

“Electronic Commerce: The Legal Issues and their Impact on the Legal Profession”

Presentation by Dale D. Marshall, to the Annual General Meeting of the Barbados Bar Association.

Grand Barbados Hotel, Bridgetown, Barbados, September 25, 1999

Mr. President, Honourable Judges, colleagues, ladies and gentlemen.

I am deeply honored to have been invited by the Bar, to which I belong, to speak with you on the subject of Electronic Commerce. It is a complex subject

And I cannot possibly hope to do more than touch very briefly on a few of the obvious legal issues raised by this new mode of doing business and share a few thoughts on how it affects us as lawyers and as potential users of eCommerce.

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 of 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 your neighbor.

And so we ask ourselves, what does this digital economy have in store for us? What promise does eCommerce have for us in our chosen profession? How will it affect the way we practice law?

Does eCommerce offer anything? Or is it just another way for us to become even more absorbed by the cultures beyond our shores?

Electronic Commerce is expected to be a principal means for conducting trade in the year 2005 when the Free Trade Area of the Americas comes into effect. Already, global electronic commerce stands at For conducting trade in the year 2005 when an estimated US\$ 100 billion, of which \$70 billion represents *business to business* eCommerce with \$30 billion representing the more recent development of business to consumer eCommerce. Global eCommerce is expected to continue its exponential climb and, according to some estimates could approach a staggering US\$3 trillion by 2005.

The opportunities of eCommerce are great and the Internet and eCommerce will be hugely beneficial to countries like ours. Too many people hold the view that economies such as ours cannot benefit from eCommerce. This view needs to change. For the first time in history there is a technology which levels the playing fields between small businesses and large businesses, and between small countries and large countries. Consider for example the exploitation of intellectual property rights on-line.

The fact is that the Internet can help our local artists more than it can help Madonna. Today consumers can go to any record store and buy Madonna – but maybe not find the works of Square One. With the net and eCommerce our local artists can now have their music available on-line and not just so that people can buy CDs but also for consumers to download the music in a digital form on-line.

Our artists, potters for example, manufacturing beautiful works of art, , in the past would have found it virtually impossible to market his work in European markets. eCommerce opens up the world to him. I must admit that I am now buying Chilean wines on-line. But those are tangibles.

In terms of intangibles such as services, 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 on line with claims and counterclaims being filed via that media, resulting in savings in costs and more importantly for the litigants, a savings in time.

Our own firm has significantly cut it's 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.

All of these opportunities for our clients spells opportunities for us as providers of legal services.

In plain language, if eCommerce is the direction that the world is going, we have no choice but to become steeped in the subject so that we can properly deal with the issues which are expected to arise. And if our clients are employing eCommerce in their businesses, do we have any choice but to follow suit.

What does following suit mean?

We need to embrace the technology . Websites- email etc.

CHALLENGES

There are some very obvious challenges to a thriving Internet economy developing in the Barbados and the wider Caribbean. Not the least of these is the

cost- from costs of Internet services, cost of telephony services, 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. People 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. You may think that such matters need not concern us. However, electronic commerce being inherently global, requires that people everywhere must have easy access to the Internet.

There is also a substantial challenge to eCommerce posed by our legislative frameworks.

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?

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. Whose national laws apply to transactions and business dealings conducted on-line, when eCommerce itself does not recognize or respect any national boundaries? 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 to see where they are hosted and nowhere on these sites is this information given.

Let me share with you a personal experience. In February this year, 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. I what national court can I claim redress.

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.

Another issue which is relevant not only for us in Barbados but for all countries is the uncertainty of whether agreements entered into electronically are binding on the parties. The fact that is that our laws seem only to have contemplated paper based transactions. A cursory glance through the laws of Barbados would reveal many pieces of legislation which require a written signature for validity and often these signatures have to be witnessed. ECommerce existing as it does in a digital form, makes these requirements obsolete. Unfortunately, our laws do not recognize any form of electronic signature.

Our laws will need to be updated to bring us in line with the technological developments settle the issue of the legal validity of electronic contracts and digital signatures.

What does all of this mean?

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.

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.

REGULATION OF THE NET

There is great cause for concern among lawyers about the fact that there is no central body in existence to govern the Internet. This is not only a consumer issue; it is also a concern for those businesses which go on-line.

Who protects the consumer? Can it be left up to businesses to so regulate themselves, that the rights of the consumer will be protected. I will mention again my Barnes & Noble experience. My last 4 email sent over the last few month complaining about the fact that I have not yet received one of the books which I ordered, have gone unanswered.

Who protects the businesses, for example from the improper use of domain names by competitors or detractors? In this regard, consider the problem which the Swiss Pharmaceutical giant **Novaris**, faced not long ago. That company had a website which had the address www.novaris.ch. But there was another website with a very similar domain name www.novaris.com. This latter site was in fact set up by the organisation Greenpeace, to criticise the pharmaceutical company Novaris for what they felt were harmful environmental practices.

Commonwealth courts have also had to deal with similar issues. The Yahoo case in India involved the registration of the domain name www.yahooindia.com. The internet giant, Yahoo.com, brought suit in India to prevent the Indian company from using this confusing variant of its name. The defendant argued many points such as the sophistication of net users and the disclaimers put up on the site – all of them unsuccessful. The court held that Trademark law applied with equal force in cyberspace as it did in the physical world.

PRIVACY

I believe it is important to make a brief mention on the issue of privacy on the internet. While the common law does not recognise any right to privacy, we are again caught by the requirements of the universal marketplace where consumers

value and insist on certain minimum privacy standards.

There are three internationally agreed aspects to **privacy** on-line. 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.

OPPORTUNITIES FOR THE PROFESSION

With the advent of eCommerce, there will be substantial opportunities for members of the bar not only in terms of new and expanded areas of work. Equally important is the opportunity to use the medium of the Internet to reach into markets that were traditionally open to the few.

Our foreign clients are using eCommerce and our local clients are beginning to test the waters. Unless we get into the area as practitioners today we will once again find ourselves playing second fiddle to the accounting profession who are ready to offer business and legal advice to our clients on how to successfully navigate cyberspace.

A final word – I wish to say here that we cannot continue to hide behind the so-called genteel and ancient ways of practising law. We need to examine the global marketplace and see where we are and then look to see what we have to do to be able to meaningfully participate. It is a common thing today for potential clients, both corporate and individual, to try to access information on the people they want to hire by looking in their websites. Indeed the question is increasingly being asked today, do you have a website where I can find information about your practice. The bar needs to study the issue of websites and encourage their development among our practitioners. We cannot afford to sit back with our pre-victorian ethos and ignore what is happening around us. Websites are being employed all around us as a legitimate marketing tool and we need to get on board.

It is my view that the Bar association should lead the way by setting up a website and by communicating to the profession on-line.

Our court system could be assisted by electronic filing of documents and our local decisions should be posted on line with free access to the members of the bar. And there are many other areas where we can innovate using the Internet and eCommerce.

Conclusion

Humanity 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, 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.

The possibilities for trade and education and the simple sharing of information are limitless. We may find that buying music and movies as discs or tapes will give way completely to purchasing and downloading them over the Internet. The concept of a library as a place where books are stored and a place where the serious lawyer must visit frequently, will change.

We need to decide if we will seize the many opportunities that are available to us through eCommerce or if we will allow ourselves to be left behind.

Thank you.

25 Sep, 1999