Competing Telecommunications and Cyber Regulation:

Is There a Need for Transatlantic Regulatory Framework?

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I. INTRODUCTION

The rapid emergence of a liberalized global communications market[1], and popular use of the Internet have brought into question traditional means of national regulation. Martin Bangemann best described the need for expedient action in the rapidly developing information society. Bangemann stated that, "[I]f someone had predicted the attention the Information Society policy would be given only a few years ago, he or she would have been considered as cosmic in imagination or short on brains . . . the world needs to establish a new set of rules adapted to the capabilities of new technologies."[2] These regulations must be formulated quickly and legislators must try to envision that rapid evolution shall occur in the field of information technology. Traditionally, telecommunications, satellite technology, and computer technology operated independently of one another and had thus been regulated independently.[3] However, with

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[1] See Agreement in Telecommunications Services, April 30,1996, [attachment to Fourth Protocol to the General Agreement on Trade in Services], WTO Doc. S/L/20, 36 I.L.M. 354 (1997). (Hereinafter referred to as the Fourth Protocol of the GATS).

2 European Commissioner Dr. Martin Bangemann, Speech at the Telecom Interactive '97 Conference entitled: A New World Order For Global Communication: The Need For an International Charter, (Geneva Sept. 8 1997).

3 See Id.

the convergence of these technologies the governments of the world must develop rules that go beyond the Fourth Protocol of the GATS. [4]

The two major players in telecommunications and cyber technology are the United States and the European Union. Because of different economic and technological factors the United States and the European Union envision telecommunications liberalization and cyber regulation in very different manners. Part II of this paper will deal with the impact and differences that the United States and the European Union have on the interpretation of the Fourth Protocol of the GATS.[5] Part III will provide a brief analysis of the need for cyber regulation and different approaches proposed by the United States, the European Union and independent proponents. Part IV will conclude that while an Internet Charter perhaps working under the WTO framework seems to be the most desirable solution for the long term, in the short term different legal regimes will have to cohabitate.

II. CONFLICT AS TO THE INTERPRETATION OF THE FOURTH PROTOCOL OF THE GATS

In an effort to foster the liberalization of the telecommunications markets, fifty-five governments negotiated under the auspices of the World Trade Organization[6] the historic Fourth Protocol of the GATS.[7] The Fourth Protocol of the GATS advocates granting Most Favored Nation ("MFN") treatment to other WTO Members, who have also signed under the Fourth Protocol, entry regulations that address participation in the Member's basic telecommunications.[8] To participate in the Fourth Protocol of the GATS a WTO Member must substantially alter its existing approach to the delivery of basic telecommunications services.[9] The United States was one of the WTO Members which was prepared to meet the initial compliance date, January 1,1998, of the Fourth Protocol of the GATS. Subsequently that date was altered to February 1, 1998 for most contracting parties. However, there are several European Union Member States whom will not be in compliance until the year 2000.[10] This means that the European Union's telecommunication's market will not be fully liberalized until next year.

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4 Fourth Protocol of the GATS supra. at note 1.

5 Id.

6 Hereinafter the World Trade Organization will be referred to as the WTO.

7 Fourth Protocol of the GATS supra. at note 1.

8 See Stefan M. Meisner, Global Telecommunications Competition a Reality: United States Complies with WTO Pact, 13 Am. U. Int'l L. Rev. 1345 at 111 (1997).

9 *Id.*

10 Memorandum from Herbert Ungerer of the European Commission, Directorate General IV, Address to: Institutional Investors Salomon Bros., Regulatory developments in European telecom markets 3, (Sept. 23,

Meanwhile, the European Union has raised many issues concerning the United States compliance with the Fourth Protocol of the GATS. The Federal Communications Commission of the United States (FCC) has radically changed its regulation of basic telecommunications services with the promulgation of the 1997 Rules and Policies on Foreign Participation in the United States' Telecommunications Market, Market Entry and Regulation of Foreign Affiliated Entities.[11] The 1997 Foreign Entry Order abridges the regulatory procedure that basic telecommunications providers from WTO nations must undertake to enter the United States Market. The European Union has expressed concern that the 1997 Foreign Entry Order is incompatible with the United State's commitments under the Fourth Protocol of the GATS, and as a result has threatened to lodge a complaint before the WTO.[12]

A. Reconciliation of the 1997 Foreign Entry Order and the Fourth Protocol of the GATS

"The level of Fourth Protocol commitments varies from Member to Member."[13] However, the WTO has produced a Reference Paper in an attempt to create a common regulatory system among WTO Members.[14] The Reference Paper defines specific anti-competitive behaviors including: the exploitation of "essential facilities" by a "major supplier"[15], cross-subsidization of affiliates,[16] and misapplication of proprietary information.[17]

1997). The transitional periods for the following Member States are as follows: Dec .31, 2000 for Greece, Jan. 1, 2000 for Ireland and Portugal, Dec. 1, 1998 for Spain, and July 1, 1998 for Luxembourg.

