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INTRODUCTIONS, OPENING REMARKS AND WELCOME

RUTH DAY

At last year's conference Ron Plessner said he felt like he had just gone through the Epcot Center where, for those of you who've been to Disney World, you get on a train and you go whipping by a vignette of countries, one by one, by one, by one, and he thought last year that we had a panel that was the Epcot Center of Internet and e-Commerce Law. It's a good concept actually and this morning we have another outstanding tour in that each of these gentlemen is going to give us a short presentation on all we need to know about e-Commerce initiatives in their respective jurisdictions. Mita Mitra from British Telecom will run the panel.

MITA MITRA

Hello, very pleased to welcome you all to the opening session of the second day. As Ruth announced, we've got a very distinguished panel to talk about the practicalities of how the legal rules differ in different jurisdictions and countries. It will be followed by a practical perspective on handling different national rules.

I will get straight in with our first presenter because we're running late, Takashi Kume, from the Ministry of International Trade and Industry of Japan.

**PERSPECTIVES ON JURISDICTION AND CROSS BORDER E
COMMERCE**

TAKASHI KUME

Thank you very much. Good morning, Ladies and Gentlemen, it is indeed a great privilege and pleasure for me to be here invited by the Internet Law and Policy Forum today. And I want to say thank you for all the people who support this conference.

I know the time given to us in this session is kind of limited, and I would like to focus my points mainly on a brief introduction of the Japanese jurisdictional system, MITI's views on e-Commerce in the global market, and then provide some proposals on jurisdiction in e-Commerce taking into account of The Hague Draft Convention which was already discussed yesterday, but I hope I can add something more. I'd also touch upon the situations concerning ADR in Japan.

Before getting started, I have to say some disclaimer

that views I will present here don't necessarily reflect those of the institution to which I belong or any institution in Japan, but are totally my personal views.

Whenever I present something out of the government, I tend to say this kind of disclaimer in a routine way, but this is literally true on the issue I will deal with today because, as you know, those issues are extremely difficult. But I think it's very useful to exchange views, even if not mature enough and that's why I'm here today.

First of all, I'd like to briefly introduce Japanese general rules on international jurisdiction. Japanese rules concerning international jurisdiction in general are governed by case law. A leading Supreme Court case that dealt with this issue was the Malaysian Airlines System case in 1981. This case presented some general rules on international jurisdiction with regard to civil and commercial matters which is..., there are no explicit statutory provisions on international jurisdiction in Japan. Therefore, international jurisdiction has to be decided in accordance with principles of justice which should require that

fairness be maintained between parties and that proper and prompt trial be secured.

The provisions on distribution of the venue among the local courts as established in the Civil Procedure Code reflects those principles although those are not necessarily concerned with international jurisdiction itself. Therefore, a defendant should be subject to the jurisdiction of the forum when the conditions meet the provisions for venue set forth in the Civil Procedure Code. Although there have been minor variations in lower courts judgments since this case was ruled, roughly speaking this judgement still can be called case law on international jurisdiction.

Secondly, I'd like to introduce MITI's points of view towards e-Commerce. The MITI's proposal for WTO e-Commerce initiative is available on the above Web site which we are now in the process of getting revised, and we are now working hard to present a second proposal after having received quite a few responses to the first draft from all over the world.

In that proposal, we have presented a basic idea to the effect that e-Commerce is and will become more vital,

not only to business, but also to society itself throughout the world. The confidence of ordinary people as well as business towards activities on the Internet is our common public goal. E-Commerce presents opportunity for all consumers and small business to obtain easy access to the world market via the Internet.

In the past, the world market was readily accessible only to large global companies located in developed countries. But now, e-Commerce is a new and powerful medium which can help close the Digital Divide among countries and achieve global equality in the new world economy. This can only be accomplished if countries take balanced steps between consumers and business, now and in the future. In undertaking this initiative, a country should take into consideration the viewpoints of both consumers and industries and the quality of life of every person in the information society is surely based on reliable and stable legal systems.

To ensure reliable and stable legal systems that sustain the fruits of e-Commerce for both consumers and the industries, what can be done by jurisdiction, which is our present issue to be discussed?

As all of you are aware, jurisdiction is a matter of choice of forum, at least in a civil procedure. You may otherwise think that harmonizing substantive laws would be a more direct way for striking the balance between consumers and industries. But as all of you are aware, in many cases harmonizing substantive laws must be a long and winding road which may not have the destination after all. Therefore, adopting a set of uniform rules on jurisdiction must make sense in that predictability in international commerce will be improved which leads to sound development of e-Commerce.

In addition to that, I think it's also important to ensure predictable and reasonable extraterritorial application of public or administrative laws such as antitrust laws or consumer protection laws or financial regulations, which is related to prescriptive jurisdiction or enforcement jurisdiction to some extent. I'm afraid that I won't have time to deal with this issue today, but I have to say that Japan has been too shy on this matter and now is the time to reconsider reasonable ways of extraterritorial application of these rules.

But I must add hastily that we are quite doubtful of

unilateral application of a state public law in foreign countries without any agreement, especially on enforcement, in advance. One of the practical ways is to enter into a bilateral agreement which was already made for example with the U.S. government on antitrust implementation.

Some people understand that nothing has really changed in the way you deal with legal issues related to cross-border transactions due to the advent of the Internet.

They say that problems posed by the Internet to conflict of laws or jurisdictions should not be viewed as a difference in kind but as that in degree.

Basically, I agree with this idea in the sense that most of the legal issues or problems arising from transactions using the Internet could have happened even without the Internet. But I still believe some problems would be really new issues in kind.

In order to understand what is really a new problem, we have to go back to the nature of the Internet. In other words, we have to figure out what are unique elements to e-Commerce compared to ordinary transactions without using the Internet. In sum, I think a digital processing system and the openness of

the network are the core elements that distinguish Internet from other mediums. Because of these features, information is readily accessible simultaneously and immediately, irrespective of the territorial location. Therefore, it is inherently and instantly global. As a result, issues of jurisdiction and conflict of laws are more likely to arise. The concept of "place" in the traditional sense might not be very important. However, what I think is very important is we still have to use the conventional framework of conflict of laws or jurisdictions rather than create a brand new system from scratch.

In the context of the conventional framework, I think it's important and useful to review the Hague Draft Convention which has been intensively discussed since yesterday and will be discussed today as well. Among others, I will deal with four issues which are: contracts, consumer contracts, branches and tort. And I want you to think about what is really a unique issue to the Internet, and if any, what can be a desirable solution to these new issues.

Firstly, I'd like to deal with contracts. General rules on contracts in the current Draft is to provide a

jurisdiction those states, such as; a state where goods were supplied in whole or in part; a state where services were provided in whole or in part; and with regard to matters relating to, both to goods and service, a state where performance of the principal obligation took place in whole or in part. I basically have no objection to this Draft as far as it deals with conventional contracts. However, I want you to think about a new type of contract that was made available only by the Internet, and whether controversial understanding is adequate or not.

For example, let's think about contracts on-line delivery of digital contents such as music or software which, I think, reminds you of the brilliant luncheon speech yesterday. First of all, there's a problem where the digital contents should be regarded as goods or services. I don't intend to deal with this issue right now, but the conclusion should be the same, whether it is considered to be goods or service. If you treat digital contents as goods, the problem is where they were supplied; if you treat digital contents as services, the problem is where they were provided; and if you think of it as a mixture of goods and services, the problem is where performance of the

principal obligation took place.

In this context, I think basically jurisdiction should be provided in a state where the receivers of the contents were habitually resident. If the country or origin is a place where jurisdiction is provided, I'm afraid that race to the bottom might follow. On the other hand, however, from practical points of view, it may be difficult in some cases to identify where the receivers of digital contents were habitually resident, which will harm the predictability of sellers of digital contents. Therefore, I think it necessary to introduce a disclaimer in this article, and I will explain you in more details later on how disclaimer should be done.

Next, I'm dealing with consumers' contracts which is dealt with in the Article 7 in the Draft Convention which was already discussed intensively at the last panel yesterday. As was introduced there, in the Draft, consumers may bring a claim in a court of the state in which it is habitually resident, if the conclusion of the consumer contract related to trade or professional activities that the defendant has engaged in or directed to that state, and the consumer has

taken the steps necessary for the conclusion of the contract in that state.

And choice of court can be made by an agreement of the parties only if such agreement is entered into after the dispute has arisen, or to the extent only that allows the consumer to bring proceeding in another court. I think the gist of this provision is how to interpret the phrase "defendant has engaged in or directed to that state". In other words, by referring to this phrase, is a company permitted to use a disclaimer claiming that they intend to do business only in limited countries that they designated in advance?

Let's assume what would follow if the answer is no. If the answer is no, any consumer is allowed to bring suit, whether the companies intended to do business with those consumers or not. And the industries have only two choices: one is selling all over the world at the risk of getting sued anywhere in the world, whether they like it or not; or never using the Internet. This "all or nothing" solution will discourage especially small businesses from using the Internet for business.

Companies may find themselves having to appear before a foreign court that they have never expected. Small businesses may be forced to withdraw from the market, which may deprive the consumers of opportunities at the end of the day. I don't think the balance is very appropriate. Therefore, I believe disclaimer should be permitted, the next question is how?

I think it useful for us to look at the project which is currently being made in the WIPO, concerning protection of industrial property rights in relation to the use of signs on the Internet. Article 10 of the current Draft stipulates that condition in order for a disclaimer to be effective. For example, the statement should be contained on the Web site. The statement should be written in the language used in the Web site and in the state disclaimed. The user should request the address of customers before the delivery of the goods or services, and the statement has to say that the user refuses delivery to customers who have indicated that they are based in that state. Although further study and scrutiny is necessary, I think the way of presenting a disclaimer proposed here, basically can be used for consumer contracts handling and in other situations such as tort.

Let's go on to the next topic. Article 9 of the Draft reads as follows, and although there seems to have been serious discussions in incorporating the phrase, "regular commercial activities" that many of you are aware, I think the point of this article is how to interpret whether the dispute relates directly to the activity of that branch, agency or establishment, or to that regular commercial activity. I believe this sentence must allow a company to use the same type of disclaimer that I showed you before, and to the extent that disclaimer can be accepted I think the essence of the current draft will work out.

The next topic is Tort. In the current Draft, a plaintiff may bring an action in tort in the courts of:

A state where the act or omission that caused injury occurred, or where the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that State.

In the context of e-Commerce, I think the point of this

article is foreseeability for the person claimed to be responsible. In other words, under what circumstances and conditions he can claim that injury was unforeseeable? I believe one of the facts that has to be taken into account is whether he presented a disclaimer or not, and if so, by what means? Again, as I mentioned before, in contracts, a disclaimer that meets certain requirements should make a company free from getting sued in the country where it had never expected to do business.

The summary of my proposal so far is: disclaimer should be permitted if they meet certain requirements and conditions as I showed you before. Even without new provision, it is possible to allow companies to use the disclaimers in interpreting the relevant provisions. However, on its face, it is not very clear whether my interpretation will be adopted in every country or not which will harm the predictability.

If you have to go to court to make sure this interpretation is correct or not regardless of whether the court has jurisdiction in the end or not, you still need time and money, and the situation can't be improved at all. Therefore, I think it must be useful

and necessary to incorporate a horizontal provision which applies to the Articles 6, 7, 9 and 10 in the context of e-Commerce stipulating the requirements and the effects of a disclaimer.

Last but not least, I'd like to touch upon Japanese problems that make ADR not readily available. We expect various types of disputes will arise in the field of e-Commerce, and as many people have already mentioned since yesterday, it will get more and more important to provide flexible venues to settle the disputes, not only in the court but also out of the court, depending on the nature of cases.

In this context, we think it is important to facilitate utilisation of ADR as Mr. Kuner reported yesterday. However, there's at least one obstacle in Japan, that is Attorney's Law which allows lawyers exclusively to represent parties, even for ADR. Attorney's Law, Article 72 reads:

Concerning legal matters, those who are not lawyers are prohibited from dealing with legal issues such as agency, arbitration etc. for the purpose of making profits.

ADR institutions in Japan have to be established by lawyers or other institutions whose purpose is not to make profits, due to this provision in Attorney's Law, I'm sceptical whether such institutions can provide good service. We believe some flexibility should be introduced into this area so that cost and speed for dispute settlements be reduced dramatically. And the MITI is now eager to seek possible ways for qualified non-lawyers to get actively involved in ADR procedures which, we believe, are necessary for the sound development of e-Commerce.

That's the end of my presentation. If you have any questions, please get in touch with me by this e-mail address. Thank you very much for your attention.

MITA MITRA

I present to you now Mr. Mauricio Devoto, who will consolidate some of the issues we heard yesterday on Latin America, and also give more of a perspective on what is or is not happening there, and his personal view of the reasons why.

MAURICIO DEVOTO

Well good morning. First of all, I would like to thank the ILPF for having invited me to the debate, to this forum because that's a way of incorporating Latin America to the debate of the law of cyberspace.

I'm from Buenos Aires, Argentina, I'm a lawyer, a notary public, a Latin system notary like European notaries. I'm director and co-founder of ITCenit, a Research Center on Information Technology that was established in 1996 with the aim of exploring the impacts of the digital revolution upon the law, economy, as well as upon education and society as a whole.

The Latin American perspective and jurisdiction was explained yesterday by Mariana Silveira from the National Law Center for Inter-America Free Trade and Ronaldo Lemos from Brazil. So I'm not going to talk now about prescriptive jurisdiction or adjudicative or enforcement jurisdiction, I will give you a different and a global perspective of what is going on in Latin America.

Just as the rest of Latin American countries, Argentina

is receiving the first rays of this new era or digital revolution. And just as the rest of Latin American countries, it's adopting a passive stance, like a person lying in the sun on the beach, without realizing the economic future of the country, that the economic future of the country may depend on the attitude he assumes.

Latin America will attain future significance as an emerging market in terms of expansion of e-Commerce, both in the USA and the European Union. We are already witnessing the pressure put upon many sectors, mostly by the USA, in order to soften or reduce the legal hardness that could hinder e-Commerce. But in general very few are aware of Latin American society's involvement in the digital era. In many instances, this ignorance leads to the choosing of an incorrect approach, an approach that does not allow governments and foreign companies to achieve successful results.

When I prepared this work I gave a lot of thought to the best way of making good use of these few minutes and this is why I decided to offer you a general overview of what is going on in Latin America. And the main issues have been briefly summarized as follows:

what governments are not doing; what business companies and NGO's are not doing; the academic sector and the "Campus Syndrome"; the need for an interdisciplinary approach; and the debating about definition and regulation of the Internet.

One of the critical points I want to draw attention to is the lack of national and regional initiatives in the fields of information technology. Our main actors, potential users and consumers still do not seem to realize they have entered a new era that will transform their lives, nor do our authorities and leaders of the private sectors.

Governments have an important role to play in this respect. There are many measures that can and should be taken so as to lead our countries towards this new society. These measures are of varied types and degrees of importance, and should be discussed as a whole. But before investing time and money in the study and implementation of some specific measure it is essential that we discuss its aim and design the necessary plan. I think that without an overall plan, without a strategy, no measure per se will allow us to achieve the proposed aim.

Let me stress my point: the lack of this type of general initiatives in the national and regional levels is leading to isolated and uncoordinated efforts, which means we are addressing in a separate way issues that are closely connected. Short-term problems prevent governments to realize the important role they should play in the development of this kind of initiatives.

But I also notice that the private sector, the business companies and the academic sectors and NGOs as well are drifting astray.

The visible face of digital economy in Latin America are the "dot coms". Confusion is widespread. Everybody talks about e-Commerce and dot coms, but few people have gone beyond what they read in the newspapers about billions and trillions of dollars that will be negotiated in the future. Everybody talks about portals, but few admit they have never surfed and do not even know what portals are for. People mistake NASDAQ for digital economy. NASDAQ's rises and falls only add to this confusion. Owing to the sluggishness of governments and the academic sector in setting up standards, it is the business companies themselves who

explain the pros and the legal problems they could derive from the use of new technologies, and they do so at the same time they try to sell their products. This, understandably, makes people suspicious.

I said government has a decisive role to play, but let me add that the private sector also has to take the initiative. It should try to direct all new ideas pertaining to e-Commerce towards one common center. Business companies must join forces in order to set up common policies that allow them to anticipate those issues and try to define their own codes of conduct, while offering alternatives capable of lessening the effects of a sure state regulation.

The academic sector does not understand the implications of the digital era. The most noteworthy universities do not carry out research activities. They are busy building their campuses, while in other parts of the world, they are already asking themselves what to do with them. And worse yet, they are ignorant of what is going on in the world. Thus they do not get involved in discussions regarding leading issues.

This is especially noticeable in MBA and postgraduate

courses syllabuses at schools of Law. Those schools, however, are witnessing the timid appearance of some academic courses that deal with the birth and development of the dot coms.

Several problems have not been anticipated: those pertaining to security, privacy, confidentiality of information, what may become of the practice of retrieving and using personal data, as well as crucial topics associated with Internet and its regulation.

A general debate on these issues is still missing. And these matters should be given priority in countries such as ours, where the processes of deregulation and privatization carried out these last years have led to a great inflow of foreign capital.

The idea of convergence is lacking in government, business and academic sectors. There is no interdisciplinary research. Governments regard digital revolution as a technological issue. Engineers and technicians work on their own, designing and developing products in the belief they will be used in an ideal free world, a world without rules and regulations. Economists are wholly ignorant of the far-reaching

effects of digital economy. The most advanced among them prepare estimates about e-Commerce, a type of commerce whose implications they fail to recognize.

Let me focus now on lawyers. Lawyers do not see beyond their eyes. The idea of convergence has not touched them. They still have their specializations: experts in constitutional law, business law, telecommunications, patents and trademarks, copyright, administrative law, maritime law and international private law. They focus their attention only on specific topics. Faced with new challenges that arise from the Internet, they look for solutions within the traditional regulatory framework, or try to apply, by the same token, the solution arrived at in former court decisions. Throughout Latin America, the associations of lawyers, notaries public and CPA's have established computer science committees in order to identify and study these issues as they arise. The fact of their being called "computer science committees" gives you an idea of the degree of development of their parent associations. Instead of delegating the responsibilities for these topics, they relegate them.

Owing to the backwardness of the associations, and the scant number of people involved, they have not been able to create

subcommittees specially oriented to the study of each particular issue, as is a standard practice in the ABA.

We have, however, one thing in common: their committees, as well as ours, are exclusively composed of lawyers.

This is true, I believe, of the rest of the world. Each sector analyzes the digital phenomenon from its standpoint. Neither do universities or other independent institutions affirm the need to create interdisciplinary centers formed by engineers, lawyers, economists, philosophers, business administration, journalists, experts on communication sciences. As regards jurisdiction, a prevalent idea is that "one of the things that may be new about the Internet and its relationship with jurisdiction is the role that private ordering, private self-regulation, may play in conjunction with a governmental framework to deal with some of the uncertainties of applying traditional jurisdictional concepts to this new medium". I agree with that. However, the result is that each different sector prepares its own private project, which is looked upon suspiciously by the rest. Private initiative loses its strength when institutions are composed of experts trained in the isolation typical of

their specialization. Let us consider, then, how valuable interdisciplinary committees could prove to be in this respect. This, I believe, will be the challenge of the future.

Latin America has not yet given thought to the crucial need for defining the nature of cyberspace. However, we, just as much as the European Union, love regulation. Thus, we rush to regulate throughout legislation whatever comes first to our attention, that is, e-Commerce or electronic or digital signatures.

Nobody thinks about the distinguishing features of the world in which the activities to be regulated are performed. Nobody ask themselves what cyberspace is. Nobody thinks if, when we are there, we are in some other place altogether, or are still here, or else, whether we are here and there, in two different places at the same time. Legislators and jurists apply criteria from the real world in order to regulate these new realities without asking themselves whether they should be looking for a different approach. Lawyers and lawyers and more lawyers, that is what I see. Sorry for that. There is an intention of solving the very few cases about jurisdiction, for example, raising

in Argentina by applying to them the traditional interpretation criteria. I can't say too much, but we have a case now that involves Argentina and is related to the fees she pays to the reservation system Amadeus. But we have, we don't have e-Commerce, we really don't have e-Commerce and we don't have cases.

Let me tell you some of the questions we should be asking ourselves. Was this space, as many people say, born completely free, not bound by any rules or laws? If this were so, should it be kept free of regulation?

Is this possible or even desirable? Are there any other forms of regulation besides law? Isn't the very architecture of the Internet a form of regulation? Is it advisable to avoid government regulation? Can we leave everything to be determined by market laws, by the values that some people decide to invest cyberspace with? Does the non-intervention government policy guarantee that cyberspace will always be free of regulation?

I think that not finding the answers to these questions can be the cause of certain issues losing their importance, and one of them can be that of jurisdiction. As long as the Internet keeps losing its

original values or principles, its open source software or end-to-end architecture, as long as the battle of the distribution of contents is lost to patents and copyrights, we will witness a stronger tendency towards the zonification of space in order to allow for the application of local laws.

But it's true that when we are there we are still here, here we still have traditional analysis methods that may be helpful in order to decide on the necessity, convenience and opportunity of regulation.

And the "Checklisten" technique can be useful for us in this respect. Remember the Checklisten is a technique without a purpose of its own. Its aim is, in any case, to help the law become feasible, whether it belongs to the citizens or the state. I will only remind you the ten simple issues proposed by German federal government: Is it really necessary to do something? Which are the alternatives? Should the federation have a hand in this? Should a law be drawn up? Is it necessary to take some measure now? Should legislation cover the foreseen scope? Can the licensing period be restricted? Does legislation share the same mind with citizens' opinions? Is legislation feasible? Is the

cost-benefit ratio reasonable? And let us look now at the range of alternatives: What costs will the affected people incur? Can you impose a financial burden such as this on affected people? What additional costs would be created in national, provincial and local budgets? Were any studies made about the cost-benefit ratio? Which were the results? After this law becomes effective, how will we measure its effectiveness and secondary costs?

And for conclusion, in Latin America, we do not have clearly defined policies that join together the different elements related to the Internet and the digital revolution. Without this type of initiatives, without a consistent debate, without an interdisciplinary approach to the subject, e-Commerce as well as all related legal matters will remain as undetermined and vague as they are today, and this will adversely affect e-Commerce in this region.

By the beginning of this year, the ITCenit, backed by the American Embassy in Argentina submitted a proposal for the designing of a comprehensive initiative on IT to the Argentine government. This initiative was called the Argentina Digital, and it contains the aims

that the government should pursue in this matter. And the government has adopted some of our proposals, so we hope we are beginning to head in the right direction. But there's still a lot of work to be done.

Well thank you for your attention, and let me remind you that Latin America is part and a parcel of America, and I hope that this new world or this new old world helps create the union of the continents. Thank you.

MITA MITRA

Pleased to introduce now, after that very provoking talk, JJ Disini to talk about developments in the Philippines. Mr. Disini has been involved in drafting the implementing laws and regulations on the e-Commerce Act that's been enacted there.

JJ DISINI

Good morning. First of all, I'd like to thank the Internet Law and Policy Forum for the invitation to speak today on the Philippines perspective on Jurisdiction and Cross Border e-Commerce. I guess we have a limited time so I'll just run through my slides.

And the first thing I want to discuss is the, I

suppose, the first and the biggest today cross border e-Commerce event that has happened from the Philippines value that billions of dollars depending on which report you believe, and I'm talking about the "I love you" virus which allegedly originated from the Philippines. As I put up there, this event has put the Philippines on the map and as I like to say, put us on the wrong map.

But I think, the important thing to remember, and I'd like to say this now because few people know this, that although the virus was released from the Philippines, or allegedly released from the Philippines, what is certain is that the cure did come from the Philippines, and the name of the company is Trend Micro, and I have it up there, and this is the company that came up with the anti-virus, I believe within 24 hours after the virus had been... or the announcement of the release had been discovered.

And the "I love you" virus brought about some interesting multi-jurisdictional issues primarily related to the application of the Computer Fraud and Abuse Act which is an American Federal statute, and in fact, FBI agents were involved extensively in the

investigation by the Philippines authorities. And I believe the doctrine which allows the U.S. government to apply that law, which is a foreign law, to acts done exclusively within the Philippines is the effects doctrine, which is that if the acts are done in one jurisdiction and the effects are felt in another, then the jurisdiction in which the effects are felt may be exercised over the accused.

Another issue that arose was the application of the U.S. Extradition Treaty with the Philippines, and the fact that it did not apply largely because, for the extradition to be allowed, the act must be a criminal offense in both countries. And since there was no law at that time in the Philippines with respect to criminalizing hacking or the release of viruses, the extradition could not be effected by the United States.

There were however private efforts of extradition. This took the form of job offers for the accused, which is quite interesting, because I think some of them believe these to be authentic job offers. I, on the other hand, saw this as an opportunity for a foreign government to arrest them upon their arrival.

Another interesting development is the old departure

order which was issued by our Secretary of Justice, interestingly enough, in violation of our own regulations on the issuance of hold departure orders. Usually an accused may be held within the Philippines through a hold departure order issued by the Secretary of Justice only after a case has been filed in court. But in this case, even before information was filed with the court, the Secretary of Justice issued the hold departure order, and I thought it was a little silly because insofar as cybercriminals were concerned, the Philippines was considered a haven, and this accused had no, there was no motivation for them to leave the Philippines because the risk of arrest in a different country was there.

Anyway, the provision on hacking was included in the Electronic Commerce Act which was passed and signed into law in June 14, 2000, which does include a provision on hacking, which penalizes the release of viruses. And I think to the credit of our senate, which approved on third reading its version on April 2000, a full month before the "I love you" virus incident, there was, the provision on the release of viruses was already included.

The interesting thing about the provision, and about the provision on criminalizing hacking is the provision on the penalty. There's a mandatory imprisonment from 6 months to 2 years. However, there is also a penalty of a fine which is a minimum of a 100,000 pesos and a maximum commensurate to the damage caused, which means that if this law had been passed at the time the "I love you" virus incident happened, then the fine would be somewhere in the vicinity of, depending on which report you believe, 9 billion U.S. dollars to what, 16 billion U.S. dollars. So, I think that what would happen is that provision is there to be attacked as being a cruel and unusual punishment.

So just moving on to some of the other provisions of the e-Commerce articulating to jurisdiction, the source of our Electronic Commerce Act is the UNCITRAL Model Law on e-Commerce which was passed in December, or was it, I'm sorry, in 1996 and Singapore's Electronic Transactions Act.

The first thing to remember about the Philippines e-Commerce Act is that there's a limited recognition of electronic signatures. In this respect, we've veered away from the general recognition

of electronic signatures contained in the UNCITRAL Model Law and in the Singapore's Electronic Transactions Act, and instead came up with a criteria, four criteria for validating electronic signatures which, if you read through it, it's quite confusing, but the only thing which we see which qualifies are digital signatures. So, in the Philippines, no electronic document is considered signed unless it is signed through a digital signature.

One of the other provisions which caused some concern at the House and at the Senate was the provision of notarization. Notarized documents are public documents in the Philippines and can be admitted directly into court without further authentication. However, given the problems associated with notarization, which I understand was discussed at the pre-conference event here, the issue was passed on by the House and the Senate under the law to the Supreme Court of the Philippines which will issue or is mandated to issue rules on electronic notarization.

In an attempt to put in some jurisdictional rules in the Electronic Commerce Act, we have a Tax Situs Rule which was incorporated in the Model Law provision

relating to the place of dispatch and receipt of data messages. This is an interesting provision because it merely states the place and receipt of data messages, and the rule is that, what's put into the Model Law, to my understanding, because servers can be placed anywhere, in other words, the mail server of the sender and the receiver may move from place to place. And in order to have some sort of certainty as to the place, it was deemed important to peg the place, the place of dispatch and receipt of data messages to the place of business of the sender or receiver. And I suppose when the legislators read the rule as written under UNCITRAL Model Law, they thought it was a provision on jurisdiction, and so they placed that the rules on Tax Situs will be determined by that rule.

However, the interesting thing is that the provision, at least to my mind, does not determine Tax Situs because the rule will always determine or will always give out two places, the place of receipt and the place of dispatch. And so, if a Filipino is purchasing something from Amazon.com, then the place of dispatch would, say, be the Philippines and the place of receipt will be Seattle, and that doesn't tell us anything about the Tax Situs. So that was, I think, a dead

letter provision in the Electronic Commerce Act.

Another point on the Philippines with respect to personal jurisdiction, this relates to the remedy of a foreign defendant. And this is just to differentiate the rules in the Philippines and in the United States.

I believe under U.S. law, if one is sued in a court in the United States, you can resist jurisdiction, even though summons have been served upon you. In the Philippines however, and I think that this arises because of our lack of experience in handling multi-jurisdictional disputes, if a foreign defendant is served summons by a local court, there is no remedy under our rules to resist jurisdiction although, because we take American jurisprudence persuasively and we cite them in Philippines courts, the defenses under American law may apply to the Philippines. However, under the current state of law in the Philippines, those defenses are not currently available.

So, the issues moving forward in the Philippines on multi-jurisdictional disputes, first as I said earlier, there is a lack of statutes and jurisprudence to settle jurisdictional issues. However, I guess in our favour, we could cite U.S. jurisprudence as mentioned yesterday

by Dean Perritt, the Zippo case can be cited in the Philippines, also the cases of CompuServe versus Luni, for example.

There's also a lack of experience in resolving cyberspace jurisdictional issues, and there's a great concern right now that lawyers themselves are not equipped to handle this issue, what more judiciary. So, I think what's going to happen is that there's going to be a resort to alternative modes of disputes resolution in the Philippines insofar as these disputes arise.

Finally, from the standpoint of legislation, our legislators are not used to harmonizing laws with international laws, and so therefore what I foresee is that many of the laws that are going to come out of our congress may be inconsistent with foreign laws on cyberspace. This is something that we will have to be vigilant about, and we'll have to keep track of what laws and bills have been passed. Since the Electronic Commerce Act was passed in June, there's been a slew of cybercrime bills that have come up, have been filed in the House, in both Houses of Congress.

And the more interesting one is the one related to cybersquatting, and although it may.. the rules are similar to that, or similar to the UDRP, the difference is that cybersquatting is now a, well it's proposed to be a crime in the Philippines. And after some discussion in the local mailing list about the provision on cybersquatting, it was determined that since the law can be applied only to Filipino citizens, it was believed that only Filipinos will go to jail for cybersquatting, and in effect gives foreigners an advantage in that they can cause the incarceration of a Filipino cybersquatter whereas the reverse would not be true.

So, I think the passage or the filing of that bill raised some issues as to the ignorance of some of our legislators and the people assisting them in the drafting of this bill on the developments that have been coming out relating to ICANN and what I call network rules. And I think that the issue of jurisdiction insofar as we are discussing it today in the context of the Internet, really arises and becomes a global issue because of the global nature of the network and the global access to that network, and what arises is an unprecedented interaction between

people and different forms of transactions as well, whereas before transactions were tangible in nature, now there are transactions which are intangible.

And as discussed yesterday by our luncheon speaker, when it comes to intangible or Internet goods and services, the issue of jurisdiction really comes to a head. And I was looking at the slides of Mr. Kume earlier on The Hague Convention, and it seems that the performance of a service which is done online is not, cannot adequately be addressed by The Hague Convention because the problem is that, where is the service rendered? Is it the place where the company is located or the place where the servers are located in the case of an online service?

So there's an increasing importance of network rules, and I'm talking about protocols or what Lawrence Lessig calls Code insofar as the passage of laws is concerned or consideration of laws. And I think that, as I said, our legislators should be concerned about these developments.

And one of the most important development with respect to network rules is, with respect to the Internet, is

the fact that network rules or protocols are created by, and I have their acronyms up there, all of them, that's the Internet Architecture Board; the Internet Society; the Internet Engineering Task Force; and the Internet Engineering Standards Group. And the reason I have them up there is because I've read about what they do, and I'm still confused as to who does what with respect to the setting of standards. But I do understand that they are coming up with IPV6 or it's already out there and it's being tested, and I think that it's an important development. And what I see is that, in the case of the Philippines, is that we are not involved in this process.

And we are also not involved, as far as I know, in ICANN, and I think that we should be, and it's, as I put up there, it's an experiment in Internet governance. Yesterday morning, Mr. Gurry discussed jurisdiction in three aspects, the jurisdiction to prescribe, adjudicate and enforce. And when you take the context of ICANN in relation to UDRP, I think that all of that is pressing. In other words, ICANN prescribes UDRP, there's an adjudication process, which, although ICANN does not take on a person directly, it has authorized third parties to do so and ICANN thus has

the authority to enforce those judgments.

And where did this jurisdiction derive, and it is my opinion that that jurisdiction or the power of ICANN is really related or linked to the network rule which says that there must be somebody or an entity or a person which must manage the domain name system.

