

“Constructing a Legal Infrastructure for Electronic Commerce”

Address by Senator Dale D. Marshall, Chairman of the F.T.A.A. Joint Government/Private Sector Committee of Experts on Electronic Commerce at the Conference – Business Agenda for Electronic Commerce in Chile

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Distinguished guests, Ladies and Gentlemen.

Let me first thank you for your very kind invitation to visit your lovely city, and more importantly, to participate in your **Business Agenda for eCommerce** conference.

On my last visit to Santiago, I was here to address your Coalition of Services conference on eCommerce on the role of the FTAA in developing an eCommerce Policy for the hemisphere. Our Committee of experts has since set to work at examining the many issues of electronic Commerce and I am pleased to say that we have made meaningful progress towards formulating our recommendations on eCommerce for the region to be presented to the Trade Ministers of the Hemisphere in November.

May I also compliment the Chilean private sector for so enthusiastically participating in the deliberations of the Committee. The Chilean Private Sector

has grasped every available opportunity to share its expertise with the committee on such complex subjects as:

- *the Desirability of Internet Governance* and
- *Free Competition.*

I am therefore delighted to come to Santiago, and in my capacity as Chair of the Committee of experts, speak with you on some of the legal issues which are of importance when you set about **Constructing a Legal Infrastructure for Electronic Commerce**. My esteemed colleagues will address certain specific aspects of the subject and I would like to look, in a more general way, at the issues which confront us as a region.

It is by now axiomatic that eCommerce is the product of a technological revolution which has made many of the traditional modes of doing business outmoded. The traditional frontiers and geographical barriers which governed our day to day lives, have become largely irrelevant in the context of and in the face of this thing called 'eCommerce'. And with the falling of these boundaries, many of the well settled legal rules and approaches to commercial have also become of limited utility and application. Such things as signatures to contracts take on a new meaning when we enter into contractual obligations over the Internet.

Perhaps it is to do with the nature of lawyers, or the nature of the people who make our laws; whatever the cause, laws have never kept pace with new developments in technology, and so it is today. We need therefore to study the legal issues and try to address them in as timely a fashion as possible to meet the demands of eCommerce, mindful always of the fact that we cannot predict with any certainty the direction of eCommerce in the next few years.

I propose to address in this forum the issues of Jurisdiction and Civil responsibility, Intellectual property protection and finally, the desirability of Internet governance, including self-regulation.

JURISDICTION AND CIVIL LIABILITY

Imagine if you will a consumer logging on to a website for the purpose of effecting a transaction. Let us assume that he logs on to a popular virtual - bookstore and purchases a book. Payment is made by virtue of a credit card. A few weeks later the wrong book arrives or at the very worst no book arrives. Who does the consumer sue? Which country's court has jurisdiction to adjudicate over such a dispute? The simple answer may be the court of the country in which the company is domiciled -the United States for example. But is that the correct answer?

What if the website to which you logged on and made the purchase is not in that country at all but is instead hosted in a jurisdiction in Asia? Under the law of most nations, your transaction would actually have taken place in the place where the website is hosted.

This example I hope, demonstrates the nature of the problem of jurisdiction. The Internet is truly a **world wide web** and by its' very nature does not allow for a the jurisdiction issue to be settled along traditional lines, simply because an entity may have a site hosted in any country in the world, while not having any physical or juridical presence in that country. Physically, a web site is nothing more than a set of data files and programs located in a computer somewhere. Thus the site is highly mobile and can be moved from place to place, country to country with tremendous ease. While therefore the actual transaction may be conducted in a particular country, that country's court may find that there is no entity in existence over which it can have jurisdiction.

The situation is complicated by the difficulty in even identifying the entity with which you are doing business. In fact, that there is generally no obligation on an entity setting up a website in a country to do anything more than to pay the cost

of hosting the site. Neither is there any obligation on the part of the Internet host to do any due diligence. Very often, when occasion arises for people to investigate the person behind a website, the names and addresses are found to be fictitious.

When you combine the possible anonymity of owner of a website together with the ease of mobility, the entity is really able to exist for the most part in cyberspace and independently of geography. This is the essential characteristic of cyberspace.