11 In re Rules and Policies on Foreign Participation in the United States Telecommunications Market, Market Entry and Regulation of Foreign-Affiliated Entities, FCC No. 97-398 (Nov. 25,1997), available in 1997 WL 735476, para. 4 [hereinafter 1997 Foreign Entry Order].

12 EU Urges US to Change Telecom Rules, EU Release No. 54/97, (Aug.5, 1997). See Meisner supra. note 8 at 113. WTO Warning to Washington Over Telecommunications Licenses, Eur. Rep., Sept. 3,1997, available in WL 13046329 (reporting the European Commission's outrage when the United State's 1997 Foreign Entry Order was still a proposal up until now no such complaint has been lodged).

13 See Meisner supra. note 8 at 116. John H. Harwood et al., Competition in International Telecommunications Services, 97 Colum.L.. Rev. 874, 883-884 n.3 (1997) (describing the varying levels of commitment but emphasizing that the overall result of the Fourth Protocol of the GATS is to open a substantial portion of the basic telecommunications industry).

14 See Reference Paper to the Fourth Protocol of the General Agreement on Trade in Services, 36 I.L.M. 367 (1997) (noting although the Reference Paper is not an official WTO document its adoption by all fifty-five Members to the Fourth Protocol of the GATS indicates its importance) [hereinafter Reference Paper].

15 See id. at 367. An essential facility is defined as a public wire or radio based telecommunications network, without access to the essential facility a market participant cannot conduct its intended economic activity. The Reference Paper describes the exploitation of an essential facility as a single entity or a group of entities, with a monopoly or market power over the essential service, and there is no economically feasible substitute for the essential facility. See also ABA Antitrust Section, Antitrust L. Dev. 276-282 (4th ed. 1997) (describing that the "essential facilities doctrine also exists in United States antitrust law preventing the restriction of an essential resource by a monopolist denying present or future competitors the opportunity to compete).

16 See Reference Paper supra. note 14 at 367 (defines cross-subsidization as anti-competition behavior, because the

To comply with the Fourth Protocol to the GATS and the Reference Paper the FCC had to adopt the 1997 Foreign Entry Order, substantially changing the legal tests applied in 1995 Foreign Entry Order.[18] In the 1995 Foreign Entry Order the FCC applied an "effective competition opportunity" (ECO) analysis. The ECO analysis reviewed any new telecommunications service that crossed state lines to ensure that the "present or future public convenience and necessity require or will require the construction, or operation, or construction and operation of such additional [service].[19] The ECO analysis also required that the foreign ownership and/ or control of a domestic common carrier be limited to one-fourth the total number of directors, if the FCC found "that the public interest [was] better served by the refusal or revocation of such license." The FCC crafted the ECO analysis and other safeguards to promote the specific goal of promoting the United States' international telecommunications services in markets that were not yet liberalized.[20]

Because at that time a Fourth Protocol to the GATS did not exist, the FCC had taken upon itself to prevent the anti-competitive behavior of foreign basic telecommunications suppliers that had monopoly or market power in their respective home markets.[21] In the 1995 Foreign Entry Order the FCC detailed the harmful market practices that a foreign market participant with monopoly power could manifest in a liberalized United States basic telecommunications market.[22] The 1995 Foreign Entry Order was meant as an incentive so that prospective foreign market participants in highly regulated markets would lobby their governments to liberalize their local markets in order to qualify for FCC approval in the United States market.[23]

In the 1997 Foreign Entry Order, the FCC changed the test applied to foreign applicants in the United States. Because the Fourth Protocol of the GATS was then being negotiated, the weight of protecting the United States market from cross-subsidizing participants was reduced. In the 1995 Foreign Entry Order, although the ECO test was not the only criterion it was the overwhelming factor upon application to enter the United States' basic telecommunications

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telecommunications provider with market power in one market uses those monopoly profits to subsidize its business activities in other markets that are competitive).

17 See Id. (lincludes improper use of proprietary information by a competitor as and anti-competitive act.)

18 In re Market Entry and Regulation of Foreign-Affiliated Entities, 11 F.C.C.R. 3873 (1995) [hereinafter 1995 Foreign Entry Order].