So the issues that arise with respect to network rules, are that since they apply equally throughout the network, network rules are global in nature in the case of the Internet, since there is global access to the Internet. And to the extent that they are global in nature, they impinge upon the political power of governments as mentioned yesterday by Mr. Gurry, the exercise of the jurisdiction is not only a determination of law, or choice of law, or choice of courts, but an exercise of political power.

An interesting thing about the UDRP is that it does not determine the choice of law to be applied to each cyberspace or cybersquatting dispute. In fact, the panels are left to their own devices to apply whichever law they see fit to any cyberspace or cybersquatting dispute.

And another interesting point about the UDRP is the recognition of foreign judgments. The UDRP states that "The Registrar will comply with the orders of a court of competent jurisdiction." Now I guess the question that arises is: what is a court of competent jurisdiction? which leads us to the next topic which is "Network Rules and Politics".

Because if a court of a country which is considered, say, politically, what's the word, or if the courts of a particular country do not enjoy the faith of the international community, then does the Registrar have the option of saying that that is not a court of competent jurisdiction? And or alternatively, could ICANN say that an illegitimate government will not be allowed to make changes to certain domain names issued by their country top level domain registry?

So these issues are important, and I think that from the Philippines perspective, we need to get involved in the process, both in ICANN and in the ISOC, IAB, IETF, process of coming up with network rules, and I think that is the next step that we need to take, we need to get involved. And I think it's important to remember that all, both of those organizations, ICANN and ISOC

are democratic in nature, and they do welcome the participation of foreign countries, and I think that in that respect it behooves us, the Filipinos at least, to get involved and be a part of that, of those processes.

And thank you for your attention.

MITA MITRA

I now introduce to you, Jon Eichelberger who has been based for a long time, working in China, and will give his insight into developments in China.

JON EICHELBERGER

Good morning, I'd like to thank the Internet Law and Policy Forum for inviting me to speak here today. I'm an American lawyer who has lived in China for more than 12 years, and I've been working as a lawyer in Beijing for about the past eight years. So my perspective is perhaps not precisely a Chinese perspective but the perspective of a foreign lawyer working there.

I'd like to talk with you this morning generally about foreign investment in the Internet and e-Commerce sector in China. I'm not going to talk very much about

jurisdiction and some of the reasons for that, I think, illustrate something about the state of Internet and e-Commerce in China today. The Internet / e-Commerce market and the legal framework for it are both in very early stages of development. Moreover, at least in the B2C context, there is relatively little cross border e-Commerce as yet, and the biggest reason for that has to do with foreign exchange control. There are actually very few consumers in China other than expatriates who have access to foreign currency, who have foreign credit cards that they can use for online transactions.

Another reason why the jurisdictional issue has not become acute as yet is that in the B2B context, following traditional practice, almost all contracts provide for arbitration, often in Beijing, sometimes outside of China.

I think the last factor is that generally speaking, foreign court judgments are not recognized in China, and very often Chinese court judgments are not recognized in other countries. Not precisely a jurisdictional point but related to it.

I think maybe my last comment on jurisdiction would be

that when China does finally begin to have to address that issue, presumably after its currency becomes convertible, based on, for example, the experience with choice of law rules, we can expect that they will adopt a very protectionist approach, both protective of consumers and of business groups in China.

I'd like to turn now to some more general issues for foreign investors contemplating e-Commerce in China. A preliminary point is that most foreign companies going to China are looking at actually investing there, setting up operations in China rather than operating cross border.

If we look at the historical perspective, we're really at the point of starting what's often referred to as the third wave of investment into China. The first wave really lasted throughout the 1980's up until 1989, and was characterized by a lot of ups and downs, but it had a primary focus on manufacturing. The second wave, from 1992 to 1997 saw a tremendous diversification of foreign investment activities in China, out of manufacturing into services, real estate and other areas. The third wave is really going to gain momentum next year after China accedes to WTO, and among other

things, Internet and e-Commerce should play a major role in that third wave of investment.

There's some common experiences from the first two waves that I think new investors going to China would benefit from looking at. First, there's been a tendency on the part of investors to overestimate the size of the Chinese market. Second, foreign investors have tended to underestimate the vastly different perspectives of business people and government regulators in China about fundamental business transactions. I think a point to remember there is that most of the people in power in government today, and many business leaders as well were raised in a socialist system, they were raised in a planned economy and while they've been living through a transition to market economics, that transition is not complete.

And finally, there's been a tendency on the part of foreign investors to ignore or not pay enough attention to customary due diligence before making investment decisions. It's as if the enthusiasm about investing in China somehow affects people's judgment.

Just looking very briefly at the size of the market, it's certainly not 1.2 billion people in terms of actual market. A much more interesting statistic is that Internet users, according to official statistics,

grew from 8.9 million to 16.9 million in the first half of 2000. That's a number that's been rising very rapidly over the past year and half or so. However, it is expected that it will begin to level off simply because they aren't that many people yet who can afford computers, who can afford to pay where there are still relatively high access charges in China. Most of those people are in an emerging middle class in the three major cities in China.

Another aspect of the market, there's thought to be great potential for mobile Internet. I read recently that the number of mobile phones in China is now nearing a 100 million. So many investors are focusing on that in China.

And finally, as I noted earlier, at least in the B2B's context, the cross border market is very limited because of foreign exchange control.

It's when we look at the regulatory framework for Internet / e-Commerce in China, I think it's really where you start to see the difference in perspective that I was talking about earlier. The Chinese government's approach to e-Commerce is really a blend

of encouragement and control. There's been a clear recognition that e-Commerce and the Internet is going to be very important to economic development in China to reform state-owned enterprises, to increase economic efficiency. But at the same time, there's tremendous concern on the part of the government about the uncontrolled dissemination of information that the Internet represents. In particular, that's focused on state secrets, a badly defined term in Chinese law, and also, of course, on wanting to limit political dissent.

On the encouragement side, we've seen legislation last year addressing, at least guiding principles for electronic contracts, although there's not as yet been any implementation of rules in the area of authenticity or authentication of signatures. A domain name registration system has been created over the past three years. There are currently some pilot projects for online advertising being conducted in Beijing, Shanghai and Guangzhou. And finally, there are a large number of government sponsored research committees looking at legal issues and regulatory issues for the Internet. I believe China participated in the discussions for the UNCITRAL Model Law, and I understand was at least present at some of the discussions for the Draft Hague Convention.

On the control side, legislation dealing with Internet access, in theory at least under Chinese law, all Internet users in China access the Internet through a central gateway which is controlled by the Ministry of Information Industry and its subsidiary company. Last year again there were new laws on state secrecy making Web site operators responsible for any divulgence of state secrets over their Web sites. Again that term is not very well-defined, and so there's a lot of uncertainty as to the scope of that law. Again last year, there was a ban issued on the use and sale of foreign-made encryption products in China. This produced an outcry from both foreign and some domestic companies. We, at the time, actually had to trudge down to a local bureau in person and register our Internet Explorer software because it contains foreign-made encryption products. There's been some backing away from the implementation of that law, and it remains to be seen how that will develop.

And now we're also starting to see licensing requirements for online sales of audiovisual products, online sales of books, those really emphasize the focus

on upholding the censorship laws, censorship rules.

Moving on to the regulations of foreign investment, Chinese policy-makers and Chinese regulators tend to divide the world into ISP's, a term, which I think everyone is familiar with, and ICP's, Internet Content Providers, a term which is much less well-defined even in China. It's quite clear that foreign investment in ISP's is banned at present under a general ban on foreign involvement in telecommunication networks. But on the ICP side it's a much less clear picture. Value added telecommunications services are also banned under the telecom ban, but the definition of those is very poor, and at least some regulators, the Ministry of Information Industry in particular seems to be trying to force all Web site operators that provide any kind of information and content on their Web site, which of course is everyone, into that rubric, so that foreign investment is also banned. That however, that definition has not yet become law.

e-Commerce also faces restrictions. Foreign investment in e-Commerce is restricted in the areas of foreign trade, domestic commerce, commission sales, advertising, publishing, in other words, almost all of

the means by which Web site operators generate revenue are restricted for foreign investment. The restriction means that central government approval is required for any foreign investment, those approvals are not generally forthcoming or are only very rarely forthcoming.

The result of all of this regulation has actually not been to deter foreign investment. Foreign investment has been pouring into the Internet / e-Commerce sector in China over the past 18 months, but it has led to foreign investors adopting creative, if you will, structures, structures however that are often irrational from a business standpoint, and quite often run the risk at least of being legally invalid for their businesses in China.

Just finally a brief word about the impact of WTO. China is expected to accede to WTO in 2001. In principle that is going to lift the ban on telecommunications for example, although there will remain foreign ownership caps. It is also going to loosen or eliminate the restrictions in foreign trade, commerce, advertising, publishing, et cetera. I think that's all a very positive step forward. One thing to

remember however is that the implementation process for WTO is likely to be very slow and marked by a fair degree of confusion. And I think we're also going to see attempts on the part of regulators to claw back controls to try and keep restrictions in place that arguably may comply with the letter of WTO, but certainly don't comply with its spirit.

As a closing note, the ILPF has graciously agreed to publish on its Web site an article that a colleague and I have written on the impact of WTO on e-Commerce and Internet in China. So you'll be able to take a look at that there. Thank you very much.

MITA MITRA

I would like now to introduce the speak on the Malaysian perspective, Azman bin Othman Luk, who works for a law firm in Malaysia.

AZMAN BIN OTHMAN LUK

Good morning. First of all I'd like to thank ILPF and especially Ruth Day for giving me the opportunity to speak today. It's a great honour.

As Mita said, I'll be speaking on the Malaysian

perspective on jurisdictional issues in the e-Commerce today, and if I may I will start with the usual disclaimer. The views I express today are definitely not those of my government. In the time-honoured tradition of PowerPoint Rangers everywhere. I think I'll start by giving you some absolutely meaningless statistics, so here we go [refers to screen].

Now, I'm not going to go into those [statistics] in detail, but you can see basically we're a small country with an even smaller E-economy, so you're probably wondering what sort of insight Malaysia could possibly give into jurisdictional issues of e-Commerce. Let me just give you a little bit of background into our e-Commerce initiative.

In the late 1990's, our government embarked on a very ambitious and some might say audacious plan, to kick start our entry into the digital era. Basically, this plan is meant to help us to leap ahead of the industrialized nations and make us into a world and regional leader in technology and communications, as well as e-Commerce. And as a starting point, the Malaysian government has created what we call the Multimedia Super Corridor which has

been touted as Malaysia's gift to the world. As you can see, it's actually a green field corridor, physical tract of land, 15 kilometres by 50 kilometres, situated in and outside Kuala Lumpur. It will house two "world-first" smart cities, Putrajaya, which is the new seat of government and Cyberjaya, an intelligent city for the multimedia industry.

The government has actually touted the MSC as, and I quote:

A multimedia utopia offering a productive intelligent environment in which a multimedia value chain of goods and services will be offered across the globe.

To champion the cause of the MSC, the government has set up the Multimedia Development Corporation, which has been given a kitty of 10 U.S. billion to oversee the three projected phases of the MSC.

We are currently at Phase 1. You can see that [the object of this Phase] is to successfully create the MSC and attract a core group of world-class companies. Currently we have 362

companies, including people like Microsoft, et cetera, in the MSC. Cyberjaya and Putrajaya have been established, and Malaysia has put into place a framework of cyberlaws. Phase 2, you will note, envisages, amongst other things, the championing of cyberlaws in the global society. And Phase 3 is particularly interesting especially in the context of the discussion on borderless ADR which was discussed yesterday. Malaysia is expected to become a knowledge society and I quote:

The platform for the International Cybercourt of Justice.

Really, that's a big title, but basically [the International Cybercourt of Justice] is supposed to be an online dispute resolution forum.

So what are the 7 Flagship Applications [of the MSC]? They're listed up there [refers to screen]. I don't propose to go into them in detail apart from the last one which is relevant to us today, that is Borderless Marketing.

Quite simply, Borderless Marketing covers the following: Telemarketing; Online Information Services; Digital Broadcasting; and e-Commerce in general. And

this is a quote taken directly from the MSC Web site:

"...(companies) will find a conducive regulatory environment in the MSC as a comprehensive framework of cyberlaws, led by the Digital Signature Act is being drafted to facilitate the growth of electronic commerce."

So you can see there's a huge emphasis in this entire scheme, on law being used as a vehicle for growth.

What exactly are the laws that Malaysia has put into place to try and jump start the E economy? Basically they're divided into two [categories]. You have a Digital Convergence Law which is our Communications and Multimedia Act 1998; then you have the so-called Cyberlaws specifically designed for the E economy. The Digital Signature Act is the most important [of these Cyberlaws] and I'll be discussing that later. And of course, in implementing these laws, the Malaysian government has had to deal with the issues of jurisdiction as have other countries. Just how successful we have been, I'll let you decide that for yourself.

Let me first touch on the Digital Convergence Law. Previously, our multimedia and communications industry was regulated in two very distinct spheres, the traditional fields of broadcasting and telecommunication services. In 1999, on the 1st April, and I might add, not a very auspicious day to enact new legislation, these two acts were repealed and replaced by a digital convergence Act, the Communications and Multimedia Act of 1998, which has been described as:

"An Act to... regulate the converging communications and multimedia industries..."

Unusually for Malaysia, this Act actually has extraterritorial jurisdiction. Now this concept is rather alien to us, this goes against the grain of Malaysian jurisprudence in general. It's almost as though, for example, the US legislature had passed a law banning the carrying of handguns, it goes that deeply against our legal makeup.

Section 4(1) provides that the Act applies both within and outside Malaysia. Section 4(2) goes even further:

"notwithstanding subsection (1)", the Act applies to "any person beyond the geographical boundaries of

Malaysia... if such person is a licensee under the Act, or provides or will provide relevant facilities or services under the Act in a place within Malaysia".

Now I've actually put it up on the board [refers to screen] because I'm really hoping that somebody will explain to me what it means, because I myself am not sure.

So what are the activities which are regulated by the Act for which you need a license? Well, the Act has been touted as "technology neutral". So the legislators have actually put the [regulated] activities into four distinct categories. The first two are pretty self-explanatory [refers to screen]. The second two I believe cover the question which was raised by JJ Disini of the Philippines just now, as to online services [refers to screen]. What is an "Application Service"? Essentially a service provided by means of network facilities, and this covers electronic transaction services such as e-Commerce, Internet banking. A "Content Application Service" is basically an application service which provides, well, content. And that covers online information services, video-on-demand and other services like that.

Content is defined as:

... sound, text, still picture...

basically anything:

*... which is capable of being created,
manipulated...*

et cetera:

... electronically.

So if you have been following the trend here, you will see that in theory, this licensing regime applies to every Web site on earth which you can reach from Malaysia. So what happens now if you conduct an activity for which a license is required?. Well, the framework of the Act is such that you must get the license, no matter where you are, otherwise [refers to screen showing image of punitive action] this will happen to you.

Now, the Malaysian government quickly realized it didn't have global reach. It's difficult enough as it is to protect tourists on island resorts, let

alone, go bomb somewhere else. And even more importantly, they realized they had no clue how they would actually implement the licensing regime which was set up under the Act and was actually in force.

So, they did the next best thing to issuing licenses, they employed what I call the "startled rabbit" reflex and basically froze everything. They declared a one-year moratorium on licensing. So you had a very strange, almost surreal series of events where the Malaysian government was promoting e-Commerce with all the force it could, but you could not get a license to carry out your business legitimately even if you were willing to sell your grandmother for it,.. And the Malaysian government basically turned a blind eye to the e-commerce activities that were being undertaken.

So they then had to re-look at the issues. And after having paid foreign consultants an obscene amount of money to come up with the Act in the first place, they had to pay an equally obscene amount of money to a second batch of foreign consultants to, to tell them how to implement the Act. And that led to the Exemption Order of the 1st April 2000 which

came into force one year later. And you will note that the activities now exempt from licensing are: "electronic transaction service; interactive transaction service; network advertising boards and cineplex"; and surprise, surprise: "any Internet content applications service".

So basically the war was over: the rest of the world 1, Malaysia nil.

But you have to bear in mind that the other provisions of the Communications and Multimedia Act still apply to any Web site, no matter where it is.

Right, so much for the Communications and Multimedia Act. I'd like to move now to the Digital Signatures Act. I must say that Malaysia displayed commendable foresight in being one of the first few countries in the world in 1996, to actually try and enact Digital Signature legislation. And in doing so, it adopted what I call the "Rank Xerox" School of draftmanship. Basically they went to Utah and photocopied the bill, and everywhere it said Utah, they used, white-out to change it. Which led to some unfortunate developments.

The Act basically provides that a:

*... document signed with a digital signature
in accordance with the Act is legally binding
as if signed by hand...*

Unfortunately:

*Proof of digital signature is by way of
certificate issued by a licensed certifying
authority.*

So what are the shortcomings of the Act? Basically it's not technology neutral, it's specific to PKI-type digital signatures, there's no provision for recognition of electronic signatures in general, (as opposed to the Electronic Transactions Act of Singapore which was mentioned by JJ Disini earlier or Australia), and only digital signatures issued and verified by a licensed certification authority are recognized. Now the thing is, despite the Malaysian's government push toward borderless marketing, it has so far steadfastly refused to issue any [certification] licenses except to two Malaysian companies whom I would warrant very few

people in this room have heard of before, Digicert Sdn Bhd, and Cybersign Sdn Bhd.

Now I was interested yesterday at the emphasis that was placed on the expectations of consumers as opposed to the requirements of government. And I think the Digital Signatures Act here actually indicates how governments can go very wrong when they don't take into account the market realities. Basically only Digicert is in operation and since its inception, only 20,000 plus signatures have been issued. That's a drop in the ocean, even for Malaysian e-Commerce. So basically, the Digital Signatures Act has not provided the boost to e-Commerce the government thought it would.

I'll just move quickly onto contracting online. Malaysia has chosen not to enact specific electronic transaction legislation (unlike Singapore and Australia). There seems to be a view that existing contract laws are sufficient, though that may be changing. And Malaysia leaves the choice of law and jurisdiction solely up to the individual concerned, so it's up to you to choose. . And strangely enough, in order to promote e-Commerce, they've actually exempted

electronic business from the scope of the Consumer Protection Act 1998, for now.

So how has the Malaysian government actually dealt with jurisdictional issues in practice, seeing that the acts weren't too successful [in dealing with these issues]?

Well, I was hoping to give you some case studies on the SC, the Securities Commission experience. Because of lack of time I'll just mention that, in fact, what they've done in practice is to rely on the approach which Barbara Wellbery, I think, referred to as "negative selection". For the purposes of online offers of securities in Malaysia, it's not sufficient that you do not target Malaysians, you must actually specify that you will not contract with Malaysians. How far that regime is going to hold up, we've yet to see.

Another thing which is peculiar, given Malaysia's push towards e-Commerce, is its reluctance actually to be involved in arbitration proceedings or a borderless ADR. An example of this can be found in the way we treat domain names. MYNIC has steadfastly refused to accede to the ICANN UDRP, and I think this is for the reason which was mentioned by JJ Disini earlier. Basically I think the government feels that it's an

impingement on their political power, their ability to decide basically who will get a ".MY" domain name.

MYNIC has actually set up a simple administrative procedure to prevent cybersquatting, eg. you have to be Malaysian, your server has to be up and running for connection to the MYNIC server within seven days. How effective has it been? Well, let me just give you a hypothetical example. You take my name, "Azman Othman Luk", take my initials AOL. AOL.com, in Malaysia you could register it. I'll leave you to draw your own conclusions.

Okay, thank you, that's all I have.

MITA MITRA

I'd just like to say, reiterate it's a fantastic quality panel. I just couldn't interrupt, it brought together themes from yesterday, absolutely demonstrated audacious thinking, provocative thinking, clear sights in so many things, I'm just really privileged to be here, to hear what you've produced and explained to us.

What I'd like to ask is whether people would like to ask questions, they're welcomed to. Shortly, thereafter there will be a break and we will have the

presentation from Tom Bell on practical applications to cope with the differences in national laws.

DAVE WEITSEL

Could you all take, give us a perspective on each of your regions in, we've been talking about self-regulation and how self-regulation on the Internet is viewed. I know that many of you touched on that, but if we could have a quick overview?

TAKASHI KUME

Actually the meaning of self-regulation as we discussed yesterday may be broad, and it depends on the definition of self-regulation. From my point of view, as a person who implemented Electronic Signatures Law in Japan, I fell we are actually competing with "market" in terms of how to resolve disputes. In the case of authentication, for example, if the required standards for the accredited certification authority is too high, nobody wants to apply to it, even when they expect some disputes will arise in the future. They could still go to court in order to resolve the disputes instead of being subject to regulations. So in terms of that, the government regulation should be reasonable from the market perspective.

And it also depends on to whom you are

targeting your policy because if you are just concerned with business people, I think it's more likely for you to be able to get it solved by market. But if you are concerned with consumers, probably it's more likely for a government to show some guidelines including regulations. And it also depends on the kinds of disputes. Various aspects should be considered.

MAURICIO DEVOTO

I'm going to be very short. In Argentina and Latin America, I don't think we're going to have too much self-regulation and I think that the government regulation is what we're going to have for the future and in related issues for Internet.

JJ DISINI

For the Philippines, there is currently as we said, as I said earlier, the law is quite new, it is only, it only took effect at the end of June. The implementing rules are in place, but largely we're in a stage of self-regulation, but I agree with Mauricio Devoto that I think in the future we will see a lot of regulation in the Philippines, I think there's a demand from the people involved in information technology that there be

regulations issued by different government agencies covering... For now, the call is for regulations for certificate authorities.

JON EICHELBERGER

I think the issue of self-regulation doesn't really seem to be on the agenda much yet in China. It does cut against the dominant philosophy that the government should regulate everything. It's hard to tell I think in the future as the e-Commerce legal framework does take shape. It's possible that areas will, you know, open up for self-regulation, but I think that's several years away at least.

AZMAN BIN OTHMAN LUK

The Malaysian Communications and Multimedia Act actually does provide for recognition of voluntary codes which are issued by industry, and these codes are given effect in law in that compliance with the codes is a legal defense. So although we haven't actually seen any codes which have been registered yet under the Act, I think it's only a matter of time. So self-regulation is a big thing in Malaysia, and we're looking to see more of it.

BOB OSWELL

Two of you are from ASEAN countries, could you talk a little bit about any sort of ASEAN wide initiatives e-ASEAN initiatives and any sort of attempt to harmonize either consumer protection laws or any other laws that are implementing the e-Commerce?

AZMAN BIN OTHMAN LUK

Well, actually, although, you know, there might have been discussions at some level on harmonization initiative, actually there's been very little impact. So I don't think I've got much to add actually. JJ?

JJ DISINI

I understand there's some an eASEAN task force, they're supposed to (inaudible), I believe, in an agreement among ASEAN nation member states. I also understand that there were some discussion on Digital Signature legislation to be undertaken I suppose. I'm not familiar exactly with what projects the eASEAN is currently undertaking. They were proposed recently by the Philippines office of the eASEAN and they were asking for proposals for projects to undertake. So I guess we're still a bit in the dark on as to what specific initiatives are we going to take from the

Philippines side.

PHILIPPA LAWSON

Hi, Pippa Lawson from the Public Interest Advocacy Center. Azman mentioned that the Malaysian government wanted Malaysia to become a center for online dispute resolution I think, am I wrong?

AZMAN BIN OTHMAN LUK

Well, actually they were envisaging not so much of a private body as an international court, like the International Court of Justice in The Hague. But basically it would decide disputes online, disputes would be submitted to it online, and decisions would be made online.

PHILIPPA LAWSON

Can you provide anymore elaboration besides that?

AZMAN BIN OTHMAN LUK

Actually I wish they would provide me with more information on that point, I've got no further idea [about the set-up of the Court] apart from that.

PHILIPPA LAWSON

Okay, and it's still just an idea?

AZMAN BIN OTHMAN LUK

Correct, yes.

PHILIPPA LAWSON

Thanks.

MITA MITRA

If there are no further questions now, I'd like to conclude this part of this morning's session. And Tom Bell will address the floor now.

MANAGING CROSS BORDER LEGAL RISKS

**"Private" Harmonization: Practical Strategies for
Cross Border e Business**

THOMAS BELL

It's a pleasure to be here today. I was going to invite people to go ahead and feel free to get up and take a break. While I started talking, I see people have already done that, which is fine.

I actually want to share a couple of quick stories. Ruth asked me to speak in Montreal at the ILPF session last year, the first time we talked about jurisdiction. I got there, and first of all, you have to understand a little bit about my practice. I'm very much a practical practicing lawyer. And I got there and she's got this program right in front of me, and it's just a luminary body, including Chairman Pitofsky from the FTC. So the room is packed, there's press everywhere, people are taking pictures, you know, the TV cameras are rolling, and I felt, I thought a little bit about an environmental conference where, you know, you have the leaders of industry talking about resource, management and recycling and everybody is listening intently, and then I get up and talk about

how to take the garbage out.

But I feel like I took the garbage out well last year because she asked me to do it again this year, and so I wore my uniform today, this is the uniform of an Internet lawyer, there's a difference between policy-makers and lawyers in my practice area. And so I'm going to stick to my guns this year and talk again very practically. But I want to first do another flashback to 1995 when, in Seattle, we hosted, we co-hosted with Microsoft and Netscape a conference called Internet Law and e-Commerce, very well attended. And at that conference we passed out sheets of paper and said: "You know, there's a group of people who are interested in starting something that we'll likely be called the Internet Law and Policy Forum." and a number of people signed up.

And so what I'd like to do today, from my practical perspective, is talk a little bit about a report card from 1995 to today. I think in that period of time, technology on the web has progressed dramatically. The other thing that has happened is we have numerous new business models, they continue to launch every day a few that I just saw recently, one was an online energy

exchange, the wireless Internet applications technology is exploding, and the companies continue to move very quickly. There's a quote from Jeff (inaudible) where he said: "I always run through the office, I mean, physically I'm a little bit hyperkinetic, that's why I like this environment." it moves very very quickly

So the question becomes, since 1995, what of the law, what has happened? One of the goals that we talked about back in 1995 was public harmonization, something we've seen today the need for and talked about as we have disparate laws throughout different jurisdictions, both within the United States where I have to deal on a daily basis, and throughout the world as people struggle with the same issues, and whether or not they can publicly harmonize their laws. And in some ways I feel like we've got more statutory dissonance going on right now than public harmonization.

Now, that's not to say that I don't believe in the importance of public harmonization. Two critical areas where we in industry are struggling [inaudible] still in digital or electronic signatures and privacy, areas where it would be very helpful to us and our clients if the laws were harmonized, but they're not there yet,

and it takes time.

So what are we left to deal with practically on a day-to-day basis?

Right now we're left to deal with two different sets of laws. One is what I call legacy laws that may or may not apply to an online business model. The other issue that we're left to deal with today in particular is a proliferation of laws targeted at the Internet, something that I wouldn't have said two years ago, and certainly wouldn't even have thought about in 1995.

First of all, what's a legacy law? Legacy law is a term we made up that really refers back to something called like a legacy system, a legacy software system, a legacy hardware system, and I define legacy to mean any law passed prior to the creation of the Internet or any law passed after creation of the Internet but without any intent to regulate it. Most laws governing the Internet today are legacy laws. Now, I'm not to say legacy laws are good or bad, they're just not intended to govern the Internet but they do.

The other thing I want to mention quickly is statutory

proliferation which is something that has accelerated dramatically over the last 18 months in particular. First of all, the principal laws typically lag behind technology in business. That's been true for the last five years, but it's changing dramatically, again I think particularly in the last 18 months. Here's a couple of examples.

Last year in the California State Legislature, there were 13 laws that were proposed to govern Internet issues. This year, already there are over 230 laws that have been proposed. In the United States, we have 21 different privacy laws pending before the U.S. Congress. Maybe we'll get one this year, but 20 pending, 20 different states have different bills pending; in New York alone there are 20 different bills; in California there are 9. I venture to guess that in most of your countries and jurisdictions, you have at least one or more bills dealing with privacy that you passed in the last five years that you're struggling with now.

Now, in the face of these issues, one concept that I call statutory dissonance, or these public laws that we have yet to harmonize, what can a company do that is

deploying a business model across multiple jurisdictions, and I think that what we advise is that they really have three choices.

The first is that they limit their product offering or business. This is not acceptable in most cases to an aggressive entrepreneur. They don't like this advice from us: "Sorry, you just can't do it in that jurisdiction." okay. When they limit their product offering of business, they usually have two choices: they have to revise the business model, which means they have to change their business plan; or they have to revise the scope of geographic deployment, which in essence means that they reject the jurisdictions where they don't feel like the business model can be tolerated. This is the least attractive of the options to the entrepreneurs.

The second option they have, and this is simply stated, it is to version the site. In other words, their business model is reflected on their Web site. In order to do business in a certain jurisdiction, they're required to do a different version of their business by doing a different version of the site.

The third is a concept that I call "Private Harmonization", and what I mean, and I think we all do this every day as practicing lawyers, well I've just have given it this term, we privately harmonize the business model to comply with the conflicting laws, and I'll talk a little bit later about how that actually works. I'll talk a little bit more about what versioning the site means.

Versioning the site in some ways is consistent with the world because throughout the world we have different languages, different currencies, there are differences in markets. And so, providing a different product offering to a jurisdiction in some ways is consistent with how business is done. It may also be consistent with the distribution model, and by distribution model I'm talking about, physical products are usually distributed geographically, that's why companies put a distribution plant. Even if they're are an online business in the United States, they've got plants in different jurisdictions because it's easier and cheaper to ship products a short distance.

However, it's more expensive. Anytime you have to do different versions of your product for different

jurisdictions, both the start-up costs and the maintenance costs are higher. And in some ways it's inconsistent with the promise of the Internet, the promise that you make to some small company in Iowa, that they can do business in China and compete with very large Fortune 100 companies because when you require them to do different versions of their business model, in some ways you're favouring the large company over the small.

This is an example of versioning a site in a very simple way. You'll see up here, towards the upper left-hand corner, Del has asked you to choose a country. In this case, I chose Taiwan. Now you'd have to go through the whole site to see the differences, but let me point out one versioning issue on this site.

These are the site terms, again this is the stuff of lawyers, these are the site terms for Del's page if I select Taiwan. And if you look down here in Section 13.5 it says it's governed by and construed in accordance with the laws of Singapore. Del in this case has taken a regional approach to versioning their site legally. If I were on the U.S. page it would say that it was governed by the laws of the State of Texas. They've taken a regional approach where Del Asia, all

of their online contracts in this case are governed by the laws of Singapore. So, this is an example of versioning a site legally to deploy a business model.

Now, what about the notion of private harmonization? First off, it's a methodology, and let me go through the steps real quickly. The first thing that you do is you identify the applicable laws across the jurisdictions. The second thing is you try to come up with a standard that you can comply with, and what I say is to comply with the highest acceptable common denominator, so you look across the laws, you find the common factors, and you comply to the extent that you're willing to. What ends up happening is, some of the laws, the business model will not tolerate, and in that case, what you do is, you exclude the jurisdictions with the laws, the product or business model will not tolerate, or you exclude products. That's the methodology of private harmonization.

This is interesting and this is something we've learned over the last two or three years in helping our clients deploy these business models. If the requirement of the law is a disclosure, and private harmonization generally works, you can on one Web site deploy the

business model without having to version dramatically.

However, if the requirement is a licensing requirement, and I note the next panel will talk about licensing, so this will be interesting to put in context. If the requirement is licensing, private harmonization may or may not work, it depends, and I'll show you some examples, and versioning of a site may be necessary. If the requirement is content or jurisdiction-specific, and jurisdiction-specific usually means a product, but if it's content or jurisdiction-specific, versioning is usually required. So if it's one of those, for instance taxes is a good example, data segregation is another, that usually requires that a site be versioned for a specific jurisdiction.

Let me give you an example. Disclosure. So again, we're in private harmonization and I posited that if the requirement is disclosure, versioning is usually not necessary, you can privately harmonize fairly easily. Take the United States as an example, this is true throughout the world. This is very simple, I'm talking about consumer coupons, okay. In the United States nearly all 50 states have a consumer coupon law, most foreign countries have them as well. The consumer

coupon laws require disclosure of cash value, and if you have a coupon in your pocket, take it out, you'll see it there, a minimum redemption amount which ranges from nothing to, in some cases a nickel and as high a one dollar, and it requires an expiration date and some specified language. Some jurisdictions have language they want you to put on it. Okay, three jurisdictions of the U.S. 50 prohibit them altogether, they say: "You cannot do them." Now how do you privately harmonize that?

Well, if you look at the coupon that's in your pocket, or the next time you pick one up at McDonald's, you'll see that it includes a cash value, and usually it's a very, very, very, very small amount because they don't want to give you cash for their coupons. That's why, when you see on the coupons, one twentieth of one cent, it's always such a low amount because it has to have a cash value. A minimum redemption amount of at least one dollar, and it's usually one dollar because that's the highest common denominator among the range of those jurisdictions, and it has an expiration date and listed language for any specific jurisdiction.