One might argue that the above comments only apply to those companies and persons who set out to defraud customers. Perhaps, but let me say that I have looked over numerous websites to try to find out what country the website is hosted and I have never found any indication of where that might be. I have examined many websites for a dispute settlement policy, I have found none. I have examined many websites which I have assumed are hosted in the USA, nowhere can I find confirmation that they are hosted in the USA or which state within the US they might be.

Let me share with you a personal experience. Eight weeks ago, I purchased two books online from barnesandnoble.com. One book was immediately available and the other would be available in one week. I requested overnight delivery and specified that they should ship both books together. Four days later one of the books arrived.

To this day, the second book has not been sent. Naturally, the cost of both books has long since been billed to my credit card and the card has been paid.

This is a classic breach of contract case for any law school student, however, every question that I have posed to you becomes relevant. Who do I sue and in which state and in which country?

This brings me to another important issue which is connected to jurisdiction. That issue is the cost of obtaining a remedy in a foreign court. Precisely because the Internet makes geography irrelevant, many of the *business to consumer* eCommerce transactions cross international boundaries. Recent estimates for 1998 suggest that 74 percent of the money generated by the Latin American Internet economy went to businesses outside of the region and primarily to the US. With such a high percentage of the transactions being 'cross-border', we have to consider whether the cost of obtaining remedies in a foreign court would be stand up to a cost and benefit analysis. If access to foreign courts by a consumer to have a dispute adjudicated, is prohibitive then that access means nothing.

The cost of the books which I purchased from the Barnes and Noble site was less than US\$19.55. The cost of shipping was US\$41.90. I ask myself what it would cost for me to obtain a remedy in a foreign court, and even with friends in the legal fraternity across the US, I hardly think that it would bear any reasonable relationship to the cost of the books. And again this assumes that the website is hosted in the USA.

The point therefore has to be that in order for consumers to effectively participate in truly global eCommerce, he has to be able feel satisfied that he knows with whom he is doing business; what location that person is doing business from; and that he has meaningful access to some kind of dispute resolution mechanism. The consumer has to be confident that the anonymity of the Internet does not simply make him an easy target for unscrupulous businessmen against whom he can get no relief. This is as important a safeguard to the consumer as privacy and encryption, as the availability of redress will encourage trust in the marketplace.

INTELLECTUAL PROPERTY PROTECTION

The forgoing stresses the importance of protecting the consumer. However, protection must also be offered to the business which has goods and services to offer in a digital form. I speak of protection of intellectual property rights. This is one of the most valuable rights in today's marketplace for those companies who can trade in digital products and in order to encourage those companies to become involved in eCommerce, we must ensure that adequate protection exists from piracy.

The unauthorised duplication of CDs, movies and soft ware cost the companies producing these products billions of dollars each year. Today you are able to download movies, CDs, video games and software from many websites. In fact the pirates are so open about it that they regularly post requests for information regarding sites where these commodities can be downloaded.

By offering the highest levels of protection to the companies which own these products, they will in turn have the confidence to use the digital highway for the distribution of their goods and services. This will naturally benefit the consumer who will have the convenience of accessing those goods when they want, in addition to greater choice.

The Internet has been described as being the greatest opportunity of the millennium for such companies and at the same time it has been described as the biggest threat of the millennium. It has transformed piracy from a local phenomenon to a global phenomenon. With increases in bandwidth and compression, it becomes easier to download the pirated material in terms of facility and speed. With the advent of the Internet, it is now easier and cheaper for a pirate to distribute his pirated goods. There is therefore now a global upsurge in infringements and trade in pirated and counterfeit goods.

In addition, the anonymity of the Internet is a double edged sword which also serves to protect the intellectual property pirate. The structure of the web and the anonymity which it provides makes it difficult to police the web and even when policed , the pirate can easily set up another site from which to offer the pirated materials.

How can we establish a legal infrastructure which will provide intellectual property protection?

Our enactments which seek to provide such protection, are all still based on the concept of territoriality. This means that they seek to protect a right from infringement in a particular jurisdiction. Chilean intellectual property laws therefore protect against infringement within Chile. These laws therefore do not take into account the unique nature of the world wide web, which does not conform to geographical limits.

