

“Exploiting the potential of Electronic Commerce: Opportunities and Challenges”

Presentation by Dale D. Marshall, Chairman , FTAA Joint Government/Private Sector Committee of Experts on Electronic Commerce at the WIPO Regional Consultation on Electronic Commerce and Intellectual Property.

Organized by the World Intellectual Property Organization (WIPO) in cooperation with the Jamaica Ministry of Commerce and Technology

Montego Bay, Jamaica, June 9th, 1999

Distinguished guests, ladies and gentlemen.

I am deeply honored to have been invited to be a part of this very important regional consultation on Electronic Commerce and Intellectual Property. I am particularly pleased to join my distinguished colleague, Gary Patterson in this panel to speak on the subject **Exploiting the potential of Electronic Commerce: Opportunities and Challenges.**

Since becoming Chair of the FTAA committee of Experts on Electronic Commerce a year ago, I have had the opportunity to speak on the subject of eCommerce throughout the Hemisphere. I have always tried where possible to speak with the local businessmen and women, and government representatives and discuss with them the growth in eCommerce and its potential in their countries. From those comfortable with technology, I have heard comments filled with unbridled enthusiasm about the prospects of eCommerce. From the technologically shy, I heard comments filled with resigned pessimism.

Many people are very cautious about eCommerce and approach the very thought of doing business online with great trepidation. After all, no sooner that we come to grips with existing business concepts, than eCommerce jumps into the fray, changing all the rules.

But are we really faced with a choice on whether we grasp the technology and all that it offers or whether we retreat from it into the safety of our long established commercial traditions. I hold the view that every business, every country in the world will be dragged into the eCommerce mode whether they want to or not.

In the 1700's, the commercial cycle was measured by how long a ship[took to reach the New World, discharge its' cargo and return to its home-port in the Old World. Today, we have moved from a cycle measured in months and in tons of cargo, to a cycle measured milliseconds and in bits.

In this digital economy, distance is irrelevant and Singapore is nearer to you than the door.

And so we ask ourselves, what does this digital economy have in store for us? Do we dare? Or do we dare ...not?!!

Does eCommerce offer anything? Or is it just another way for us to become even more absorbed by the cultures beyond our shores? In preparing this presentation, I wondered if there was any magic to be found in positioning the *challenges* eCommerce before a consideration of the *opportunities* or vice versa. Finding no convincing rationale, I thought I would take an alphabetical tact on the subject, and the letter 'C' coming before "O" , my sequence will be obvious.

CHALLENGES

There are some very obvious challenges to a thriving Internet economy developing in the region. These challenges are cannot be looked at from a wholly

parochial perspective, for the simple reason that eCommerce itself is not parochial. eCommerce makes geographical boundaries irrelevant, and in the same way that it will take your businesses to the world, it will also bring the world to you. While some issues may be domestic, they will also be relevant in many other countries simply because we are now looking at a global market place. If such a company is looking at the global market it would be obvious that whatever challenges and wherever they arise, the potential for a global market place is diminished. If a consumer in Belize is hindered from taking part in eCommerce, then the possibility of doing business with consumers in that country will be restricted.

COST

Not the least of these challenges is that of cost. I speak not of costs to the business, because low costs to the business is the very essence of eCommerce. I am speaking about the cost to the consumer. From costs of Internet services, cost of telephony services to the costs of the hardware. These costs will indirectly impact on the ability of the average person to access the Internet.

Unless Internet access is affordable, it will be impossible for us to empower a sufficient percentage of our populations to make eCommerce a viable commercial option for our businesses. Many countries in the region do not have a flat rate for telephone usage. The consumer therefore has to pay for the time spent on the phone-line, as well as the time spent online. Browsing the Internet, which is a must for any potential consumer, may simply not be an affordable past-time. Any of you who are involved in marketing know how important it is for people to browse. A environment where the costs are so high that people log on and log off after a very short time is not an environment in which eCommerce will thrive.

PAYMENTS

Businesses involved in eCommerce in the region, are limited in terms of their customer base to those people who have access to credit cards. Let us consider what percentage of the total population of Jamaica have credit cards. Whatever that percentage is, that is the maximum number of potential eCommerce customers today. Most online transactions cannot be done today without credit cards. On the other hand, every Jamaican has money to spend. We are not talking about wealth, we are simply talking about the ability to purchase a good or a service.