And there's almost always a legend that says: "Void

where prohibited." Well why is that? Because there's three jurisdictions in the United States that prohibit coupons.

So that's an example of how a simple disclosure issue can be deployed on a Web site across multiple jurisdiction and they're not necessarily harmonized laws.

Let's take the next step which was: what if the requirement is licensing, can you privately harmonize or does the site have to be versioned?

I took in this case auctions and exchanges because the business model to me is very interesting, and there's been some very interesting recent developments, particularly here in California. This is a licensing regime, which means that someone has to register. Somebody usually has to sign up and it's either a company or an individual. I think the applicability of these statutes to the online auction model or the online exchange model is very very unclear.

Now a lot of that is historical, this is the California Civil Code and I'll read just parts of this with you.

It says:

It's a sale transaction...

First of all, think about eBay for a minute, it's a sale transaction and eBay hasn't done a sale:

... conducted by means of oral or written exchanges between an auctioneer...

so it contemplates at least an auctioneer that's an entity or a person, probably a person:

... and members of his or her audience which exchanges consist of a series of invitations for offers for purchase made by the auctioneer and the offers to purchase.

Well, is eBay an auctioneer; does this licensing requirement even apply to the business model?

Another example, a very interesting one. This is New Zealand statute, and note the date, 1928, most of the auction laws in the United States and many in other countries were passed prior to 1950, and they were

dealing with itinerant auctioneers that would go place to place in the United States, state to state, and set up an auction, and in some cases they were committing fraud, and so the statutes required that they be licensed so the State knew who they were. Now this is interesting in New Zealand:

The selling...

again it's a sale, is the auctioneer selling it or is the person who brought the goods selling it:

... of property of any kind or interest and supposed interest in any property.

Here's an interesting part:

By outcry...

by the auctioneer saying: "I'll take.":

... and commencing at a higher figure and going to a lower figure by what is known as a Dutch auction, knocking down of hammer, candle, lot, parcel, instrument, machine, or

any other mode...

Well does that include software? This is eBay's home page.

Now, if I had asked you what eBay's business model was, you would have replied: "It's an auction." Do you see the word auction any place on this page? This is their home page; the answer is no. Here are their terms and conditions, this is a legal agreement that you passively agree to every time you go on the site. I don't represent eBay by the way, so I can talk about this one. I like this, 3.1 overview. "Our site acts as the venue for sellers to list items, and buyers to bid on items." You look through this page, again you have a hard time finding the word "auction" or "auctioneer".

In fact, there's a recent case here in California, it's going on right now, it's over the California Sports Memorabilia Act, where eBay and others have been sued for failing to comply with the Sports Memorabilia Act that says, if you're selling or if you're a dealer or auctioneer of Sports Memorabilia, you're required to provide a certificate of authenticity, and also that

you're negligent if you don't react to fraud occurring within your auction.

Here's eBay's position in its pleadings. "eBay operates a person-to-person trading community over the worldwide web through its Internet site. Through this community, millions of users have listed for sale tens of millions of items from books to pink panther PEZ dispensers." This is in pleadings, I really like this actually. "eBay provides a venue, you see the venue word again for these transactions, but it does not participate in the transaction itself." The fact, eBay discloses right here, up front, as plaintiffs' acknowledge in their 16 paragraphs. "eBay also does not possess or examine the items listed on the site, rather it simply empowers willing buyers and sellers to find each other and trade directly. Thus eBay is in a very real sense the modern incarnation of the traditional newspaper classified advertisement, automated and accelerated for the 21st Century."

Now, when you have eBay or some other auction company knocking at the doors of your country to set up shop, is it required to register as an auctioneer under your auction laws? I think the answer is very unclear, and

if it is, it will, if it is required to register, it will almost surely require that the site and the business model be versioned to comply with the laws of your jurisdiction.

Now let's move on to... the third category was Content.

And in Content, I said that generally speaking versioning the site is required, and pharmacies provide a very interesting example how licensing and content both come into, I'll go through this one quickly. In the United States, state national licensing regime for pharmacies and pharmacists, it's, the applicability of this business model is not in doubt, it's not like auctions. Pharmacies are pharmacies. You have a prescription, you fulfil it with the drug, you're operating a pharmacy in the jurisdiction. So there's no question about the applicability of the licensing regime. A little more difficult to privately harmonize the content-based requirements, so there may be some versioning required.

Let me take a simple example. Motrin is the generic drug that was sold under the name Advil. Tylenol is, what is it, acetaminophen, I think is what it is. So the generics are a low cost alternative. Take the

United States, here are the laws that have to be privately harmonized to come up with one business model. Nine jurisdictions require patient approval for the substitution of a drug, of a generic drug; seven jurisdictions require notice of a lower cost alternative, so you have to tell people if you got a lower cost generic; five jurisdictions require a notice and opportunity to object, so you have to give the consumer an opportunity to say: "I don't want that"; and then four allow the patient to request the generic drug but don't do any of the things that those nine, seven and five jurisdictions require. So what do you do? You version the site internally with a different web page for different customers, it's too expensive. It's too expensive to do this person by person. Or you privately harmonize it with a box on the page that allows the customer to authorize substitution of a lower cost alternative. That's the practical solution.

But there's some questions there, and it's still unclear, is that adequate consent since it's not product-specific, it doesn't talk about that drug, it just says: "Yes, I authorize substitution of the lower cost alternative." Is it adequate notice of a price difference, to just say it's lower; or do I have to

say: "It's 14 cents lower." in order to comply with those statutes. It's unclear. So not necessarily easy, particularly in the content area to do a quick private harmonization.

Let's talk a little bit more about content regulation real quick, because I said when content regulation is at issue, generally speaking, versioning is required, and here's a couple of good examples.

Prohibited products. In the United States, it's illegal to sell most Cuban products. A client came to us: "We want to sell Cuban cigars." we said: "You can't do it, you have to exclude that product from your U.S. offering, and if you really want to do it, you could forum shop and have one of your offshore subsidiaries." Probably even that doesn't work because when they look to the parent in the embargo laws. Gambling is a better example because in that case you can generally forum shop to set up your online gambling operation in some other jurisdiction.

Written content is one that also demands versioning of a site. Let me show you an example, this was in the paper. Is Professor Geist here yet, do you see Michael, I

don't see him. Yes, he was actually quoted in the paper, and this is an interesting one. A professor in Germany went on to the Amazon.com U.S. Web site, and he ordered the book "Mein Kampf" which is prohibited literature in Germany, and it made great press in the United States how Amazon went way too far and it shipped this book to his German address, so it shipped the book to Germany. Amazon as you might guess, took the position: "Now wait a minute, he came to the U.S. site. It's like you walked into a bookstore in New York, you can buy "Mein Kampf" there and you can take it home, we just sold him a book." Okay, it's the country of origin versus the country of receipt argument. And Amazon's further argument was that if you go to our German language site operated in Germany, this is the U.S. site by the way, and you can buy "Mein Kampf" there for our price \$14.40, you can see a number of other selections below that, some of which would be considered hate literature in Germany. This is the German site, on this site you cannot, you can see the book "Mein Kampf" but you cannot ship it to a German address. This is a site that is versioned to comply with that content-based law.

Data protection and privacy are two other areas where

there are content specific laws that are causing us to have to version sites, in some case back ends of sites, which is even more expensive.

Until we are completely worked out between the U.S. and the EU on privacy, in some cases the EU privacy directive requires that we version back ends of sites, because we have to segregate data, which is expensive.

U.S. and other pharmacy laws do the same thing because they require that customer data bases that have medical information be kept separate and apart from data bases that do not contain that information. That undermines the value of the data.

A couple of quick observations then I'll close. I've talked today about the short term or the micro level of the application of the laws that you are passing or considering. And what we do on a daily basis is we privately harmonize those laws, page by page, product by product. Now the problem is there's an incredible proliferation of laws, and it's getting more difficult, not less difficult, to do this.

So what does it mean for the long term or at the macro level? I think it means that if market forces prevail,

and I believe that they will, business flows to jurisdictions with tolerable laws, and business avoids jurisdictions with laws the product or the business model cannot tolerate. And understanding that comment or that posit would be my entreaty to the policy-makers here today. Thank you very much.

I don't know if we have time for questions or not, I can take one.

RAJESH SREENIVASAN

Hi Thomas, my name is Rajesh. I'm from Rajah & Tann in Singapore. A straightforward question actually on the issue of harmonization. I noticed you mentioned objective tests such as to try and reach minimum base lines, for example dollar values for coupons. Now how would you take that from a strategy standpoint when you're dealing with subjective issues such as you mentioned, content regulations, how do you draw minimum base lines there?

THOMAS BELL

Okay. I'm going to restate that because I'm not quite sure I understand. Now, it's an observation I'll give you, not a question. The question was:

how do you draw the distinction when you've got subjective tests, like a content regulation versus an objective test like a dollar value. For instance, literature is another good example... is an easy one again. Let's say hate literature, okay. The answer is, from a practical perspective, if we're moving too fast, we don't, I'll be honest, if there's any uncertainty then it's a matter of how much business risk the clients are willing to take on the subjective tests; if they're absolutely committed to the jurisdiction then they spend more time and we dig down deep; if they're not absolutely committed to the jurisdiction, it becomes second-tier.

So for instance, this is a good example. When we're sitting down with an entrepreneur that has a site, and they want to take to 10 different countries. They'll identify the countries that they're the most interested in, we'll do a quick overview of the law, for instance of the auction laws in advance to the business model being deployed. And if there are substantive regulations of what the auctioneer can or can't do, must or must not do, what the site must or must not say, that goes into the decision about whether or not they're going to deploy.

So, I've dodged your question a little bit, because what happens if the business models deploy quickly and there's too much uncertainty, there's too much risk involved in the business model, or we can't give them, or you in your country can't give them a clean opinion that they'll be okay, or they have to dramatically change their business model, they just won't go there. It's back more to the macro level. The jurisdiction just doesn't allow them to tolerate the risk until the law catches up and makes it more clear. So, the more subjective the standard, the less likely, I think, they are willing to take any legal risk. If the legal risk is very low, all they have to do is post the \$50 bond and comply, they'll do it.

So I hate to tell you that, but it's in some ways a very very practical answer, how big is the risk? If the risk is big and the standard is objective, they won't do it. If the risk is small and the standard is subjective, they'll do it. Thank you very much.

RUTH DAY

Actually I think the impact on business is one of the most important considerations that policy-makers face, so Tom, thank you. Are you staying for lunchtime,

there'll be a table set aside in your honour, and perhaps you'll have a chance to talk to people more and answer their questions, because there probably are many questions about the valuable information you've given us.

Short break. We have, on the next panel we have a speaker that has to catch a plane, so if you all would be back in 10 minutes, we'd really appreciate it, thank you.

BREAK

ANITA RAMASASTRY

Our next panel is on issues with respect to licensing and regulation in cross border Internet financial services. We have a small, but I hope interesting panel for you, and we are... and up there is no moderator. We are actually a self-regulated panel with no chair. So I was asked to step in. I'm Anita Ramasastry, I'm an assistant professor at the University of Washington, and the Associate Director of the University Center for Law, Commerce and Technology.

I will introduce both of our other two speakers, and let them get started. Our first speaker is Brian Smith, and his resume is indeed impressive. He has had more than 28 years of experience, as his resume mentions, in financial services, as a partner, a senior federal regulator, and a senior corporate officer of a multinational financial services company. So he really has a breath of experience and depth as well.

He is going to speak to you today and give you a case study on issues of global interoperability in retail financial services, looking at both lending and payment systems, and I think his practical and real-life experience will be very interesting.

He will be followed by a European colleague, Dr. Emilios Avgouleas who is both an academic, a lecturer in law at the University of Manchester, and someone who is working on cutting edge financial services work in Europe with Linklaters, one of the top international law firms in this field. And one of his most recent projects that he has worked on, the Merrill HSBC Internet Bank. He will have the European perspective on these issues.

I will hand over the mike first to Brian.

**LICENSING AND PRESCRIPTIVE REGULATION OF CROSS BORDER
FINANCIAL SERVICES**

BRIAN SMITH

Thank you, Anita.

When I checked into the hotel, I said to the registration clerk, that I was here for the ILPF council meeting, and they said: "Oh, sure, that's the international legal group specializing in personal and family law." I said: "Well, I don't think so." And then he said: "You're the fellow who has booked the romance package in the hotel, aren't you?" You know, I come from Washington, DC. Booking the romance package opens up all kinds of possibilities, none good! For those of you that may be memorialising this presentation, and for the benefit of my wife, I did not accept the romance package.

This family law thing carried on when I realized that I was divorced from my PowerPoint presentation. One of my partners is sitting in Dallas, Texas with the presentation that's geared for this conference. I was going to do it all over again because the staff said: "This is easy, we can do it for you in record time." And then I listened to the presentation yesterday, and I decided that I was better off painting word pictures than using my planned PowerPoint because much of what I want to say to you today is in reaction to what I heard yesterday.

Ruth has been fond of saying that this panel, and actually most of today is geared to the reality behind how Internet commerce actually works. And I'd like to think that. I'd like to think that I participate in the reality of it.

I would like to start off by saying a couple of things. First, there is a gross difference between the vocabulary that we use in deciding public policy

issues and in talking about framing legislative changes in the world of electronic commerce on the one hand and the practical problems of achieving e-business on the other. It is not possible, in my view, to separate issues like jurisdiction from applicable law in the practical world. The vocabulary that we must use differs when we take a microscope to Internet commerce, and the microscope includes the application of these laws, those that exist and those that we contemplate, to specific industries. And my specific industry is financial services.

I'm here to tell you that what we've said in much of our conference is undermined by the actual (*sub rosa* if you will) existing law in most countries, and the global changes that we're advocating will not alter these other existing statutes unless we're careful to consciously do so. I'm going to elaborate on this point by offering a case study, a real-life case study.

I won't tell you the client, and I will hide a lot of the other details, but the scope of the project was for a non-financial technology company, developing an Internet based payments and lending system. The first product is a virtual only, that is, Internet based retail lending product, in other words an open-end revolving credit account. You might say from my 30 years of practice, it's like a virtual credit card. Some countries don't even have open-ended

credit, revolving credit.

The second product was a virtual-only, consumer-to-consumer and consumer-to-business payments mechanism. I use the word payments mechanism, not payments account, too many of the technologists use that word, and Anita is only, I'm sure, too glad to tell you how you tripped over that in the law and how the law is evolving, but part of this was a virtual instrument, a prepaid instrument where you would top it up, you know, fill it up if you will, with an ACH draft (in the United States), or using a credit card. And the other part of it was a real-live electronic draft similar to using the ACH where I cause money to be moved from my account at my bank to your account at your bank, with no intermediary stop in some non-banking company. Both were supposed to have virtual applications on the Internet. You applied for it on the Internet, you contracted for it on the Internet, you signed the contract by digital signature via the Internet. As soon as you were approved for the credit and your account was opened, you could use it on the Internet, and only on the Internet. The sponsoring company was providing authentication of your identity to the merchant so that

when I use my account at the merchant, they would say:
"Yes, that really is Brian, and yes, he has enough
money to use it."

As you can readily see, we are talking about a lending,
a banking, traditional banking function and a payment
system. And these are two heavily regulated business
activities. I would offer the observation, unlike some
of the other business activities that we were listening
to over the last two days, these are activities that
raise the ire, the public policy concern of national
governments. It doesn't make any difference whether
it's the physical or the virtual world, there is a
visceral reaction when a national government recognizes
that somebody wants to do a banking-like business in
their country or is somehow contemplating offering a
payment system in their country.

So what do we do? We looked at the applicable laws in
10 countries, including some in Europe, North America,
Latin America, Asia-Pacific. As an aside, I think you
ought to also know that we had a separate but similar
study for another client which overlaps some of these
countries, and also added five more, so we have 15

countries experience now. This separate product expanded this inquiry into the commercial banking, that is, commercial lending and payments. So it validated what I'm about to tell you in retail and went a little further in commercial financial services.

What were our objectives? First, to identify the country specific legal issues, the impediments, the requirements which would affect the final product development and then product implementation; to develop the best practices and strategies designed to smooth out the legal bumps country to country, the differences; to bridge the gaps where there were no laws that would protect us or at least partially cover us in some jurisdictions. Our objective was global interoperability. My premise is that legal global interoperability complements and impacts technology global interoperability. We're looking for a seamless product worldwide, with very little variation, very little versioning so that there can be a common level of expectation that the brand on these products stands for a minimum level of experience and expectation for both the merchants and the consumers who participate.

Now remember, this product is designed to compete in

the Internet space with some very long established brand names, American Express, Visa, MasterCard come immediately to mind for this revolving open-end credit product. This means the consumers and merchants or businesses writ large must agree to participate and to subscribe to the business risk associated with participation. Indeed the brand name is intended to put a minimum level of operating rules and expectations for the consumers who use the product, and the merchants who accept it.

Now I was there at almost the beginning of MasterCard. I joined them in 1972, they were founded in 1966, they were operational in '67, we had 2,500 banks when I joined, when I left they were darn close to 20,000. In 1977 we went electronic. I'm also from New York, which you can probably hear in my speech, and I have what the speech therapist call an intrusive R, so I have to spell certain words so you'll know the difference. Irrespective of all the L-O-R-E that you hear about how MasterCard and Visa were founded and revisionist history, the L-A-W of it is, that there was not a lot of established L-A-W anywhere on these subjects. This product was in a virtual open field, and it was much after the fact that nations started to react to it.

The MasterCard and Visa, and indeed American Express models, you can find American Express exceptions to national laws on their various products.

And yesterday we heard that somehow the charge-back systems of MasterCard and Visa are a hybrid system, yes they are, but they were in existence 12 years before the law was enacted to make it a hybrid.

Okay, that's the backdrop, what are our findings? Well, let me re-emphasize that it is potentially misleading, if not dangerous, for the dialogue on Internet jurisdiction to proceed without giving specific thought to the way actual commerce in certain industries takes place, and how it is regulated. Too broad a stroke will kill it; too narrow will direct it, and that's not what the Internet's all about.

Second, the peculiar requirements of financial services, banking, lending and their related businesses, as well as the payment systems dramatically affect the scope of the decisions as to what law must be applied and what should be modified. So it is a broad statement but I think it's a correct one to say that each and every country that we examined, closely regulates who may provide financial services in their country; how the services may be provided; the manner, indeed the language and terms that must be used in offering those products; the implication for local country authority, for example, bank supervision, capital requirements, examination over the providers of those products, and the requirements of local law.

Now, in the United States, if you just take the example of a home equity loan, as a national bank you can offer home equity loans in 51 jurisdictions, 50 states and the District of Columbia, no problem, no licensing, except that in just about all of those jurisdictions, there is a variation on the disclosure and contract terms. Multiply that experience worldwide.

And why is that? Because the countries are

concerned about what their consumers are contracting for and how they are treated, and they are very concerned about national treatment in regulation. When I was a regulator at the office of the Controller of the Currency as their chief counsel, and we were very concerned as the regulator of the National Banking System with national treatment. You treat my banks a certain way, and I'll treat your banks a certain way, country to country.

Dealing with the more general rules without the specifics has the potential for frustrating the effect of the general law. I'm going to give you some examples. But I think there's a more insidious possibility here, and that is, you can force a structure, you can force a business model and international relationships among financial service providers by the law, and that'll affect trade and competition in financial services. For example, there are some countries, all countries say: "You can't do it here unless you are licensed here." What does it take to be licensed there? What do I have to do to be licensed and regulated and be able to offer products in a particular

country? Now, if you're an international technology firm that hopes to offer financial products, you are not a financial institution, but by definition, to offer them in the United States and virtually anywhere else, you must become one and be licensed to provide these services.

So what it means is, unless you are prepared to be licensed to do business in multiple jurisdictions, subject yourself to the examination, supervision, regulation, capital requirements, et cetera, et cetera, et cetera, you need to find local partners. So when we talk about electronic commerce and we talk about selling and shipping goods, or even eBay-like auctions, it's a very different model than when we talk about financial services. I can sit in Seattle and sell books, virtually anywhere, but I can't make a loan to you unless I'm regulated in those places. So it means that I either become a regulated and licensed entity or I find local partners. And it pushes a framework, a structure, a business model of a consortia, if you will, of local partners.

Now just take this client for example. We were going to compete

against MasterCard and Visa on the basis that MasterCard and Visa can't act fast. They have 20,000 - plus banks, they can't do anything until everybody is virtually ready to do it. The Justice Department has another view on that subject, but the reality of it is, it's like turning a battleship in a bathtub, they have billions of dollars of legacy systems, 40 years of way of doing things, it's not easy for them to adapt quickly to new circumstances.

This client company said: "We can adapt overnight, Internet, no problem, we're in business. We've got a great business model, we've got venture capitalists pumping the money in, we can be everywhere, we can act quickly." Well, not if the local laws force consortia on you because then you wind up with local partners, and while you may not have 20,000 of them (and indeed the Justice Department's complaint would suggest there's only a couple of dozen that really matter in MasterCard and Visa) we would wind up with a couple of dozen, and a less facile, less adaptable business model.

So let's look at just a couple of issues. Can this product and service be offered? Well, almost uniformly banking services may not be offered without some kind

of license or similar approval, with all the concomitant supervision. Licensing requires a direct regulatory nexus between the country and the licensed entity, which is not the typical Internet model. The compliance burden is great and not contemplated by an over focus on jurisdiction. The compliance burden for a company in financial services is predicated on the joining of jurisdiction and applicable law.

So if you create a business model with local in-country partners, you can avoid some of the compliance burdens directly, it's not your direct burden, but you've changed your model. Indeed in some of the countries that we examined, if I apply on the Internet for a loan, but it's open credit, revolving credit, and I'm accepted, I'm not really applying to the company sponsoring the Internet site. I'm applying in effect to the local partner. Doing so through a third-party - my client - is called loan brokering in some of the countries we examined, and in several of those, it's not only illegal, it's punishable by jail.

Now, in the United States, we don't typically call that loan brokering. Loan brokering only really arises if

we have more than one opportunity. If I've got a direct link for you to apply to the lender and the documents are clear, and the site disclosure is clear, I've actually applied directly to that lending company.

What about the utility of electronic signatures on electronic contracts? Well, even as we were conducting this work over a long period of time, and we engaged the assistance of local legal experts in some of the countries in which we did not have offices in order to render conclusive judgments, the laws were moving and generally they're moving in the right direction, recognizing the legal enforceability of electronic contracts and electronic signatures. But there are gaps in certain country laws.

For example, one of the leading lights in western jurisprudence has a law that requires a physical signature on a physical contract for consumer credit, but has a law allowing for an electronic contract and electronic signature but they forgot to link the two.

Another country says: "You can sign on for this, but you have two weeks to repudiate it." Now think about that, I have just allowed you to get an open-ended line of credit, you've used it, and you're going to repudiate it two weeks later? Think about that in the context of a securities purchase, all of a sudden now I don't like the way the market moved and I'm going to repudiate it? These rules sound great in theory. They sound like consumer protection, but often they have no basis in reality when you apply them to certain specific business propositions. I'm not saying that these protections should be rejected, but they must be carefully examined and applied.

Consumer protection laws, the form, the content, the intent, the manner of the necessary disclosures, the ability to avoid contracts are all heavily regulated, and none of them are consistent. So it doesn't really do you a whole lot of good to say: "We're going to have a broad based e-Commerce Law, and we'll debate for the next three years over the proper jurisdictional rules because our clients, the practicing lawyers' clients, aren't waiting." We are not waiting, we are actually doing financial e commerce, we are doing it through best practices, we're developing common

standards, we are developing private codes of conduct.
And I go back to my MasterCard and Visa experience as proof it works that way.

In 1965 for Visa, and in 1966 for MasterCard, banks sat down in hotel rooms and drafted a private code which replaced the uniform commercial code in the United States, set up the relationships among the banks, stated the rules for the banks to deal with their customers, the rules for the banks to deal with the merchants, and then left to those banks in foreign countries, outside the United States to comply with their local law. And in the absence of specific statutory law, the private code worked real well. But you know, our policy makers got a little carried away, they improved on all of this, passed lots of laws, and now we're in the danger of preempting e commerce's natural development.

So in conclusion. There's an artichoke approach here. You have to peel back every one of the leaves to get to the heart of the artichoke. We cannot look at the artichoke and say: "That is not a prickly pear." that's not enough, because when we apply this to financial services writ large, banking, securities, insurance,

payment systems, we have to keep pulling these leaves off, we have to find the worms, if there are any, and each one of these layers is multiplied by the countries in which we propose to do business. And it is not an easy task, and it's great work for lawyers, and thankfully there's not too many of us doing this.

Secondly, it's difficult I've said before, if not impossible, to separate the discussion of jurisdiction from the discussion of applicable law in this industry, and then from the need to protect consumers perhaps by private codes of conduct.

And third, best practices. Don't legislate now what you don't even understand. None of us completely grasp what's at work here. We do not know where e commerce is going, we don't know who's going to be in it, how the business will be conducted or what the problems are. We are bringing physical world models and problems to a virtual world that we haven't even focused on yet. We don't know what it means, it's in constant flux. So to legislate consumer protection, to legislate ADR, to legislate many many of these subjects without really knowing how it all truly works, and what's possible with the technology...is, a very dangerous course to set.

You know, in some respects, truth-in-lending was necessary because banks generated eight-page, small type contracts for credit. Nobody reads them anyway, I know that, everybody knows that, but at least if you put the contract out in the form as prescribed by the regulators, you have a defense: "We gave all the disclosures." The technology of the Internet allows us to make clear meaningful disclosures. I don't need eight-page contracts. I've got vibrating type, different colours, pop-up screens, you can't move from one screen to another until you click on the button that reads: "Yes, I read the damned thing." There's lots we can do with the Internet and technology that we weren't able to do in the physical world.

And so I urge you policy-makers to give us room. Give us just a little bit of room to run. Pass the minimum statutes necessary but give us room to run with clear guidelines as to how you want the business to be treated, and the penalties for not treating it that way. But then stand back, give it three to five years to figure out whether we did a decent job before tightening the belt.

Thank you very much for your kind attention.

ANITA RAMASASTRY

I think now is a wonderful time to switch to the European perspective on the how's, the why's and the when's, and Emiliios Avgouleas will speak to us about that.

EMILIOS AVGOULEAS

First of all, I would like to thank the IPLF for inviting me to speak before you here today.

A. The regulatory landscape for provision of financial services in the EU

The Internet as a channel for the distribution of financial services is a very serious issue for the EU as well. My perspective is the perspective of the academic and the practising lawyer. The perspective of the practising lawyer is business efficiency, the perspective of the academic is consumer protection, and I will try to explore with you today how the EU is trying to achieve both aims.

But first we have to see what are the main problems that a provider of investment services through the

Internet is encountering in the 15 EU countries.

An Internet financial services provider in the EU needs first to be licensed in one of the Member States. Secondly, it has to comply with conduct of business rules such as conflict of interest, fair disclosure, best execution and segregation of client money and client assets rules. Thirdly, in case that the provider is offering the investment product to the public at large, it will probably have to comply with public offer of securities rules, that means publication of a prospectus. Fourthly our provider will need to comply investment advertisement rules when it issues its promotional material.

And then there's the problem that mostly concerns this forum: implementation and enforcement of contracts that are concluded over the Internet, and how the choice of law in the contract is not going to be frustrated by the intervention of the law of the customer's jurisdiction.

Of course, licensing rules in the EU are largely

harmonized both for banks and investment firms, and more recently for insurance companies. So a US provider can come to the UK and submit an application to the relevant regulator to become an authorised entity.

If the kind of business that our provider does is a core investment service, it will obtain the passport of the Investment Services Directive by notifying the home country regulator. This will allow it to conduct the same kind of investment services in the other 14 jurisdictions. The same procedure may apply to an EU authorised bank under the Banking directives. That's the EU passport. It enables banks and investment firms to offer investment services branch into another Member State either through the establishment of a branch or cross border which is mostly a matter of concern for Internet investment service providers.

Now, what kind of investment services may an Internet financial services providers offer throughout the EU, provided that has been licensed in at least one jurisdiction? It can offer brokerage services, dealing in securities, or manage and market fund products; or conduct multiple IPO's as a sponsor, underwriter or distributor; or depending on the nature of its licence it may offer to take deposits from depositors from the other 14 countries or offer loans to customers in the other 14 jurisdictions.

However, there is a catch here, not all investment services can be passported. If the provider is a pure corporate finance firm, if it only offers investment advice for instance, it needs to obtain a license in all jurisdictions that this activity is licensable, there is no passport for provision of advice. You need to do something more than that, there is no passport for the provision of custodial services and so forth.

The other problem, very big problem for you, the representatives of the non-EU financial services providers and banking institutions, is that the passport doesn't apply to you unless you're authorised in one of the Member States. If you do not wish to obtain a full authorisation, for reasons of cost including regulatory cost, e.g. capital adequacy requirements, the threat of consolidated supervision, and just operate as an authorised branch, the restrictions to offer services cross border will be enormous. And the approach of the domestic regulators is very arbitrary and, in fact, I would dare say, discriminatory.

So, for US financial service providers, there is a

serious issue how they have to comply with the regulatory framework for the provision of financial services in the EU.

First of all, let's see what is the situation for a broker like Wit Capital, that has a Web site in New York and deals regularly with EU investors facilitating securities trading through that Website. If that Website is accessible for instance to UK investors, that means if by means of a PC and a mouse a UK customer can go to the Web site and effect the transaction, the provider is in breach of the UK public offer of securities regulations. The fact that the site may have disclaimers, not intended for UK customers, the fact that the site may have strong warnings means nothing to the FSA, unless the site is passport-protected for UK customers. If the offer exceeds the number of 50 persons, or it's not intended only to professionals, you're in breach of the UK's public offer rules.

If on the other hand, you issue a prospectus in one of the Member States which will be subjected to the scrutiny of one of the Member States regulators, then that prospectus can be used to effect the public offer

to the other 14 jurisdictions, subject to translation and inclusion of provisions on local tax rules.

Now this sounds very good in terms of business efficiency, but it doesn't work that way in practice. The local regulator will always find something in addition, will ask something in addition, will have a definition of security that will marginally diverge from the definition of security in the jurisdiction that the prospectus has been offered. So in practice, underwriters and offerors, who conduct cross border offer of securities in the EU may encounter problems even if they are in possession of an approved prospectus.

Also, the public offer of securities prospectus directive is quite vague in its exemptions when it comes to professionals. So in some jurisdictions, high net worth individuals may fall into the professional exemption, and some others not. Which means, in some jurisdiction you may offer securities, funds and all kinds of investment products that fall into the definition of investment instruments into the directive to high net worth individuals, benefiting from the professional exemptions, to others you can't.

Another serious issue for financial service providers over the Internet is the application of conduct of business rules. Conduct of business rules have not been harmonized in the EU, as this is a serious political issue. Member States regulators could not find a consensus: a) What is a conduct of business rule, b) What should be the applicable conduct of business rules. So Article 11.1 of the Investment Service Directive provides a very general framework, and what falls in the between is every financial service provider's nightmare. The divergence between different sets of conduct of business rules is the biggest obstacle that financial services providers encounter in offering investment services cross border in the EU.

Sometimes, and very deliberately, because if there is equivalence and symmetry between the home and the host state rule, you can carry the home state regulatory framework with you as a matter of general principle of the EU law. Country regulators, draft conduct of business rules that are completely asymmetrical with the conduct of business rules in other jurisdictions.

So in principle, the general principles are in compliance with the general principles of the Directive, in practice however the detailed rules differ widely and that applies to regulatory monitoring and enforcement as well. It is highly likely that the Finnish and the Danish regulators will never ascertain jurisdiction on an investment service provider that offers the service or the product cross border. It's most unlikely that the French or the Italian regulators will not ascertain jurisdiction.

Conduct of business rules in some jurisdictions are rules of universal application, jurisdictions like France, Italy. In other jurisdictions as the UK, professionals can drop out from the protective regime.

The exemption may cover even high net worth individuals provided that they have consented to waiving the protection of the conduct of business rules. In the majority of EU Member States that's not possible.

Another problem is investment advertisements. What is an investment advertisement? An investment advertisement is all kinds of statements that are

calculated to lead to the conclusion of an investment contract, a very wide definition indeed. Also, under the new Financial Promotions regime in the UK which will replace existing rules on investment advertisements and unsolicited calls, which will be effective following the coming into force of the Financial Services and Markets Act 2000, if you operate a Website that provides description of investment products or investment services and this can be accessed by UK investors you're in breach of the UK investment advertisement rules.

I'm focusing on the UK regulations because if you do not provide the site in Italian, apparently you do not target Italian investors, and you're not in breach of the Italian investment advertisement rules. But since English is the language of the Internet, it's a very major issue whether a non-EU financial service provider is falling, falling afoul or not of the UK Investment Services Law.

