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What the Future Holds: Policy Choices in the Global E-Marketplace

Maureen A. O'Rourke*

This essay's title is a misnomer. No one knows "What the Future Holds" in the global marketplace. We can, however, make some educated guesses about the issues that will assume particular importance in the next year or so. Thus, the essay might be more accurately titled, "What May or May Not Be the Important Issues in Internet Commerce in the Next Year or So"—less catchy, admittedly, but closer to the truth.

I suspect that policymakers will spend much of their time focusing on three related questions: (i) access (in at least three different forms); (ii) how to encourage e-commerce generally and (iii) whether e-commerce in information products implicates concerns different from those arising in the sale of goods online. This essay reviews issues under each one of these categories. The goal is primarily to identify the debates rather than to suggest solutions. E-commerce raises complex issues not amenable to simple solutions in an essay and, indeed, that will require careful study over time.

I. QUESTIONS OF ACCESS

E-commerce raises questions of access in a number of different forms. First, e-tailers generally would like to offer their products to the largest number of potential purchasers possible. If many consumers do not have access to the technology that allows them to connect to the Internet in an effective way, the market will be

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smaller than it otherwise would be, and therefore, less desirable to sellers and buyers alike. Moreover, consumers without access to the Internet will miss not merely online shopping opportunities, but also access to the mass of sometimes edifying information available on the Web.

This problem has at least two related facets: who will have access to technology and what specific *means* of access may they legitimately employ? Policymakers have labeled the former problem of unequal access to technology the "Digital Divide."¹ Indeed, this issue has been with us for so many years that the term "Digital Divide" has grown in the collective consciousness to a point where it is almost passé. Nevertheless, unequal access to Internet technology will remain a concern in the near future and inequalities may grow for some time rather than shrink. Even if policymakers could solve the problem of unequal opportunity to access the Internet, what technology would the formerly disenfranchised or even the Internet-savvy use? As technology marches on, the question of who will have access to the better technology, like broadband, arises.

While almost everyone is familiar with at least some of the issues the "Digital Divide" raises, fewer may know about an access debate currently raging in the United States. That debate focuses on who may link to a Website and how they may do so. In recent months, certain popular sites have begun to employ an ancient tort, trespass to chattels, in an attempt to regulate access to their sites. Depending on how courts finally resolve such claims, the use of trespass to chattels to regulate access to sites could hamper the emergence of the Internet as a market that approaches perfect competition and promises significant benefits for consumers.

The following discussion addresses problems of access. It discusses some parts of the debate over the "Digital Divide" and access to broadband technologies. It then reviews some of the caselaw on access to Websites and proposes an approach to resolving such questions.

1. Report of the Digital Opportunity Task Force, Digital Opportunities for All: Meeting the Challenge, at 3 (May 11, 2001), available at <http://www.glocom.ac.jp/dotforce/final/DOTForceReportv50g.pdf>.

A. *Problems of Access Generally—The Digital Divide*

Commentators have thoroughly documented the “Digital Divide” both domestically and outside of the United States.² Within the United States, there are dramatic disparities in access to technology across income levels.³ Geography makes a difference as well: rural Americans are less likely to have access to technology than their urban counterparts.⁴ Indeed, less than five percent of towns with populations under 10,000 have access to broadband technology.⁵ Poor, rural Americans are twenty times more likely to be left behind in matters of technology than their fellow citizens.⁶ Minorities and the disabled are less likely to own computers.⁷ These disparities persist despite efforts by the public and private sectors to narrow the gap.⁸

In May 2001, the Digital Opportunity Task Force (DOT Force) released its proposals for bridging the global gap. The G8 heads of state had created the DOT Force at the Kyushu-Okinawa summit in July 2000 “in a cooperative effort to identify ways in which the digital revolution can benefit all the world’s people, especially the

2. See U.S. Dept. of Com., *Leadership for the New Millennium—Delivering on Digital Progress and Prosperity*, 3d Annual Report, 3-19 (2000) [hereinafter *Delivering on Digital Progress*] (discussing the Clinton Administration’s initiatives in providing direct government assistance to the technologically disadvantaged, and in encouraging the private sector to do the same).