19 See 47 U.S.C. 214(a) (1994).

20 See 1995 Foreign Entry Order supra note 18 at 3875-3877.

21 See Id..

22 See id. at 3879-80.

23 See Meisner supra. note 8 at 121. See also Klaus W. Grewlich, Konflict und Ordnung in der Globalen Kommunikation (1997) (discussing the Global One merger between Sprint, France Telecom, and Deutsche Telecom, where the FCC required the foreign suppliers as a condition to meeting the ECO analysis that both telecommunications firms lobby their respective governements for deregulation of the telecommunications sector).

market.[24] The 1997 Foreign Entry Order now replaces the ECO test with an open entry standard. The open entry standard presumes that the entry of a foreign market participant from a WTO Member does not threaten competition.[25] Some WTO Members have not fully committed to completely opening their markets.[26] The FCC will not, on its face, discriminate applications from prospective market participants that are WTO Member's whose commitments to the Fourth Protocol are inferior to the United States'.

However, to ensure United States' consumers the benefits of increased competition, the FCC preserves a public interest review preventing any anti-competitive behavior by a prospective foreign market participant. The public interest review is applied to the rebuttable presumption that the potential market participant does not threaten competition. The public interest review considers whether: 1. The foreign participant might threaten competition, and 2. Considers the effect of the application upon "national security, law enforcement, or obligations arising from international agreements to which the United States is a party."[27] In the first part of the test, the burden of proof is on a third party to prove that granting a license to a foreign market participant will distort competition in the United States.[28] The burden of proof in the second part of the public interest review lies with the executive branch of the United States government. These standards will be applied narrowly according to the FCC and will be used to challenge an application only in exceptional circumstances.[29] Furthermore, the public interest review is permitted by the Fourth Protocol of the GATS.[30]

B. The European Union's Stance on the Fourth Protocol of the GATS

The European Union has alleged that the public interest review is vague, overbroad, and makes an unnecessary assumption. The FCC assumes that safeguards are needed to address potential anti-competitive conduct that a foreign telecommunications provider with market power in its country might engage in with its affiliates in the United States.[31] These safeguards

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24 See Meisner supra. note 8 at 123. See Harwood supra note 13 at 885 (describing that there were cases, most notably the Netherlands terrestrial microwaves services case, where the FCC did determine that negative findings of the ECO analysis did not outweigh the benefits to American consumers that would result from a foreign participant's entry, as well as, the foreign participant's country's regulatory changes.)

25 Fourth Protocol of the GATS supra. at note 1. However, participants with exclusions related to basic telecommunications service do not have to accord MFN treatment to other participants in the excluded sector.

26 Id.

27 Id.

28 David Molony, Carrier liberalization given a boost by complementary agreement covering equipment, Communications Int'l. Week at http://www.totaltele.com/cwi/197/197nr.html (Jan. 19,1998).

29 Fourth Protocol of the GATS supra. at note 1.

30 Decision on Negotiations on Basic Telecommunications, Ministerial Decisions and Declarations of the General Agreement on Tariffs and Trade, Dec. 15 193, 33 I.L.M. 136 144-45 (1994).

31 Fourth Protocol of the GATS supra. at note 1. Meisner supra. note 8 at 138.

permit the FCC to require a dominant foreign market participant to offer reasonable access to its network to all United States telecommunications providers on similar terms and to make extensive reports to the FCC. The European Union alleges that these safeguards could be interpreted as non-tariff barriers and may reduce a foreign market participant's access to the United States telecommunications market. However, the European Union would need to prove specific instances of FCC discrimination in order to succeed in a WTO claim.[32]

The European Union is also trying to liberalize trade within telecommunications sector beyond the Member State level. The European Union has adopted the EU ONP Interconnection Directive[33], to adapt the current monopolistic interconnection environment to a multi-operator environment. A general duty to supply interconnection exists in particular for public network operators with "market power".[34] This directive will be combined with the European Union's Full Competition Directive to analyze Art. 86 abuses of a dominant position. Namely, instances where a market participant with market power bottlenecks the local loop. The Commission has also discussed a range of the best interconnection rates, using the average of all the Member States to determine a recommended "benchmark".[35] This benchmark will also be used as a benchmark to determine anti-competitive behavior.[36]

While there are disputes and questions as to the regulations provided by the new basic telecommunications regime established by the Fourth Protocol of the GATS, at least there is a regime. The cyber world is in need of far more regulation because it is not just a novelty internationally, the cyber world is also under-regulated nationally.