A suggested solution is the construction of passport protected sites and restricted access. Now what is happening in theory is not exactly happening in practice. The FSA will not start issuing

writes against Internet financial service providers based outside of the UK that publish information about their investment products in English. They must truly target UK investors. But that's arbitrary as well.

The difficulty is of course that you cannot really, for reasons of cost, and that's another example where consumer protection conflicts with what we call business efficiency, to have always passport protected sites, especially for the advertisement of the products that the Internet financial service provider offers.

Now as regard the rest of the EU Member States, there is no definition of investment advertisement anywhere in the EU financial services legislation.

The definition of investment advertisements differs widely, and enforcement of relevant rules varies. Whereas in the UK the provider can utilize the professionals' exemption that's often impossible in other Member States. And the solution is again licensing. You're authorised in one of the jurisdictions in order to be able to issue the same advertisement through a Web site in New York, as an authorised passported person. That means that you have to encounter all the costs of licensing, including lawyers' fees, and to be subjected to consolidated supervision by the Member States regulators whichever Member State you have opted to establish and be licensed.

It's an unresolved problem and it's a problem that may potentially explode depending on how wisely EU Member State regulators will use their enforcement power because of course they do not have any real authority in terms of enforcement on a broker that is publishing investment advertisements in Florida unless they ask the SEC's cooperation, in which case they have to provide the SEC with solid evidence that there has

been a breach of their investment advertisement laws.

The other very major problem for providers of Internet financial services is the legal validity of contractual arrangements conducted and concluded over the Internet, and their enforceability. This is a massive problem in the EU, which is traditionally a pro-consumer jurisdiction. It's not only the maize of financial services regulations that is applicable in this case, a massive web of consumer protection laws is also applicable. Most of those rules are equally of a private law and public law nature. Some of them fall within the ambit of the EU's power to legislate, some of them fall outside because of the principle proportionality, which means that the EU has a serious problem with the regulation of contracts concluded via the distance marketing of financial services?

To give you an idea of the extent of the problem. Financial services are not included either in the e-Commerce Directive, or in the Distance Marketing Directive. So what we have come up since 1999, is this document which in my latest e-mail with EU officials is

going to the council again soon, that's a new directive, a directive on the Distance Marketing of Consumer Financial Services in specific which provides 14 to 30 days cancellation periods. That means that once you have concluded a contract, you have 14 to 30 days depending of the investment product to withdraw.

This document sets a massive amount of obligations for providers of financial services by distant means. And I read to you what a distance contract means in the directive in order to give you an idea how wide is the scope of this directive and its protective provisions:

Distance contract means any contract concerning financial services concluded between the supplier and the consumer at an organized distance sales or service provision scheme, run by the supplier, who for the purpose of that contract makes exclusive use of means of distance communication up to and including the time at which the contract is concluded.

That means that financial services providers that use fax or telephone means are caught by this directive, mobile communication means

What financial service means under the draft directive?

It means any banking, insurance investment or payment service. And in addition, the directive is catching all kinds of provision of real estate credit such as mortgages, real estate mutual funds and so forth. Yet, this document is a massive advancement to what we currently have in the EU, which means 15 widely differing consumer protection regimes, 15 widely different regimes.

B. Recommendations

I would like now to share with you a few propositions for the resolution of this problem. I've heard from the previous speaker, Mr. Smith, who has very wide experience in this area, how it would be better to leave everything to the private sector to harmonise it.

In my humble view, that's not completely possible any more because you don't have only two major players, e.g. Visa and MasterCard who in the context of oligopolistic interdependence agree a code of conduct, a code of ethics or a code of practice. That's

not possible in today's financial services landscape. We currently have dozens of Internet financial service providers. I'm not so sure whether the interest of Morgan Stanley, or Merrill Lynch coincides with the interest of start up stockbrokers based in Florida or San Francisco. So my view from practical experience is that I do not really know how, even soft harmonisation is possible in this field, unless regulators become involved.

One model that, however informal, may be useful, is the model of the Basel Committee, which eventually led to convergence of the banking regulatory laws in the field of Prudential supervision globally through the dicta of ten wise men committee, that of the governors of the ten biggest central banks who were meeting initially for social purposes in Basel. Maybe that's a preferable solution than continuous negotiations between formal bodies or waiting informal bodies to come up with viable solutions to find a *modus operandi*.

Investment advertisements. That's another area that industry input is invaluable. I think that the regulators are very unclear, at least in the EU, what is investment advertisement and what it is not. Personally, I would like it to be more connected to the conclusion of the contract itself. Even in terms of time, I would like these announcements to be far closer to the time that the contract, the investment contract is concluded rather than general announcements on a Web site anywhere in the world.

Contract enforceability: the draft distance marketing directive is a massive leap forward despite its inadequacies in terms of business efficiency for the EU? For the first time in the area of financial services, and exactly because our consumer laws are so divergent, EU legislators talk in terms of maximum and not minimum harmonization.

Since 1985, all financial services legislation on an EU level is on a minimum level. That means that if the local regulators want to take stricter provisions, want to adopt stricter provisions, want to implement stricter restrictions, they were free to do so. In

this context, the EU prefers that the local legislators do not meddle with the enforceability and the legal validity of distance contracts for a marketing and provision of financial services. Because if they do, we will again go full circle and return to the current regime which is absolute uncertainty of law. Thank you very much.

ANITA RAMASASTRY

We have heard two excellent presentations. I know that everyone is anxious to have a little bit of time to stretch their legs, so I will try and be brief.

I would like to thank the ILPF as well for inviting me. I'm both an academic and a former regulator, so again you'll hear a cross-pollinated perspective. Ruth Day asked me to just give a little overview and to talk about licensing in the broader context.

This panel was industry specific, but it was meant also to provoke some thought and discussion about how licensing as a jurisdictional mechanism might work in the Internet context more broadly. And I will also talk a little bit about electronic money, an area where I have spent some time and actually worked on the legislative front, at least in the United States.

In general, with licensing and financial services, it is the regulatory oversight that comes with prescriptive licensing that is important. We've talked a lot about jurisdiction, we've talked a lot about codes of conduct and self-regulation. And this panel is really about regulatory jurisdiction and prescriptive licensing, where the

regulator comes in and gets jurisdiction by virtue of granting a license to a business entity. And I would like to remind people that licensing is more than just creation of burdens. It is the creation for the consumer of the regulatory trust mark. We heard a lot about trust marks and brands, and what is the best trust mark for a consumer? It's a regulatory body actually going in and licensing something. The consumer knows that the regulator has conducted an evaluation of the entity. And an example, it's not quite licensing per se, but think of the FDIC logo if you're an American when you go into a bank. You know what it means, it's very small, but it stands for something that instills great confidence in you when you actually access your bank account.

What does licensing achieve? It creates a primary regulatory structure for a particular entity. If someone has oversight and they can ensure, at least in the financial services context, the safety and soundness of a financial institution. And there are other industries and service providers where licensing provides that same kind of role, and I know Tom Bell, for example, gave you an example earlier of online pharmacies. And again, licensing could and does play

an important role for certain types of activities, where well-being, safety, soundness or finance are issues. Licensing gives a business entity the ability to engage in certain permitted activities as well.

So licensing gives a consumer confidence, but it also gives the business clear understanding that they are permitted to engage in a range of activities. By applying for the license, you know here are the five things that you are enabled to do. And in the financial services context, it also imposes certain obligations and restrictions on an entity. You can do X, you can provide things, you can loan, you can accept deposits, but you can't engage, at least until recently in the United States, in securities activities if you were a financial institution. So privileges as well as obligations.

But the most important thing for the regulator, and I think we sometimes forget that -- is that licensing provides a jurisdictional hook. And that isn't going to go away. If you are licensed, you are regulated, you can be supervised, and your books and records are open to examination. On the other hand, if you are unlicensed, you are now engaging (in a given jurisdiction) in an unauthorized activity. That of itself gives the

regulator the ability to begin civil or criminal prosecution. So it's a jurisdictional hook in both ways. You can do something by virtue of a license, if you don't have a license then suddenly you are subject to that jurisdiction's enforcement authority, and that's why it is an important tool in the financial services context. Somebody is online, they are engaging in an illegal pyramid scheme, there's a problem with fraud; the jurisdiction is able to actually go in, and theoretically, although again with the Internet it's difficult, to bring you to court.

So again to remind you, why licensing in the banking context? We're talking about prudential regulation. Banks are holding consumers' money, and as Brian Smith mentioned, non-banks are now holding consumers' money. But when someone is holding that money, there's a risk for the individual consumer, which we must not forget, but there is also something that's what we call systemic risk. And bank failure poses a risk to the financial sector as a whole. Each physical jurisdiction has an interest in protecting the depositors and the consumers and the investors in their part of the world, for marshalling the assets if there is a failure, but also preventing fraud and protecting individual deposits.

So licensing can be seen as a competing set of regulatory burdens. We've talked about that before. You are licensed in 15 jurisdictions, that is what you have to do now, it creates a burden. With Internet banking and financial services, there is the possibility that you have to comply with multiple regimes. The other option, as Emilios Avgouleas mentioned, is you just prohibit access in the jurisdictions where you don't want to obtain a license. You block access to the website, you pose terms and conditions that exclude customers, you password protect the site.

But while it's a burden, at the same time, and I think that is what this panel wants you to think about is, that it can be a useful tool in the extent that you harmonize standards. The EU has achieved that with respect with banking and passporting. The Basle Committee with its standards is able to do that, so that even though you have to obtain a banking license in the United States and in Europe, the prudential, meaning the safety and soundness standards are similar vis-à-vis the burden of complying and applying for the license isn't that difficult. You can submit the same kind of paperwork and what you need to do is pretty standard. In the EU reciprocity is based on a home

country licensing system and therefore again, because of reciprocity, one license in one EU jurisdiction gives you a passport.

So again, licensing with creative harmonization can work in the EU with respect to banking and financial services, and passporting is a real example, I think, that people need to pay attention to.

What I will talk about now is actually again my real world experience with electronic money. Licensing does create burdens, but they are important burdens and we need to remember that regulators, when it comes to certain issues with respect to the safety and soundness of consumers, will not give up that jurisdictional hook they have. They are not going to give it up, and as the two panellists have mentioned, right now there is a multiple level of compliance that these multinational financial service providers have to comply with.

But we also need to worry, not about the established financial institutions and banks, but about the so-called "mice" that are there. Someone mentioned the elephants are always regulated. Banks know that when

they're entering a new jurisdiction in the brick-and-mortar world, and now in the Internet world, they need to talk to the regulator and to get a license, it's not a problem. There are costs associated with it, it's a headache, they'll try to move towards standardisation, but they know what to do.

But in the Internet world, it's the new company, it's the technology companies, it's the auction sites, it is anyone who wants an easy payment platform that wants to operate globally, that think they can do it quick and fast, that are a) running afoul of these licensing regimes, and b) are the ones that we need to be concerned about because they don't have years of experience, they don't know what prudential regulation is, they don't know how to comply, and they don't very often have the financial assets) to deal with that. So a) licensing can be used creatively; and b) it is because of demise and because of the start-up companies, and because for example payments are so essential to the Internet, that licensing isn't going to go away. So E-money is an example of where licensing provides a useful mechanism and where harmonization of standards and notions of reciprocity may need to evolve.

My specialization is with respect to micro payments. I work on issues with respect to Internet funds transfers. Many of you have heard of companies like PayPal that "beams" money over the Internet, PayPal is not a bank, and takes money as if it were a bank, but yet does not have that same imprimatur, no FDIC logo on its Web site.

Prepaid gift certificates, another example of micro payments. Some of you may have heard of beenz or flooz, you can buy these gift certificates, give them to people, Rocket-Cash is something that's an Internet allowance for kids also referred to by commentators as Internet "Scrip." There are e-coins -- you can buy coins to shop on the web. These are all micro payments. Very often they involve a third party that is not a bank, and that's what I want to underscore, that holds consumers' money as if it were, and since taking a deposit from you but without those prudential safety net in place. No deposit insurance, no regulator looking over the payment service providers' shoulder.

So that' is the key issue for regulators. There is an explosion of micro payment systems and providers out there, but who' is the lead regulator? And on a daily basis,

these companies are starting and taking consumers' money because, again, all of these e-commerce companies need payment vehicles.

So the problem is the non-bank providers, the "mice". Many of these entities have no idea that they are required to be licensed, and I talked to many of the law firms that represent these companies or these ventures, and they don't know that there might be existing licensing regimes in the United States or in Europe that apply, so they start taking the consumers' money. And traditional financial institutions, and also brick-and-mortar companies, like Western Union, already are subject to prudential regulations of a certain type, and they start to say: "Wait a minute, isn't there a level playing field?"

I will give you an example of one micro payment company. I don't know if any of you have heard of e-gold. e-gold is popular among certain patriot groups in the United States. If you want to use, you don't like fiat currency, you don't like United States dollars, you don't like any government currency, e-gold is the product for you. It's an electronic currency issued by e-gold Limited, a Nevis corporation, 100% backed by the gold bullion.

You're buying warehouse receipts when you transact over the Internet with e-gold. And e-gold has advertised, I lifted this off on their Web site, it's integrated into an account-based payment system that empowers people to use gold as money. The e-gold payment system enables people to spend specified weights of gold to other e-gold accounts. Only the ownership changes and the gold remains in a vault.

Well, I don't know if you're really buying gold when you use e-gold to transact, you can buy lots of things, from political diaries to wonderful T-shirts, with different militia groups on them, but when you use e-gold as a consumer, you're still prepaying, you are using either a cheque, a credit card, something, to give this company your money and that company will hold your money until you want to spend it or send it to another friend who' is part of e-gold payments network You think this company is licensed anywhere in the world? No. Look at their Web site, is there any restriction as to where they can do business, is it limited to United States customers? Absolutely not. And e-gold is just one of many many different micro payment services that are flourishing.

So, there's a strong incentive to regulate these entities. In the United States, there is no federal regulation at the moment. However, non-bank e-money issuers or providers, like e-gold, may be subject to widely different money transmission and payment instrument laws in 40 states. Western Union is licensed in all these states, it's not a bank, but it sends money. It takes people's money and wires it for them. Moneygram, it sells money orders, all of these people have to be licensed under state money transmission laws, and e-gold again, because it is holding somebody's money, probably needs to be licensed too.

There is a move in the United States towards uniformity in this area, again licensing in all of the states, but using a uniform standard. And I work as the reporter for an act known as the Uniform Money Services Act, which the Uniform Law Conference, (the UCC people) adopted this summer as an attempt to create that uniformity, but recognizing that licensing was an important recipe for dealing with micro payments.

The European approach is a little bit different. So again, not only do you have licensing for these companies, but also you have a slightly different approach.

In the EU, there' is the definition that's been proposed in electronic money institution, not treated exactly like a financial institution, exempt from a lot of the provisions of the first and second banking directives, but still required to have certain minimal capital subject to supervision and licensing. And if you're on a small scheme, again you are selling small stored value cards, you might be exempt in a local jurisdiction that chooses to exempt you. Other jurisdictions require that only financial institutions can offer Internet payment services. If you are in Hong Kong, you have got to be a bank, so you can't be e-gold, and that is what Brian Smith was talking about.

So I will just end by saying, I hope that many of you who are the jurisdictional gurus out here, think a little bit about the fact that licensing isn't going to go away, and there are important reasons for that. You heard from the consumer people yesterday, but the regulators that deal with certain industry sectors who want prescriptive licensing want it for a reason, consumers as well as for example in financial services, economic stability. Harmonization of standards as Emilios has mentioned with the Basle Committee for example, may be the third way or the middle way of

dealing with this, or creating passporting, or at least a way of allowing regulators to have confidence from jurisdiction to another, so that licensing means filling out one form and sending it to 50 regulators, licensing becomes light touch at that point. But the regulator still has the ability to examine, to take enforcement actions, et cetera.

And why it's important is not because of the elephant, it is important, and this will not go away, we don't have as many mice in the room today, but it is because of these new companies entering traditional sectors. They don't know that there is a licensing requirement very often, yet it is precisely because they don't know that we want to make sure that they comply, because again, they're the ones that are holding consumers assets. Thank you very much.

I think we should just move on to the next panel because we ran overtime. So thanks.

TORTS OVER GLOBAL NETWORKS

**Facing Global Liabilities, Pursuing Remote Defendants:
The Draft Hague Convention**

STEWART BAKER

Well, it's been pointed out that every time I'm scheduled to chair a panel, the prior speakers do their best to spare you from much time devoted to our panel.

But in this case the organizers have extended the time for lunch, and lunch will now begin at one o'clock, so we will run until just a bit before one o'clock.

We've got an excellent panel to talk about tort liability under the Convention. To my immediate right is Elizabeth Banker who's Corporate Counsel for Yahoo! (recording missing) the issues arising from litigation surrounding Yahoo's users and the torts, the many torts that they are accused of. Prior to that she had a distinguished career at Steptoe and Johnson.

Next to her is Lawrence Greenberg. Lawrence Greenberg is the... most of us would call him the general counsel of the Motley Fool, but his formal title is Chief Legal Fool. The Motley Fool for those of you who are not

familiar with it is an investment forum where shareholders and investors give each other advice and comment on the successes and more often the failures of companies that they've invested in, and not surprisingly, there are a number of legal issues that arise from those comments.

Next is Marc Pearl, formerly the General Counsel of the Information Technology Association of America, now partner and in charge of the e-Commerce practice at Shaw Pittman.

And finally next to him is Perry Viscounty who is with Latham and Watkins in Orange County and who has handled a wide variety of intellectual property and other e-Commerce issues.

I'm going to just handle this as a kind of conversation among the panelists, but I'm going to ask Marc to start us out by giving a kind of overview of the Convention and Article 10.

MARC PEARL

As best I can, thank you, and it's a pleasure to be before the ILPF. The work of this group and its input and perspectives have been very much appreciated within the entire community and it's important that this conference builds on that. And certainly for those of us who have been very concerned about certain aspects of the Convention, the thoughtfulness and the substance of the speakers and the materials, I think, will help move this dialogue along.

The Article 10 which I think for those of you who were here earlier this morning, was in effect put up on one of the speaker's PowerPoint, goes to the issue of the tort aspects and very simply that:

A plaintiff may bring an action in tort in the courts of the state A) in which the act or omission that caused the injury occurred; or B) in which the injury arose unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act or the omission could result in an injury in the same nature in that state.

There's an exception in terms of an antitrust violation and then there's also an additional sub-text that the plaintiff can bring the action in accordance with this paragraph that I just read:

... when the act or omission or the injury may occur.

The reading of the e-Commerce community, and that's the only aspect that I'm presenting here, having been active in and trying to, in essence, coordinate the views of a number of companies and associations, primarily U.S., but international input as well in the kind of overview of Article 10 and all of the articles, is that the general consensus is that the language that is contained in this article can at best be termed as vague, which for those of you who are more expert in transactional and interpretation of language of any treaty can in essence see through even more so than I, and that many have deemed it, after analysis, to be at worse damaging to the legal system and certainly current legal precedent in the U.S..

There are a number of questions raised just by the language itself which we can, you know, go into.

Suffice it to say I think it's important to put forward an overall general statement.

Earlier this summer, the United States Council on International Business and the Information Technology Association of America, before I left, sent out an informal survey to many companies around the United States who either had focused or who had yet to focus on the proposed convention and the results have not been distilled in a formal data point way. But I will tell you that in general, the feeling of those who are either brick-and-mortar moving into the click-and-mortar, or who started from the beginning as click-and-mortar companies have deemed the overall convention, and particularly the problems that are surrounding the language of Article 10, to the conclusion that the benefits do not outweigh the burdens.

And therefore, how we in essence either resolved the draft that's there article by article, or approach it in a more systematic way from the beginning are things that I think have been alluded to throughout the course of the last couple of days. But Article 10 is, I think, just symbolic of the overall problems of language and approach in the context of a treaty that

started in 1992 and now has to confront the e-Commerce
community and the arena of what in fact e-Commerce is
and will become.

STEWART BAKER

Well, maybe what we should do, I think what might be useful is to start asking ourselves, what kinds of torts are likely to emerge from the Internet, from e-Commerce. And what I propose to do here is just ask Elizabeth and then Lawrence, what kinds of torts they're actually seeing, what kinds of accusations of tort they're seeing in the sort of litigation that appears before them as counsels to e-Commerce companies. Elizabeth.

ELIZABETH BANKER

Sure. I think one of the places to start is to understand that a lot of the things we see happening in terms of tort litigation involving the Internet is not only disputes that individuals may have with other Internet users, companies may have with Internet users, but there are also disputes between companies about business practices. There have been cases where Internet service providers have actually sued their users. One example of that, that's an interesting case, is where a company sued one of their users for using the mail system to send out SPAM, the result being that the company was put on the black hole list, damaging their reputation.

But the more typical cases are the ones where suits are brought against a user. Those typically come out of message board scenarios or places where the users are free to post content about their opinions which often are not favourable. We have a site called Geocities, where users can create home pages. One of the popular activities is creating anti-whatever company sites. In those cases, the company may decide that they don't like the way their name is being used or the things that are being said about them, and they may file suit against the user. We also have finance message boards for discussion about publicly traded stocks. Again, that's a scenario where you may see defamation claims in addition to a number of other claims.

As for other types of torts on the Internet -- SPAM has been an area where there has been some tort based litigation.

A VOICE

But what's the tort theory there other than the harm to reputation theory...

ELIZABETH BANKER

There are a couple different ones. It can be trespass,

fraud, or misrepresentation. Misrepresentation or fraud claims may be appropriate if headers have been forged, which is a popular activity in connection with SPAM. Lawyers are getting creative about how they frame tort claims.

There have been privacy suits as well. There was one filed against Yahoo! by a user on the basis that we handed out their user information in response to a civil subpoena without providing notice in advance. That suit was dismissed, but the tort basis there (in addition to statutory claims and a California constitutional claim) was a claim of negligent misrepresentation because we didn't advise the user in the privacy policy explicitly that responding to subpoenas was something we were going to do.

I think what we see in Internet cases are tort claims in areas where there is not an appropriate statutory framework under which people may bring a claim. People are very creative and use the torts that are available to fashion a claim. I think we see this particularly in the company disputes about marketing practices, crawling or scraping Web sites, those types of relationships between competitive companies.

STEWART BAKER

Lawrence, what do you think?

LAWRENCE T. GREENBERG

Well, we generally see what Yahoo! sees only smaller because we're significantly smaller ourselves. But in addition to that, there are suits that arise, not just on message boards but from the activities or the abilities that the Internet gives to people. For example, one of the most common that we're concerned about as a media company is the misappropriation of our material. It's not very difficult for someone in any jurisdiction to copy an article off The Motley Fool and either post it on their Web site because they love us and think it's so good, or because they wish it to be their own. Substantively or legally, there's not much difference there. In fact, we view that people who love us with a lot more gentleness. And they typically are more responsive to our concerns.

Additionally, as Elizabeth noted, for us as a company that writes about securities and has, and provides a forum for individuals to share their thoughts on securities, there is always the possibility of securities fraud liability for somebody. So far in

the United States, most of the securities fraud litigation that has arisen out of Internet activity has involved SEC enforcement actions for individuals violating either the straightforward 10b-5 antifraud provisions, or the provisions that regulate the ability of individuals to promote investments for compensation while not disclosing that promotion. And the SEC has been very active in that and has conducted a number of fairly high-profile sweeps.

On an international level, obviously the intellectual property infringement takes place. Various issues arising out of domain do, of course. We haven't seen a tremendous amount of actual fraud actions abroad although one thing that is of concern to really anyone in the media space, especially in the financial media space, is something that was touched upon by the previous panel, and that is a concern as to when activity that is quite innocuous in the context of, well, in the United States where much expression is protected by the First Amendment, pure discussion of investment could be considered to be conducting unlicensed investment business which could expose the discussant, whether it's a company or a little individual sitting in his or her basement in Petaluma.

We could subject that person to some sort of enforcement action or some sort of civil fraud or unlicensed activity action which would come closer into the torts space.

STEWART BAKER

Yes, Marc.

MARC PEARL

Sure. I've seen some additional, what I call emerging E-torts. One in particular is cybermedical malpractice where these health sites will dispense advice or information about a particular medical ailment. And people in other countries will access the site and possibly treat a family member based on the information they receive and later claim that it was malpractice or negligence by having that information available which turned out not to be appropriate.

I've also seen cybersquatting cases all over the world where people will register a famous trademark or name, TomCruise.FR and sit on it or provide content in connection with that. Virus production and dissemination where employees will create a virus, disseminate it through the Internet, and employers are

being sued for that since their equipment was used through, by carriers liability theory, which can just have enormous impact on companies. You can think of the liability associated with a virus being distributed throughout the world, the damages can be in the millions or even billions of dollars if an employer is found liable for that because their equipment was used and their employee did it during office hours.

I've also recently seen a string of lawsuits providing old traditional business torts through e-Commerce. The old claims of intentional and negligent interference with prospective economic advantage or a contractual relationship. People are suing, saying because of an act that occurred in one country, they were damaged in another country with their ability to transact their business. So, for example, again a domain name suit where a company who registers domain names took back the domain name claiming it was wrongfully registered.

And the company in another country lost all of their business that they had set up, and potential customers and contracts that they had entered into.

So those are some of the other, what I call emerging E-torts.

A VOICE

I don't want, given the compactness of this particular panel, I think it's important for us to take a step back before we move into the tort round, and that is because in point of fact that the whole concept of torts is not necessarily even a global concept, I mean, that's why it's torts or delicts which I had asked Jeff Kovar at the front end of this thing, tell me what a delict is, having missed that in Torts 101 in law school.

But I think the whole concept in the question that we're asking is, particularly arising out of a Convention that is dealing with, yes, commercial and civil, does the whole nature of a tort arise in one or both or either which is in a non-contract situation, or in essence a kind... which has now been famous as Liz was talking about, in a contractual situation, but that because creative lawyers or lawyers who are creative, which may be in fact the next oxymoron, but that in point of fact, lawyers who are trying to be creative and cannot find remedy through the contractual law theory will come up with a series of misrepresentations or negligence, trespass, nuisance, reckless disregard, et cetera, et cetera, to get around the contract.

And one of the things that, I think, is important to look at, just from our base level of tort, are the questions that are raised in the context of do we then use the Convention as a way of justifying actions outside of normal contractual relationships, and what flows from that, and as the U.S. courts have looked at, in essence, a theory called the economic loss rule which, and I'm not sure what injury means for example, it's not defined in the Convention, what is foreseeable, the purposely availing yourself. Those are some of the questions that come up, and if a company doing business in the web is all of a sudden going to be subject to any non-contractual claim, yes, I know, we're going to go into the cause of action, but that is part of the problem.

In essence, by being a member of the web community, are you opening yourself up to any tort claim anywhere in the world that are either... and if you cannot claim that it arose out of the contract, you can get back to an economic loss theory, which is the injury, only if it's economic loss. And we're not talking, at least I'm not talking about, you know, the product blowing up in the person's face. We're really talking about a tort theory based on contract. And if we're talking

about a tort theory based on contract, the U.S. courts for over 30 years have in fact embraced very strongly the economic loss rule which says that you cannot claim outside of the contract other theories, because that's built into the relationship. We have a relationship, we have a contractual relationship, if you suffer an economic loss, you have to sue under contract. And this article is very confusing, and it's just, it complicates the relationships that companies that are going to go into the web and all other kind of E-torts that Perry is talking about, you know, that you have to settle anyway, it just complicates it to an incredible degree which I don't think has been in essence massaged and worked through enough by the international community in the context of at least a U.S. centric approach to this litigation theory of let's find another way of suing.

STEWART BAKER

Well, certainly we will want to hear, since we are civil law handicapped up here, from civil lawyers in the audience about whether the kinds of things we've been discussing as torts would fail to make the cut as delict in civil law. It seems to me that many of these things could easily be shoehorned into existing notions

of obligations under civil laws. Some of the broader civil law obligations ought to include many of the theories of tort that we've put forward here.

Well, let's, actually let me ask Elizabeth and Lawrence. Have you actually started to see these cases coming up outside the U.S., have you... or is this something that we have yet to actually experience?

ELIZABETH BANKER

I think we've seen fairly limited activity internationally on torts. The types of cases that I think we're seeing are defamation cases most typically. For a company like Yahoo!, where the users are the source of the content, that's of concern to us, because in countries outside the United States, we don't have the protection of the Communication Decency Act which says that Yahoo! as the online service provider is not responsible as the publisher of information if it's provided by a third party. The CDA creates an area where we're immune from most of these state law tort claims that people would bring against us on the basis of defamation, harassment, different types of abuse, privacy, invasions, or similar claims.

STEWART BAKER

Is that true for you too?

LAWRENCE T. GREENBERG

Yes, for us, defamation is the first thing to arise, and it is more frightening because, I mean, we're talking about content over which we do not have control, that we do not create and cannot know whether it's true or not. And that in some areas may give us perverse incentives because, and one of the purposes, as many people here know, behind Section 230 of the Communication Decency Act, was to actually encourage companies to take responsibility for, or not necessarily take responsibility in a legal sense, but take responsibility in a moral and practical sense for what goes on, on their message boards, to police them for things that are really bad, like child pornography in the classic example.

In some countries, or in dealing with some countries, we may be presented with the choice between maintaining our relatively immune status and not fighting the bad user-generated content, or we could, well, by trying to be good citizens, we expose ourselves to increased liability.

The second area where I think we're starting to see some level of legal activity, and I don't think that it's arisen yet to the level of actual litigation, is again in the copyright area where, and to a lesser extent trademark, where people, because of the nature of the Internet, find it very easy to misappropriate, that's not something that comes as a surprise to anyone. It was something that was going to happen, and different countries have different ways of addressing that.

STEWART BAKER

Later on I'm going to ask you if you had to choose between more effective international remedies as plaintiff or the likelihood of more judgments against you being enforced in the United States as a defendant, which you'd choose, but I won't ask you yet.

Let's try unpacking some of the language from an e-Commerce perspective to see what this would mean in the context of a Web site or on an online service provider.

The plaintiff may bring an action in tort in the court of a state in which the act or omission that caused injury occurred. Is that clear enough from the point

of view of e-Commerce, is it usually going to be clear where the act and omission occurred?

LAWRENCE T. GREENBERG

Well, I think that the only way that it's really clear is by letting it be infinitely broad, and say that, "Okay, the only true way for clarity is to say, well if someone was injured, where that person is, is the site of where the act or omission occurred."

Now, in reality that seems to be extraordinarily broad, unjustifiably so, especially in the context of a global network where anyone can go into business and have some sort of expectation that his or her business can be accessed from anywhere. I don't know if anyone remembers the television advertisement that was, came out about a year ago with a group of Japanese business people discussing a bid that came in from a supplier, and it came from Mitchco, and Mitchco was a guy in his coveralls, sitting at his computer doing business with the world. Now, Mitch in that example was consciously choosing to do business with a Japanese company, and he even, you know, said "Arigato" at the end which showed that he was truly a world businessman.

In fact though, a lot of businesses don't actually know or care where the people they are dealing with are, especially in the case of businesses like ours which is media and community, or Elizabeth's which is much more, although, I mean, similar. For us, when we have content out on The Motley Fool Web site, which is Fool.com, and I encourage you to... well never mind, but on Fool.com, we have a lot of material that we write, and we write it in the United States, and it's oriented towards the U.S. securities markets, for people who are interested in investing, or saving, or buying insurance, or whatever have you, in the United States. The advertisers that we have on the site, to the extent they're financial service companies are licensed in the United States. And if you click on an ad for one of our advertisers, and try to open an account from Belgium, you'll only be able to do that, well, I guess you won't be able to do that through that site, you'll have to go through the company's equivalent in Belgium, assuming there is one.

However, well, anyone can go to the site and can read, and assuming they have some way of trading, can act on the information that they have, although not through us. We have no connection to those people except in

that, you know, we like them to come. Did our tort, if we did one, take place in the foreign jurisdiction? I might argue, and I don't know whether it would work, but I hope not to have to make this argument any time soon, that in fact our entire relationship is with our advertiser, not with the person who is injured, and that we had no realistic expectation that we'd be dealing with the person abroad.

Now, I'm not sure I can really address the smaller or hobbyist sites that may have affiliate advertising or banners for Amazon.com on their site, who are businesses who may be defaming or defrauding people left and right, assuming goodwill and whatever, and they may not have even the level of sophistication to have an expectation that they are doing business on a global Internet despite various advertisements from companies like Cisco, that show the whole world.

So in any event, to make an extraordinary long and convoluted answer short, not everyone knows where they're doing business, and not even everyone knows who they're doing business with, or even that they are doing business.

MARC PEARL

Stewart, if I can.

STEWART BAKER

Yes, sure.

