to determine if the activity is legitimate or authorized. If an investigation reveals unauthorized robotic activity, eBay may attempt to ignore (‘block’) any further requests from that IP address. Attempts to block requests from particular IP addresses are not always successful.”

Factual Background

• “The information available on the BE site is contained in a database of information that BE compiles through access to various auction sites such as eBay. When a user enters a search for a particular item at BE, BE searches its database and generates a list of every item in the database responsive to the search, organized by auction closing date and time. (Id. P 5.) Rather than going to each host auction site one at a time, a user who goes to BE may conduct a single search to obtain information about that item on every auction site tracked by BE. (Id. P 6.) It is important to include information regarding eBay auctions on the BE site because eBay is by far the biggest consumer to consumer on-line auction site. (Id.)
eBay v. Bidder's Edge

Factual Background

• In early 1998, eBay gave BE permission to include information regarding eBay-hosted auctions for Beanie Babies and Furbies in the BE database. In early 1999, BE added to the number of person-to-person auction sites it covered and started covering a broader range of items hosted by those sites, including eBay. On April 24, 1999, eBay verbally approved BE crawling the eBay web site for a period of 90 days. The parties contemplated that during this period they would reach a formal licensing agreement. They were unable to do so.

• In late August or early September 1999, eBay requested by telephone that BE cease posting eBay auction listings on its site. BE agreed to do so. In October 1999, BE learned that other auction aggregations sites were including information regarding eBay auctions and decided to resume posting. On November 2, 1999, BE issued a press release indicating that it had resumed including eBay auction listings on its site. On November 9, 1999, eBay sent BE a letter reasserting that BE’s activities were unauthorized, insisting that BE cease accessing the eBay site, alleging that BE’s activities constituted a civil trespass and offering to license BE’s activities. eBay and BE were again unable to agree on licensing terms. As a result, eBay attempted to block BE from accessing the eBay site; by the end of November 1999, eBay had blocked a total of 169 IP addresses it believed BE was using to query eBay’s system. BE elected to continue crawling eBay’s site by using proxy servers to evade eBay’s IP blocks.

Analysis

• eBay asserts that it will suffer four types of irreparable harm if preliminary injunctive relief is not granted:
  (1) lost capacity of its computer systems resulting from BE’s use of automated agents;
  (2) damage to eBay’s reputation and goodwill caused by BE’s misleading postings;
  (3) dilution of the eBay mark; and
  (4) BE’s unjust enrichment. (Mot. at 23:18–25.)

• The harm eBay alleges it will suffer can be divided into two categories:
  – The first type of harm is harm that eBay alleges it will suffer as a result of BE’s automated query programs burdening eBay’s computer system (“system harm”).
  – The second type of harm is harm that eBay alleges it will suffer as a result of BE’s misrepresentations regarding the information that BE obtains through the use of these automated query programs (“reputational harm”).
eBay v. Bidder's Edge

Analysis

- "If BE's activity is allowed to continue unchecked, it would encourage other auction aggregators to engage in similar recursive searching of the eBay system such that eBay would suffer decreased system performance, system unavailability, or data losses. ... BE does not appear to seriously contest that reduced system performance, system unavailability or data loss would inflict irreparable harm on eBay consisting of lost profits and lost customer goodwill. Harm resulting from lost profits and lost customer goodwill is irreparable because it is neither easily calculable, nor easily compensable and is therefore an appropriate basis for injunctive relief. ... Where, as here, the denial of preliminary injunctive relief would encourage an increase in the complained of activity, and such an increase would present a strong likelihood of irreparable harm, the plaintiff has at least established a possibility of irreparable harm."

Trespass to chattels "lies where an intentional interference with the possession of personal property has proximately cause injury." ... In order to prevail on a claim for trespass based on accessing a computer system, the plaintiff must establish:

1. Defendant intentionally and without authorization interfered with plaintiff's possessory interest in the computer system; and
2. Defendant's unauthorized use proximately resulted in damage to plaintiff. ...

Here, eBay has presented evidence sufficient to establish a strong likelihood of proving both prongs and ultimately prevailing on the merits of its trespass claim.