3. See Henry H. Perritt, Jr., *Economic and Other Barriers to Electronic Commerce*, 21 U. Pa. J. Int’l Econ. L. 563 (2000); Bob Rowe, *Strategies to Promote Advanced Telecommunications Capabilities*, 52 Fed. Comm. L.J. 381 (2000).

4. See Rowe, *supra* note 3, at 386; see also J.M. Spectar, *Bridging the Global Digital Divide: Frameworks for Access and the World Wide Wireless Web*, 26 N.C.J. Int’l L. & Com. Reg. 57 (2000) (discussing the need to institute policies designed to ease barriers to Internet usage among persons living in rural communities).

5. Molly M. Peterson, *Broadband Battle Over Small-Town U.S.A.*, Nat’l J., June 16, 2001, available at 2001 WL 7182298.

6. *Gephardt Statement on the Democratic E-Strategy for Economic Growth* (2/6), U.S. Newswire, Apr. 5, 2001, available at 2001 WL 4141881, at *3.

7. See Margaret Chon, *Erasing Race? A Critical Race Feminist View of Internet Identity-Shifting*, 3 J. Gender Race & Just. 439 (2000); Jerry Kang, *Cyber-Race*, 113 Harv. L. Rev. 1130 (2000).

8. See generally William E. Kennard, *Equality in the Information Age*, 51 Fed. Comm. L.J. 553 (1999) (discussing the disparity in obtaining Internet access based on race and income, and the public and private sectors’ efforts to bridge the gap); Mark J. Maier, *Affordable Internet Access for All Americans*, 6 Rich. J.L. & Tech. 8 (1999) (discussing how government incentives can be used to encourage affordable pricing).

poorest and most marginalized groups.”⁹ According to the DOT Force Report:

One third of the world population has never made a telephone call. Seventy percent of the world’s poor live in rural and remote areas, where access to information and communications technologies [ICT], even to a telephone, is often scarce. Most of the information exchanged over global networks such as the Internet is in English, the language of less than ten percent of the world’s population.¹⁰

Those statistics, while grim, are not surprising. As the Report recognizes, they reflect the general socio-economic disparity between the developed and less-developed world.¹¹

The DOT Force Report sets forth nine action points as its Genoa Plan of Action.¹² They are:

1. Help Establish and Support Developing Country & Emerging National e-Strategies;
2. Improve Connectivity, Increase Access and Lower Costs;
3. Enhance Human Capacity Development, Knowledge Creation and Sharing;
4. Foster Enterprise and Entrepreneurship for Sustainable Economic Development;
5. Establish and Support Universal Participation in Addressing New International Policy and Technical Issues raised by the Internet and ICT;
6. Establish and Support Dedicated Initiatives for the ICT Inclusion of the Least Developed Countries;
7. Promote ICT for Health Care and in Support Against HIV/AIDS and Other Infectious and Communicable Diseases;
8. National and International Effort to Support Local Content and Applications Creation;

9. Digital Opportunity Task Force, *supra* note 1, at 3.

10. *Id.* at 6.

11. *See id.*

[The] “digital divide” is, in effect, a reflection of existing broader socio-economic inequalities and can be characterized by insufficient infrastructure, high cost of access, inappropriate or weak policy regimes, inefficiencies in the provision of telecommunication networks and services, lack of locally created content, and uneven ability to derive economic and social benefits from information-intensive activities.

Id.

12. Genoa was the site of the G8 meetings from July 19-22, 2001.

9. Prioritize ICT in G8 and Other Development Assistance Policies and Programmes and Enhance Coordination of Multilateral Initiatives.¹³

The DOT Force places responsibility for implementing its plan with developing countries' governments working alongside corporations and non-governmental organizations.¹⁴ It plans to play an advisory role in assisting these entities in taking the relevant steps toward bridging the "Digital Divide."¹⁵

Reducing a problem as complex as the global "Digital Divide" to a nine-step plan of action is indeed a noteworthy accomplishment. However, skeptics might question whether—even if the DOT Force plan would work—the money and will exists to implement it. Translating the plan from political platitudes into action requires money, and the Report says little about from what sources and in what magnitude that money will come. Further, the Report makes certain assumptions about the desirability of competitive markets that some nations do not share.¹⁶ Developing countries may not be interested in the Genoa Plan if they view it as simply another way in which the developed world seeks to foist its policy agenda on less-developed countries. Indeed, the most difficult part of implementing any global plan may be determining how to accommodate local cultural values that can vary widely, even within a single country.