MARC PEARL

Even if one was to assume and jump to what Lawrence is talking about, that once being on the web you make the assumption that you're doing business with the world, okay, you know, an unsophisticated, whether you are a small Web site operator or a content provider, or a service provider, or goods provider, products provider, anywhere in the world, when you go into the Internet environment, you make an assumption that you're doing business with the world. And we've heard a series of explanations about saying you can, you know, exclude certain jurisdictions, void where prohibited, et cetera, et cetera, but for example, in the tort round, at least it affects in terms of ... you are at least, in doing business with the world, it's doing business, it's establishing contractual relationships with whoever responds to your store site, and says: "I want to do business with you." and you set up certain terms. Torts take you out of that realm.

And so example in the class action realm, where plaintiffs are in multiple jurisdictions, how does that work? I mean, I don't have the answer. But if you in fact are doing business with the world, and in fact there are multiple jurisdictions of plaintiffs that decide to have a class action suit against The Motley Fool anywhere in the world, how do you deal in the context of even in an international convention under those kinds of circumstances? So again I don't have the answer. I'm just saying that in the context of your "where it occurs" question, that's left opened.

And in a tortious society, at least as litigators would have us think, you know, every company is left open. You can't say I'm not doing, I'm not going to have any tort claim against me anywhere in the world, that's just not practical.

ELIZABETH BANKER

There's an additional problem for companies that act as a platform for their users or those who would contract for the purposes of hosting a store or a Web site that may do e-Commerce. The people who contract for that hosting of the store are actually the ones in the position to determine who in the world they'll

actually do the transaction with.

The company that does the hosting of that store does not have control over individual transactions. So in cases where there may be an attempt to hold the hosting company liable for -- whether it's fraud or misrepresentation or whatever the tort may be-- that company had no participation in deciding whether or not it was actually going to engage in a transaction with this person in this foreign jurisdiction.

Similarly, whether even outside sort of the e-Commerce situation, if it's just posting of content, the user can be anywhere. And one of the frustrating things for online companies, I think, is, even if you make the effort to draw some distinction between a U.S. based service that is just ".com" and foreign services which are directed to specific countries, may be in the language of that country, and complying with the laws of that country, you may still see foreign users coming to the ".com" site to engage in acts that in their country would be illegal or subject them, and also you as the service provider, to liability.

A VOICE

So it's not just the consumer of whatever it is you're offering, it's the contributor to the forum who can expose you to suit in an unexpected jurisdiction. If the guy writes in from Saudi Arabia, and posts something from Saudi Arabia that is defamatory under Saudi law, or otherwise in violation of it, then under the language of Article 10, that's where the, it's arguably where the act occurred and he and probably you can be sued in Saudi.

ELIZABETH BANKER

It puts companies in difficult positions in many cases. One of them, I would just use as an example, is where you would see a site that was put up by a user, which is critical of a politician, and the way they carry out their official duties. In the United States, that site would clearly be political speech that is protected under the First Amendment. In addition, as the service provider, you would look to the CDA and say, well even if somebody was going to bring suit, you would have that protection.

In a country that does not have a First Amendment equivalent and a CDA equivalent, you have to look at the situation -- ask questions like, what are the jurisdictional issues here, what language is it in, what does the audience for this text appear to be-- and make some determination about the risk. It can be very difficult to do. I think for U.S.-based lawyers, those types of decisions can often be difficult to make because you're in a position where you're sometimes making decisions that go against what you've been taught going through law school and growing up in the United States.

LAWRENCE GREENBERG

And just one thing I would add is that if you look at the more successful or more prominent web based U.S. companies, a very high percentage of those are content or content-related companies. And of those, a very high percentage of the more successful ones, the ones that are actually pushing the content side forward, a lot of those do rely to a great extent on user-generated content, whether it's an AOL, a Yahoo!, CNET, and a number of the other sites that aggregate population intelligence, allow groups of people to apply their thinking to a variety of problems, Motley

Fool is one of those as well, these are the ones that seem to be actually making some headway in the market, and ones that are perhaps most vulnerable.

PERRY VISCOUNTY

And I think another problem is forum shopping. For example, with the proliferation of wireless devices now, whether it's your cell phone which allows you to access the Internet, or some other device, you can be anywhere in the world and post a statement that defames somebody. If you're sued here in the United States, you have the First Amendment as Elizabeth said; if you're sued in the UK, there's a different standard, and the defendant has to go forward and has the burden of proof.

So I think what you're going to see is where there's a tort in one country but not in another, you're going to have forum shopping since there are different standards around the world. And look at the language "where the act or omission occurred." Well, if I'm travelling into a foreign country and I post something on the Internet, is that where the act occurred because I happened to be in Saudi Arabia that day when I posted it, or does it

occur where the server is located, or does it occur where somebody reads the defamatory statement sitting in their office or home? So there's some interesting issues there on how you interpret where the act or omission occurred.

The same thing with the injury, where did the injury arise? Well, what if you're a company or a person who has a reputation in several different countries. There again you have the potential for forum shopping, you're going to pick the country which gives you the most favorable jurisdiction. In the past people would often bring these cases where the defendant resides. Since we have such favorable laws here, especially in California, suits are often brought here.

MARC PEARL

And that goes to a question that's going to go towards the end of this session, Stewart, which is something that I certainly, when I testified before the House Judiciary Committee earlier this spring, the phrase was that the problem that the community sees, is that this proposed convention may be putting the analog cart in

front of the digital horse, and by that I mean, some of the issues that Perry raises and that Elizabeth and Lawrence raise, are issues that even at the front end, in contract formation, and as we've heard over the last two days, have not even been settled yet. We don't even know the nature of e-Commerce formation of contracts, and yet the problem is, is that the Convention, and it's not a problem because we're going to need it, and I think that that certainly embraces what Catherine was saying yesterday, but it, in essence, comes up with the conclusion on dispute resolution before we even have settled law on contract formation.

So we're settling in essence what the parties are arguing over, or the enforceability of a court's judgment, when as your question to Lawrence and Elizabeth said, we don't even have a lot of case law on which to build a framework of dispute resolution. So that these issues that have come up are things that might be a little bit too far ahead of the curve in the context...

STEWART BAKER

Let me try out a defense of this, which says, you

should certainly expect to be sued where you are and where you perform your acts, and therefore the notion of jurisdiction under A) should not be, with the exception of your vicarious liability for people posting from Saudi Arabia, ought not to be a big issue.

The hard questions arise under B) where the injury arose. There's been an assumption among a lot of e-Commerce businesses that a passive Web site, certainly based on U.S. law, a passive Web site in which you're not proposing transactions with people in jurisdictions with which you're not familiar means that you're not likely to be subject to, of the jurisdiction of those courts. But it seems to me the kinds of torts that we're talking about here, defamation, allowing SPAM to be sent out, invasion of privacy, misappropriation of content, securities fraud, bad medical advice, almost all of those things are things where just putting up a passive site with words on it subjects you to having caused injury in a place where people read it, even though you haven't asked for a lot of economic transactions in that place. That raises the question: can you get out of being subject to jurisdiction there by saying it wasn't foreseeable that the harm would occur there. Do you buy that, do you think that courts

are going to say: "Yes, it wasn't foreseeable that this site would be read in this country."

PERRY VISCOUNTY

No, I don't buy it; I think many courts will find it was foreseeable. You're accessible, often times they'll even find evidence that you knew people were accessing your site from a foreign country. Let's say you have a registration requirement, or even if it's voluntary registration, people might input information saying: "I'm from this particular country." and that's in your record. So the argument can be made, you knew people were accessing your site. Even if you're passive and you're just providing information.

I think there's another problem here with that language "where the injury arose", and that is this foreseeability test goes beyond our law. I mean, here we have this case that basically says you have to purposely avail yourself, and so you have to go to that particular state and do business there, or transact something there. Where here the argument that it's just foreseeable to me is just so broad and really can subject you to a finding in foreseeability anywhere in the world.

MARC PEARL

Which is what we obviously saw in France with respect to, you know, the Yahoo! situation as well. The fact remains, is, is that if a local, very local site in Quebec decides that in French it's going to in essence communicate and it's only considering itself to communicate content and information to citizens of Quebec and Canada, does the fact that it's written in French and that it's available on the Web site of the world, all of a sudden put them into any French speaking countries' laws? Because there has been this cultural language argument that has been raised, that you need to put things in language, well if you put into the language, does that automatically then put you into that country? And that's, and I'm not even talking about English in UK or somewhere else, or Hong Kong. So from that standpoint, those are the kinds of...

A VOICE

As long as you don't spell "utilize" with an S.

MARC PEARL

With an S, exact, exactly. But I think that that's the context of where it arose, what your intentions were.

Tort takes you out of that, of business certainty. And to a great extent, on behalf of the e-Commerce community, we're not asking for guarantees, but we are, in essence, asking for a sense of business certainty when we're doing, when we are in fact entering into contractual relationships.

And if any country can, in essence, or any party in a country can skirt contractual law, then in fact you are putting a damper, if not just a real major wet blanket on the ability for companies to want to move into the Internet environment.

STEWART BAKER

All right, let me try another approach that I think a defender of the Convention would put forward. He'd say, you know, yes, of course you have defamation lawsuits and some of them could be based on the theory of publisher liability, but if those judgments were brought back to the United States, the courts would not enforce them, they'd say, this is a violation of the CDA and our policies, this is a violation of the First Amendment if the defamation theory is brought by a public official. Are you guys comfortable relying on the public policy exception to enforcement?

ELIZABETH BANKER

I think that that gets us somewhere. It certainly helps. It would take a lot of the defamation and user speech-related claims out of the mix. I think there would still be a lot of places where we would still need to get some comfort about how the Convention would work. For example, commercial transactions between users and whether or not the service providers are going to have some liability to the extent that transaction goes wrong. Again, we wouldn't necessarily have control over where the buyer was and the arrangement between the buyer and the seller.

Other situations include where there is misuse of a service provider system -- whether that's SPAM, a hacking case, something like that -- where you could have a negligence claim, a trespass claim. I think there are probably countless other types of situations that could come up that wouldn't necessarily be covered by the CDA, the First Amendment or some very clear U.S. law or public policy.

STEWART BAKER

Yes, actually, looking over the language, I think

clearly the First Amendment protections would be invoked.

MARC PEARL

But that's for... but we can't be, afford to be U.S. centric. I mean, it's not always going to be a U.S. defendant. I mean, if we're talking about a French defendant dealing with an Indian plaintiff, you know, it may not in fact play out, and while I'd love to be as U.S. centric as possible, the fact is that we're dealing in a multinational, you know, and multinational cultural world. And I think that if we just even pull out the U.S. centricity out of this argument, those questions still arise in terms of trying to deal with those companies. It might give greater sense of comfort to U.S. businesses, but it doesn't give, I think, at all any feeling of comfort to anyone who doesn't have the same kind of public policy legal framework outside of the U.S.

STEWART BAKER

All right. Well, I think we ought to start turning to the question of what it is that e-Commerce companies ought to be thinking about this particular provision,

and I'll come back to Lawrence and Elizabeth with the question.

On some of these potential torts, it's conceivable that your companies would be plaintiffs, you could be victim of spamming or misuse of your domain name in the header. You certainly are going to be victims of misappropriation of content and intellectual property violations, and domain name, cybersquatting kinds of issues, those are things where e-Commerce companies are more likely to be the plaintiffs than the defendants, and enforcement of judgments is usually good for plaintiffs.

On most of the others, privacy and securities fraud, and malpractice, and defamation, the e-Commerce companies are likely to be the defendants rather than the plaintiffs.

So, on balance, are you more attracted to the prospect of getting judgments enforced or more scared about the prospect that judgments from abroad will be enforced here?

LAWRENCE T. GREENBERG

From a perspective of being risk-averse, I'm more scared, and some of that is because in the end, as a, in situation where we're plaintiffs, we're going to have to go abroad and try to enforce things anyway. And we're not necessarily dealing or... Let me step back.

As a defendant, one of the things that we really need to worry about is not so much the forum, because I mean the forum is the forum, and a place is a place, and foreign lawyers are often less expensive than the U.S. ones. The choice of the law though is where things get particularly frightening. And when we're plaintiffs, when we're injured abroad, well, we didn't plan for the injury, so coming in a matter of prospective thought, you know, we couldn't necessarily evaluate what we were going to have to do, because this is tort, not contract.

As a defendant you like to feel that you have some control over the consequences of acts that are going to be attributed to you. So in the end, I think that we're more likely to be looking at large exposure than we are to be looking at large loss of benefits that we

otherwise could have obtained through the tort system.

But I haven't done, you know, detailed economic analysis, and I doubt that we'll have the opportunity to do so.

ELIZABETH BANKER

I would agree with Lawrence. I think the risk as a defendant certainly outweighs the benefit of being able to enforce judgements internationally.

And I say that for a lot of reasons. I think one of them is, in some of the issues you raised, where we would be likely to be plaintiffs, there have been some things that have come up that make international enforcement easier. I think the ICANN procedures for resolving domain name disputes have been very useful. So it makes it less likely we would have to do a lot of legal wrangling to try and enforce something in that situation.

But also I think for a company like Yahoo! that relies on third party created content, and third party includes both users and companies that we would license it from, the idea of taking on liability for anything - - and I love our users-- but *anything* our users could do to injure

someone anywhere in the world and without being able to control it; that liability exposure is a bit frightening.

MARC PEARL

Stewart, one of the things that in transitioning from an association to a law firm that you begin... and others have taught me, is that, I did some, a little bit of legal research in terms of the court, and cases that have been out there, and one of the things that I learned in the context of tort in the context of contract, is that, and it goes to what Lawrence was talking about, that the whole nature of a contractual relationship builds into the premise that the parties have thought about and built into the cost structure, having in essence allocated the risk factor, and that you build that in, in terms of doing business in the world.

And if you, in fact, permit parties to sue in tort when the deal goes bad in some way, will not only rewrite the agreement, not in essence "foreseeable", but, and it wasn't part of the bargain that was going on, and that the theory in the United States, and only as what I've been able to see in just a few other countries, it's the Economic Loss Rule of

Canada, the UK to a certain extent, Australia, New Zealand and Hong Kong, and that's about it. That we don't even have a settled approach to this kind of economic loss theory, so that as companies, whether they'd be U.S. or others who do business on the web, are caught between being able to in essence build into the cost factor the possibility that you are going to be sued outside of the contract, and it's going to hurt any company's ability to do that.

And so, I would point people to one federal law in the U.S. which was written in the context of an electronic commerce environment, which was the Y2K Act of last year. And built into that was definitions on economic loss rules, and under what circumstances, even fraud in the inducement was dealt with in the context of that, because it basically laid out that if you're only suffering economic loss, you can't go into a tort theory.

If that kind of concept, again at the front end, and I'm not necessarily saying that at this conference we're going to be able to debate even through this convention, that the economic loss rules are now going to codified in treaty language, but if that kind of

concept has at least begun to be embraced in the international global digital environment, we have a better sense of then building into the cost structure of companies whether it'd be Motley Fool or Yahoo! or a financial institution, how do you deal then with people that are going to be injured, again whatever that means, but in the context of a contractual relationship. And I think that we're not there yet.

STEWART BAKER

We're starting to talk about ways in which one might tinker with the provision to make it more attractive, and I think we do want to talk about that, but let me give Perry, and also you, Marc, because I'm not sure you have been put this question directly. If you had to vote yes or no, in or out on this language, where would you be?

PERRY VISCOUNTY

I would say out. Like the others, I am more concerned with judgments being entered in a foreign country and then enforced, than I am about being able to do the opposite. I do worry about it. I think it's a good idea but I'm concerned about the exposure. And I

can't get comfortable with the fact that you can negotiate a contract, you can decide on what laws will apply, where the venue will be, you can limit damages, but the tort area throws a monkey wrench into this whole thing, and you really can't predict with certainty where you're going to be sued, what laws are going to apply, and what the result will be. So I would vote no.

STEWART BAKER

Marc.

MARC PEARL

Well, if we looked to Article 6 in terms of the contract theories and we buy into the foundation upon which the Convention is coming, which is, there is a relationship that exists in the commercial civil world, and that we are in fact going to look to the contractual theories, then obviously actions in contract would be better then all of a sudden coming up with this dangling creative article for lawyers to say: "Well, if you don't like Article 6, and that doesn't solve your problem, then we're going to move you very conveniently into sanctioning on Article 10 which says... and you always have the opportunity to argue

that it was a tort."

STEWART BAKER

For those of you who've seen John MacLaughlan in MacLaughlan and Company, I will say "Marc votes out."

MARC PEARL

Right. And it goes to what I think that the U.S. government and what others were talking about in Ottawa at the e-Commerce experts, which is that at the very least, it's certainly a grey area, it's certainly something that needs to be further dealt with. And I don't know that all of those issues have been raised in the context of the e-Commerce. In the analog world, the tort aspects of, you know, injury, may in fact be necessary. I know that the trial lawyers really care about a product coming from Taiwan and blowing up in someone's face in Paris. There's no question about that, that's a tort. But in the e-Commerce environment, what I think we're talking about is, in many a large case, economic loss only, that's the only injury, and that's not fully defined, and it's not worked, and it's very vague, and that's why we're left with the... it's got to be...

STEWART BAKER

So let's explore for the next few minutes the question of what it would take for people who care about e-Commerce to move from "no" to "neutral" on this. I think that's something that we ought to be thinking about. Marc put forward one idea, it's to say we're going to exclude economic losses from claims that can be made under Article 10, that's certainly one approach. I'll put a couple more that came out of this because I'm struck by the fact that it's not clear whether many of the torts we've been talking about could be described as mere economic loss: defamation certainly not, spamming, misrepresentation, also not purely economic loss, privacy interests, misappropriation of contents, securities, fraud, medical malpractice, domain appropriation, production of viruses, those are all things that cause losses that are not quite economic loss, I think intentional interference with contractual rights arguably is. So we haven't... we know this list down of lawsuits that we're worried about too much.

MARC PEARL

But you're asking for an economic recovery, correct?

STEWART BAKER

Well, so are you if it blows up in your face, all you want is money.

MARC PEARL

Or your medical bills paid for or something like that.
I mean...

STEWART BAKER

Okay.

MARC PEARL

Which, yes, is money, but is in a different context. And are these, are these torts that have been raised arising out of a contractual relationship or not, and in some of the cases I would grant that Perry's examples were not always in every instance arising out of a contractual relationship. And on that case, we might be able to find some semblance of order as the Convention approaches.

But I think that the issue is maybe not, whether or not there's economic loss, but is the claim, again you know, those of you who don't want to talk about cause of action in the context of this Convention present

problems, but is the claim arising out of a contract, and if the claim is arising out of a contract, should we not default to a contractual theory?

STEWART BAKER

Let me ask Elizabeth and perhaps Lawrence a similar question. A lot of the things that you're worried about are what you might call vicarious or secondary liability, liability for the principal wrongs of other people, the defamation, securities fraud where you're not running the site, medical malpractice from bad information. Would it ease your mind if this could be drafted so that it excluded that kind of secondary vicarious liability for the acts of others from the scope of this mandatory jurisdiction?

ELIZABETH BANKER

I think for a company like Yahoo!, and I'm really going to draw a line between the types of services we provide in the e-Commerce space and the types of services that other companies that actually are selling a product themselves conduct in the e-Commerce space, I think on this issue there's a huge difference. For us, that type of provision, if appropriately crafted, would probably give us a lot of

of reassurances. It doesn't mean it would solve all of the problems, but it would certainly give us a much larger comfort factor with the provision that we currently have.

For companies that are actually engaged in e-Commerce transactions on their own behalf, they're not simply providing the platform that the buyer and seller use to meet up with each other, I don't think that would be of much use to those types of companies.

LAWRENCE T. GREENBERG

I mean, the vicarious liabilities is a serious concern and relieving us of it would be something that would matter. I mean, obviously execution is important and if this is something that is a potential basis upon which a U.S. court might decline to recognize a foreign judgment, that would introduce discretion into the process, although it would still be something of an improvement.

At the same time, it doesn't introduce some of the level of predictability into our business specifically to the extent we are a media company producing content on our own. But it's definitely a step.

STEWART BAKER

Another way of cutting this, would be to say that apart from misappropriation of copyright and trademark IP protected material, that simply providing information, maybe on a network, if you were narrowing this down, isn't subject to Article 10. So that no tort in which the provision of information is the heart of the claim is going to be subject to the enforcement provisions of Article 10.

MARC PEARL

That's better.

STEWART BAKER

You like that?

MARC PEARL

Well, whether you, if you are a conduit of some sort, as Yahoo! or, to a certain extent any, an auction site, or you know, it raises, and I was raising it... you know, "the knew or should have known". You know, someone sends an e-mail to Yahoo! or eBay or some site and says: "You know, there's some very hot stuff going on there, you need to take action." And if you don't take immediate action, are you then under this theory

that you're talking about, making you subject to an Article 10 claim?

And I don't know how, I know that what we were wrangling through over the course of three years on just the copyright arena in the Digital Millenium Copyright Act, I don't know if we want to open ourselves up to that kind of vagueness at the front end of a discussion on dispute resolution before we've even settled what the nature of the different kinds of businesses are there in the world.

ELIZABETH BANKER

The Digital Millenium Copyright Act in the way it decided to create a sort of safe harbor just for hosting content and with the notice and take-down procedure is dramatically different from what you see in the Communications Decency Act, where it gives us the discretion to remove or not remove once we're notified, and we're still not going to be held liable as the publisher of the material if we're not the creator of it.

There are different models out there, but they're dramatically different models. And in choosing how to

create this sort of exemption or provision, it would be...

STEWART BAKER

Complicated.

ELIZABETH BANKER

... you'd have to be very careful about how it was done. And also, looking from the perspective of people who might be plaintiff in tort actions, you don't want to draw it so broadly that they couldn't actually get to the person who is the originator of the content as well.

MARC PEARL

And that goes to 10.4 that we really didn't talk about.

If an action is brought in the courts of a state only on the basis of that injury arose or may occur there, those courts shall have jurisdiction only in respect to the injury that occurred or may occur in the state, unless the injured person has his or her habitual residence in that state.

What if in fact, what would an injunction or a take-down order similar to what we saw in the Digital

Millenium Copyright Act, what effect would that have on outside borders of that state asserting the jurisdiction if there's a take-down order? For Yahoo! and Anywhere or any, or Amazon., you know, France, or whatever. And so that in essence the whole nature of an injunctive relief aspect of this is going to wreak havoc. So it's not, I just simply raise the question in the context of, a simple tinkering of the language is not necessarily going to solve all the problems.

STEWART BAKER

I wanted the give the audience a chance to ask us a couple of questions before we break. Yes.

ED LAU

I've been very interested in this because I think that there's also other areas of torts that we haven't really touched upon. There is a whole area of commerce that's revolving around electronic commerce that originates from overseas, and I think we've got to look at it as very important.

The fact that... I've been present at some of the meetings that have been occurring at The Hague, and what I can say, and some of the defense is, that at the

time that these articles, such as Article 10, were originally drafted, we weren't thinking specifically about electronic commerce. We were talking and thinking about general commerce and the tort liability that might arise from defective products and so on.

Now, there may not be a whole lot of lawsuits going on in terms of tort injuries, but I think the perception is that a lot of that, and we're talking about tort injuries of a personal injury type is not occurring because a lot of the countries where these products are coming from just simply don't recognize American judgments, and we're looking for a way to be able to bring that in.

Now commerce, I think, is going to increase in terms of the sale of products. We're going to see more and more television advertisements where there's nothing more than a www.xyz company, and they're selling products there. There are whole areas of even retailers that are being solicited through the Internet, from other countries, where they say: "We've got some brilliant new products here, we can send you some samples." and you look at it, and you order these products off of the Internet and the product comes over here it's non-

conforming or maybe it's even a dangerous product. Maybe it's something as simple as a Christmas tree light that overheats and it causes a fire, and you have massive amounts of potential tort liability.

I think that we've got to separate the fact that at the time that this particular draft treaty was being worked upon, because we didn't have a focus on the e-Commerce, and that's why we've only had this focus, I think, for the last couple of years when we are looking at the e-Commerce, we need to get more dialogue so that we can figure out: how can we enact a treaty that's going to take care of general tort liability in terms of products, liability, personal injuries and so on, and still not harm other areas. The things that are more of concern to me is simply that there are whole areas of law that many people have just, who are present at The Hague, haven't thought about the implications of the rules as they are right now, simply because we have not been exposed as we have in meetings like this to see that there may be some negative implications of the way this treaty is drafted. And certainly this treaty is not in the final form, it's just a preliminary draft.

I think that everybody really is very much interested in getting live examples that people, such as yourselves, can provide, that are very helpful in helping to analyze where the deficiencies are, and how we can add language or put in other things that might soothe the problems that this treaty may cause to some of the e-Commerce areas and intellectual property rights. But I think that we need more dialogue on this and I think that's really the focus that I've been updating in terms of being here for the last day or so, because it's been a very stimulating understanding of problems that I haven't really thought about. But I think we need more meetings like this to be able to find a way of balancing all of these different interests.

STEWART BAKER

Yes, I think we all agree, we're always discovering new ways in which electronic commerce is transforming our lives. Just today, I discovered that I'm competing on rates with Malaysian and Venezuelan lawyers, and not too damn well, I guess. Other questions, yes.

ADAIR DYER

I wanted to ask, what is the development so far of

liability insurance for companies that are engaged either as platforms or as an e-Commerce? Is this a newly developing field too, because I suppose that writing insurance for companies like yours is not like writing insurance for General Motors or more traditional companies.

MARC PEARL

Let me... most of the insurance companies, the risk managers of the world have not, are not e-Commerce savvy at this point. We saw, the first vestiges of it in terms of how they wanted to exclude, and this was not just the U.S. issue, this was a global issue, they wanted to exclude coverage, for example, on the Y2K issue, and we got wind of that over two and three years ago. It's going to be less, much more difficult for a company that wants to insure any company that does business on the web to in essence exclude problems that happen on the web obviously. So, not to use any of the companies but the Zurich's, and the AIG's, and the Chubb's, and the St. Paul's, and the international insurance companies that are desirous of doing business in the e-Commerce environment are becoming very very aware now, slowly but surely, of issues such as information security and

privacy, the kind of firewalls that are put up and the kinds of liabilities that they're willing to do.

The problem is that the existence of a Convention that opens up the flood gate of potential lawsuits in a tortious environment as opposed to a contractual environment in essence scares off risk managers, sure scares off the insurance companies, because if, in fact, there is this global Convention which says you can be sued under tort in any jurisdiction in which your site may be able to be accessed, it's going to obviously lower their ability to provide a sense of risk management.

STEWART BAKER

Although I assume anybody who's doing business on the Internet in a big way has basic liability insurance, and the question I guess is, have insurance companies begun to look for creative ways of excluding foreign liability?

LAWRENCE T. GREENBERG

Not yet, at least not with us, and I hope you don't give them any ideas. In 1996...

STEWART BAKER

I don't know, we've go to talk about my rates first.

LAWRENCE T. GREENBERG

When we first went out seeking insurance which coincided with our bringing in a lawyer for the first time, the insurance companies were largely clueless, and after much negotiation came back with a policy that covered us for everything except copyright, securities, trademark... But if we ran someone over using the Internet, we would have been okay.

In 1999, when we just revisited the coverage that we'd actually finally managed to implement, the insurance companies had at least come up with marketing packages that covered a lot of what was necessary. I guess the next step for them will be to carve out frightening international liability, but until Stewart raised it, I don't know that they were going to.

ELIZABETH BANKER

And I would say that the insurance companies are developing some special packages that are designed for Internet uses or at least technology companies, whether it's hacking insurance or

the types of insurance products that are offered for auction transactions, for the actual users. While transaction insurance is not necessarily directed at the company that provides the platform for the auction, it does limit the liability exposure because the customers are going to be taken care of in the end.

STEWART BAKER

There's just two people standing, and that's going to be all the questions we're going to take, and I'm going to ask that you keep them short and the answers too, please.

EMILY FRYE

Let me just come on very quickly on the insurance matter. Within the past 18 months, I know of three companies, large companies, including LLoyd's of London, that have come out with policies specifically directed at the risks associated with doing business on the Internet. If you need more information about that, I'd be happy to talk to you, and I do not represent any insurance company.

I am Emily Frye with Eyewitness, and I wanted to just ask if you folks, specially on the right, but as well

you folks on the left, Marc and Perry, because you've encountered a number of businesses hitting these issues, I'm under the impression that basically, both under the Section [inaudible] of the CDA and according to the line of case law that we've seen developing about types of people who just provide information conduits, as well as law under the EU that protects the mere conduit of information, in other words communication service providers, it grants these people some qualified level of immunity, that we're at least looking at a category of people, of service providers that has some recognition of getting out of the liabilities that we've been talking about when you get out of the contract situation and into the tort arguments.

I'm wondering, especially if you guys, have you taken these bits of law, the EU directive and these case law analyses that we've got in the U.S., and have you tried to apply them to your own situations, for instance, and this is just something that came to mind, drawing an analogy such as suing me, Yahoo!, would be much akin to suing the shipper of a defective product. The injured consumer could sue the maker, but they couldn't me as the boat owner, have you thought about these arguments at all?

ELIZABETH BANKER

Sure, I think the really hard problem with torts is that the difference between being able to prevail on a case and being able to bring it is dramatically different. And I think for companies that really have a global presence and are perceived as having deep pockets, the lawsuits that will be filed tend to outnumber the ones that actually have merit by such a huge amount that we're still very sensitive to anything that does not give us sort of an easy and quick way to end a suit.

MARC PEARL

The copyright theories of DMCA and of the directives to a certain extent, even as Ed was talking about, do not necessarily translate automatically into the general commerce arena that is being dealt with by the Convention and by this Article. And therefore, one of the things that we try to do in the Y2K Act for example, is to try to dissuade companies from just simply bringing these suits. And we saw law firms around the world, we did one search early in 1999, that there were 11,000 law firms in the world that had set up, quote unquote "Y2K" practice. They didn't set it up because they thought it wasn't going to make money,

they set it up for reasons that they thought in the contractual e-Commerce tort realm, they could bring a litigation.

And that's exactly what I think is the fear of a lot of businesses, that because e-Commerce exists, because we can bring the lawsuit, we can sue up the wazoo, and that's, and Article 10 seems to at least give some support for that kind of legal theory.

STEWART BAKER

Last question, and it really better be short.

PIPPA LAWSON

Okay, I do want to thank you, first, Stewart, for highlighting the fact that the business concerns raised on the panel and I think generally about The Hague Convention are driven by business in their role as defendants in lawsuits, and that no one up there is speaking really on behalf of the plaintiffs' side of the issue.

And it's that which, the issue which really drives my question here, which is, I come from Canada, in Canada we have cost rules which do a pretty good job of first

of all preventing...

STEWART BAKER

Is this a question or a speech, okay.

PIPPA LAWSON

Yes, no, no, it's a question, a frivolous and vexatious lawsuits, and actually of discouraging lawsuits generally, and I realize you don't have such rules in the United States.

So my question is, to what extent would more adoption of such rules in the United States and elsewhere where they don't exist help this problem? To what extent would it go towards resolving the problems we're talking about, simply by minimizing the amount of litigation?

LAWRENCE T. GREENBERG

Well, I think that would be a relevant calculus, although at the same time it... depending upon the actual law that applies, we still could be looking at the possibility of losing, in which case we still have to consider the vulnerabilities because you can bring suit for just about anything, sometimes you can win,

and because we're dealing with varying legal environments in countries that we don't actually even know that we're going to have full nexus with, we still have the concern over that vulnerability. But yes, the cost issue as a way of deterring suits, in a lot of countries it works.

STEWART BAKER

I'd like to ask you all to join me in thanking these panelists for their presentation. Lunch is served.

LUNCHEON

RUTH DAY

We have two outstanding panels on cross border issues in intellectual property and copyright this afternoon, so let us begin with the very first one, with Professor Goldstein.

CROSS BORDER ISSUES IN COPYRIGHT AND TRADEMARK LAW

Basic Concepts and Recent Developments, United States, Japan and the European Union

PAUL GOLDSTEIN

Thank you, Ruth. I think it's only a small exaggeration to say that in the age of the Internet, all of the most challenging questions of copyright and trademark law are questions of cross border jurisdiction, questions that in Europe are commonly called questions of private international law.

The global reach of the Internet and the ease with which contents protected by copyright and/or by trademark, the ease with which that content crosses international boundaries accounts for the unprecedented confluence of the very difficult and economically consequential issues that this panel will be addressing

this afternoon.

Just as an example, that's, I know, in the minds of some people here, can a company that is treated as a copyright or trademark infringer in country A escape liability for copyright or trademark infringement by moving its servers to country B while still serving and gaining revenues from customers in country A? Can country A seek to halt this activity on the part of its absconding company by extending its own copyright or trademark laws to cover its conduct in country B; can it employ choice of law rules that will effectively impose the law of country A on conduct occurring in country B?

This is the class issues that the two panels this afternoon will be discussing. The first panel before the break will lay the basis for the consideration of these issues by setting out some basic principles of territoriality and private international law in the context of intellectual property. The second panel, and I would add that the first panel will conclude with a description of an alternative way of dealing with cross border issues outside the traditional confines or structure of private international law, and that is the

context of ICANN in the UDRP.

