

Introduction

Internet regulation has become one of the hottest and arguably most important areas of law today. It is the place where the wave of Internet revolution crashes up against the complete system of governance itself. We are still at a very early stage in governing the internet- a frontier area— where there is little concrete guidance and, unfortunately, more questions than answers. In and around the year 2000, e-commerce, the internet, the legal system and governments began to have their first set of skirmishes and terms like “napster”, “metatags”, “browser integration”, and “cyber squatting” entered the legal lexicon.

This assignment gives an overview of some of the most interesting issues and themes in regulating the net and shows how developments on the internet are pushing the traditional legal and governance concepts and raising difficult issues for legislators, lawyers and judges trying to adapt existing law to these new ways of doing business. This assignment will not be looking at a particular country or Government but Governments and countries in general. There are two methods of bringing in new laws or regulations in most countries and its governance begins thereafter. Most laws are either by precedence of a judgement or through legislation by the government. Both these professions face both opportunities and responsibilities in connection with the changes that have and will come. After introducing e-commerce and the Internet, this assignment will go through some general themes about e-commerce and Internet law and legislation, focus on some significant legal concerns and then attempt to draw a few conclusions from where we now stand at this early stage of governing the Internet.

Reasons for growth of Internet

It is certain that the growth of the Internet has been a boon for most, but many of us credit its success and rapid growth to the lack of its governance and regulation. Had there been government interference in its functioning and spread, it would have taken generations to come this far. Therefore, should the government now step in, regulate the net, and choke its further possible growth or should it step back, like all this while and watch its own controls, borders, boundaries etc disappear slowly.

Challenges for Governments

Today almost all governments, without exception are facing many challenges due to the Internet. Many do not have laws that deal with cyberspace, e-commerce etc, while others have problems with the jurisdiction of the laws they have enacted as the crime may have been committed in one country with the perpetrator sitting in another.

In addition, the Internet tends to reroute around problems. The Internet has shown some tendency to treat legal roadblocks as problems to be routed around. For example, as the nature of the legal objections to napster's involvement in music distribution over the internet became clear, new technologies such as Gnutella and the like were developed that specifically used new technological approaches to produce arguably similar results while avoiding the specific legal issues raised with respect to napster ¹.

1. Lee and Learmonth, "Spawn of Napster", The Industry Standard (May 8, 2000) <http://www.thestandard.com/article/display/0,1151,14543,00.html>

We are on the verge of moving from a traditional industrial society to an information society. This information society is sometimes referred to as a knowledge-based society. Nicholas Negroponte has captured the essence of this transition in his description of it as the movement from atoms to bits. ² in

other words, we are moving from a world where the focus is on tangible “things” (i.e., atoms) to a world where the focus is on information, which is carried through intangible electronic impulses (i.e., bits). The question governments face is both simple and profound: how do bricks and mortars laws apply in a digital era? Alternatively, perhaps a better question, can bricks and mortars laws apply in a digital era?

2. Negroponte, *Being Digital* (Knopf 1995)

Key dilemmas Governments face

The problems that most Governments and courts face on a day -to-day basis range from e-commerce related crimes and frauds, cyber-squatting, copyrights, privacy to aiding, encouraging and abetment of crimes, pornography etc.

E-commerce

There have been a vast number of legal issues raised by e-commerce, even in its relatively short history. New ways of doing business have been created because of e-commerce lately. Outsourcing, partnerships (strategic, alliance etc), co-venturing, exchanges etc have become popular buzzwords in this new business world. Transactions take place in stocks and shares. Contracts have become more complex as the parties may be in two separate countries while the arbitration body in case of disputes in a third country.

Bill Gates and others have talked about e-commerce being able to create the “frictionless” economy³. One of the things that Internet can do is to reduce the barriers and inefficiencies in transactions, or what is commonly thought of as red tape or “the paperwork”.