B. *Access to Broadband Technologies*

Decisions of policymakers will also influence what technology citizens have access to, and under what terms. Technology marches on, but only about five percent of American households have access to broadband.¹⁷ One definition describes broadband as

13. See Digital Opportunity Task Force, *supra* note 1, at 13-20.

14. See *id.* at 10.

15. See *id.* ("[T]he DOT Force can . . . play a critical and significant role by suggesting, initiating and/or supporting these actions.")

16. See *id.* at 8 (stating that "pro-competitive policies" are prerequisites to the development of communications infrastructure and access, which are required to reduce the digital divide).

17. *The Internet Freedom and Broadband Deployment Act of Law: Hearing on H.R. 1542 Before the House Comm. on the Judiciary*, 107th Cong. (2001), available at 2001 WL 21755660, at *3 (statement by James K. Glassman, Resident Fellow, American Enterprises Inst., House Comm. on the Judiciary) ("Today, barely 5 percent of households have even the most rudimentary form of broadband—or fast

“high-speed telecommunications capability” that “requires both a high capacity backbone with adequate access points, and local distribution from those points of access to the users.”¹⁸ Generally providers have offered three technologies to provide this service: (i) DSL (Digital or Direct Subscriber Line); (ii) cable modem access and (iii) wireless access. Although each technology can provide broadband access, the law regulates them under different regimes.

For example, a common carrier/open access regulatory model governs DSL. This technology uses the telephone system; and principles of open access bind the Regional Bell Operating Companies (RBOCs).¹⁹ In contrast, no such open access model applies to cable companies. Instead, such companies are largely unregulated. Some providers of cable modem service offer Internet access only through an affiliated Internet Service Provider (ISP). This has led to calls for principles of open access to govern cable firms as well.²⁰ However, the question of how to regulate cable companies (if at all) is complex.

It is unclear under what statutory category cable modem services fall, or which agency has the regulatory authority to govern such services. Indeed, two courts have reached opposite conclusions about whether or not Internet transmission across cable lines constitutes a “cable service.”²¹ In 2000, the Federal Communications Commission (FCC) issued a Notice of Inquiry requesting com-

access to the Internet. As a result, the promise of the Internet is not being enjoyed by 95 percent of Americans—an increasingly frustrated group. Incredibly, in the first quarter of this year, for the first time ever, the number of Americans with Internet access of any sort actually declined. As Francis Rose wrote recently in *Wired* magazine . . . ‘The digital future has arrived, but the analog past won’t let go. Data flashes across the country at the speed of light only to end up dribbling out of your wall in the tech version of Chinese water torture.’”

18. Delivering on Digital Progress, *supra* note 2, at 59.

19. See Julian Epstein, *A Lite Touch on Broadband: Achieving the Optimal Regulatory Efficiency in the Internet Broadband Market*, 38 *Harv. J. on Legis.* 37 (2001) (discussing the RBOCs’ argument for open access to cable systems for ISPs, in the context of the RBOCs’ obligation to allow open access to their own networks under the Telecommunications Act of 1996).

20. See Douglas G. Lichtman et. al., *Telecommunications Law and Policy* (2001).

21. *Compare AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000) (holding that Internet transmission over cable is a telecommunication service, not a cable service, within the meaning of the Communications Act and that that Act prohibits local governments from imposing open access requirements), *with MediaOne v. County of Henrico*, 97 F. Supp. 2d 712 (E.D. Va. 2000) (labeling such Internet transmission a “cable service” and holding that local regulation is preempted).

ments on whether it should treat cable modem service as a cable service, a telecommunications service, an information service, or some hybrid subject to a number of the Communication Act's provisions.²² Regardless of what statutory basket governs cable modem service, the case for open access is itself uncertain.