The second panel will then focus on some specific issues, particularly as they are raised by two quite controversial cases, the iCraveTV case, and the Napster case.

Now to start us off with some of the basics of jurisdiction and territoriality, Professor Naoki Koizumi will describe the situation of territoriality in Japan. I would encourage however those of you who are interested, not only in Japan, but in rules respecting territoriality, really the issues that I've discussed just a moment ago, around the world, particularly both in the U.S. and in Europe, to pay particular attention to the description of the situation in Japan.

As it turns out, and this is the comment that I will be making following Professor Koizumi's presentation, the rules on territoriality followed in Japan are very closely parallel to the rules followed as well in the U.S. and throughout Europe. So for that, and other reasons, please do give close attention to Mr. Koizumi's presentation.

I would add that Professor Koizumi is professor of law at the Sophia University, the Faculty of Law in Tokyo, where he teaches and specializes in writing on intellectual property law. I had the great pleasure of first meeting him back in 1989 when he was a visiting scholar at Stanford Law School where I am based, and he's also been a visiting scholar at the Max Planck Institute in Munich. Professor Koizumi.

NAOKI KOIZUMI

Thank you, Paul. First of all, I thank Chairman Katoh and the Director Day for inviting me to this significant conference, Jurisdiction the IInd. It is a great honour to me. I believe, even in the Internet era, the best way to achieve a mutual understanding is to meet and talk face to face. My presentation focuses on the scope of territorial principle in Japanese Intellectual Property Laws.

Intellectual Property Law has been dominated by territorial principle. Territorial principle has two legal usages. First, the territorial scope of any IP law of a country shall be limited to the border of that country. Unauthorized use of patented invention abroad, for example, will not normally be an

infringement of the domestic right.

Second, territorial principle also designates the law of the country where the protection is claimed of the applicable law to the infringement suit. Territorial principle is, in other words, a conflict-of-law rule. Mostly the protecting country is the country of the court. But this will not always be the same. The protecting country will not always mean the country where the infringing suit is raised. For example, Tokyo district court might apply the U.S. patent law to a case involving a patent of an American inventor, alleged to be infringed by a Japanese firm.

Territorial principle might lead to unjustifiable results. Japanese college students, using an amazingly efficient MP3 search engine distributed from the server abroad, reproduce musical works without permission by the rightholders. The downloading shall be itself, or might be itself an infringement of the Japanese copyright law but it is of course almost impossible to enjoin each downloading done at home or in the college computer center in Tokyo.

By distributing the search engine software by, or the

system, the company abroad might be or should be held as a joint tortfeasor or a contributing infringer. The problem is, under current Japanese law, the server that transmits the software is located abroad, i.e., the alleged infringing transmitting act is done outside the boundary of Japan, therefore, territorial principle will normally exempt the foreign company from liability under current Japanese law. Is that a fair result? That's the problem.

Then, what is the rationale for territorial principle? Why it exists?

Territorial principle is among the first principles of International Intellectual Property. Strangely enough, to locate the rationale for territorial principle is not an easy task. Like many other countries, we find no express provision stating territorial principle in the Japanese trademark or copyright law.

First of all, where is territorial principle stated? It is fair to say, at least for industrial property including trademarks, international agreements only vaguely refer territorial principle. The first candidate is the independence of each country's

intellectual property rights from the other countries stated in the Paris Convention, Article 6, Paragraph 3, and the Berne Convention, Article 5, Paragraph 3.

Even though the international agreements, including Paris, Berne and the TRIPs have achieved remarkable harmonization of the substantive level of IP protection among the member countries, there still remains unique provisions which represent the cultural-industrial policy of each country, for instance, *droit de suite*, folklore rights. The principle of independence takes that kind of peculiarities for granted.

But I must say the independence principle offers no good explanation for territorial principle. The two are independent notions, I say. Suppose trademark law of country A reaches extraterritorially to an unauthorized use of a registered mark abroad. As far as the law of A defines the scope of territorial application of the law A, the law A is independent from others. Nonetheless, such extraterritorial application will not be inconsistent with territorial principle.

The second possible explanation will be the National Treatment stated in the Paris Article 2 and the Berne,

Article 5, Paragraph 1. Late Professor Friedrich Karl Beier at the Max Planck Institute for IP in Munich was the most famous advocate of this theory, and many other scholars have supported it. But this theory is not well grounded too.

National Treatment only obliges each member country an equal treatment between domestic people and foreigners.

Suppose the Japanese Patent Law is amended, and it applies U.S. Patent Law both to Japanese and American patent holders. National Treatment will allow this amendment, but territorial principle will not, as far as U.S. law applies to infringement occurred in Japan.

That is why the recent Japanese Supreme Court decision has only stated, territorial principle is a conflict-of-law principle and cites no concrete statutory provision.

On the other hand, we could find a more plausible explanation for territorial application of copyright law. Article 5, Paragraph 2 of the Berne Convention designates the law of the country where the protection is claimed of the applicable law to consider the copyrightability and scope of protection of a work. This provision is not perfectly clearly articulated,

but we might read this paragraph as follows:

The law of the country where a use of copyrighted work, for example, unauthorized downloading, broadcasting, occurred is the law to be applied.

And this will explain territorial principle.

Then, what is the rationale?

One could trace the origin of territorial principle back to the sovereignty of King and Queen. Patent monopoly reached only domains the King ruled. It is true, even today, patent law and copyright law reflect the industrial and cultural policies of a State. In other words, the rationale will regard IP laws as exercise of sovereignty of that country, like tax law or criminal laws (public laws we say in continental usages), rather than private property law. From this characterization, it could follow that IP laws are totally exempted from choice-of-law rules and perfunctory dominated by the TP or territorial principle.

This seemingly extreme attitude has actually recently been supported by Tokyo High Court. The defendant is a Japanese firm located in Japan. The firm is alleged to contributory infringe U.S. patent by exporting to a U.S. firm in the States directly infringing the patent. The defendant may, under U.S. Patent Law, Section 271, which explicitly reaches contributory infringement occurred abroad. Tokyo High Court, admitting jurisdiction, denied application of the U.S. law and dismissed the plaintiff's injunction claim. Tokyo High Court reasoned patent law applies territorially, therefore the plaintiff couldn't raise injunction suit under the U.S. law before a Japanese court.

The court seemed to deny the application of a foreign patent law totally. It's not totally clear, but it seems so. One might advise the plaintiff, go to the U.S. court. It's not always practical for a Japanese plaintiff owing U.S. patent who finds difficulty in normally expensive legal proceedings before U.S. courts.

Now, let us turn to the scope of territorial principle under Japanese law. The Japanese trademark law has provision for indirect infringement. Unlike the U.S.

law, the Japanese law is silent whether a contributor abroad is also an infringer or not. So far no case has been reported on this point. But from a recent Tokyo District Court decision, we might infer a general reluctance, reluctance to extraterritorial application of IP laws. Pointing that extraterritorial application of patent right conferred by the U.S. Patent Act contradicts public policy of Japan, the court denied application of the U.S. Patent Law, Section 271, to a case involving an instigation done by a Japanese firm. Compared to the High Court case law mentioned above, the district court followed a normal conflict analysis first, then it chose the U.S. law as applicable one, nonetheless, the conclusion was denial of the application of a law with extraterritorial application.

I suggest, with many colleagues in Japan, an extraterritorial application of IP law to a contributory infringement abroad. First, the Japanese IP laws have no definite provisions that limits the territorial reach. Territorial principle only dates back to traditional concept of King's dominion. Second, there exist cases where an infringement act consists of a series of wrongdoings across the border, that's clear. As far as these are deemed to be one set

of infringement, it is absurd to forget sometimes most vicious one done abroad.

Then, assuming territorial principle, then, which is the law of the protecting country? This is an easy question in most cases. For example, the country where a counterfeit software is made, or the country where a luggage bearing fake trademark is produced.

On the other hand, satellite broadcasting is a more complicated case. An act of broadcasting begins with transmitting or uploading the radio wave to the satellite, and ends with receiving the wave from the satellite. Clearly there are two options for the protection, for the law of a country to be claimed. The transmitting country or the footprint country, the EC Satellite and Cable Directive of 1993 has, after a long debate, chosen the law of the country from which the wave is transmitted as the protecting country. Between countries having relatively well harmonized copyright statutes, like the EC, it will not make a big difference under whichever law the clearance of copyright is executed, also the rule where the convenient for the content user without doubt.

But one may take advantage of this rule though. Transmitting from copyright-haven country will save license fee. Unauthorized broadcasting will damage the economic and moral interests of the rightholders in the country where the audience watch the TV, never the people living in the country where the rocket has been launched. I suggest the protecting country for satellite broadcasting shall be the footprint countries.

The more difficult is Internet, though. My theory (actually Ex-WIPO Director Boggs) will lead an impractical result, that one must be world-widely authorized before he or she uploads the content to the Internet. When, in contrast, when we adopt the EC Directive theory above, only to locate the server and ask the rightholder will vanish the concern for infringing. My opinion is a compromise, a two-tier rule for choice, for us, the code will consider transmitting country's role, when the country will protect the work well under the supportive level, the courts shall turn to the role of the protecting country.

As for trademarks, similar problems exist. Japanese

company A would use a registered trademark, and ask the permission by the Japanese rightholder. She might be accused to be an infringer by a rightholder abroad who has the right to the same mark of that country. Shall we require the company search and clear every trademark rights in the world? Or, is that fair, one could be exempted from liability after he has, or he or she, has cleared the trademark rights in those countries where the most people understand the language in which the Web site is written? The problem is for Web sites in English or Chinese, unlike Japanese, this will not be a big comfort for would-be users.

I could wrap up. First to tract an act of contribution abroad as a part of domestic direct infringement will not contradict with territorial principle. Then the protecting country shall be the country of where normally damages resulting from the infringement occurs. That may include every footsteps in the cyberspace, but reasonable limitation is to be allowed so far as the user has taken reasonable steps. For trademarks, language might be a clue.

Thank you for your attention.

PAUL GOLDSTEIN

Thank you very much, Professor Koizumi. I've been asked to say a few words to fill in the picture on jurisdiction and territoriality in the United States and in Europe, in the European community.

As I indicated in my introductory remarks, it's not too difficult to fill in the details and some of the differences from the very basic points made so well by Professor Koizumi. As I indicated, there is a strong degree of parallelism between the rules on territoriality and choice of law in Japan, and those followed elsewhere in the world.

Certainly, the basic rule on territoriality is the same worldwide. That rule is that a state's, a country's prescriptive competence, that is its power to make rules that govern the substantive conduct of individuals on its soil, a state's prescriptive competence ends where its national boundaries end. The principle or the reason, the rationale underlying the principle of the rule of territoriality are essentially derived from notions of comity, respect of one sovereign nation for the power of another sovereign nation respecting conduct on its soil. These

principles, I might add, to state the obvious, were created several centuries ago, well before conduct of the sort encompassed by the Internet with cross border transactions occurring so fluently were even considered. The book trade wasn't even at its beginning at the time these rules were evolved.

Let me underscore some differences of detail, and emphasis though between the situation to the U.S. and Europe, and Japan. To start with a basic rule, and I think this does fit into the framework that Professor Koizumi laid out, let's return to the example I gave of the class of issues we're talking about here at the outset of my remarks, and that is the case where a company based in country A is labelled as an infringer for its activities, let's say, in facilitating the transfer of copyrighted works in country A, decides to move its servers offshore, moves its entire, at least the technological component of its operations out of the United States, presumably to a jurisdiction that for the present at least will be more favourably disposed to its conduct. And I might add, and personally I don't know that any of us is going to talk about, we're just talking about jurisdiction and choice of law. The prospect that another country will have a

law much different than the law of country A, increasingly declines as the norms embodied in the TRIPs agreement get enforced worldwide. The playing field is rising worldwide, and choice of law becomes less crucial, but that is our topic. And let's assume that the servers have been shipped to a country that for the present is not disposed to find them infringing.

The question would then arise, if this company, originally in country A keeps its corporate headquarters in country A, and decides to or decides to manipulate, manoeuvre, control all of its operations worldwide from the United States, basically to authorize infringing conduct abroad, will it be liable under U.S. law for those acts of authorization? It is not now in control of servers within the U.S., those are outside the U.S., but it is authorizing others to operate those servers in a way that would infringe if the conduct occurred in the United States.

The answer to that under U.S. law is quite clear. It's relatively clear under European, the law of European countries as well, although it's not controlled by any particular jurisdictional convention in Europe, either

the Brussels or the Lugano conventions. And the rule in the U.S. is that the conduct of authorizing acts of infringement abroad does not of itself constitute copyright infringement in the United States. The major authority for that proposition has come from the Ninth Circuit, the Ninth Federal Circuit, which for those of you who are strangers to it, you are sitting the Ninth Circuit today, San Francisco is situated in the Ninth Federal, the Ninth Federal Circuit.

So acts of authorization, although they may contribute to acts of direct infringement abroad, do not constitute an infringement of U.S. copyright law. Now that is a rule that... and the decision in that case, the Suba Films case rests squarely, and the court alluded to it, on the principle of territoriality.

There are exceptions to the rule of territoriality, intellectual property cases in the U.S. and in the European community as well. In the United States, it's a consequence principally of the so-called Effects Doctrine. If conduct that occurs outside the United States nonetheless has effects, typically economic effects, on conduct within the United States, that may be sufficient for a governing statute under U.S. law to

be interpreted to control that conduct and subject it to liability.

The Effects Doctrine has been the occasion for much criticism of U.S. law from foreign governments, particularly from Europe, particularly from France and Germany. The Effects Doctrine was first developed in the context of antitrust cases in which companies that were engaged in antitrust violations abroad were held liable under the U.S. antitrust law, under the Sherman and Clayton Acts for conduct they committed abroad because it had anti-competitive effects that were felt within the United States.

In the case of intellectual property, the doctrine is most evident in trademark law, the so-called Bulova case decided by the United States Supreme Court many years ago said that where a trademark infringement occurs abroad, in this case in Mexico, it will nonetheless be cognizable under substantive U.S. trademark law, the land (inaudible), if it had some effects on U.S. commerce. In this case, some counterfeit Bulova watches came back into the United States from Canada, people were confused about its source, those were sufficient effects for U.S.

trademark law to be applied to acts of counterfeiting that in fact occurred outside the United States.

To my thinking, the most dramatic application of the exceptions doctrine, it's not even called an application of the exceptions doctrine, arises in the following situation, and it's a copyright case, although it hasn't been applied outside of copyright law although it could certainly indicate both a patent and trademark law. Let us say that our company, that we started with in country A has arranged for its servers to move offshore.

But now, let's have that company commit one act of copyright infringement on U.S. territory, just one act of infringement, it is now liable for copyright infringement in the United States, for making one copy, let us say, of one sound recording. If the making of that copy is logically, functionally connected to the copies that were made offshore in other countries, then that company will be liable under copyright law in the United States for infringing, the one infringement that occurred in the United States, and for damages that arise from that infringement and for damages that are suffered by reason of all of the conduct abroad.

Even though there was no jurisdiction, no territorial claim over the acts of infringement that occurred abroad, if one act, and it just takes one, if one act of infringement occurred in the United States, that becomes the key that opens the door to recovery of damages and profits worldwide. And I personally consider that to be a major assault on the principle of territoriality. Whether it is or isn't, it is solid law in the United States most recently applied again here in the Ninth Circuit. It was created in the Second Circuit, where New York City is, but it was applied in the Los Angeles News against Reuter's case, where one act of infringement occurred in the U.S., I think the other acts were in Canada, and recovery was allowed for any damages suffered by reason of the Canadian conduct.

Now, that is a rather extensive application of the Effects Doctrine. I should add, the U.S. is not alone in taking that approach. There's a 1977 decision of the Federal Supreme Court in Germany that makes really exactly the same decision. It was a the case that involved some Hummel Christmas plates that were produced in Germany, distributed in the United States, and the suit was filed in Germany under the Copyright

Act, the Author's Rights Act in Germany. Recovery was had for lost profits under German law, and the copyright owner was also held entitled to any profits lost by reason of the distribution of the work that occurred on the U.S. territory.

One other point about territoriality. I think it may surprise some people that perhaps given advice based on what they believed to be the common wisdom. In the United States, at least, the rule of territoriality is not a rule of constitutional law. It is a rule of statutory interpretation, by which I mean, if you look at any territoriality case in the U.S. where a court says the Antitrust Act or the Copyright, Patent, or Trademark Acts do not cover this conduct abroad. They are saying only that we have read the act, and there is a presumption against extraterritorial application of the act, a presumption only. So if the act is unclear on its face, whether it applies to foreign conduct or not, territoriality tells the court, invoke the presumption against extraterritorial application and restrict it to domestic effects. But it is a rule of interpretation only which means that Congress, the United States Congress, is entirely free to amend the statute.

And the example I gave earlier, the Suba Films case, the acts of authorization occurring in the U.S. acts of infringement abroad, if the Congress decided to rewrite the Copyright Act so that conduct authorizing foreign infringement did become actionable under the U.S. copyright law, it would be, there's absolutely no question under U.S. jurisprudence that that would be the result. In fact, we had examples of it in the Patent Act.

Several years ago, the United States Supreme Court held that where an alleged infringer had packaged together parts for a canning machine, a shrimp canning machine, and shipped them to Latin America, that the machine had not been made, used or sold in the United States, and therefore under the Patent Act, there was no act of infringement in the United States, the act of assembling, making the machine, occurred in Latin America, therefore, under the Patent Act, no liability.

Congress very quickly amended the Patent Act, created Section 271 F, which says specifically:

The act of shipping abroad a work whose assembly abroad would have constituted infringement if it occurred in the United

*States shall be deemed to be an act of
infringement in the United States.*

So it's a matter of U.S. law at least, I can tell you categorically that the territoriality, the territoriality principle is only a prudent principle of statutory interpretation. The United States Congress which has been very active of course in the intellectual property area of late can change any of these rules.

Let me conclude with a point that deals with choice of law issues that Professor Koizumi also alluded to. Choice of law together with choice of forum and notions of so-called transitory cause of action offer another way for a country to achieve extraterritorial application of its law. It's a far more subtle way in which it's done, a far more indirect way, but nonetheless it raises issues as Professor Koizumi indicated, that need to be attended to.

The fundamental proposition is that the rule of territoriality if a conduct occurs in country B, the law of country B should apply, it's also a choice of law rule, does not necessarily mean that the company,

the plaintiff that wants to stop that conduct must sue, must bring its cause of action in country B. As a matter of principle, forum selection is opened to the decision of the plaintiff.

So we may have a plaintiff that decides to sue in country A, assuming it has obtained jurisdiction over the alleged infringer, for conduct that the infringer is committing in country B. Most countries will accept that principle of choice of forum. Actually, the United States is somewhat more reserved than other countries in that respect. We have in the United States a doctrine called *forum non conveniens* that says, in certain circumstances, after weighing the advantages to the two sides, or the detriments to the two sides, a federal district court in the United States can say: "We are not going to take jurisdiction over a cause of action that arose, let's say, in Singapore." which is a recent case again in the Ninth Circuit.

By contrast, in Europe, at least outside of Great Britain, and this, under the Brussels and Lugano Conventions, there is no defense of *forum non conveniens*. The civil law tradition generally didn't

entertain that defense and the Brussels and Lugano Conventions honour that and say, if an action is brought within one country in the European community, with respect to conduct in another country in the EC, that country forum must hear that case. Britain is the exception, it's more like the U.S. in that respect, although Britain needs to obey Brussels and Lugano Conventions vis-à-vis conduct occurring in other convention countries, respecting conduct occurring outside those countries it will, and is certainly free to apply the more limited U.S.-type approach.

Now the probably most consequential aspect of rules on choice of forum by plaintiffs relates to the so-called transitory cause of action. And the situation there again to take the one that I began with in my introductory remarks, a, let's say the company we're concerned with were the defending company, moves its servers to country B, and commits its acts there. Plaintiff brings an action in country A against the defendant whose assets presumably are situated in country A still, and brings the action though not under the law of country A, although technically the forum country gets to choose what the choice of law rule is, and if country A's choice of law rule said country A's

law applies rather than country B, that would be very very favourable to the plaintiff in this case, he'd say, I can choose the forum, let's say the United States in this example, and I get that forum's choice of law, the law of country A applies rather than country B, effectively I've gotten an extraterritorial application of U.S. law without violating the principle of territoriality, rather by a more subtle exercise of choice of law.

That's unlikely to happen because choice of law rules essentially are the law of the country where the infringement occurred, or the offending conduct occurred is the applicable law.

So back to the example, the plaintiff brings the action in the United States, let's say the U.S. court decides it is not an inconvenient forum, decides to hear the case, choice of law rules, the U.S. court says: "Well, we have to apply the law of country B." At that point, U.S. court divides on what they will do. Some courts will say: "Copyright infringement is not a transitory cause of action." which is to say, it's not an action which if it occurs in one country can be heard in the United States. That tends to be the Ninth Circuit

approach here in San Francisco. Other courts on the East Coast of this country tend to say: "Yes, copyright infringement is a transitory cause of action if the infringement occurred across the world, that doesn't matter, we will hear the case in federal district court in Manhattan and apply the foreign law to the resolution of the case." They will do that in copyright cases interestingly enough not in patent cases, and not in trademark cases.

Now, the importance of that, and with this I will conclude, is obviously if the defendant's assets are in the United States, it makes sense to go against the defendant in, or in country A, it makes sense to go against the defendant in country A, because that is the place where a judgment is most easily going to reach local assets.

I would add finally, to compare this to the European situation, there was absolutely no question under the Brussels or Lugano Conventions, but that these actions are transitory cause of actions, and they will be heard in the forum state within the European community.

Well, I think that's enough by way of elaboration on

Professor Koizumi's remarks.

I would like to turn now to Thomas Vinje who will give us a presentation on these issues as applied to an actual problem of cross border transfer of information. That will be helpful to get the basic principles out and then begin to apply them to concrete instances. By way of introduction, Mr. Vinje has practised law in Germany and Australia, finally came back to the United States, briefly practicing with Morrison and Foerster in San Francisco, and then moved to Brussels to set up Morrison and Foerster's Brussels office where he is now the managing partner, and where he specializes in European Union Intellectual Property Law and Competition Law. Tom.

THOMAS VINJE

Now, I am indeed going to ask you all to put yourself in the shoes of a new Internet media company, a company that is streaming and downloading video or music across borders. And I'm going to ask two basic questions, or you will ask yourselves two basic questions from the perspective of such a company.

Where could a cross border online media transaction

engaged in by this company infringe copyright? And secondly, where must you go to obtain the rights to the work, where do you have to clear those rights, to whom must you go?

I've been dealing with these questions from the practical business perspective of an American company, E-Music, from some similar European companies like Vitaminic, and as legal counsellor to an organization called EDIMA, European Digital Interactive Media Association. And I must admit that the questions are challenging, as we will see. And there are more questions than answers; I fear that is simply the reality.

We're going to look at two things, streaming and downloading. These activities are occurring today mainly in the music context, but they will be occurring more and more in the not too distant future in the video context as well. And we're going to look from a European perspective at two basic rights, and try to see where those rights might be infringed by certain activities in the streaming and downloading contexts.

And the first right is the communication to the public

right. The Copyright Directive which is soon to be adopted in Europe, and will come into effect in the not too distant future, will establish a harmonized communication to the public right throughout the European Economic Area.

And so, let's say, for example, that you are an American company, an Internet music company, that you have your servers, for example, in Florida, and you are streaming music via Internet; in other words, it is accessible anywhere in the world, including in Europe, let's say obviously France. Well, does the accessibility in, for example, France, of a streamed piece of music or video infringe this right of communication to the public in France?

Well, there has been to date very very little if any litigation in this context in Europe, so there is no clear answer to that question. I think that it probably does. If it does, to whom do you have to go to obtain a license for that right, for that streaming?

We'll get later to the question of where you might be sued and obviously your activities might be governed to some extent by where you have assets and where they might get you, but we'll come to that later.

So who do you have to go to obtain those rights? Well, the answer to that question unfortunately is also not perfectly clear as we'll come to later because, in particular, the collecting societies in Europe have not gotten their act together, and they have great disagreements among themselves about who has which rights, for which territories, and about who can grant you which licenses.

There's another question with respect to streaming, and that relates to the second basic right we're going to talk about, and that's the reproduction right. Does streaming infringe the reproduction right wherever the streamed music or video is accessed?

So again let's say we have a server in Florida, streaming occurs from that server around the world via the Internet. When a user sits at his or her computer in France, and listens to that streamed music, there will be very fleeting copies made in the memory of that computer, in the context of streaming. Do those copies fall within the reproduction right, and if so, who's responsible for them; who would be the infringer?

Well, perhaps this question is, from a practical perspective, not that problematic because it does

seem, to me at least, that any temporary reproductions, any temporary copies made in the user's computer, that are made in the context of a streaming that is performed subject to a valid license to the communication to the public right, so you have to have the initial rights in place, will fall within the temporary copy exception in Article 5.1 of the Copyright Directive that is in the process of being adopted.

So my view would be that your company, with its server in Florida, would not need a right, a reproduction right license for those copies streamed into France. But that question does remain to be resolved, there's no case that says that.

So, the second basic activity is downloading, I assume everybody knows what streaming is and what downloading is. Does one need for downloading a communication to the public right or a making available right? The Copyright Directive will establish a harmonized right of communication to the public/making available on demand which will be an implementation of the Article 8 of WIPO Copyright Treaty.

Do you need a communication to the public right -- a making available right -- for each territory into which the copies are downloaded? I think, yes. So for example, for the copies that are downloaded into France, one would need a making available right for the territory of France.

How about the reproduction right? Well, do you need a reproduction right for the copies on the server, for whatever territory in which the server is located? I think pretty clearly, yes, you need a reproduction right for those copies.

Do you need a reproduction right for each of the downloaded copies? In other words, the copies of the music or video that are downloaded by the user onto his or her computer, let's say again in France. That raises the question about who is responsible for the infringement. I do believe that if a copy

is made on a computer in France, downloaded and made onto the computer in France, that that would be an infringing copy unless there is a license. But who's responsible for that infringement if it is an unlicensed copy, just the user or also the Internet music company with the server based in Florida?

I think it's pretty likely that the Internet company, perhaps jointly with the user, is going to be deemed responsible for that infringement. So I think that the Internet company had better have a license, a reproduction right license for each of those downloaded copies. Again, we'll come later to where do you go to get that right, from whom do you get it, how do you get it?

And that's, well, that's the question right now. Where do you go to clear these rights? And there are various possibilities. One would be to clear the rights at the place where the entity originating the download or the streaming has its economic establishment. So let's say the company is established in, as well as having its server in Florida, it's established in Florida. One possibility would be to obtain the rights there to go to someone who has the rights there and can offer them

to you. The second possibility is at the place where the download or the streaming originates. So in this case, in our example, Florida as well, the place where the servers are located. Another possibility would be the place of download, in other words, where the user downloading the work or receiving the stream is located. And the final possibility is both at the origin and at the destination of such cross border deliveries.

I think under the principles that the two previous speakers have enunciated, it's quite possible that the latter possibility, the final possibility may be the ultimate result, but we shall see.

So we have a highly uncertain situation because of the uncertainty regarding the application of rights to streaming and downloading. There are unfortunately no real answers to the questions that I posed about where streaming and downloading activities infringe copyright. There's also a great uncertainty about the scope of rights held by rightowners, and especially in the context of collecting societies. And there's also a lot of uncertainty about arrangements among collecting societies. And there's also a lot of

uncertainty about arrangements among collecting societies. There are many many jealousies involved; the collecting societies in Europe, in particular the authors' right societies, are very powerful, and they have disagreements amongst themselves about how to approach this. Some of them, for example a collecting society in Italy, are willing to grant pan-European licenses. Other collecting societies object rather violently to that approach and say that those licenses are not valid for their territories.

So, there is unfortunately a great deal of uncertainty and the position in which you are in, remember you're sitting in the shoes of one these new Internet media companies, is unfortunately a very uncertain one, and the best you can do is just to make your way through, to navigate your way through this uncertain territory as best you can.

I'm sorry I can't offer you more concrete answers, but that is the world in which these actors are living, that is the world that is presented to these kind of actors by the challenges of the borderless Internet environment and clashes with the territoriality principle and the copyright contexts.

There is also unfortunately no legislative or, in fact, any other solution on the horizon. One can hope that the collecting societies at least will get their act together and will decide who has which rights for what, and put together an effective system for worldwide licensing of the rights necessary for streaming and downloading. There's some reason for hope that that will occur, but it's not going to happen in the next few months.

So finally, just very briefly, and I'm trying to keep within my ten-minute allocation, it's a big topic, and obviously much much more could be said, but what about jurisdiction? Looking at this, I'm not going to get into the topic of the Brussels Convention and intraeuropean jurisdiction which I understand other speakers are going to address, but look at this basically from the perspective of an American company involved in streaming music, downloading music into Europe.

Where can you be sued, where will the courts take jurisdiction over you for those activities?

I think experience shows that at least in some

Countries, the mere accessibility of your Web site may very well be enough for courts to take jurisdiction. In the Yahoo! case involving the Nazi auction site, the facts were that Yahoo! France complies completely with French law and does not allow the sale of Nazi memorabilia, whereas Yahoo! U.S., the U.S. auction site, does allow it because U.S. law allows it. Nonetheless, the court in France has taken jurisdiction over that case, and appears inclined to apply French law to it.

I can give you one other practical example, not in the copyright context because I'm not aware of any cases in the copyright context. But in the patent context, I have a client in Silicon Valley which produces technology for manufacturing semi-conductors, and it has been sued in Paris by its main competitor, which is a French company, merely by virtue of the accessibility of its Web site in France. This company, SiGen is the name of the company, has never sold one franc worth of anything in France, but nonetheless, the court in Paris has taken jurisdiction over that case, over that company, and is considering the case for patent infringement, and it seems to have no problem whatsoever finding jurisdiction in that context.

So, I would expect that the same sort of approach might very well be applied in the copyright context, I see no reason to think otherwise.

So, I think I've kept within my time limit, and I thank you very much for putting yourself in the shoes of one of these new companies, and realizing that it's not a very simple situation to be in. Thank you.

PAUL GOLDSTEIN

Thank you, Tom, it's very good. I'd like to shift the focus of our remarks from the general to an even more specific or innovative set of questions, and that is to look at an institution evolved through a combination of efforts in the public and private sectors at resolving some of these questions of jurisdiction and territoriality. I'm referring to ICANN, and ICANN has an alternative dispute resolution institution that has had some prominence in recent years. Michael Geist will introduce us to those issues, the pluses and minuses of the ICANN process in resolving these issues.

Michael is a law professor at the University of Ottawa where he specializes in Internet and e-Commerce issues. He is also a director of e-Commerce law at the law firm

of Goodman Phillips and Vineberg. He writes actively for a popular and a not-so popular audience on Internet issues. He writes regularly on cyberlaw issues for the Globe and Mail. The unpopular audience he reaches, I've told Michael the other day, that I felt that I knew him. My first reading every morning after I connect to Eudora is Michael's absolutely superb summary of what has just happened the day before in the world of the Internet, this is in the context of BNA Internet Law News, that it's now a BNA function, but I remember it from the very beginning when it was Michael's invention. Michael.

**ICANN's Uniform Dispute Resolution Processes:
Lessons in ADR**

MICHAEL GEIST

Thank you, thank you very much. Thank you very much, Professor, and thank you ILPF for inviting me.

We've heard ICANN's UDRP, the uniform dispute resolution process referenced a few times over the course of the last couple of days, largely in a very positive light about the benefits that we've seen in fairness and things of that nature. What I wanted to do was scratch a little bit below the surface, and talk about some of the very positive things and questions that we've seen with the ICANN-UDRP. We'll talk a little bit about, I think, some of the problems that we've seen as well.

I'm assuming most people are familiar with the UDRP itself, but I'll give literally one slide overview of what involves. Talk about the cross border dimension, since this is a panel dealing with cross border dimension and jurisdictional issues, and talk how ICANN, does the UDRP is surely playing a very positive role in that regard, and then, eight months later,

we've been at it for about eight months, and the good, the bad, frankly the ugly, and the future of the ICANN-UDRP process.

In a nutshell, as is pretty obvious, in the generic top level domain space, domain name disputes are frequently cross border. You can register a .com, a .net or a .org, and it doesn't matter where you live, and there may be another party in a different jurisdiction that says they've got legitimate rights to this name and you don't. And so frequently, the disputes that arise as part of these domain name disputes are going to involve people in different jurisdictions. So it was clearly recognized that some sort of solution was needed that was global in scope, that appreciated the fact that there are going to be disputes in different jurisdictions.

There were other factors that people were looking for in creating the process. One was speed, try to get this resolved as quickly as possible; and one was accessibility, both on price to make sure that this was something that people could afford, it replaces the court system or it doesn't quite replace the court system, but let's make it cheap as a first instance

where you can go to. And let's make the decisions themselves as accessible as possible.