"BE argues that it cannot trespass eBay's web site because the site is publicly accessible. BE's argument is unconvincing. eBay's servers are private property, conditional access to which eBay grants the public. eBay does not generally permit the type of automated access made by BE. In fact, eBay explicitly notifies automated visitors that their access is not permitted. "In general, California does recognize a trespass claim where the defendant exceeds the scope of the consent." Baugh v. CBS, Inc., 828 F. Supp. 745, 756 (N.D. Cal. 1993)."
eBay v. Bidder's Edge

- “eBay is likely to be able to demonstrate that BE's activities have diminished the quality or value of eBay's computer systems. BE's activities consume at least a portion of plaintiff's bandwidth and server capacity.... eBay's claim is that BE's use is appropriating eBay's personal property by using valuable bandwidth and capacity, and necessarily compromising eBay's ability to use that capacity for its own purposes. See CompuServe, 962 F. Supp. at 1022 (“any value [plaintiff] realizes from its computer equipment is wholly derived from the extent to which that equipment can serve its subscriber base.”).

Ruling

- The court preliminarily enjoins defendant Bidder's Edge, Inc. from accessing eBay's computer systems by use of any automated querying program without eBay's written authorization.

Holding

- The court concludes that under the circumstances present here, BE's ongoing violation of eBay's fundamental property right to exclude others from its computer system potentially causes sufficient irreparable harm to support a preliminary injunction.

Conversion

- When a person wrongfully possess or uses the personal property of another as if the property belonged to her or him.
Disparagement of Property

- Economically injurious falsehoods are made about another's product or property

Negligence and Strict Liability

Negligence

- Acts that depart from a reasonable standard of care and create an unreasonable risk of harm to others
- Factors
  1) That the defendant owed a duty of care to the plaintiff
  2) That the defendant breached that duty
  3) That the plaintiff suffered a legally recognizable injury
  4) That the defendant's breach caused the plaintiff's injury
Duty of Care

- People are free to act as they please so long as their actions do not infringe on the interests of others
- Courts consider the nature of the action (outrageous or commonplace), the manner in which the act is performed (heedlessly or cautiously), and the nature of the injury (serious or slight) in determining whether a duty of care has been breached.

Reasonable Person Standard

- How would a reasonable person have acted in the same circumstances?
- Objective standard

Duty of Landowners

- Duty to Warn Business Invitees of Risks
  - Retailer and other firms that explicitly or implicitly invite persons to come onto their premises are usually charged with a duty to exercise reasonable care to protect business invitees
- Obvious risks provide an exception
Duty to Rescue

• If a person fails to come to the aid of a stranger in peril, that person will not be considered negligent under tort law.

Injury Requirement and Damages

• To recover damages, the plaintiff in a tort lawsuit must prove that she or he suffered a legally recognizable injury.

Causation

• If a person breaches a duty of care and someone suffers injury, the wrongful activity must have caused the harm for a tort to have been committed.

• 2 Questions for the court
  1) Is there causation in fact?
  2) Was the act the proximate, or legal, cause of the injury?
Causation in Fact

• Did the injury occur because of the defendant’s act, or would it have occurred anyway?
• Causation in fact – injury would not have occurred without the defendant’s act
• But for test – but for the wrongful act, the injury would not have occurred

Proximate Cause

• Proximate cause exists when the connection between an act and an injury is strong enough to justify imposing liability

Foreseeability

• It would be unfair to impose liability on a defendant unless the defendant’s actions created a foreseeable risk of injury
Defenses to Negligence

1) Assumption of Risk
2) Superseding cause
3) Contributory and comparative negligence
Or Plaintiff failed to prove the existence of one or more of the required factors for negligence

Assumption of Risk

• A plaintiff who voluntarily enters into a risky situation, knowing the risk involved, will not be allowed to recover.
• Requirements
  1) Knowledge of the risk, and
  2) Voluntary assumption of the risk

Superseding Cause

• An unforeseeable intervening event may break the casual connection between a wrongful act and an injury to another.
• **Superseding cause** – relieves a defendant of liability for injuries because by the intervening event
Contributory and Comparative Negligence

- **Contributory Negligence** – a plaintiff who was also negligent (failed to exercise a reasonable degree of care) could not recover anything from the defendant.

- **Comparative Negligence** – enables both the plaintiff's and the defendant's negligence to be computed and the liability for damages distributed accordingly.

Res Ipsa Loquitur

- Presumption of defendant's negligence
- Different from the normal burden that plaintiff has the burden to show that the defendant was negligent
- Applies only when the event creating the damage or injury is one that ordinarily does not occur in the absence of negligence

Negligence Per Se

- May occur when an individual violates a statute or an ordinance providing for a criminal penalty and that violation causes another to be injured.
- The injured person must prove:
  1) That the statute clearly sets out what standard of conduct is expected, when and where it is expected, and of whom it is expected;
  2) That he or she is in the class intended to be protected by the statute; and
  3) That the statute was designed to prevent that the type of injury that he or she suffered
Danger Invites Rescue Doctrine

- A person who is injured while going to someone else's rescue can sue the person who caused the dangerous situation.