Electronic commerce, as it is presently conducted, is therefore restricted to a small segment of all our societies and will not become widespread until we develop ways to extend it to a greater segment of our societies.

This is again not a purely domestic issue. In much of Latin America, a region that the Caribbean is drawing close to, banks have forbidden merchants from clearing credit card sales online. Most people cannot participate in online commercial activity unless they have a bank account with one of the few banks which will allow you to manage your account online and make payments via this medium.

We must therefore consider and concentrate on three things:

- **how to increase the customer base by bringing the technology within reach of every citizen;**
- **how to simplify the process of doing business online so that every citizen can use it effectively; and**
- **finding a mechanism of payment which will allow every citizen to participate in this online marketplace.**

There are also substantial challenges to eCommerce posed by our legislative frameworks.

LEGAL AND JURISDICTIONAL

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?

What if the website to which you logged on and made the purchase is not in the country which you expected but is instead hosted in a jurisdiction in Asia?

This example I hope, demonstrates the nature of perhaps one of the biggest problems facing eCommerce. 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. 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 can truly exist in cyberspace and independently of geography. As one examines various websites are not likely to find any indication of the country in which the website is hosted. You will rarely find a dispute settlement policy.

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. I have searched the Barnes and Noble website for some indication as to where the site is hosted or where the corporate entity can be found after many, many clicks on the site, I still have not been successful.

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 which have jurisdiction is prohibitive, then it cannot be said that a consumer has meaningful access to courts to obtain redress.

The total cost of the books which I purchased from the Barnes and Noble site (including the shipping costs), was less than US\$70.00. For me, the cost of pursuing a remedy in a foreign court, and even with friends in the legal fraternity across the US, would bear no reasonable relationship to the cost of the books.

What does all of this mean? Do we apply the long standing common law legal principle of *caveat emptor*? Would this not place an undue burden on the consumer? It would certainly make the net an unfriendly place.

The point has to be that in order for consumers to effectively participate in truly global eCommerce, they have to feel satisfied that they know with whom they are doing business; what location that person is doing business from; and that they have meaningful access to some kind of dispute resolution mechanism.

The availability of redress will encourage trust in the marketplace.

PRIVACY

There are other challenges which we must overcome in order to realise the full potential of eCommerce – Privacy for example. There are three aspects to *privacy*. First, there is the right to enjoy a certain amount of personal life free from unwanted interruptions or intrusions. Second, there is the right to communicate with other people without unwanted or unwarranted surveillance. Third, there is the right to control access to information about ones' personal life.

Privacy is essential for electronic commerce to flourish. People simply will not post their personal information on the Internet unless they receive some guarantee of confidentiality. If we want the benefits of electronic commerce, we must ensure privacy of all personal data.

While I have sufficient confidence in the Internet to shop online and to transmit data online, I have met many people who have said to me that they do not feel

comfortable making purchases on the net or even sending other than the most basic email. They see the potential in eCommerce, but they are simply unwilling to become participants. These people all have legitimate concerns about the extent to which their privacy may be intruded upon, concerns about illegitimate business practices, concerns about the security of their data. The stark reality is that eCommerce will only flourish if consumers can trust the integrity of the medium.

REGULATION OF THE NET

There is cause for concern about the fact that there is no central body in existence to govern the Internet. This concerns not only the consumer, it also concerns the businesses who go online.

Who protects the consumer ? Can it be left up to businesses to so regulate themselves, that the consumer will be protected? If consumers are at the mercy of rapacious businessmen, they will not develop the level of trust which is required for eCommerce to develop.

Who protects the businessman, for example, from the improper use of domain names by his competitors or detractors? In this regard, consider the case of problem which Novaris, a Swiss pharmaceutical giant faced. That company had a website which had the address www.novaris.ch . But there was another website which had a very similar domain name. That domain name was www.novaris.com. This latter site was in fact a site set up by the organization Greenpeace, to criticize the pharmaceutical company Novaris, for what Greenpeace felt were harmful environmental practices. Who protects businesses from **cyber-squatting**? Or from infringement of intellectual property rights?

Do we protect the customers by regulating the industry through governmental action? Or do we promote the concept of an industry which regulates itself.

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.

The conservative element argues that we cannot trust businesses to voluntarily act in the best interest of the consumer. Moreover, those elements argue that the Internet is so wide open that the idea of self regulation is not only farcical but impossible.