What resulted was the ICANN-UDRP. There are now four providers that provide dispute resolution services under it, so they've essentially passed it on to these organizations: the WIPO, the National Arbitration Forum, E-Resolution and CPR. It was really, the big three are the first three. Actually there's the big one, there's the other two, and then there's the fourth. WIPO handles by far the most number of cases, NAF and E-Resolution have been at it from the beginning, and CPR is one of the newer bodies.

It's important to note the ICANN-UDRP deals exclusively with bad faith domain name registrations. That's often, people don't realize that, they think this is for all domain name disputes, and it's not, it's designed to deal exclusively with domain names that have been registered and are being used in bad faith. In terms of the speed and accessibility, it's been a success. Typically, decisions get handed down within three months, and it cost about \$1,000 although there's a slight range, but not a lot.

To provide a sense of the international nature and sort of the good and the bad, I give Bodacious-Tatas.com, which was the decision that was handed down a couple of weeks ago, and the complainant in that case was Tata & Sons, an India-based company, that said that this domain was registered in bad faith and was being used in bad faith by D & V Enterprises, which is a New Jersey based company. There's pornography on the site.

But of course the big question becomes in this instance, does Tata & Sons really deserve, let's say, did they have any specific right to Bodacious-Tatas.com.

To give you a sense of the international nature of it, we've got the two parties from different jurisdictions, the ADR Provider, the WIPO based in Switzerland. The arbitrator was Michael Ophir based in Israel, and he relied on some precedent in the case, the Nokiagirls.com case which was primarily a Japanese based case which had a Belgian arbitrator. So if you're looking to something that's truly international, it's Bodacious-Tatas.com. And there are lots of those sorts of cases.

And in this particular case, the arbitrator took a

look, and I guess the biggest issue that was out there was, well did Tata & Sons have any particular right to this? And the arbitrator said: "Well most certainly, there are people that might go to Bodacious-Tatas.com and expect to find Tata & Sons." and what happens when they find that pornography? Because of course, lots of people type in Bodacious first before they type in the name of the organization and get really confused about what they're actually going to find in that particular site.

And so, in any event, the name itself was cancelled. It wasn't transferred to Tata, it was just cancelled, so it's been eradicated from cyberspace. So it's a safer place now that Bodacious-Tatas.com is no longer on line.

The good within the system, and there are some good things within the system no doubt, and this exemplifies it. A complaint was lodged on May 23rd, and the decision came down on August 18th, so fast as they were hoping for, it was inexpensive, there's just the one panelist, so it's roughly about \$1,000 to get it done.

But it co-existed with the local legal system, and I think it was referenced yesterday that one of the

reasons the UDRP's been effective is that you really don't have a choice. You kind of, you do have a choice, but you're compelled to be part of it if the complainant brings the action. But it still co-exists with local law.

And in this particular case, Tata & Sons was able to get an injunction in India to take this domain name, to grab this domain name, but it didn't amount to very much, enforcing it was not going to happen in India, and so they really did need to turn to an international body like ICANN to get this completed.

As I mentioned, it's clearly global, the case is global in nature by virtue of the composition of the case. And the law itself is certainly accessible, you can go on line and read [Bodacious-Tatas.com](#) for yourself. And it also relies on precedent, which is an interesting thing that's developing, and something that I expect we're going to see more. About 25 to 30% of the cases are now relying on prior decisions, and so we're truly developing a full body of case law around domain name disputes with ICANN. And so that... and this is yet another, I think, generally good thing, in particular if the decisions are good.

Beyond the case, there's some other things that I think are quite good about the case. One is just the volume of cases that the UDRP is dealing with. As of yesterday, September 11th, on this morning's ICANN site, 1,720 proceedings have been launched, involving 2,981 domain names, in eight months. It's a huge number of cases to be able to deal with. And so clearly it's a very positive thing.

Moreover, I think the UDRP is beginning to develop into an international standard, and so we're seeing a lot of country code top level domains, the ccTLD's, looking to the same dispute resolution mechanism. And so, WIPO now provides dispute resolution as you can see on the slide, to a large number of country code top level domain for disputes. There hasn't been many this far, but there may be down the road, and if they are, we're getting the same sort of standards being applied. That's the good.

The bad, and I guess I should preface this by saying, when you've got these numbers of domain names, clearly there's going to be an awful lot of good cases, and it's very easy to focus on the bad. And frankly, there are lots of cases that are well-decided cases, that

were frankly slam dunks and it was obvious that you had cybersquatting involved.

Part of the problem is that there have been a fair amount of notoriety, a lot of decisions and many conflicting decisions that make it very difficult to know precisely what their rights are, what the outcome might be. And so, while the procedure has certainly worked well, sometimes when you start looking more deeply at the substance, you get a little bit concerned. For example, some of the inconsistent decisions that we've seen around geographic names. So last month we had the Barcelona.com case, in which the City of Barcelona claimed it was entitled to the name Barcelona.com, and an arbitrator agreed, which concerned, needless to say, a lot of large media companies around the world who have established major portal sites based on geographic domains.

Well, two weeks later, we get the St.Moritz.com case, in which an arbitrator reaches precisely the opposite conclusion. And so... which is it? Generic domain names, which most people never expected the ICANN-UDRP to deal with, but very early on had a Crew.com case, in which J. Crew, a clothing manufacturer said it's got a

special right to the word Crew.

We've had other arbitrators say: "Well, hold on a second, this doesn't make any sense, no one has a special right to that." and Jobpostings.com is one of some other cases where in a generic context the arbitrator said: "No, there's no special right, and you don't win."

Then there's, and I think this is probably the biggest issue we've seen, it's the definition of bad faith use.

It was a heavily discussed topic when the rules were formed. It was the issue that you needed not just bad faith registration, but you needed bad faith use as well. And early on we had some decisions in which the arbitrator said: "No use can be bad use." which effectively means it doesn't matter at all, all you need is the bad faith registration. So as long as you've registered it in bad faith, the fact that you're not using it is also bad faith. And there is the bad faith use side of the equation.

And so you get conflicting cases. buyguerlain.com versus buyvuarnetsunglasses.com. In one case, buyguerlain, the domain name is transferred over in the

buyvuarnetsunglasses, the arbitrator said: "You're not using the domain, you don't need the bad faith use to fall under the test, and so I can't transfer this domain." And so, which is it, we've got a lot of cases where there's some truly conflicting decisions. There are some plainly bad decisions and some poorly reasoned decisions. The only one that's perhaps worth mentioning is the Rockportboatline.com case because it took place between two litigants about an hour and a half outside of Ottawa, in Rockport, it was between Rockportboatline and Gananoqueboatline, and they literally are across the river from one another, and so Gananoque registers as Rockportboatline.com and Rockportboatline launches the action fully expecting to win. It's incredible to see their competitors who now registered their domain names. And they lose as the arbitrator buys the story that Gananoque is considering investing in a port in the town of Rockport, and so they're entitled to that.

And so you get, I mean, you're always going to get some bad decisions, and so frankly, it's not really even worth dwelling on it. It's more that the inconsistent decisions I think are the problem. But it's also the poorly reasoned decisions, in the Rockportboatline case

there is no reason, it basically says: "These are the three standards that you need to meet, and you haven't met them." end of story. And so, it's problematic when there's nothing to even to take a look at, and at least assess.

The ugly, I think, is the forum shopping that we've seen taking place, and if not real bias, there's certainly a perception amongst some of bias. And it's important to know that when a complainant lodges an action, they're the one that get to pick the provider.

And early on, there was some significant concern that, and this was even before the rules were put into place, that if the complainant gets to pick the judge so to speak, there is an incentive for the judge, or for these judges who are competing with one another, to rule in favour of complainants, otherwise you're not going to get the business. It doesn't take, it's not going to take very many cases for people to realize that one arbitration provider is ruling predominantly in favour of complainants and another is not, and if you're advising your client as to where to launch the action, it's a no-brainer. And frankly, that's what we've seen.

I guess you can actually see that. This first slide, and there's two slides that kind of show where things have gone. This shows the number of domain name transfers and cancellations as a percentage of the total number of decisions. And if you take a look at the WIPO and the National Arbitration Forum, and particularly WIPO because they're securing far more cases at the moment than National Arbitration Forum, they're ruling at a clip of over 80% of the cases. Just about or slightly more than eight of ten decisions, of every case that they hear, they rule in favour of the complainant by either transferring the domain or cancelling it.

E-Resolution in contrast is ruling at around 50 to 60%, 55%, which is a huge difference. And there is enough cases now, E-Resolution sorted over a 100 cases, that that kind of discrepancy shouldn't exist if you take it that, just, from a random sampling of the cases that you're going to hear, not every... some cases are clearly going to be cybersquatting, some aren't, but there should be some convergence between the providers, and to this point in time there hasn't been.

What you get is forum shopping, and so the WIPO, which in January when this began, at a point in time when no provider had any record to hang their hat on, got 29% of the cases that were launched. If you take a look over the last couple of months, they're now getting over 60% of the cases, that's more than all the other providers combined. Not only are they getting the vast majority of the cases, but the number of cases is increasing at an incredibly rapid rate, which means they're getting more and more cases period. They're getting a higher percentage, and just as a pure number, more cases are being brought every day.

And so this is, even if there's no bias, there's... well, the perception of bias is a problem even if there isn't true bias, and I think that the concern early on that this might be the case, and it's exactly, and it's precisely come to fruition.

Where are we headed? ICANN is supposed to review this process this fall, and perhaps they'll take some of these sorts of things into account at that point in time. For the moment, we don't have any information about what that's going to look like or anything like

that. The ICANN Web site, they haven't discussed it, there's nothing there about it, they've only, there's only just been some random statements from some ICANN officials indicating yes, we intend, after about a year of the process to re-examine it and take a look, so we'll look for that soon enough.

At the same time though, even if they do re-examine, it seems possible that there may be an expansion about the coverage of the process as well as the costs. On the coverage side, the WIPO recently launched a new public consultation dealing with issues like, whether or not the process ought to be expanded beyond its current bad faith registered trademark confines. And so they're considering should we go towards personal names and geographic names and trade names. If this sounds familiar, these are issues that were discussed throughout the process when ICANN was putting this together in the first place. And after considerable debate within the Internet community, it was rejected.

WIPO would like to reopen the debate and consider whether or not they have reopened the debate, and consider whether or not we ought to re-expand into these areas.

At the same time, on the cost side, there have been some suggestions that one of the reasons that we're getting such poorly reasoned decisions in some instances is that it's just not a cost effective decision. Some of the arbitrators, who often get about \$500 for rendering the decision, look at this and say: "I just can't spend any time on this because that's just not, is it \$500 an hour or \$500 for the case?" And when they hear it's \$500 for the case, it's just not worth it. And so there's a concern that the cost itself is actually leaving us with some poorly reasoned judgments because some of the arbitrators just don't want to spend any time on it.

Finally, we're going to start to see I think in the months ahead local courts taking a look at the ICANN process, and we'll get a sense of to what extent they want to defer to ICANN decisions. We had one case in the United States, Weber Grills that was still ongoing at ICANN, and what the court said was: "Well, we're clearly not bound by what ICANN says, but we're not going to render any final decision because the ICANN process is still in play." In Canada, there's one case that was recently launched by the Royal Bank which lost RBCInsurance.com in an E-Resolution decided case, and

they've now launched an appeal because you are entitled to launch an appeal. So it'll certainly be interesting to see over the months ahead how the courts actually take a look at the ICANN process itself. So that's it.

PAUL GOLDSTEIN

Thank you, Michael. I think we have a 15 minute break, and when we return, we can focus on issues relating to Napster to iCrave and other tricky questions on the Net.

BREAK

PAUL GOLDSTEIN

Thank you. Our first speaker for the last panel is Ute Decker who is a legal advisor at the International Federation of the Phonographic Industry, IFPI, and who has specifically asked me to keep her introduction very brief. And so, I think you've just heard it.

Ute will speak on some of the issues that we've already looked at from, and related issues, from the perspective of The Hague Convention as well as some other, some other topics. Ute.

Panel: Cross Border Cases; New Technologies

UTE DECKER

Thank you, Paul. Coming from a content providing industry, I feel a little alien in this audience, but I nevertheless enjoyed the last two days very much, and I would like to thank ILPF and Ruth Day very much for inviting me to participate. I think this conference and the discussions are taking place on an extremely high level, and I personally learned a lot.

I would like to talk about how right holders feel about the draft Hague Convention, particularly with the focus on cross border litigation. I am also going to drop a few remarks here and there about the current experience in litigation. As an introduction, I would like to say that having worked in the e-Commerce environment for three or four years by now I have noticed that throughout this time a strong concern in the ISP community that copyright could cause problems and obstacles that cannot be overcome by technology, application of due care, or insurance cover.

Copyright is in some circles seen as a danger as it could lead to an overload of litigation or other effects leading to an obstruction of the development of e-Commerce.

But as a matter of fact, this is not what happens. Compared to the amount of copyright infringing activities on the Internet, there is very little copyright litigation going on, and when it takes place, it is very carefully targeted and the litigators, the plaintiffs, make a point in addressing the content provider first, and hardly ever go against the intermediary.

Let me turn to the implications of the Hague Convention in application to intellectual property. In the context of jurisdiction that is the subject of this conference, it is important to bear in mind the territoriality of IPR and the fact that its protection is always national *a priori*. To get the terminology straight, IP is usually understood to cover primarily patent and trademark law, and then we have copyright on the side, which is quite distinct, as I will explain later on.

In view of the developments and discussions taking place on international level that I will turn to in a minute it is important to have a look at the characteristics of IP and copyright first.

In the area of patent law the territorial character is most obvious. This is due to the fact that a patent does not come into existence unless it is registered. Because the registration is expensive, the patent holder generally chooses a variety of jurisdictions and is very selective about it. The idea is to target specific markets.

This leads to a patchwork of protection for one patent and often there are different exclusive licensees for different territories.

Turning to trademarks, the situation is slightly different. Trademarks can come into existence either being registered for a country or by their use and acceptance on a national market. This leads to a two-tier system. For some trademarks the protection follows the use on the market, for others it is based on the registration.

Copyright on the other hand is completely different from both patent and trademark protection because the protection is triggered by the mere incident of the creation. The international protection of copyrightable works and of related rights in a variety of territories is due to widely recognised international agreements. As a consequence of the most important international agreements, among them the Berne Convention and TRIPS, the protection of copyright and related rights is virtually global. However, due to the nature of Copyright and illustrated by the different levels of protection this protection system is still a patchwork territory by territory though in its essence covering most countries on this planet.

One of the reasons why I am pointing to the most crucial differences in the area of IP and copyright is that, and I think one of the previous speakers mentioned this already, WIPO has worked on an initiative to draft an instrument on the use of signs on the Internet. This draft refers predominantly to trademark protection. WIPO has seen a need to characterize what constitutes the use of a trademark on the Internet in a particular territory. Most naturally, in the area of trademark protection and the use of signs on the Internet, this instrument would have grave implications on the scope of protection, the liability for trademark infringements, the applicable law and also on jurisdiction.

Now, as this is going on, I would like to point out in which way both the problem and the suggested solution are peculiar to trademark law but cannot be translated into other areas such as copyright law. Regarding trademark law, we always have the problem that trademarks may be registered in different territories for different right holders and/or for different products. Trademark protection from the outset is meant to give control over the industrial, economic exploitation of a sign on a targeted market. The use on a particular market determines both where protection is triggered and where an infringement of a conflict takes place.

When signs are used on the Internet, it is difficult to find out in which territories this can initiate trademark protection and how to deal with conflicting trademarks that otherwise co-existed in different territories or markets without leading to infringement claims between the right holders. Another problem is to find general standards to determine which jurisdiction shall be competent to deal with infringements and how a country can keep the necessary control over the effects of foreign judgements on the national market.

Copyright is different in almost every relevant respect: it is clear that the use leads to a relevant exploitation in any country where it takes place. The protection itself follows international agreements providing agreed standard of protection. The exclusive rights are clearly cut in the national law. And copyright does not depend on the use in a territory for the initiation of its protection.

To sum it up, regarding trademark law and other signs when used on the Internet it would appear that there is a valid concern that the current situation leads to a lack of clarity and predictability and may give rise to conflicts that cannot fully be solved by the existing legal framework. For other aspects of intellectual property, however, and for Copyright in particular, the situation is different and there is no need to apply restricting criteria.

I would like to address now a concern that there has been voiced earlier: the effects that the rules on jurisdiction have on the liability of intermediaries. During this conference, we have heard a lot about how the implications of copyright have changed with the use on the Internet, and that copyright can lead to the liability for activities taking place on the Internet. Particularly ISP's seem to look at this, and wonder: "In what situations are we going to be liable and are actions going to be brought against us?" and so on. Apparently, one way of looking at that is to rely on disconnects in the rules on jurisdiction and the enforcement of judgements, and to focus on evading liability in the territories where the entity or person feels most vulnerable.

Answering this approach, it is important to keep in mind that jurisdiction and liability are two completely different issues. The problem of who commits an infringement in regard to copyright, and who can be held liable for it is a question of material law and is regulated deliberately at a distinct level allocated often at the core of a legal system. Several legislators have done so already, e.g. the US in the DMCA and the European Union in the Electronic Commerce Directive. This is the proper place where concerns regarding liability can be tackled.

On the other hand, concerns regarding liability should not influence the discussion on jurisdiction because this leads to confusion and seriously impedes the delicate balance within the rules on jurisdiction and in their relation to material law.

Answering this approach, it is important to keep in mind that jurisdiction and liability are two completely different issues. The problem of who commits an infringement in regard to copyright, and who can be held liable for it is a question of material law and is regulated deliberately at a distinct level allocated often at the chore of a legal system. Several legislators have done so already, e.g. the US in the DMCA and the European Union in the Electronic Commerce Directive. This is the proper place where concerns regarding liability can be tackled. On the other hand, concerns regarding liability should not influence the discussion on jurisdiction because this leads to confusion and seriously impedes the delicate balance within the rules on jurisdiction and in their relation to material law.

In this context, I would also like to refer to the report of the American Bar Association on this subject.

In the annex, this report has a section on the results of the working group on IP rights.

The working group reportedly has noticed a movement within the IP community attempting to extend the scope of competent jurisdictions in regard to IP infringement claims. I must say that I do not see any movement of this kind. Quite the contrary, the rules that I will explain in more detail later, are and should be the same and no extension is attempted.

Turning finally to the provisions in the draft Hague Convention, I would like to address first the section on tort (Art. 10). At the chore of this issue the provision deals with the questions of what is considered to be a tort, and how tort leads to jurisdiction in particular territories. Looking at copyright, it is clear that the infringement of copyright is a tort. This leads most naturally to the conclusion that courts should be competent in any territory where a copyright infringement either has been caused, or initiated, or where it shows effect.

This leads to the next question: Where does an infringement actually take place? This issue is controversial, and Thomas Vinje has fortunately has gone into this to some extent already so I can be very short. Of course, an exploitation and therefore possibly an infringement takes place, where a copy is made, where the copy is distributed, and, when content is being put up on the Internet, the infringement takes place both where this activity takes place and also where it is perceived.

In so far I am in agreement with what Thomas Vinje said. Looking at the frequently raised question of the character of hyperlinks, we have seen in several cases already that hyperlinks to infringing material in some special circumstances depending on their effect and presentation can also be an infringement in themselves.

Consequently, all these incidents should give rise to access to courts in the territory where this takes place and where it shows effect. I would like to remind you, as many members of the audience may not deal with IP matters on a day to day basis, that within the WTO framework the TRIPs agreement has been concluded that puts all WTO members under the obligation to provide the means for efficient enforcement, and that this includes access to courts and to efficient procedures.

Let me summarize at this preliminary stage the two central messages of my presentation. One is that copyright and IP can never be subject to what is frequently referred to as the country of origin rule. We have heard a lot about this context from previous speakers already. This concept is useful for activities which are done in one territory and have an additional, dependant effect in others territories, but it cannot apply to copyright where the use in any country is a primary exploitation and possibly a separate primary infringement takes place in this territory subject to the territorially limited regime of protection.

As explained before, IP- and copyright-based claims are different in this respect, because they result from infringements that happen territory by territory. Consequently, the rules in Art. 10 of the Draft Hague Convention reflect the established rules and are an essential part of the rules on jurisdiction.

Second, copyright cannot be subject to exclusive or otherwise restrictive rules on jurisdiction. The draft of The Hague Convention has one section on exclusive jurisdiction in regard to IP rights (Art.12.4) and this is where my introductory remarks on the differences between patent law, trademark law and copyright are relevant again. Of course, looking at an IP right that comes into existence by means of registration, everything that relates to the validity of the registration most naturally would be dealt with in the country where the registration has taken place. But as regards the infringement of the right that has been registered, there's no reason to concentrate jurisdiction in that territory and to deny the right or to allow the right to access courts in other territories. Allocating exclusive jurisdiction over infringement claims in regard to registered rights leads also to an artificial separation of connected issues and leads to an unjustified difference in the treatment of registered versus unregistered trademarks.

For copyright, the text says explicitly that no exclusive or otherwise restricting rules on jurisdiction shall apply. But in application to trademark law, I am more concerned. Bearing in mind that trademark law generally applies the two tier system for the coming into existence of protection, the rule would lead to unnecessary divergence and a situation in which registered trademarks are weaker than non-registered due to the difficulties in litigation and the artificial separation of the claim.

Let me more or less finish by saying that the aspect in The Draft Hague Convention that right holders are most interested in is the enforcement section. We think that building a network for the enforcement of judgments is a very useful tool. In litigation the order of legal questions posed is often reversed as compared to the usual analysis. The litigator generally does not first think about the material law and the details of the infringement and arguments but rather starts by thinking: "Where can I get a remedy that is effective in the crucial territory?"

If I want to keep somebody from doing something i.e. by means of an injunction, where can I get an injunction that is effectively enforced?" This is also one way of looking at the effect of The Draft Hague Convention. With the perspective of a litigating party in mind, the creation of an international enforcement framework is a very important development. The next step, of course, for affected industries is to look and check whether the sections on jurisdiction and the competence of courts lead to acceptable results.

For the economic assessment of the effects I would like to add a little bit of the experience that has already emerged in the course of litigation. Regarding an infringement on the Internet, the right holder faces somebody putting up the content somewhere causing thereby great damages not only in that territory, for example, not only in the United States, but also in other markets, for example Germany, Japan, and France to name just a few bigger markets. If in this situation the right holder has to initiate actions in all these different territories, the litigation itself is not economical anymore, because the costs of litigation add up rendering the recovery of damages far too expensive.

In order to keep the costs of proceedings considerably lower than the damages that can be recovered, it is important to have at least one court that can assess and allocate damages exceeding the harm done in the territory where the action is brought with the possibility to enforce this judgement in a multitude of jurisdictions. This is already part of the rules as specified in the Draft Hague Convention, and we think that this is a necessary and important aspect.

I will skip the experience in recent litigation because I see that my time has run out. I am very confident that you're going to hear more about this from my fellow panellists in particular about ongoing litigation against Napster and about the iCraveTV case.

As a concluding remark, I just would like to remind you, that right holders already rely on traditional rules that provide access has to courts in all countries where the infringement takes place and shows effect. Right holders are asking to uphold these rules. In the context of the Draft Hague Convention, it is important to give one court the competence to assess damages for several territories. Based on the assumption that the crucial rules on jurisdiction will not unreasonably restrict access of right holders to courts, we support the development of The Hague Convention in so far as it creates a network for the enforcement of judgments.

Thank you very much for your attention.

PAUL GOLDSTEIN

Thank you very much, Ute. We now get to hear from Hank Barry about how happy Napster is indeed about the confluence of interest between Napster and the record industry that Ute refers to. By way of introduction, Hank Barry is the interim Chief Executive Officer of Napster, he is, his full time job, his day job is as a partner in Hummer Windblad Venture Partners. Hank is trained as a lawyer, and is practiced as a lawyer with two firms in Silicon Valley as a partner, and before that in New York City. He is a Stanford Law graduate, happily, I'm proud to say he's also a former student of mine, and pleased to say that he serves on the Board of Visitors of the Stanford Law School. Hank.

HANK BARRY

Thanks Paul, thanks very much. By way of introduction, Paul actually referred to me earlier as the defendant with assets in country A. I'm also known as that person. And I did take copyright from Paul, although I missed the contributory infringement lectures. That should be a lesson to all of you to go to class.

Let me start with a quick review of both the conventional client/server model for file distribution

as well as the new peer-to-peer model. It seems to be gaining rapid acceptance on the Internet. I'll also review the basic copyright questions I think arise under both models. And then I'll talk for a minute about the implications of the global reach of the Internet on liability issues for both models.

In the classical client/server set-up and this may have already been discussed earlier, but I'll go through it quickly, something like the traditional worldwide web, FTP gopher whatever, the user sends a short message to a server asking for a particular file, then the server, if it has the file, sends that file to the user.

You know if that file is copyrighted and the transfer is unauthorized, then the plaintiff holder may seek to file an infringement action against either the user who requested the file or the person who owns the server or both. Typically, the copyright holder will consider filing a case against the owners of the server, much like the AOL case, since relief against the server owner may have much larger impact than relief against a single user or group of users. I'm not going to spend any time here on the DMCA but we can talk about it after if you like.

In the peer-to-peer world, it's a totally different concept, and it has significant implications I think. With peer-to-peer, a user tells the server that the user is interested in locating a particular file, the server contains none of the files that the user seeks to download or transfer, instead the server simply keeps a list of what files all of its users have. It answers the user's request by telling the user the location of another user who has the file that the user is interested in. If the user wishes to, he or she can then contact the peer user and initiate a transfer of the file.

If that file is copyrighted, then, and the transfer goes unauthorized, otherwise unauthorized, then a plaintiff copyright holder may claim infringement by reason of that transfer, although it's somewhat unclear what act, i.e. which side of the transfer would be claimed to be infringing, the copying or the making of the transmission.

So what does this have to do with what we're talking about today? Well, if the server is not in the United States, or if it's outside the United States, what if the user supplying or transferring the contested files

are in different nations, these and other geographic permutations produce a complex new challenge for international law, I think.

So with client/server, we had a relatively straightforward answer. The copyright holder can bring an action against either the transferring user, the client or the server owner, in their own courts under their own copyright laws. Under Berne, each member nation agrees to let citizens from one nation sue, excuse me, from other nations sue that nation's own citizens in its own courts, under its own law. Thus for example, under Berne, Canada is required to recognize the U.S. copyright and allow U.S. copyright holder to bring an action in Canada against an alleged Canadian infringer, under Canadian law. But under general principles, it's generally difficult to obtain extraterritorial application of any country's own copyright laws, as we've discussed earlier today, thus the law of the nation where the alleged infringement occurs typically governs the litigation of this dispute.

Berne provides much less clearly, I believe, in the peer-to-peer context. First, when a plaintiff seeks to

sue an alleged infringer in a foreign nation, only that nation's law and not the plaintiff's own law would apply.

Second, the nations belonging to the WTO are also bound by GATT TRIPs, but again GATT doesn't require statutory damages either, and I should say, statutory damages are not required under Berne obviously.

Finally, on some other coverage issue, the Berne Convention is widespread but not ubiquitous. Taiwan, for example, isn't a member and neither are a few of the South Pacific or African countries. GATT has even more gaps. While these gaps may once have been insignificant, they may come to have a great, much greater impact in an Internet world in which a server can be located essentially everywhere.

Perhaps an even more challenging issue arises however in analyzing a plaintiff's potential effort to a sort of contributory infringement theory against a peer-to-peer server operating in a different nation than the nation in which the challenged file transfer, that is to say the alleged direct infringement occurs. Here the Berne convention arguably provides even less ground

for plaintiff's case. The complexity arises from the fact that the alleged contributor infringement now straddles jurisdictional lines. For example, a server in Canada points a U.S. user to a U.S. peer, and the challenged file transfer occurs entirely within the United States, thus the alleged contribution now takes place in a different nation than the alleged direct infringement.

To prove contributory infringement under most nations laws, a plaintiff typically must prove that there's been direct infringement somewhere and that the defendant contributed to or assisted with that infringement in some way and knew that it was doing so.

But with the peer-to-peer server, the two components of alleged contributory infringement necessarily take place in different countries' jurisdictions. This, in an example that I've made, this raises the question of which country has a right to apply its laws?

In an action brought in the U.S. against a peer-to-peer server owner located in Canada, application of U.S. law to impose liability seems improper because the challenged conduct occurred entirely in Canada provided

that the server is owned by Canadian nationals. Application of U.S. law here would appear to be an improper extraterritorial application of U.S. law. At the same time, application of Canadian law would not necessarily give rise to liability. An action brought in a Canadian court, using the Berne Convention for jurisdiction, would require application of the Canadian Copyright Act, but because the purported direct infringement is alleged to have occurred exclusively in the U.S., it's unclear whether contributing to such an alleged foreign infringement is a violation of Canadian law.

Paul talked earlier about a couple of cases, but I'll just say. In the U.S., the Ninth Circuit has ruled twice that a U.S. defendant may be sued for allegedly contributing to the infringement of a copyright in another country. So the courts are just beginning to grapple with these issues.

I think that not all Berne signatories have expressly recognized any theory of contributory infringement, and some of these nations might not recognize contributory infringement as actionable at all.

So I guess this all says that, Ute's point is a good one, which is that we need to look at these things on a worldwide basis. Looking towards the future, the peer-to-peer phenomenon appears poised to continue its rapid growth, and not just with Napster, with other peering systems such as Nutella Freenet and I am sure there will be more this afternoon, and it seems likely we will not receive rapid and clear answers from the courts to these new P2P issues. Over time however the current debate regarding the substantive issues raised by the peer-to-peer model as well as the implications of that model on extraterritorial application of national laws will likely drive some additional development of copyright laws within and outside of the United States.

And finally, to the extent that ambiguities remain, for example by virtue of some nation's lack of contributory or other vicarious liability provisions, I think we can expect to see some further amendments to international treaties, either GATT TRIPs, or perhaps Berne, to account for the changing realities of the digital world. That's it. Thanks.

PAUL GOLDSTEIN

Thanks very much, Hank, and we'll turn our focus now to one particular case that raised many of the issues that we've been talking about in cross border again between U.S. and Canada, the iCraveTV case. Our first speaker on that is Mark Hayes. Mark is a partner in Davies, Ward & Beck, where he works with the firm's technology and communication's group specializing, among other areas, intellectual property matters relating to information technology and telecommunications, new media and broadcasting. His work gets him in the thick of activities as counsel to the Canadian Association of Internet Providers, Canadian Cable Television Association and Bell Canada. Mark.

MARK HAYES

Thanks, Paul. I'm going to talk a little about iCraveTV in the context of the issues that we've heard. And Hank has really done better than I am, he had Canadian flags all over the place, and I don't even have them. I feel really terrible, let's all wave towards his later on.

I want to first of all say I'm not here as an advocate for any particular point of view, and I'll use the

usual disclaimers about the firm and any of our clients. What I want to speak to you today is as a practitioner who tries to deal with these issues practically every day. As Catherine Kessedjian said yesterday, we have to be able to intelligently assess jurisdictional risk, and I think that's really the issue that we're going to see when I talk a little bit about iCrave here.

I don't want to be in a position where I have to do one of two things, one is either give the very popular answer, we've heard the last couple of days, "I don't know"; or else have the client on one phone and the other phone calling my insurer every hour. We really need to have some more clarity about jurisdictional advice, and I'm going to talk a little bit about that as we go along.

The iCrave situation presents, I think, a case which is very much at the margins of some of the issues that we've been talking about. Ultimately iCrave failed, and as I think I may be able to demonstrate, I think they failed because of poor execution rather than poor concept. The interesting nature of this dispute I think is that it involves the world's two largest

trading partners, and probably the two closest countries in terms of the way that they interoperate with each other, the U.S. and Canada. And as I think you'll see, there are fundamental differences in our copyright law, and that's part of the reason why we have a problem.

So what do we talk about, where did iCraveTV come from, and why can't I go onto the next slide... don't tell me it crashed. No, it should be, let's try next. Okay, here we go. Where did iCraveTV come from?

Well, it's a convergence of a number of different historical points. First of all, there's an inability to obtain audiovisual licenses, i.e. TV, and that's not really because iCrave didn't want to license them. It's because nobody has the rights, and that includes the people who sued iCraveTV, that is the motion picture studios, the television broadcasters, the sports leagues, none of them own all the rights to be able to put their content on the Internet. And so, as a result, up until the time that iCrave began, it was sterilized, the content could not be legally done by anyone except if you could fit into an interesting regime which we had in Canada, and that's a compulsory

retransmission regime for television, it also applies radio, but that's not really relevant here.

And what this means is that there is a regime that says that you are allowed to retransmit television that is sent out over the air, this does not apply to cable channels, it's only over-the-air television, and the copyright owners and there are lots of them, are paid through a regulatory system whereby money is put into a pot and then is divided by a board appointed by the government to all of the various collectives who represent the copyright owners.