Special Negligence Statutes

- **Good Samaritan statutes** – persons who are aided voluntarily by others cannot turn around and sue the “Good Samaritans” for negligence
- **Dram Shop Acts** – a tavern owner or bartender may be held liable for injuries caused by a person who became intoxicated while drinking at the bar or was already intoxicated when served by the bartender.
- Social hosts…

Strict Liability

- Liability without fault
- A person who engages in certain activities can be held responsible for any harm that result to others even if the person used the utmost care
Abnormally Dangerous Activities

• Activities that involve a high risk of serious harm to persons or property that cannot be completely guarded against by the exercise of reasonable care

Product Liability

• Liability of manufacturers and sellers for harmful or defective products
• Liability is a social policy and is based on two factors:
  1) The manufacturing company can better bear the cost of injury because it can spread the cost throughout society by increasing prices of goods and services, and
  2) The manufacturing company is making a profit from its activities and therefore should bear the cost of injury as an operating expense

Contracts in Action

• Ch. 4
What is Consideration?

- Value given in return for a promise or performance

Elements of Consideration

1) Something of legally sufficient value must be given in exchange for the promise
2) There must be a bargained for exchange

Legal Value

1) A promise to do something that one has no prior legal duty to do,
2) The performance of an action that one is otherwise not obligated to undertake, or
3) The refraining from an action that one has a legal right to undertake (forbearance)
Bargained-for Exchange

- The promise given by the promisor (offeror) must induce the promisee (offeree) to offer a return promise, a performance, or a forbearance, and the promisee's promise, performance, or forbearance must induce the promisor or to make the promise.

Adequacy of Consideration

- Is the consideration enough?
  - In general, a court will not question adequacy of consideration based solely on the comparative value of the things exchanged
  - The exchange of promises and potential benefits is deemed sufficient as consideration
  - Courts leave it up to the parties to decide what something is worth

Grossly Inadequate Consideration

- Inadequate consideration may raise a red flag for a court to look more closely at the bargain
- Possibly undue influence or fraud?
- Court may declare the contract unconscionable
Agreements that Lack Consideration
• When do parties' actions or promises not qualify as contractual consideration?

Preexisting Duty
• In general, a promise to do what one already has a legal duty to do does not constitute legally sufficient consideration.
  – Prevent extortion and the holdup game
  – A court may allow an exception for unforeseen difficulties
• Rescission is the unmaking of a contract so as to return the parties to the positions they occupied before the contract was made.
  – Consideration is there a new contract?

Past Consideration
• Promises made in return for actions or events that have already taken place are unenforceable.
Illusory Promises

• If the terms of the contract are uncertain, the promise is without consideration and unenforceable.
  – Example – performance based on discretion (subjective)

Option-to-Cancel

• When the promisor has the option to cancel before performance has begun, the promise is illusory.

Settlement

• Accord and Satisfaction
• Settling a claim
  – Release
  – Covenant not to sue
Accord and Satisfaction

- Accord is the agreement under which one of the parties undertakes to give or perform—and the other, to accept, in satisfaction of a claim—something other than that on which the parties originally agreed.
- Satisfaction takes place when the accord is executed.
- The amount must be in dispute.

Liquidated Debts

- A liquidated debt is one whose amount has been ascertained, fixed, agreed on, settled, or exactly determined.
- Accord and satisfaction cannot take place.

Unliquidated Debts

- Reasonable persons may differ over the amount owed.
- The amount owed is not ascertained, fixed, agreed on, settled, or exactly determined.
- Acceptance of the payment of a lesser amount operates as satisfaction, or discharge, of the debt.
Release

- A release is a contract in which one party forfeits the right to pursue a legal claim against the other party.
- It bars any further recovery beyond the terms stated in the release.

Signing Releases

- Know the extent of injuries or damages before signing a release.
- Releases will generally be binding if they are
  1) Given in good faith
  2) Stated in a signed writing
  3) Accompanied by consideration

Covenant Not to Sue

- An agreement to substitute a contractual obligation for some other type of legal action based on a valid claim.
Exceptions to the Consideration Requirement

- Promises that may be enforced with no consideration
  1) Promises that induce detrimental reliance under the doctrine of promissory estoppel
  2) Promises to pay debts that are barred by a statute of limitations
  3) Promises to make charitable contributions.

Promissory Estoppel

- A person who has reasonably and substantially relied on the promise of another may be able to obtain some measure of recovery.