There are just of a few of challenges confronting us in the region which we must deal with before we can take the fullest advantage of this new medium. But let us not focus in the difficulties alone. Let us also examine the opportunities that have come along with eCommerce.

The Internet and eCommerce will be hugely beneficial to developing countries. As I drove in from the airport, I saw a few handicraft shops along the wayside. I saw some interesting wood carvings. I know that I will have no time to browse during my short stay here and I don't know when next I will be in Jamaica. I wondered whether the works of that artist were available online. The story is the same for me everywhere I go. Where there is no time to look at the local art, what better way of obtaining mementos of my trip than online.

In the past, those artists would have found it virtually impossible to market their works in foreign markets but today eCommerce opened up the world to them. I must admit that among the many things I buy online are fine Chilean wines which are shipped to me in a few days. The consumer is no longer limited to what he is offered locally by the middleman but is able to exercise greater choice by going

directly to the producer. A week ago I got really brave and purchased a suit online.

But those are all tangibles and we too often think of the purchase of tangibles when we think of eCommerce. It isn't surprising because most of our private commercial activity is the purchases of goods. However, we need to also think of the trade in services.

In the Air Jamaica in-flight magazine '**SkyWritings**', I was delighted to read a story about a young man who came back to Jamaica from university abroad and persuaded his father that together they should look for business opportunities in eCommerce. They worked for many months on a project to put news online, but they were beaten to it by the Gleaner. Then they switched to putting the Yellow Pages online. The company is called IMEX and the company has completed putting the Bahamas and the Cayman Islands yellow pages online. The company is now doing the same thing in Trinidad and the British Virgin Islands. A local online success story.

Think how the professionals in developing countries finally have a real opportunity to conveniently offer their services internationally in a cost effective way. Banks in Latin America have gone online. Legal and administrative systems are always the last to use new technologies, yet in the town of Bahia, in Brazil, the court system has gone online with claims and counterclaims filed via that media, resulting in savings in costs and more importantly for the litigants, a savings in time.

My own law firm has significantly cut its communication costs, in terms of overseas calls and faxes and the costs of sending completed documents by courier, through the aggressive use of e-mail. In fact, as we speak, our firm is concluding a transaction with UK clients and UK lawyers. The closing started at 5:00am Barbados time and since that time, our lawyers who were not so lucky to

have been invited to Montego Bay, have been amending documents and rendering opinions and communicating with all the parties and staying on top of the transaction via email. Transmission of the amendments is instantaneous and makes it unnecessary to fax fifty-page agreements repeatedly back and forth. I know this because the mail has all been copied to me.

No doubt you have your own success stories and new opportunities are being created every day.

In my view, the delivery of services holds the greatest potential for developing countries. Especially countries with vast areas where many people live in remote areas. I am not speaking only in terms of reaching them as consumers but in delivering such services as education and medical care. Distance teaching is no longer be something which requires huge infra-structural investments because we have the Internet. Think about a physician specialist in Kingston, who is able to consult with staff in one of Jamaica's most remote areas and render a diagnosis and prescribe treatment online. Farfetched? Hospitals in Argentina are today working to implement that kind of system.

Conclusion

Humankind has never been very good at predicting the advance of technology. Even visionaries have had trouble when contemplating how radically new technologies can change the way we do things.

- In 1889, Charles Duell, head of the U.S. Patent Office said, "Everything that can be invented ... has been invented."
- Thomas Watson, the famous chairman of IBM said in 1943: "I think there is a world market for about five computers."
- And of all people, Bill Gates, who in 1981 said, "640 thousand bytes of

memory ought to be enough for anybody.”

Even these visionaries had difficulty looking into the future even in the areas for which they were best know. We too can barely guess at the direction which eCommerce will take in the next five years, or in the next fifty years.

There are now literally billions of silicon chips embedded in nearly every object made -- from cars, stereos, microwaves, even the doorknob of my hotel room here in the Holiday Inn. The Internet is allowing us to connect these chips on a massive scale not previously imagined. There is now available a refrigerator which, when you remove an item from the shelf, will read the bar code on the item and will automatically go online and order a replacement item. Chips and networks have unleashed a process of change that is unstoppable.

I can't predict where the Internet, or eCommerce will take us. But it is certainly here to stay.

© Dale D. Marshall,

8th June, 1999