Now, before the U.S. lawyers and the crowd say: "Wait a second, how can you guys possibly do that?" I want to point out that this regime was pursuant to the terms of the free-trade agreement entered into in 1998 between the U.S. and Canada, which specifically provided for this exact regime. So this is not something that came as a great surprise to the U.S., it was something that in fact the U.S. insisted upon in the negotiations for the free-trade agreement.

Now the other thing about this regime is that it's technologically neutral. Unlike the U.S. regime, which

is specific for retransmission on different categories of retransmitters, such as cable and satellite, the system in Canada doesn't talk about any specific technology, it just talks about retransmission.

Now the last thing is Tariff 22, and I thought it was interesting that Thomas Vinje in the last panel said that there were no pointers as to where copyright takes place. The decision of the Canadian Copyright Board in October of last year, which I was heavily involved in on Tariff 22, dealt with all of these issues in great detail, and decided that the communication to the public of copyright works took place in the location of the server, not in the location of the recipient, and I invite you all to take a look at that decision.

Unfortunately, I didn't know it would be an issue so I don't have the URL, but if you just put into any search engine "Copyright Board Canada", it'll come up with the great site for the Copyright Board, and they have all of the, all of their decisions are there in PDF format.

By the way, I know that that decision is very very similar to the two-tier rule that Professor Koizumi talked about earlier on.

So what was iCraveTV? Well, it was specifically

designed to comply with the Canadian retransmission regime. And just as a precursor of what Tod's going to say, I put the Pirate Ship, just to show you what they really were. They started streaming over the air broadcast signals on the Internet in November of 1999.

And I think there were four important points, without going in all the details, I think there were four important points.

First of all, they were streaming only, they were not reproducing, they were not caching, they were not archiving. Now, obviously the reproduction aspect of streaming as to whether streaming does encompass a reproduction is something that is controversial, I think, globally and certainly controversial in Canadian law. We require the reproduction, what's called "in a material form" and if what iCrave was doing was, involved reproduction and every cable operator and every satellite operator is reproducing too, and that would introduce some really interesting problems into our law. But in any event, that was an issue and probably will be as we go along.

The wrap-around of advertising was another controversial aspect because iCrave produced the TV

signal inside a box and then had advertising around it.

I don't know if this is a copyright issue, but it's certainly a business model issue because all of the broadcasters and the content owners said that they were competing with their own advertisement, which is probably correct.

I put "intended for Canadian viewers" with a bit of a question mark, because iCrave's public position was always that they wanted to limit reception to Canadian users because of limited bandwidth, targeted advertising and so on, I think I will be probably fair to say that unfortunately their actions did not always coincide with their public statements.

And then lastly, they had a really really porous filter system. And essentially what iCrave did was, they required you to put in your area code, which was, what was thought up by the president as a really good blocking system, so everybody, wherever they were, put in an area code from Canada, and so anybody had access.

What was really a problem in addition to that was, because people lied and so on, was that they didn't block the back door. And so, in the litigation that

was commenced in the United States where an injunction was obtained, in fact, the plaintiffs never showed all of the various conditions that you had to lie in order to get in, because they just linked directly into the dot ram, the RealAudio streams, and unfortunately iCrave never closed the back door. And that was a real problem.

So what are the issues? Well, the iCrave situation, I think, highlighted a whole bunch of issues, the choice of customer and terms, reach of national regulation, some jurisdiction issues, I think the power of the U.S. to set rules for Internet IP through their domestic legislation, and we'll talk about it a little as we go along.

But what I'd like to do is rather than talking about what happened with iCrave, I'd like to talk about assuming for the purposes of discussion of these three points, what would happen? And the three points are the following. Number one, that Internet retransmission is legal in Canada, and that has not yet been decided by the courts, but let's assume that. Number two, the retransmitter, unlike iCrave I would submit, actually makes a *bona fide* effort to prevent people from outside

of Canada from accessing them, so they try to erect a wall around Canada to only have it to Canadian users. And thirdly, I want you to assume that the blocking efforts are only partially successful, and so there is in fact some reception outside of Canada.

Now, if you look at this, there has to be a continuum of success in terms of blocking. iCrave, I think, it's fair, didn't block a lot of people, though they maybe blocked 20 or 30%, there were some people who just didn't bother to put in an area code, but didn't block very many. And I think it's generally agreed, you can't block 100%, there is not any technology there right now to block 100%. But in that continuum between basically doing not much and blocking 100%, there's got to be some point where you've done a *bona fide* job, you've done the best you can to try and block someone.

And if that happens, then will the courts outside Canada take jurisdiction, and I say, i.e. the U.S., because I can tell you, in Canada, we are the proverbial mouse lying under the elephant, and when clients come in to me and say: "Do I get sued?" what they mean is: "Do I get sued in the U.S.?" And secondly, if in fact they do get sued in the U.S., would Canadian courts enforce any judgments? So that

is if it's a Canadian with only assets in Canada, could they get sued?

Now, Ute said in her presentation that it was likely there would not be litigation unless what was happening outside the country would have a strong market effect on the users, and I don't think that's necessarily true. In the iCrave situation, the plaintiffs spent hundreds of thousands of dollars to crush a company that had only put, at a maximum, broadcast signals on the Internet to 3,000 simultaneous users. There were no market effects whatsoever, but it was very important for them, for market reasons and a bunch of other reasons. So I don't think that that is really the case.

So let's talk about limiting jurisdiction. The two things that we have in front of us, that we've been talking about a lot are the ABA Study and The Hague Convention draft, Article 10, and those two in this particular situation we're talking about, and this is one of the reasons why I think we're really at the margins, produced different results. What the ABA draft jurisdictional rule says is that:

Good faith efforts to prevent access by users to a site or service through the use of disclosures, disclaimers, softwares or other technological blocking should insulate the sponsor from assertions of jurisdiction.

The Hague Convention as we've seen in draft Article 10 would permit jurisdiction in a state where effects are felt. And I thought it fascinating to see the comparison of the tort panel that we had earlier in which the U.S. lawyers were saying they were terribly afraid that there would be, the Effects Doctrine would be used to sue them outside of the U.S., and then, you know, Paul earlier on describing how U.S. courts would apply the Effects Doctrine to take jurisdiction. But in any event.

In international cases in copyright, I think there has been a tendency sometimes stated, sometimes not stated, to apply an Effects test, certainly in the iCrave case that was the case, the judge made it quite clear that he was saving the Superbowl for the U.S. when he gave the initial injunction. And there's a case called LANS and CBC, which actually I think the actual site is a little bit different than that, it's... I don't have,

yes, it's LANS and Conus I think, C-O-N-U-S, a California case, and this involved the CBC broadcasting the famous Rodney King footage from a Canadian station to something like four million Canadians, and the court said about 3,000 Americans, and it was perfectly legal in Canada, but was found to be an infringement in the U.S. because of the leakage across the border by the border, CBC border stations. In any event, I think there has been certainly a tendency in some cases in the U.S. to do this.

So the question is, would the Canadian, would the U.S. court take jurisdiction? I think it's likely that they would, even if good faith efforts are taken, I hope they wouldn't, but I think they probably would. But I've got two notes about that. Number one, the current retransmission system for what I would call legitimate, people who are already doing retransmission include satellite, and satellite broadcasts from Canada can certainly be picked up in the U.S.. Now, all you have to do as an American citizen, is sign up with a Canadian satellite provider, and give a Canadian address, and then take your receiver, go into the U.S. and hook it up, and as long as you're in the satellite footprint, you can certainly receive the retransmitted

signals that are broadcasted pursuant to the Canadian retransmission system. Exactly the way you could if you managed to get through whatever blocking system would be used by a new iCraveTV that comes along. Now, nobody has ever sued any of the satellite providers, and you've got to wonder why it is that the situation would be different.

Secondly, I think it's really important to note that Canada is not, despite what some people might think, an outlaw nation with no copyright law. We've got some laws that are different from the U.S., that's all it is. They all fit within the Berne minimum standards, they all fit within TRIPs. What's really important is that this is not a situation where there's an outlaw nation and somebody is going and using that state.

Now, I don't want to talk too much about Canadian enforcement of foreign judgments, but we have a little different test, we use a "real and substantial connection" test instead of a minimum contacts. And I think it would be quite unlikely that even if a U.S. court were to take jurisdiction in a situation where an Internet retransmitter used *bona fide* efforts to stop it from going into the U.S., but nevertheless was

hacked into, I think it would be unlikely that a court in Canada would find there was a real and substantial connection.

Now, the question is, where do we go from here? I think there's a bunch of different places and a bunch of parts to the solution. Number one, we can have a zoned Internet, somebody could create a way that we could have geographical restrictions.

Now, first of all, this is a short-term solution, really what you're trying to do here is recreating the off-line regime that has existed for many years for the exploitation of copyright works. There's a bunch of places out there, one you may not have heard of, www.bordercontrol.com, I encourage you to try it. It's a test site that somebody has put up with a technology that attempts to identify people as to where they are.

I don't know exactly how it works, but it's cool because it comes up with flags telling you where you are, and you can type in a URL and I'll you where it's located. Having said that, I'm sure that nobody is going to be able to do it perfectly.

The second way that people are going to try and protect

this copyright content is by technological protections.

And if you have a technological protection to protect somebody from, prevent somebody from doing what you don't want them to do, they don't really need any jurisdictional concerns, and there's very strong prevention or circumvention of these technological measures in the DMCA. Other countries may not go as far as the U.S. has because the WIPO copyright treaty doesn't require them to go that far.

The next option is what has been variously referred to as Whack-A-Mole, and that is where these things pop up like iCrave and Napster and so on, and the various copyright owners whack them over the head with a large mallet. And any of you that have played this game at fairs where people just keep, the moles just keep coming up and you have to keep whacking them, it's a really fun game but I don't think it's very good for the Internet community. And I think the reason is, is because it really creates a huge amount of uncertainty, because you don't know whether you're going to be a mole or not. And when somebody comes in with a business plan, they really don't know whether they're going to be a mole or whether there's going to be something they are going to be able to do. And this has

a whole bunch of implications, including unavailability of capital, because people will often not want to invest in you if you can't have some kind of an idea of what your potential liability is going to be.

And interestingly, what this ends up doing is it favours the established players. It favours the people who are large copyright owners. It favours people who already have a business model that's established on the Internet, that they've been able to negotiate with large copyright owners. And I think it really inhibits investment and I think it encourages extravagant rights claim by copyright owners. I think what happens is if people are uncertain, let's have a go at it, we've got the money, they don't, and as a result, you can whack people over the head as much as you want. I'm really not sure this is a logical way to try and develop an industry.

Is legal harmonization really possible? I think it's going to be a problem because while we can have the Berne minimum standards, we can have all the treaties that we have, they only set minimum standards, and it's clear that the way in which they are implemented, the devil is in the details. And it's the way in which

they are implemented that are going to show differences. And so we've got Canada and the U.S., very close trading partners, both signatories to the same copyright conventions have enough differences in their copyright laws that it can lead to multimillion dollar lawsuits which receive a lot of ink in the newspaper, and if those close countries can do that, you can imagine what kind of disputes we're going to have amongst countries that don't share the same continent, the same sort of legal background and so on.

I really think that the only way to go is some sort of international cooperation and this is really what we've been talking about the past couple of days. And if we are going to do that, and I think this is an important point in considering the way we go in terms of the international treaties, is everybody has to be able to give on their sovereignty a little bit. And so when we're talking about what rights are going to be, and how you're going to protect them and so on, I don't think you can start from the point of view that your copyright law is always going to be protected no matter where it is, because sometimes people will have legitimate differences of opinion that say that it

should be another way.

If you take the test to say that you're going to be liable wherever the copyright laws are and wherever you can show an effect as Ute suggested, what you're going to have is a floating up to the highest bar that is created around the world. And right now, the highest bar on copyright is in the United States, and that's for a bunch of political reasons that have to do with the power of the U.S. copyright industry and Congress, and I think that it is probably unreasonable for most people around the world to think that the U.S. political interest should dictate what the, in effect, minimum standard is going to be for copyright infringement around the world.

So, I think what we're going to have to look at is something like the ABA rule which I had up on an earlier slide, which would say that as long as you make reasonable *bona fide* efforts to limit where your activities take place and you comply with the laws in those states in which you have tried to limit your activities, you shouldn't be looking at the possibility of liability somewhere else. Thanks.

PAUL GOLDSTEIN

Thanks very much, Mark. Our final concluding speaker is Tod Cohen who is Washington Counsel and Director of Government Affairs for eBay. Tod also has a former life, a life before eBay, where he was Vice-President and counsel for New Media for the Motion Picture Association of America, where again his work got him into the thick of activities of high-profile cases, including the just recently decided DVD DECSS case in Federal District Court in Manhattan, and also the iCraveTV case. Tod.

TOD COHEN

My name is Tod Cohen, thank you, Professor. It is a pleasure to be here with you today. I have a different position than most because now I'm suddenly with an Internet company and have to determine where I was wrong in the past and how I need to be properly reeducated on many of my prior positions. Before I was with the Motion Picture Association, I also spent two years in London doing anti-piracy work for the Business Software Alliance in Central and Eastern Europe and in Northern Europe. There was a very interesting problem of how

you deal with 95% piracy rates in places like Bulgaria. When you get it down to 93%, you declare that you have done a great job and move on.

I am going to talk about three things today and three points that I feel are important. One, how this debate really has been played out and how the public debate obscures what I consider to be the real debate between rightsowners and others. Two how this real debate relates to jurisdiction and who are the proper people to assert jurisdiction. And three give some examples from my own experiences with the iCraveTV and the DVD DECSS cases, and some discussion of the Yahoo! France auction case.

Right now, the public debate is that there is a grand world of fine international users, academics and what I call "Internet purists." eBay's PR people in San Jose made me change this line. Originally the line that I put in the presentation was "charlatans" or "anarchists" or "freedom lovers," and they said that is a bit strong. So let us call them Internet purists, and the public debate is them versus greedy U.S. content owners

(copyright, trademark, and in our instance at eBay, database owners).

With regard to trademark, the public debate is "free speech": individual domain name registrants versus large entities such as, Yahoo, NatWest, Bridgestone-Firestone and the City of Barcelona. Please look at the two little graphics on the PowerPoint slide. The bottom one which I especially enjoy because I cut and pasted it without permission. What I call the "Tod Cohen fair use test", which if they complain long enough and I make any money from it, then they will sue me. But until then, we will do it. The top graphic is a nice little piece from a company out of Uruguay called Yahoo.com.uy. , Yahoo sued this company that had registered around 41 different domain names of Yahoo and variations of Yahoo. Yahoo succeeded in getting back all 41 except this one, because under Uruguayan law it was not part of the ICANN Uniform Dispute Resolution Procedure (UDRP). . So Yahoo! had to make a decision, do they want to try to obtain the domain name under Uruguayan law or whoever regulates the country-code Top-Level Domain .uy. They have not done that yet.

With regard to copyright, the public debate is the "people," Napster users, iCrave users, Ian Johansen a 15-year old Norwegian who claims that he broke the DVD encryption system, and Offspring who made T-shirts with Napster on it versus corporate entities. The Motion Picture Association of America, my former employer, the Recording Industry Association of America and Napster, which sends "cease and desist" letters to Offspring to stop them from selling the Napster logo T-shirts. And as I understand it, when people complain about it, Napster dropped the complaint against Offspring and allows them to continue using the logo.

A VOICE

That's very wrong on all counts.

TOD COHEN

Okay, well I am only reporting what I read in the Wall Street Journal, an article which I have here, which discusses whether Offspring had the right to use Napster's logo or not.

In my eyes, the debate is really a corporation versus corporation debate. In the trademark area it was Network Solutions versus AT&T. AT&T was demanding pre-screening of domain names versus NSI

which was saying: "No, we are not going to pre-screen domain names before they are registered." The copyright debate, its Napster, iCraveTV, hardware companies and telcos versus, TimeWarner. Well it used to be TimeWarner, I do not know about AOL Time Warner.

In the database debate, from eBay's perspective, it's a company called BiddersEdge which had been engaged in scraping our site, which was 10% owned by Lycos which is now being bought by Terra versus us.

I really believe deep down that, in many instances, this is a question of corporate entity versus corporate entity. Once this is determined it makes it much easier to determine how to deal with jurisdictional questions.

The first question is who makes the money from Napster?

And unfortunately, from Hank's perspective, at this point it is not Napster. But there are many companies out there that are making lots and lots of money from Napster. For example, if you take the position that Napster has increased overall Internet usage from where it was at a certain point in time, we know that all the phone companies are making money off of Napster. We know cable companies are making money off of Napster. We know backbone

providers are making money off Napster for the interconnection charges, as well as ISPs, infrastructure companies and hardware manufacturers. All these people right now are making money off of Napster, because you have to have a way to get to Napster. And in most instances, you have to pay somebody to get that.

Who paid for your telephone or cable line, or your Internet access, or your computer, or your MP3 player, or your server, or your network storage? In every one of those instances, somebody paid for that. But for some reason, when it comes to content protection, there has been a debate that has come out in which it has been said, it is okay for that intellectual property to not be protected.

Thus, how do you solve the jurisdictional puzzle, where will you be subject to liability? Well, unfortunately, it is pretty much wherever anyone can hold you liable.

And it's the same message I gave five years ago when I started my Internet work. And it is the same message that I used to deliver to my clients. Which is -- you have to know where your assets are, and if your assets are located in a place where they can hold you liable, they are going to. And that is what we have seen.

Whoever can assert jurisdiction will assert it.

Because everybody in every country in the world has one issue where he or she believes that their national law must triumph any international agreement. So it may be child pornography, it may be Nazi paraphernalia, it may be gambling, it may be violent video games, and it may be alcohol. But in every one of those instances, there will be a nation state that will assert jurisdiction because you have made available the material in their country, either for sale or to access.

For intellectual property and jurisdiction there are different regimes that could be set up to deal with this. You could set up a "free" system or as Andrew Sullivan advocated in an article in the New York Time Magazine earlier this year pro "Dot.Communistism." However, you will have a very hard time convincing content owners to accept this regime.

You can go with the "compulsory license" model, which is hard to internationalize without very large bureaucracies, and Thomas talked earlier today about the difficulty of dealing with European collecting societies.

Or, you can have an individual licensing model, which is in most instances, by far, the most difficult to implement. It is much easier to implement compulsory license models, but it allows for countries to, in many instances, enforce their own rules. The iCraveTV dispute was an issue MPAA was very involved in. Mark Davis has made the statement that iCrave was legal in Canada. That is an open question. No one has ever officially reached the decision as to whether he or she was legal in Canada. But for me, for my representation in the U.S. of MPAA members, it was a: "So what -- it wasn't my problem." All I knew is that there was U.S. access and U.S. contacts, both by U.S. users and by iCrave's owners.

There was another case that came out at the same time that has not been discussed at all - NovaTV. NovaTV is a Czech television station, which also started to stream Czech television over the Internet without permission. MPAA sent a "cease and desist" letter to them, and they stopped.

This slide shows what iCraveTV looked like. I always enjoy this slide, because this is the one where they took it down, because it says at the bottom there:

Sorry, access to station is not available at this time.

It is still not back up. There was no doubt it was a commercial operation. As you can see from the top, there was an ad, and Mark talked about, for a moment, about the ad information and the way that it was done with the web pages and video streaming, you had a legal framing question there. And I will tell you, from the MPAA's perspective, the framing and the advertisements running around it, was a question of copyright infringement. In addition there was a very important moral rights issue here. Again, the question was whether the MPAA members had an obligation to the ultimate creators to not disturb how the material looked.

This is NovaTV, the Czech streaming situation, and that is a screen shot of what they were presenting to people, but they took it down. They stopped after about a week when they realized that they were no longer going to receive content.

Yahoo! France, the case is Nazi paraphernalia; it was discussed quite a bit. It is also interesting to note that LICRA

not only went after the auctions that were available, but they also went after two GeoCities sites owned by Yahoo. , Whether Yahoo owned these GeoCities sites is another open question. These two GeoCities locations had links to the Yahoo! Auctions where the Nazi paraphernalia existed.

Unfortunately, from eBay's perspective, in the first instance, the way that Yahoo! came out and said: "Look, the First Amendment trumps." Well that left the French court with a fairly easy answer to that, which was, it was not their problem. And part of the problem that we have as American companies in many instances is to say, you know: "Well, we have a First Amendment here, so just live with it." Well, that's not an easy way to deal with the problem. Again, this goes back to the lesson that I tried to give, which is: "Wherever you have, wherever you have assets, you are going to be held liable." That is the reality. ." I also do not necessarily believe that Yahoo! would have been any better if they had said: "This is not accessible to

French viewers." and if they put that in their user agreement.

The DVD DECSS case is an important case. As you can see, there was a little picture in the right-hand corner of the 2600 web sight that said that MPAA wanted everyone to submit to the MPAA. This was not our goal, nor part of any theory. This case was not about going after every single user of the CSS DCSS software. Instead it was really a question about preventing commercial users and commercial models from coming along based upon the encryption hack. Under the Digital Millennium Copyright Act, the MPAA and its member companies had an obligation to protect the CSS system as an "effective technological protection." If they did not, there was enormous fear that you could no longer protect that material from going online and being distributed worldwide. And remember it was the Norwegian police that went after Johansen, mostly because he bragged.

This is a screen shot of the 2600 archives and how it was internationalized. I have highlighted a Polish site, an Australian site, a German site, and a Romanian site, each with the DECSS code. One of the questions that we had, both in 2600 and we've had, when I was

with the MPAA, with iCraveTV, was whether we could use Section 5.12J, Injunctive Relief against U.S. ISP's to block access to those sites. Very similar to the Yahoo France situation of going beyond your borders.

So what are the possible outcomes? Again, as Mark said, there could be a "zoned" Internet. One of the things that iCrave's founder had claimed was that he was able to get a patent to zone the Internet. Akamai has software called Edge Scape to limit international access vs. sites that promote anonymity such as the AT&T "Publicis" project or Freenet. You can go with strong technological and password protection. However, even as much as my friends at MPAA would like, it is very hard to eliminate private piracy. It is going to be almost impossible to eliminate Freenet. However, there is no economic incentive for people too necessarily trade on Freenet to the point where it harms MPAA's members. Ute's point about commercially significant really comes down to trying to eliminate business model that are based upon somebody else's unauthorized use of protected content.

Finally, you can move to an AOL flat rate subscription service.

I see Yahoo! this past week signed a webcasting license with the RIAA that is very similar, or you can play Whack-a-Mole. As you might know, I am the eastern Bethany Beach, Delaware regional Whack-a-Mole champion. Content owners are willing to do that. At eBay, it is our VeRO program where over a thousand different entities have signed up with us to work to eliminate infringing material on eBay. They are not just established large companies, but they are individuals that want to protect their rights, and we work with them to do that. Thank you very much.

PAUL GOLDSTEIN

Thank you, Tod. We are past or ten minutes past our closing time, you've been extraordinarily attentive, and our panel has been, I think, riveting, which may account for that. I need some guidance on whether to continue with questions. Is there a feeling, yes, one or two questions? I see one hand going up, so I think there's certainly one.

CATHERINE KESSEDJIAN

It's going to be a very short question for Mark Hayes. I was a little bit surprised about your interpretation

of the ABA report. I have it here and I read it as applying to contract litigation and not to tort litigation. So perhaps this is a clarification...

MARK HAYES:

I think the portion that I cited was in the general rules of jurisdiction.

CATHERINE KESSEDJIAN

Yes, but it's basically applying to contract, but if I'm mistaken on that, and it does apply to tort, then my second question is whether the foreseeability test that we have in-built into Article 10 (1b) in The Hague Draft would not actually be helped by the ABA attempt to carve out some jurisdiction. And I think, instead of perhaps looking at it through a contradiction concept, we should perhaps look at it as a complementary thing, and that was just my question.

MARK HAYES

I think as we've pointed out earlier, the foreseeability test means that you're going to be liable everywhere, I mean, as soon as you put up a Web site you can foresee that somebody is going to receive it. And I really think that the 10 (b), 10 (1b) has

got to come around to, as opposed to a foreseeability test, I think it should be more likely good faith *bona fide* attempt not to be putting content into that jurisdiction because if we leave it so that it is possible that everybody who is hacked by anybody and as a result their content is available in another jurisdiction, is then going to be liable in that jurisdiction, it makes it impossible to be able to choose the jurisdiction you're going to go into.

And it would seem to me to be reasonable, that if I, for example, want to obtain a license for Canada only, whether under a compulsory regime or under any kind of a regime from a copyright owner, I should be able to say I'm going to get a license for Canada, I'm only going to deal with Canadian users, and I'm going to make every effort I can to make sure that users from outside the country cannot get to it. If somebody is able to get to it, do I then open myself up to liability everywhere, even though I foresee that it's possible that some hacker could have gone around my methodologies for stopping it.

It seems to me that's an unreasonable way to operate, and I'm just speaking from a business point of view, it

just seems that that's an unreasonable standard to put onto it. But finally in the balance of that, and again, I don't think foreseeability works, but finally the balance of that, I think the test of good faith *bona fide* efforts is probably a good one.

PAUL GOLDSTEIN

Peter Harter.

PETER HARTER

It's a question that I'm going to try and pull together a few things, and this may lead to the next jurisconference. You think about all these lawsuits going to Europe to sue a 15-year old that probably didn't actually break the encryption scheme, but took credit for it, from what people tell me, and for the record, as far as I understand it, the family owned a legitimate DVD player and bought legitimate DVD disks, just in the wrong country, and due to the crazy scheme, that you can't buy a disk in France and play it in some other country on a device bought in that country, that goes to lack of foresight by the Motion Picture Association of DVD scheme.

But I think an interesting thing about free speech,

copyright, security and jurisdiction, is that an economist pointed this out in a recent article, that for years and years and years, professors were trying to teach cryptography, encryption security in class and post materials, and where the posting of encryption topics would, violate U.S. export controls, which have since not changed, or violate import control laws in France and some could download into France, was a big debate. And there's a lawsuit here in California in the Ninth Circuit, Bernstein, and that case talked about how computer code as a human expression we can argue whether object code or machine code is all protected under U.S. laws or what the Human Rights issues are with that worldwide, but the interesting thing is, Bernstein won, you can post encryption schemes to the Internet. But the DVD case is saying you can't post decryption schemes.

And that's a very odd result by American courts, and The Economist, the British publication said: "It's very Orwellian that we live in a world where you can post encryption schemes but because of the facts in another case we can't post decryption schemes." And going overseas where the laws are different, because they don't have the First Amendment, or the copyright

law is better, I think it's a pretty sad case for an economy in this country we depend upon exportation of intellectual property based products. And I think, there's some real hard thinking that has to be going on by the short-term technology at DVD if they don't work.

I mean, the problem with DVD is that the encryption scheme was created at a time when U.S. export control laws forbade more than 40 bits, and for those who know, 40 bits is a very weak encryption, so it was only a matter of time before it was cracked.

So I think, as lawyers in this forum, we really have to think about to advise our friends and colleagues on how to tie all these issues together in a better way, because to have two opposite results is really quite strange, and any comments from Paul, the panel, Tod, I took a few cheap shots at Tod's former employer, MPA, but anyway.

PAUL GOLDSTEIN

Thanks Peter. I don't know whether that was a comment or a question, but if there are some responses from the panel?

TOD COHEN

The reason there are zoned regions for DVD's is not simply to make life miserable for people who buy a DVD player in the United States and want to bring the DVD player to Europe. Regional coding is based upon the theory of "windows." Windows allow companies to fulfill their desire to localize content or to time it better attendance. For example for children's movies, you do not want to release a children's movie in June worldwide since in Australia children are still in school in June, their school holidays are in December.

So there has always been a reason why you do that. Plus, there is a lag time between the ability to dub a new movie into a foreign language versus the ability to only provide captions. Captions are much quicker, but dubbing is preferred in many countries, that takes another period of lag time

It is not merely that the movie companies desire to make life miserable for you, instead there is an

economic motive to exploit the film as much as possible and the added benefit of putting it locally translated dubbed film.

With regard to "software code as expression" in Judge Patel's decision in Bernstein versus Judge Kaplan's decision in the DVD, in the Eric Corley's case, I think both of them are very consistent with the First Amendment. Judge Kaplan was remarkably thoughtful. If there is any decision in the last year that I think really frames these debates very well; it's Judge Kaplan's decision in the DVD DECSS hack case. Judge Kaplan really wrestled very hard with Professor Turestky's statements to him about the First Amendment protection and the expression inherent in software code. There are one or two examples where I think that Judge Kaplan made it clear that expression is trumped over speech. For example, a political assassin is engaged in expressive conduct, but that doesn't necessarily mean that we could allow that to occur under free speech theory. Judge Kaplan's theory is, that there is a continuum and that with regard to decryption versus encryption, he said: "Congress made that decision." And, Congress made perfect sense to protect copyright in that instance.

It was not a question of whether an individual can use the DECSS to decrypt, but it was the question of whether you could distribute and create the decryptor itself.

I think that these issues will work themselves out. I think Judge Kaplan's decision is probably the most prescient and thoughtful about why copyright is protected and why I am certain that Judge Kaplan would have come out exactly the same way in Bernstein as the Ninth Circuit did. So I do not think there is any inconsistency between the two.

MARK HAYES

Paul, can I make a quick comment about DECSS. Just from somebody outside the country, the U.S. has imposed a technological measure circumvention law and the DMCA which may or may not be followed around the world. Certainly in Canada we're wrestling with the issue of how far to go in order to implement the WIPO, sorry W-I-P-O, for the W-I-P-O people here, copyright treaties, and it really is a difficult issue as to how far you're going to go in, essentially as Tod has described, permitting people to impose by technological measures things to preserve their business model, and whether that should be something that we should throw people in jail for.

And so, it's a difficult question from outside of the U.S. The U.S. has taken a policy decision which is clearly right based on the political situation here in the U.S. and the support of the copyright industries, whether that's something that's going to be fleshed out in the same way outside of the country in implementing the copyright treaties is a difficult issue. And then, you get into all the issues we've just talked about in terms of what happens when somebody in Canada or in England or in France does something to circumvent a technological measure, which is perfectly legal inside their country, and then post it on the Internet. Does that mean that they are then immediately committing a criminal act in the United States that they should be charged with? Or do we have some flexibility for being able to allow people to do things that are legal in their country that may impinge on the political decisions that are made in other countries in the way that they impose, in which they implement their treaty requirements, which may be imposing a higher standard that is required by the treaty?

UTE DECKER

If I may add something to this from the European perspective and from the music industry's perspective.

I think it is worth remembering that in 1996, the international community and WIPO agreed that technological protection measures need efficient protection. And it has been understood in Europe as well as in the United States, that this covers the prohibition of circumvention as well as the dissemination of devices, and the DCSS code functions as a circumvention device.

So I think that in recognition of this agreement of the international community one can hardly argue that this should be legal. I also think it should be remembered that this instance actually destroyed that version of the format effectively and caused huge financial harm.

So, as the judge in that case recognized, it's not really about the First Amendment, it's about whether technological measures are given a chance or not.

PAUL GOLDSTEIN

Thank you, I believe that Chairman Katoh has some closing remarks.

CONCLUDING REMARKS

MASANOBU KATOH

Thank you very much, Paul and the distinguished panel.

It was a very interesting panel of course, and I'd like to see more of the debate, but because of the time, we have concluded here.

Before we really conclude, let me thank again for all panelists, speakers and friends who came to the conference. This has been a great conference, we are very glad to have you here. We confirmed the importance of substantive law harmonization and consumer protection on the sectorial analysis and so on. As we all thought, this has been a very informative and again interesting discussion.

I liked the lively debate about The Hague Convention. And thank you very much for the people from The Hague, international and national governments, and again all the experts. On behalf of ILPF, I'd like to thank you all again. It'd be very nice if I can say some word to summarize or conclude the two days of proceedings, but because of the time and complicated nature of the issue, it may be very difficult.

I just remembered the experience I had about ten years ago, when I was in one very serious litigation. Actually it was the experience of my friend who was an expert witness in that litigation. He was very young but a very brilliant engineer, who was giving all technological explanations to the parties and the judges, and he was very persuasive and everybody was very much convinced, impressed by his words. At the very end of his speech, by the way he was working at that time, still not using PowerPoint, but with transparency or the, you know, OHP files, and at again the very end, he said: "Your Honour, I'm sorry, I lost my conclusion." He obviously lost his final file and he forgot what he was about to say. And, I probably shouldn't go on what was the result of the case, but please don't worry, don't worry, we are going to transcribe everything, all proceedings are here. You all will know the conclusion, or what the conclusion should be.

We'd like to continue to talk with you on all things. And again, in addition to the transcript, I urge everybody, if you have any additional materials for the conference, we are going to put everything on the Web site. And again, we are going to put all proceedings transcriptions on our Web site.

So, with those words, thank you very much again, and see you again.