Requirements for Promissory Estoppel

Elements
1. Clear and definite promise
2. Promisor should have expected that the promisee would rely on the promise
3. Promisee reasonably relied on the promise by acting or refraining from some act.
4. Promisee’s reliance was definite and resulted in substantial detriment.
5. Enforcement of the promise is necessary to avoid injustice.
Statute of Limitations/ Promise to Pay Debts

- Creditor must sue within a specified time to recover the debt.
- A debtor who promises to pay a previous debt even though recovery is barred by the statute of limitations makes an enforceable promise.
- The promise needs no consideration.

Agreement Basics

Why License Intellectual Property?

- Intellectual property provides owner with exclusive rights
- A license enables the owner to provide permission, in the form of a license, to another party to utilize certain exclusive rights
- Without a license, the other party would infringe certain intellectual property rights of the owner
Applicable Legal Areas to Licensing Law

- Contract Law
  - Common Law
  - Uniform Commercial Code (UCC) Article 2
- Intellectual Property Law
- Antitrust, Misuse, and Preemption

Agreement Structure

- Let’s look at the structure of an agreement

Parties, Effective Date, and “Agreement”

- The First Paragraph
  - Identifies the parties to the agreement;
  - Sets out the “effective date” of the agreement (i.e., when the term of the agreement begins);
  - Probably defines the word “Agreement”
Effective Date

- When does the agreement come into effect?
- Past date, date of signing, future date?

Parties

- Who is entering into the agreement?
- Is your agreement with a corporate entity, an individual, or both?

Recitals

- The “whereas” is typically set apart in capital letters and/or bold text;
- Defines the nature of the parties businesses;
- Defines the background of the parties agreement;
- Links the nature and background to the culmination of the agreement
After the Recitals

• After the “whereas” clauses there is a transitioning sentence that starts “now, therefore…”;
• The section containing the definitions (if applicable) is typically first (although at times may be a later section or an exhibit);
• The second section of the agreement usually gets to the meat of the agreement by containing the service(s) to be provided or the good(s) to be delivered;
• The last section of the agreement usually contains a series of general clauses;
• The agreement has signature blocks for the parties that are executing the agreement and states not only the persons signing the agreement but the capacity in which they are signing the agreement.

Definitions

• Capitalized words should only be words that are defined in the agreement.
• Defined terms are either defined at the first instance in the text of the agreement or in a definition section either after the recitals, at the end of the agreement, or in an exhibit/appendix

License Grant

• What rights are being granted under the license agreement?
  – Copyrights, patents, trademarks, trade secrets, right of publicity, data/information
• What conditions are associated with the license?
  – Areas covered
  – Exclusive v. Non-Exclusive
  – Transferable?
Length and Scope of Grant

- **Perpetual** – rights run continuously so long as the right exists
- **Irrevocable** – not cancelable by the licensor for any reason
- **Royalty Free** – licensee does not owe any money to obtain the benefit of the license
- **Fully Paid Up** – all money due has been paid, and no more money is owed

Delivery, Inspection, and Acceptance

- The agreement should address how and when project deliverables are to be provided to the client, how the deliverables may be inspected, the procedures that are to be followed for the client to accept the deliverables, and what the developer’s obligations will be if a deliverable is rejected.

Delivery

- **When** something must be delivered
- **How** something must be delivered
- **Where** something must be delivered
Inspection

- Inspection means evaluating a deliverable for acceptance or rejection
- Agreement should specify how inspection should occur and the time for the inspection to occur

Acceptance

- Acceptance defines the criteria and manner for accepting deliverables
- May require a particular form of acceptance
- Could include failing to reject within a prescribed period of time

Rejection

- Process for rejecting a deliverable should also be described
  - Is the rejection automatic if not expressly accepted during a particular time period?
  - Is there a process to rejection and for the developer to submit for reacceptance?
Consideration

- Payment or other consideration may include:
  - Payment of money (royalties)
  - Services
  - A license (reciprocal license)

Duration

- How long will the agreement run?
  - Initial term and renewal term(s)
    - Is the renewal term auto-renew such that one of the parties need to opt prior to a certain date for the auto-renewal not to occur?
  - Limited duration, unlimited duration, or an unspecified duration
    - Term with automatic renewals

Agreement Termination

- Notice of termination
  - Form and timing for termination
- Cancellation
  - Material breach
- Additional obligations post cancellation or termination
Audit and Accounting Rights

- Should records be maintained by the licensor and available for inspection from time to time by licensee?
- What happens if the audit determines that there is an underpayment, underperformance, and the like?
  - Financial penalty?