III. THE NEED FOR CYBER REGULATION AND DIFFERENT PROPOSALS

The explosion of online communications has created a plethora of legalproblems that are not yet resolved. For example: the United States' and the European Union's differences on personal data protection have emerged as a potential barrier to global free trade on the Internet.[37] The European Commission's Martin Bangemann, would like to create an international regime of international regulations. He believes that, "[i]f [the European Union and the United States] don't agree to terms globally, each of us will try to set our own regulations, which will lead to over-regulation."[38] However, the United States is endorsing the principle of self-regulation for

32 Meisner supra. note 8 at 141. See also Molony supra note 28 (noting that only WTO Members, governments not private companies can lodge complaints before the WTO).

33 See Ungerer supra note 10 at 4. (Dir 97/33/EC).

34 Id. This corresponds to the "major supplier" concept mentioned in the WTO Reference Paper.

35 Id.

36 Id.

37 Emma Tucker, Internet: EU tries to forge system of rules, Fin. Times (Feb. 5, 1998).

38 Id.

the Internet.[39] Meanwhile, there are others who propose that governments should regulate as they wish, but enter a choice of law convention on transnational cyberspace issues.[40]

A. Comparative View on the United States' Proposal on Cyber Regulation and the European Union's Response

The United States has proposed in *A Framework for Global Electronic Commerce* and in *The US Green Paper on Internet Governance* a liberal regulatory framework favoring the free flow of information promoting free trade.[41] The Framework discusses: customs and taxation, a Uniform Commercial Code for Electronic Commerce and United Nations Commission on International Trade, intellectual property protection, privacy, security, content and Internet governance. The *Framework for Global Electronic Commerce* also discusses telecommunications infrastructure and technical standards this paper will not examine these issues because they have already been extensively discussed in the prior section.

1. Customs and Taxation

While it is easy to tax commerce that is ultimately shipped physically, it will be difficult to tax commerce in products or services that are delivered electronically.[42] This may be due to the difficulty of determining choice of law and also on the difficulty of tax authority surveillance.

In this sector the United States makes free trade arguments. The United States advocates that the Internet be declared by the WTO as a tariff-free environment.[43] Clinton has backed the Internet Tax Freedom Act, a bill imposing a moratorium on Internet taxation for several years so that the Internet industry can have time to capture a significant market.[44] However, traditional retail stores counter with the argument that in CD and software sales they are losing customers to the Internet due to the absence of sales tax.[45] The United States also believes that if a tax system were applied to the Internet it should be consistent with that of ordinary commerce governed by the tax conventions sanctioned under the Organization for Economic Cooperation (OECD).[46] According to the Joint EU-US Statement on electronic commerce there is a com-

39 Id.

40 Matthew R. Burnstein, Conflicts on the Net: Choice of Law in Transnational Cyberspace, 29 Vand. J. Transnat'l. L. 75 (1996).

41 President William J. Clinton & Vice President Albert Gore, Jr., A Framework For Global Electronic Commerce, http://www.iitf.nist.gov/elecomm/ecomm.htm visited on Jan. 30, 1998.

42 Id.

43 Nicholas Denton, US: Clinton backs bill to halt Internet taxes, Fin. Times at http://www.ft.com/hippocampus/q32e16.htm (Feb. 27, 1998) visited on Feb. 27, 1998.

44 Id.

45 Id.

46 Clinton & Gore supra. note 41. The Clinton Administration proposes that the taxation of any Internet sales: should not hinder commerce, nor discriminate among types of commerce or the location or nature of such

mon understanding by both parties that taxes on electronic commerce should be clear, consistent, neutral and non-discriminatory. They agree that both parties must cooperate and offer mutual assistance to ensure effective tax administration on the internet.[47]

2. A Uniform Commercial Code for Electronic Commerce and the UNCITRAL Model Law and self-regulation

The UCC is a codification of a substantial part of commercial law.[48] The National Conference of Commissioners of Uniform State Law and the American Law Institute are working to adapt the UCC for electronic commerce. The United States is also encouraging the United Nations Commission on International Trade Law (UNCITRAL) on a model law that supports the commercial use of international contracts in electronic commerce and including the International Chamber of Commerce (ICC) in the development of a legal framework.[49] In the Framework for Global Electronic Commerce, the United States supports the adoption of principles like UNCITRAL's to be fostered by all nations as a start to defining an international set of uniform commercial principles for electronic commerce.[50] The principles highlighted in this document include: freedom of contract,[51] technology neutral forward looking rules, and that new rules be created only as needed to support the use of electronic technology.