The FCC initially chose to pursue a hands-off policy towards cable modem service.²³ Then FCC Chairman William Kennard described the FCC's stance as "first, do no harm. Call it a high-tech Hippocratic Oath."²⁴ This policy stance reflected a fear that imposing regulations before the broadband market developed would deter that market's growth, in part because the investment required to establish such systems is quite large.²⁵ Thus, the FCC imposed no open access requirement in the mergers of AT&T and TCI or AT&T and MediaOne.²⁶ In the latter case, the FCC believed that it should not disturb the deployment of alternative technology as it was occurring.²⁷ Moreover, the company had committed itself to negotiating non-exclusive licenses with unaffiliated ISPs when its exclusive arrangements with affiliated ISPs expired.²⁸

Open access itself is difficult to define. In its Notice of Inquiry, the FCC noted that "[m]ost open access proposals entail two broad requirements, providing unaffiliated ISPs with the right to (i) purchase transmission capacity; and (ii) access the customer directly from the incumbent cable operator."²⁹ The most obvious potential benefit of open access is that it may help to prevent both

22. See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Notice of Inquiry, GN Docket No. 00-185, FCC 00-355 (Sept. 28, 2000), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-00-355A1.pdf; see also Chairman William E. Kennard, Statement Concerning Notice of Inquiry Into High-Speed Internet Service (Sept. 28, 2000), available at <http://ftp.fcc.gov/Speeches/Kennard/Statements/2000/stwek077.html>.

23. See Notice of Inquiry, *supra* note 22, at para. 4.

24. Lichtman, *supra* note 20, at 26 (quoting Chairman William E. Kennard, The Road Not Taken: Building a Broadband Future for America, Remarks Before the National Cable Television Association, Chicago, Ill. (June 15, 1999)).

25. See *id.*

26. See *id.* at 35 (citing paragraph 12 of the Notice of Inquiry). In contrast, the FTC conditioned approval of the AOL-Time Warner merger on the combined company's agreement to provide open access to ISPs. See Daniel L. Rubinfeld & Hal J. Singer, *Open Access to Broadband Networks: A Case Study of the AOL/Time Warner Merger*, 16 Berkeley Tech. L.J. 631 (2001).

27. Lichtman, *supra* note 20, at 35.

28. See Notice of Inquiry, *supra* note 22, at para. 12.

29. *Id.* at 38 (quoting paragraph 27 of the Notice).

discrimination against an unaffiliated ISP's content by the dominant service provider and a monopoly that might decrease innovation.³⁰ On the other hand, despite some exclusive arrangements, it is not clear that cable modem service providers will gravitate toward a model that restricts consumer choice of ISPs. In other words, the market may function quite well. If there is value in offering consumers a choice of ISPs, cable companies will do so in order to command a higher price for their Internet connections. Moreover, open access may actually decrease incentives to innovate by decreasing the returns that accrue to the cable company. By involving a larger number of parties in developing the infrastructure, open access may enhance the chances that the industry will standardize on the best technology. On the other hand, open access may slow the development process because the involvement of many decisionmakers can lead to delays.

Finally, wireless technology raises the question of how policymakers should allocate spectrum.³¹ The FCC assigned parts of the spectrum in the 1960s, giving large chunks to government (especially the Department of Defense) and educational institutions.³² Reallocating those assignments will lead to political battles among competing interest groups.

The World Radiocommunication Conference of 2000 endorsed efforts to "harmonize spectrum allocations regionally and internationally."³³ A staff-level report from the FCC and Department of Commerce concluded, however, that serious obstacles would hamper the United States from clearing bands that the Conference highlighted as suitable for third generation (3G) uses.³⁴ Educa-

30. *Id.* at 48.

31. See *Delivering on Digital Progress*, *supra* note 2, at 62-63 (noting the U.S. government's endorsement of the principles adopted by the World Radiocommunication Conference of 2000: "(1) governments may choose spectrum from any one or all of the bands identified for third generation mobile wireless (3G); (2) governments have the flexibility to identify spectrum if and when they choose; and (3) no specific technology will be identified for third generation services," and noting its call for support of industry efforts to harmonize spectrum allocations regionally and internationally); see also Anthony Shadid, *Fight Puts Airwaves at Risk*, *Boston Globe*, Feb. 10, 2001, at A1.

32. Shadid, *supra* note 31, at A1.

33. *Delivering on Digital Progress*, *supra* note 2, at 63.