Again, the issue of jurisdiction raises its head; whose court adjudicates on the issue; whose law is to be applied; how much will it cost; and can a judgement be effectively enforced?

While we cannot now change the nature of the net, the World Intellectual Property Organisation has developed a treaty which attempts to fill the gap through which downloading of data is thought to fall. The treaty mandates that the owner of the rights has the exclusive rights over any means by which “members of the public may access works...” Among other things therefore, our national laws therefore need to cover any means of accessing works in broad terms so as to cover any future developments in technology.

Another issue which requires consideration is, to what extent will Internet Service Providers (ISPs) be fixed with any responsibility for any infringements which take

place over their systems. The argument has been advanced that such companies must be fixed with some responsibility and therefore liability where this occurs. The rationale for this view is that they also reap the benefits of the digital marketplace and must also bear part of the burden of ensuring that intellectual property rights are not infringed. They too must be vigilant and ensure that their services are not utilised in the global piracy of these rights.

REGULATION OF THE NET

The issue of regulation of the Internet is one which requires a very delicate balancing act between the interests of the consumer and the interests of the private sector business. Recognising the inherent difficulties of the world wide web, there is good reason to wish to protect the consumer who is not dealing on even terms with the online businesses. This would be the main purpose of regulating the net. On the other hand, too much or too stringent regulation, is likely to have a negative impact on the growth of eCommerce.

The private sector strongly advances the argument that that any government regulation should be minimal and should be limited to situations where the existing legislative framework is inadequate. The private sector argues that eCommerce is growing at such a phenomenal rate and in all different directions, that a rush to regulate would have the effect of curtailing the growth of the Internet.

On the other hand the conservative element argues that we cannot trust businesses to voluntarily act in the best interest of the consumer and moreover, the Internet is so wide open that the idea of self regulation is not only farcical but impossible. They argue that without legislation, it will be impossible to enforce standards of conduct and to protect the consumer.

There is no central global body which exists for the purpose of governing the Internet and even if there were, enforcement of its edicts would be extremely difficult. There must therefore be some reliance placed on local laws to govern to some extent the relationship of the parties.

In my view, we cannot avoid regulation by means of legislation. We need to establish clear rules governing not only the relationships between parties, but also levels of conduct in relation to such things as privacy, consumer protection and intellectual property.

Because of the territorial nature of legislation, we are only able to regulate what happens within our respective geographical boundaries. We must therefore seek to employ treaty obligations to attempt to deal with the matters which transcend territorial boundaries.

Regulation does not mean that we will have to create a whole new set of laws for the Internet. Following the view that any regulation should be minimal, we would first need to see whether or not the existing laws simply need to be brought up to date to facilitate eCommerce.

When legislation is needed, it should be technology neutral. That is that it should be drafted in such a way that it will continue to apply as the Internet develops, without any great need to revisit it over time.

In creating the legal infrastructure for eCommerce, we also need to ensure that various national approaches are compatible, though there is no need to harmonise these laws.

CONCLUSION

Several years ago, when the spinning Jenny was invented in Europe, the entire being of the weaving industry was transformed. The spinners and weavers of that time stormed the mills and destroyed the machines. They feared that this new technology would destroy their livelihoods and spell the end of life as they knew it.

We always fear the unknown quite naturally, we try wherever possible to put checks on things which seem to be growing or changing at faster rates than we can comprehend. Many people today fear the net and worry about the changes that it will bring to their lives. I have met many people who admit to using the Internet but they admit that they do not and will not engage in any commerce over that medium.

Our legislative approach to eCommerce must not place undue emphasis on our fears but must instead recognize the awesome potential of eCommerce not as a novelty, but as a technology which will transform our lives for the better. There is so much more to eCommerce than simply shopping online. there is tremendous potential for example, for improving the lives of people living in the remote areas of this world through the provision of online services, from health care to education.

To ensure that eCommerce reaches its full potential, we should perhaps set up a legal infrastructure which would regulate the Internet using the approach of a parent, who allows a child to wander freely, giving it guidance, and reining him in only when there is danger ahead.

Thank you.

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