3. Gates, *Business@ the speed of thought: Succeeding in the Digital Economy* (Warner Books 2000)

Contracts are presented to Internet users on a take-it-or-leave-it basis. As a practical matter, most are accepted unread while no one would dare to sign a 10-page legal contract on pen and paper without first going through it. This raises several questions and many disputes would surely come up due to this, which might necessitate Government intervention.

The question then that comes about is of Acceptance and Enforceability. There appears to be a consensus that these types of agreements are enforceable, up to the point where provisions are unconscionable or against public policy. There is also some consensus that certain types of provisions in these types of agreements would not be enforceable. For example, if a customer bought a low-cost item subject to a click-through agreement that said that the only way to settle a dispute was through an arbitration that had to be held in another country entirely at the customer's expense, there would be an excellent chance that a court would determine that this particular provision was unacceptable and unenforceable.

Paperless Contracts

Governments must regulate the paperless contract area. Some of the click-through contracts provide simply that one accepts the contract by clicking your mouse on a button that says "I Accept". Some customers argue that they did not enter into this agreement or accept the terms, as they did not click on the button, but someone else did it, or they did it by mistake or perhaps their pet walked across the keyboard and clicked the button. The government might for example rule that such contracts were valid if one typed in "I Accept" instead of clicking. Typing in the phrase shows more intentional behaviour .

Laws on digital signatures and efforts to use digital them are directed at dealing with issue of determining actual acceptance and verifying who made the acceptance⁴.

Domain Names

Are domain names a new form of property? There has been a great deal of speculation in Internet domain names. While over 26 million domain names have been claimed at this point, only 46% of them have active web sites on them⁵. This statistic suggests that a high level of speculation is going on with domain names.

5. <http://www.netfactual.com>

It can be reasonably argued that domain names constitute a new form of digital property. In a way, they can be seen as an undeveloped form of commercial property, like undeveloped commercial real property. If it is permissible to buy land in hopes that it will later become a valuable site for commercial development, it is reasonable to look at domain names in the same light. Do real property law concepts, therefore, apply to this new form of digital property? Does it make sense to talk in terms of leasing domain names? We do need the government to answer some serious question in this regard.

Dot-com and trademarks/ cyber-squatting

In some cases, the domain name may be the most valuable asset of a business. The interplay with trademark comes as there is only one dot-com domain name available for a given name or phrase and it is the dotcom domain name that is perceived to have the most value. The traditional legal notion of trademarks has played an important role in the new area of domain names. Does a trademark owner have an over-riding right to claim a domain name that is identical to the trademark? To greatly oversimplify, under the trademark law, different parties may use the same or similar name if they are using them in different categories of goods or services or geographic areas and there is no likelihood of confusion⁶.

6. Sinrod and Reyna, "The evolving role of trademark in cyberspace", Journal of Internet law, April 2000, p5

Therefore, a major issue in Internet relates to claiming the domain -name. First, one has to get the desired name before anyone else claims it. Registration of a domain name involves a number of considerations and procedures that must be complied with to get the domain name that you want⁷.

7. <http://www.networksolutions.com> and <http://www.register.com> the procedures and policies of network solutions

Second, in the event one does not get the name one feels entitled to, the concern then is how to retrieve the domain name to which one thinks as having a higher level on entitlement. In the early days of the Internet, it was common for people to register a domain name of a well-known firm and then try to get the company to buy that name back from them at a high price. This practice became known as cyber-squatting and created a number of inequities and problems. New anti-cyber-squatting statutes were enacted to deal with this problem⁸.

8. The US trademark act was amended by the Anti-Cyber-Squatting Consumer Protection Act, 1999. Journal of Internet law, May 2000,p9

Privacy

Surveys consistently show that consumers are very concerned with their privacy and the use of their personal information, especially on the internet⁹.

This concern is undoubtedly genuine, but the actions of most consumers belie that concern. People routinely provide personal information on the internet and will often give up detailed information in exchange for a chance to win a prize or receive discounts.