34. See Aaron Pressman, *White House Undercuts Spectrum Reports*, *The Industry Standard*, Mar. 30, 2001, available at www.thestandard.com/article/0,1902,23258,00.html.

tional institutions and others already use many of these bands, raising political, technical and economic questions about the feasibility of re-allocating or sharing that spectrum.³⁵ However, the Bush administration is reportedly seeking to distance itself from these conclusions, thus raising questions about what its wireless strategy will be.³⁶

The debate over how to regulate broadband technology will likely continue as Congress considers the "Internet Freedom and Broadband Deployment Act of 2001."³⁷ This Act, developed in response to congressional concerns about impediments to consumer access to broadband technology, aims to deregulate the broadband services industry and promote the availability of choices for private users of the technology.³⁸

C. Access to Publicly Available Websites

Two recent cases raise the question whether a Website can prevent another from linking to it by automated means, copying its information and extracting uncopyrighted product and pricing information.³⁹ In *Ticketmaster Corp. v. Tickets.com, Inc.*,⁴⁰ the Federal District Court for the Central District of California initially dismissed Ticketmaster's state law claim that unwanted linking constituted a trespass to its Website, holding that the claim was preempted by the federal Copyright Act.⁴¹ The court noted: "it is

35. *See id.*

36. *See id.* (reporting Commerce Secretary Don Evans's meeting with major wireless carriers at which he dismissed the conclusions of the report).

37. H.R. 1542, 107th Cong. § 1 (2001).

38. *See id.* at § 2.

39. *See also Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238 (S.D.N.Y. 2000) (adopting *eBay's* trespass theory and also upholding a contract where assent to its terms was indicated by submitting a query).

40. 54 U.S.P.Q. 2d 1344, 1345 (C.D. Cal. 2000) (No. 99-7654-HLH (BQRx)).

41. Ticketmaster asserted a variety of causes of action against Tickets.com for searching the Ticketmaster site, taking its information, providing that information to Tickets.com's visitors, and allowing such visitors to deep-link to the Ticketmaster site. *See* First Amended Complaint for Injunctive Relief and Damages, *Ticketmaster Corp. v. Tickets.com, Inc.*, No. 99-7654 HLH (BQRx) (C.D. Cal. 2000). The district court refused to dismiss the complaint. *See* *Ticketmaster Corp. v. Tickets.com Inc.*, 54 U.S.P.Q. 2d 1344, 1345 (C.D. Cal. Mar. 27, 2000). Thereafter, Ticketmaster filed an amended complaint. *See* Second Amended Complaint for Injunctive Relief and Damages, *Ticketmaster Corp. v. Tickets.com, Inc.*, No. 99-7654 HLH (BQRx) (C.D. Cal. 2000). The district court refused to grant a preliminary injunction against Tickets.com based on this amended complaint. *See* *Ticketmaster Corp. v. Tickets.com, Inc.*, 2000 U.S. Dist. LEXIS 12987. The Ninth

hard to see how entering a publicly available website could be called a trespass, since all are invited to enter.⁴² Ticketmaster amended its complaint to reword its claim as trespass to the computer system rather than to the Website. The court rejected this claim as well, noting that Ticketmaster had not shown the functioning of its computer systems to be obstructed.⁴³

In contrast, in *eBay, Inc. v. Bidder's Edge, Inc.*,⁴⁴ another federal district court in California held that a linker's conduct could constitute a trespass to chattels because of the prospect of future harm that could occur if many linkers chose to visit the site at the same time.⁴⁵ The *eBay* court also held that any access (including that of an individual linking to a site) necessarily imposes a burden on the visited site's system, justifying application of trespass law.⁴⁶

Interestingly, the *eBay* court effectively formulated a new tort, despite grounding its holding on trespass to chattels. Earlier courts had held that electronic signals are tangible enough to constitute an invasion sufficient to sustain an action for trespass.⁴⁷ However, no court had applied a strict liability standard to such an invasion. Trespass to real property law requires that the plaintiff show actual harm when the intrusion is intangible.⁴⁸ Alternatively, some courts have held that the appropriate cause of action

Circuit upheld this denial without opinion. See *Ticketmaster Corp. v. Tickets.com, Inc.*, 2001 WL 51509 (9th Cir. 2001).

42. *Ticketmaster*, 54 U.S.P.Q. 2d at 1345.

43. See *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV99-7654, 2000 U.S. Dist. LEXIS 12987, at *17 (C.D. Cal. Aug. 10, 2000) (unpublished minute order).