Limitation of Liability

- “NEITHER PARTY SHALLE BE LIABLE FOR ANY INCIDENTAL, CONSEQUENTIAL, SPECIAL, OR PUNITIVE DAMAGES THAT ARISE OUT OF OR RELATED TO THE AGREEMENT, EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.”

Damages

- Direct damages – unpaid fees or consideration received by the breaching party but never paid
- Incidental damages – reasonable charges, expenses, or commission incurred incident to a breach
- Consequential damages – “any loss of anticipated benefits resulting from the inability to use the licensed material or intellectual property of which the breaching party, at the time of contracting, had reason to know and could not be reasonably prevented.”
Warranties

• What is the expectation of what one party is warranting will happen or is true?
• Implied Warranties
  – Merchantability
  – Goods will fit for a particular purpose
  – Automatically part of a contract unless disclaimed

Warranty Disclaimer

• LICENSOR DISCLAIMS ALL OTHER WARRANTIES, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

Indemnification

• Reimbursement for breach of a warranty
• Ability to pay and/or insurance?
Choice of Law/Forum

• Choice of Law
  – What jurisdiction's legal rules apply to a transaction?
  – “Jurisdiction with the most significant relationship to the transaction or inquiry in question and to apply the law of that jurisdiction”

Choice of Law/Forum

• Developer
  – This Agreement shall be governed in all respects by the laws of the State of California without regard to its conflict of laws provisions, and Client and Developer agree that the sole venue and jurisdiction for disputes arising from this Agreement shall be the appropriate state or federal court located in the City of San Jose, and Client and Developer hereby submit to the jurisdiction of such courts.

Choice of Law/Forum

• Client
  – This Agreement shall be governed and interpreted in accordance with the laws of the state of __________ without regard to principles of conflict of laws. The Parties agree to submit to the exclusive jurisdiction over all disputes hereunder or related hereto in the federal and state courts in the State of __________ located in __________ County.
Time is of the Essence

• Seller recognizes that time is of the essence in this Agreement and that the failure to develop, test and deliver the deliverables hereunder in accordance with the Delivery Schedule shall result in expense and irreparable damage to Buyer.

Force Majeure

• Developer
  – Except for the payment of fees by Client, if the performance of any part of this Agreement by either party is prevented, hindered, delayed or otherwise made impracticable by reason of any flood, riot, fire, judicial or governmental action, labor disputes, act of God or any other causes beyond the control of either party, that party shall be excused from such to the extent that it is prevented, hindered or delayed by such causes.

• Client
  – Nether Party shall be deemed in default of this Agreement to the extent that performance of its obligations or attempts to cure any breach are delayed, restricted or prevented by reason of any act of God, fire, natural disaster, act of government, strikes or labor disputes, inability to provide raw materials, power or supplies, or any other act or condition beyond the reasonable control of the party in question.
Unconscionability

- If license terms of an agreement is unconscionable, a court can potentially:
  - Strike down the entire agreement
  - Strike down an applicable portion of the agreement (severability)
  - Rewrite an applicable portion of the agreement (blue pencil)

Severability

- Developer
  - If any provision of this Agreement is determined to be invalid under any applicable statute or rule of law, it is to that extent to be deemed omitted, and the balance of the Agreement shall remain enforceable.
- Client
  - Should any provision of this Agreement be held to be void, invalid or inoperative, the remaining provisions of this Agreement shall not be affected and shall continue in effect and the invalid provision shall be deemed modified to the least degree necessary to remedy such invalidity.

Waiver

- The failure of either Party to partially or fully exercise any right or the waiver by either party of any breach, shall not prevent a subsequent exercise of such right or be deemed a waiver of any subsequent breach of the same or any other term of this Agreement.
Entire Agreement

• This Agreement, including the Schedules hereto, sets forth the entire agreement between the Parties on this subject and supersedes all prior negotiations, understandings and agreements between the Parties concerning the subject matter. No amendment or modification of this Agreement shall be made except by a writing signed by the Party to be bound thereby or the successor or assign of such Party.

Assignability

• Can on or other assign rights under the contract to another party?
  – With or without consent?
  – Not to be unreasonably withheld?
  – In the event of a merger or acquisition?

Notices

• Where should notices be sent?
• To whom should the notices be sent?
• What method should the notices be sent?
  – Fax, certified mail
Who Owns the Developments?

- Work made for hire
- Discussed during copyright law
- Advantages of having ownership addressed in the agreements

Program Completed

All course materials - Copyright 2010-2016 Randy L. Canis, Esq.