9. Cranor, Reagle and Ackerman, AT&T Labs-Research Technical Report TR 99.4.3, "Beyond Concern: Understanding Net Users' Attitudes About Online Privacy" April 1999,

<http://www.research.att.com/resources/trs/TRs/99/99.4/99.4.3/report/html>

The primary instrumentality of privacy protection on the net is the website privacy policy. Typically, there is a small print "privacy policy" somewhere in most websites and if one clicks on the hyperlink, it takes the user to document that describes the policy and procedures. It tells the user how the information is collected, what information is collected, and what uses are made with the data that is collected.

Websites are increasingly realizing that information, in particular, personal information about customers, has value in and of itself. Information can be turned into money by selling customer data. The recent Toysmart.com bankruptcy case brought this issue into focus^{10, 11}. In the Toysmart.com case, the bankruptcy trustee tried to sell customer data as an asset of the bankruptcy estate, drawing substantial publicity and interest. While a compromise was reached among interested parties, the case illustrated both the issues involved with the transfer of personal information to successor parties and the value of customer information as a financial asset¹⁷ also done in the case of More.com.

10. Richtel, "Toysmart.com in settlement with F.T.C." The New York Times on the Web, July 22, 2000,

<http://www.nytimes.com/library/tech/00/07/biztech/articles/22privacy.html>

11. "sale of data raises privacy concerns" The New York Times on the Web, December 4, 2000, <http://www.nytimes.com/2000/12/04/technology/04NET.html> "Sale of More.com's Customer List Raises Privacy Concerns," Computer World, October 26, 2000, http://computerworld.com/cwi/story/0.1199,NA47_STO52889_NLTam,00.html

Copyright: who owns Intellectual Property?

People tend to make a number of assumptions about who owns intellectual property and what people can do with someone else's intellectual property. Many of these assumptions are not based on the existing law and there are myths and common assumptions about copyrights in particular that have little resemblance to existing copyright law¹². For example, there is common belief that if an image or a page on the net does not actually bear a copyright notice, people may freely use it. That is definitely not the case, but some people operate on that basis.

12. Jassin, "Ten Copyright Permission Myths" <http://gigalaw.com/articles/jassin-2000-08-p1.html>

These general, often inaccurate, assumptions about intellectual property can have substantial consequences and can result in infringing uses by even well intentioned people. Different rules apply for employees, contractors and third party developers. The rules for copyrights are different from the rules for patents.

Business Method Patents

Business method patents are another important area of intellectual property that related to the internet¹³. Perhaps the most famous of these business method patents is Amazon.com's "one-click" method for making online purchases. Until a few years ago, these types of patent claims were not allowed. For a number of reasons, including a lack of prior experience in the new area of Internet, there has been a growing, but highly controversial, use of business method patents. These can be offensive or defensive in nature. They can help innovators protect innovative methods and also create barriers of entry to competitors¹⁴.

13. Fry, Assessing and Minimizing the Risks of Business-Method Patents, <http://www.gigalaw.com/articles/fry-2000-09-p1.html>

14. Shumaker, "Business Method Patents: Navigating the Seas of Uncertainty", <http://www.fr.com/publis/businessmethods.html>

Copyright

Another new challenge in intellectual property regulation for governments around the world is the Open Source movement¹⁵. The open source movement is popularly associated with the operating system software called Linux. Open Source software plays a vital role in the software infrastructure of the Internet. Open Source software is based on a licensing arrangement that allows for the free availability of source code for software and a community-based, rather than proprietary, approach to software development. There is also an emphasis on the freedom to develop derivative works from the source code and to contribute fixes and improvements to the software product for the good of the community at large. At the root of some of the Open Source licenses is a philosophy of freedom and a notion called COPYLEFT¹⁶. It has the aim of turning traditional copyright law on its head and using copyright licensing as a way to keep the free and open aspect of the software by requiring the release of source code for the derivatives and the same right to

modify. This is a growing movement and has very interesting implications in both the world of Internet and other intellectual property law.