44. 100 F. Supp. 2d 1058 (N.D. Cal. 2000).

45. *Id.* at 1069; see also First Amended Complaint, *eBay, Inc. v. Bidder's Edge, Inc.*, No. C-99 21200 (N.D. Cal. 2000) (alleging that Bidder's Edge's conduct in using an automated tool to search the eBay site, copy its information, and extract product and pricing data should afford eBay a remedy under a variety of causes of action). The district court entered a preliminary injunction against Bidder's Edge under a trespass to chattels theory. See *eBay*, 100 F. Supp. 2d at 1069. The parties later settled the suit. See *eBay, Bidder's Edge Settle Suits on Web Access*, L.A. Times, Mar. 2, 2001, at C2. Bidder's Edge has ceased operation. See *A Message to Our Users*, at <http://www.biddersedge.com> (explaining that Bidder's Edge would cease operation on Feb. 21, 2001, because of "market and financial conditions") (last visited Feb. 19, 2001).

46. See *eBay*, 100 F. Supp. 2d at 1071-72.

47. See, e.g., *Thrifty-Tel, Inc. v. Bezenek*, 54 Cal. Rptr. 2d 468 (Cal. Ct. App. 1996) (holding electronic signals used to gain unauthorized access to a computer to be tangible enough to support a trespass claim).

48. See, e.g., *Zaslow v. Kronert*, 176 P.2d 1, 7 (Cal. 1946).

for an intangible intrusion is nuisance rather than trespass.⁴⁹ Nuisance law weighs the costs and benefits of the particular activity when deciding whether or not to hold the invader liable.⁵⁰ Trespass to chattels, in contrast to trespass to real property, has always required the plaintiff to plead and prove actual harm, not possible future harm.⁵¹ The *eBay* court, by holding the defendant liable for a harmless intangible intrusion, thus invented a new cause of action:

Developing such a new tort warranted a much more detailed policy analysis than that in which the court engaged. For example, the court's economic analysis did not consider competitive concerns such as the benefit to consumers of easily available product and pricing information. Nor did it discuss how its rule fits with copyright law's refusal to protect such information or the First Amendment's protection of commercial speech. The court also did not consider the nature of the Web. No one posts an Internet site without expecting—indeed, inviting—some measure of linking from other sources. Whether a site should be able to control who links to it and how they do so is not a question amenable to a simple answer like the strict liability regime the *eBay* court adopted.

Elsewhere, I have suggested different approaches that policy-makers could take to address unwanted linking.⁵² Courts could follow traditional trespass and nuisance law, adopting a nuisance balancing test to address the intangible invasion that occurs when a link is employed. Because balancing tests always create uncertainty, a statutory "safe harbor," defining permitted and forbidden means of linking and the acceptable burden a linker may place on a server, could be created. A linker, though, should still have an opportunity to challenge the safe harbor when the plaintiff's site has engaged in misconduct. A database bill similar to one already

49. See, e.g., *San Diego Gas & Electric Co. v. Superior Court*, 920 P.2d 669 (Cal. 1996).

50. See Restatement (Second) of Torts § 831 (1965).

51. See Restatement (Second) of Torts § 218 (1965).

52. See Maureen A. O'Rourke, *Property Rights and Competition on the Internet: In Search of an Appropriate Analogy*, 16 Berkeley Tech. L.J. 561 (2001) (discussing how competition policy and antitrust law can aid policymakers in deciding how to define property rights on the Internet) [hereinafter O'Rourke, *Property Rights*]; Maureen A. O'Rourke, *Shaping Competition on the Internet: Who Owns Product and Pricing Information?*, 53 Vand. L. Rev. 1965 (2000) (reviewing the competitive environment on the Internet and the causes of action in the *eBay* case) [hereinafter O'Rourke, *Shaping Competition*].

proposed could be easily modified to adopt such an approach, providing the linker with defenses like misuse to help inform what permissible access and means of access may be.⁵³

II. ENCOURAGING E-COMMERCE

Even if all consumers could have effective access to Internet technology and efficient access to Websites, e-commerce may not reach its potential. Both consumers and online retailers have concerns that may lead them to limit their online activities. The following briefly summarizes some of those issues.

If consumers cannot trust e-tailers, they will not shop online. Indeed, Forrester Research estimates that consumer spending online would have been \$12.4 billion higher in 1999 if consumers had not been worried about the privacy of their information.⁵⁴ Those concerns are exacerbated by uncertainty over the treatment of customer information in the event of bankruptcy proceedings. In May 2000, Toysmart, an e-tailer of children's toys, went bankrupt and sought to sell customer information that it collected under a privacy policy promising that such information would never be sold.⁵⁵ Although the case was resolved with the purchase and destruction of the list by Toysmart's major investor, its practical impact may be that privacy policies will now explicitly provide for the sale of customer information. Amazon and eBay adjusted their privacy policies in the aftermath of the Toysmart case. Those policies now provide for the transfer of customer information to third parties in certain circumstances.⁵⁶

53. See O'Rourke, *Property Rights*, *supra* note 52; O'Rourke *Shaping Competition*, *supra* note 52; see also Dan L. Burk, *The Trouble With Trespass*, 4 J. Small & Emerging Bus. L. 27 (2000) (arguing for the adoption of a nuisance standard to address unwanted access to websites).

54. See Anthony Shadid, *Crackdown Seen on Customer Databases*, Boston Globe, Jan. 8, 2001, at C1.

55. See Andrew B. Buxbaum & Louis A. Curcio, Note, *When You Can't Sell to Your Customers, Try Selling Your Customers (But Not Under the Bankruptcy Code)*, 8 Am. Bankr. Inst. L. Rev. 395 (2000) (arguing that the Bankruptcy Code should be interpreted to prohibit the sale of customer information gathered by a bankrupt Website when the site promises not to transfer the information to a third party).

56. See Tamara Loomis, *Amazon Revamps its Policy on Sharing Data*, N.Y.L.J., Sept. 21, 2000, at 5 (describing Amazon's change of policy from one promising not to share information except potentially to other "trustworthy third parties" to one that lists circumstances in which Amazon shares information,

E-tailers also face difficulties in deciding with whom to do business. While the Internet opens markets, it also potentially subjects the e-tailer to a range of unknown laws. For example, many countries consider their consumer protection laws to be mandatory. The content of those laws varies by country. The open question is whether e-tailers, particularly small businesses, can afford to educate themselves on all of the relevant law or assume the risk of ignorance. Another example is, of course, the controversy surrounding a French judge's order to Yahoo! to block Internet users in France from accessing United States based sites that sell Nazi memorabilia.⁵⁷

Technology may provide a partial solution to some of both consumers' and e-tailers' concerns. Technology like the Platform for Privacy Preferences creates a standard for software that can give Web surfers more information on Websites' privacy policies as well as more control over what personal information the viewer trans-

including if Amazon sells all or substantially all of its assets). eBay has also changed its policy to allow for the limited transfer of its customer information:

We have . . . made a policy change to comply with an evolving industry standard in light of the Federal Trade Commission's action with the Toysmart website. Since that decision, many popular websites have modified their privacy policies to state that user information is an asset, and as such, they could sell, transfer, or rent that information to any third party. One of the most troubling aspects of such a policy is that it does not clarify how a third party could use your information. Our new policy describes the few rare instances in which we would transfer your information to a third party and the limited circumstances in which your information could be used.

eBay Frequently Asked Questions about the Privacy Policy Revision, at <http://pages.ebay.com/help/basics/pprevision1-faq.html> (last visited Jan. 14, 2002). eBay now also discloses what could happen to its customer information in the event eBay is acquired or merged with another company:

It is possible that eBay, its subsidiaries, its joint ventures, or any combination of such, could merge with or be acquired by another business entity. Should such a combination occur, you should expect that eBay would share some or all of your information in order to continue to provide the service. You will receive notice of such event . . . and we will require that the new combined entity follow the practices disclosed in this Privacy Policy.

eBay Privacy Policy, at <http://pages.ebay.com/help/community/png-priv.html> (last visited Jan. 15, 2002).