15. Dibona, Ockman and Stone, *Open Sources*, O'Reilly and Associates 1999

16. Free Software Foundation, Inc., "What is Copyleft?", <http://222.gnu.org/copyleft/copyleft.html>

Grey Areas

Socio-cultural issues in diff. countries

One of the problems of governing the Internet is the vast amount of Grey areas that exist in doing it. There is "no one size that fits all" kind of a possibility. Most Governments when and if they sit down to talk about creating international laws, would end up disagreeing more and achieving little on the subject. Just like in the case of Terrorism, one man's terrorist could be another's "freedom fighter." one country might think having cartoons of Gods as OK, while the other may find it blasphemous.

The greyest of grey areas is that of pornography. Not just countries but even individuals have different standards of defining it. It truly lies in the eyes of the beholder in the end it seems. In some countries, it is legal to some extent, others have it regulated, while some have it banned. What if a country wants to try in a court of law someone who has put porn on the net and that person lives in a country where it is legal to do so? It becomes extremely difficult in the absence of an international definition, standards and framework to police or regulate the net.

Acceptance and enforceability

First comes acceptance and then come enforceability. The situation of international politics now, after the Iraq war and the events leading up to that is that of complete polarisation on ideological lines. Europe and US have never been so far apart and they are in no mood to listen to each other. In such a scenario, one has to wonder, how the Internet can be governed. International co-operation is the key to acceptance and enforceability, without which governing the internet are just words. What is the use if you cant bring culprits to trial and punish them?

Conclusion

Even in the short history of Internet regulation, we have seen that its face is changing rapidly. Technology is changing, the internet is changing and the application of law to them is changing. All at what seems to be an increasingly rapid pace. Developments in technology often outstrip the ability of courts to deal with the legal issues raised by the technology. By the time a case has run its course in the traditional court system, the technology is already obsolete or the business environment may have changed drastically.

Governments must now keep up to date with the technological developments, business developments and legal developments as well, and all at the same time. Simply put, governing the Internet requires a level of creativity and innovation that matches the level of creativity and innovation in the world of Internet itself.

At the root of governing the Internet are these questions: what is the role of traditional legal concepts in an increasingly digital world? Do laws made for a bricks and mortar society still apply in a digital world? If they do not, what are the consequences and what steps need to be taken? If they do apply, then how do they apply? These questions are worth taking some time to consider

carefully. Governments around the world must do some deliberations and pondering on how to and how much to regulate the net.

Regulating the Internet is not a yes or no question. The question is how much should the governments regulate and should they let the problems arise first and then look for solutions or should they be more proactive and prevent any further problems from coming up? Will such measures choke the further development and spread of the net?

Governments do not face the Yes or No option to regulate the net. The fact that they have many options in front of them, in terms of extent of regulation is made clear from this little story. Imagine, that you are back in the fifteenth century, minding your own business, when one day John rolls into town carrying one of his first printing presses on an ox cart. He describes it in great, passionate detail, leaving you wondering whether he is a madman. He then gives you three choices. First, you can buy one of his books. Second, you can buy one of his printing presses to print your own books. Third, you can buy shares in his company. Knowing what you know now (in the 21st century) and considering all that can fairly be traced to the invention of the printing press- immense changes in politics and religion, development of capitalism, universal literacy, the creation of communities across geographic boundaries- what choice do you make? Even more important for Governments, what choice would they have made?

If the development of the Internet turns out to be an event of at least the historical significance of the invention of the printing press, what does that mean for Governments at the beginning of this new era? What if the 15th century governments would have prohibited the use of the printing press for stupid reasons? What if you could own a printing press but you could only sell the results of your printing in your own village only? Would we be where we are today?

We live in an historic time, In Internet time. The traditional governance concepts versus governing the Internet and e-commerce give governments both a great opportunity and a great responsibility. They need to think carefully about how we take advantage of that opportunity and exercise responsibility while, at the same time, acting quickly to deal with the rapid pace of new developments.

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4. [http:// www.gigalaw.com/articles/alston-2000-06-p1.html](http://www.gigalaw.com/articles/alston-2000-06-p1.html) , how E-signs will effect e-commerce.
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