57. See Mylene Mangalindan & Kevin Delaney, *Yahoo! Ordered To Bar the French From Nazi Items*, Wall St. J., Nov. 21, 2000, available at 2000 WL-WSJ 26617563.

mits to a site.⁵⁸ Other technology permits firms to maintain geographical boundaries even on the Internet.⁵⁹ For example, Universal Music Group uses software to detect its customers' locations to determine whether it can offer a particular customer the option of a digital download consistent with the copyright law of the customer's jurisdiction.⁶⁰

Another solution is global harmonization of the law. The ongoing controversy between European and American conceptions of privacy demonstrates, however, that this approach may not be practically workable. Perhaps the best approach would be to seek harmonization on rules governing conflict of laws. Then jurisdictions would still be able to enforce local values, while consumers and e-tailers alike would know what law governs their transactions.

III. E-COMMERCE IN INFORMATION PRODUCTS

The latter half of the twentieth century saw a move toward increasing intellectual property protection for information. In the United States, Congress enacted laws like the Digital Millennium Copyright Act⁶¹ and the Anti-Cybersquatting Consumer Protection Act.⁶² Courts extended patent protection to business methods,⁶³ made expansive use of trademark dilution doctrine,⁶⁴ and some have used trespass effectively as a new form of intellectual prop-

58. See *W3C Platform for Privacy Preferences Initiative: An Introduction to P3P*, at <http://www.w3.org/P3P/introduction.html> (last visited June 23, 2001) (describing how the tools following the P3P standard work and how they take action based on the user's privacy preferences).

59. See Lisa Guernsey, *Welcome to the World Wide Web. Passport, Please?*, N.Y. Times Online, Mar. 15, 2001, at <http://www.nytimes.com/2001/03/15/technology/15BORD.html> (discussing technology that allows a vendor to determine where a customer is located physically and citing Michael Geist, an Internet law expert, as stating, "We are now seeing geographical zoning online that mirrors geographical zoning offline"); see also Bob Tedeschi, *E-Commerce; Borderless is Out; Advertisers Now Want to Know if a Customer Lives in Cairo, Egypt or Cairo, Ill.*, N.Y. Times, Apr. 2, 2001, at C10 (discussing different firms and their technology).

60. See Tedeschi, *supra* note 59.

61. 17 U.S.C. § 1201 (Supp. IV 1998).

62. 15 U.S.C. § 1125(d) (Supp. V 1999).

63. See, e.g., *State St. Bank & Trust Co. v. Signature Fin. Group, Inc.*, 149 F.3d 1368 (Fed. Cir. 1998) (holding computerized accounting system patentable subject matter).

64. See Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 Yale L.J. 1687, 1698 (1999) (reviewing court decisions in cybersquatting cases).

erty protection.⁶⁵ At the same time, information providers are increasingly using click-wrap contracts and technological protection devices to govern access to and use of information. The question is whether intellectual property law, in conjunction with contract and technology, will endow information providers with perfect control over their information to the detriment of the public. Such perfect control could effectively eliminate copyright fair use, adversely affect competition by making it difficult for second generation creators to access raw material and redistribute wealth without society's receiving the corresponding increase in creativity and innovation that the intellectual property laws were designed to foster.

It is a bit too early to conclude that employing techniques of perfect control is a viable business strategy. It is not too early, however, to think critically about how to safeguard the balance between creators of works and the public in a digital world. For example, policymakers might consider whether approaches other than traditional fair use can achieve that doctrine's goals. In the patent area, they might consider reforming the internal workings of the Patent & Trademark Office and the patent re-examination doctrine to help ensure that patents issue only on inventions meeting statutory standards.

Throughout the history of intellectual property protection, society has gone through alternating cycles of over and underprotection of creative works. We may now be in a time of overprotection. Certainly, technological advances and the online environment have created a new milieu that merits, at a minimum, an analysis of whether the law has struck the appropriate equilibrium. It is time to rethink the wave of recent legislation and court decisions, to formulate a sensible test for preemption of contractual terms, and to consider alternative approaches that can safeguard the goals of the intellectual property system.

CONCLUSION

E-commerce has already become a significant force in the world economy. Policymakers, however, must face a range of issues that will affect the nature and growth of e-commerce over the coming years. Among these issues are access, how to promote poli-

65. See *supra* Part II.

cies that encourage e-commerce appropriately and how to address e-commerce in information products. Certainly, as the United States and other countries address these problems, they should find guidance not only in their own experience, but also by comparing approaches to select that which most appropriately advances the relevant policy goals.