The fact that the United States mentioned the use of a national legal instrument such as the UCC in this international debate may be misinterpreted as American nationalism. However, the United States' mentioning of the UCC should not be misunderstood as imposing the UCC on the international community. There are current examples where the United States' UCC has been influenced by the international community. For example:

In August, 1987, UNCITRAL issued the Convention on International Bills of Exchange and International Promissory Notes (CIBN), that was adopted by the United Nations General Assembly and opened for signature and ratification in 1988. This Convention established provisions for a new optional, negotiable instrument that is adaptable for use in the different domestic banking and legal systems – including under the UCC [article 5], the British Bills of Ex-

transactions. The system should be transparent and minimize record keeping. The system should accommodate the tax systems of the United States and its international partners.

47 Joint EU-US Statement on Electronic Commerce at http://www.qlinks.net/comdocs/eu-us.htm (Dec. 5, 1997) visited on Feb. 16, 1998.

48 Clinton & Gore supra. note 41.

49 Id.

50 Id.

51 See U.C.C. § 2-204(3) "Even though one or more terms are left open a contract for the sale of goods does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy." This is a general contract principle which courts may in some circumstances extend beyond the interpretation of contracts for the sale of goods.

change Act, and the civil law Uniform Law for Bills of Exchange (Geneva Conventions of 1930 and 1931). The United States signed this convention in 1988.[52]

The United States has also adopted the UNCITRAL Arbitration Rules of 1976 as a means of conducting trade with Lesser Developed Nations (LDCs). [53] The UNCITRAL is seen as an ideal body for developing such rules, because it is perceived to create balanced, fair guidelines and also because of their attention to detail.[54] When the United States mentioned the adoption of the UCC and UNCITRAL rules, it most likely meant that the UCC would try to reform those rules which are currently being negotiated by UNCITRAL. United States courts may read the UCC in light of UNCITRAL's rules, at least in terms of documentary credits used in international trade finance. This could be the case when UNCITRAL concludes its model law on electronic commerce.

Commercial self-regulation may also be implemented in a manner analogous to that of the international banking community. In addition the UCC's Article 5, has also been interpreted by United States' Courts in light of the ICC's Uniform Customs and Practice for Documentary Credits (UCP).[55] The ICC's UCP is a self-regulatory code that has been formulated by the international banking community. "The UCP constitutes a rather detailed manual of operations for

52 Kenneth C. Randall and John E. Norris. A New Paradigm for International Business Transactions 71 Wash. U. L. Q. 599(1993). The CIBN's goal was not to unify the law respecting all commercial instruments that pass in international trade. Such a task would have never been successful because it would have overridden municipal law in an unpredictable fashion, rather than serving the predictability and certainty goals of unification. The CIBN instead creates a new type of negotiable instrument in the form of a promissory note or bill of exchange (but not a check). n92 Unlike the CISG, the CIBN has an opt-in provision, so that it does not apply unless the parties specifically make the instrument subject to the treaty. In addition, the CIBN will not apply unless an instrument reveals on its face that at least two of the acts described on the instrument (e.g., making, drawing, paying) will occur in two different nations, at least one of which is a signatory to the treaty; United Nations Convention on International Bills of Exchange and International Promissory Notes, U.N. Comm'n on Int'l Trade Law, 21st Sess., at 2-42, U.N. Doc. A/43/820 (1988), reprinted in 28 I.L.M. 170 (1989) (with commentary) hereinafter CIBN.

53 For an explanation and comparison of some of these, including the UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules of 1976, the UNCITRAL Model Law of 1985, the Rules of the London Court of International Arbitration of 1985, the Rules of the International Chamber of Commerce of 1988, the Rules of the American Arbitration Association of 1986, and others, see generally Marc Blessing, The Major Western and Soviet Arbitration Rules, J. Int'l Arb., Sept. 1989, at 7. For the texts of the five sets of arbitration rules named above, see ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION: SELECTED TREATIES, STATUTES AND RULES 124-39, 173-86, 111-23, 97-107, 72-96 (1993).

54 See Blessing supra note 53 at 7.

55 See Marine Midland Grace Trust Co. of N.Y. v. Banco del País, S.A., 261 F.Supp. 884 (S.D.N.Y. 1966) (truck bill of lading was not accepted as strictly complying were letter of credit required a "Full Set Clean On board ocean bill of lading" strict conformity of documentary credits were examined in the strictest terms favored by the UCP). See also James J. White, The Influence of International Practice on the Revision of Article 5 of the UCC, 16 N.W. J.Int'l L.& Bus.189 (1995).

banks, but they are a restatement of 'custom' in the industry, and they do not purport to be the law."[56] The UCP is generally interpreted by courts as a guide to a state's own local commercial law. The UCP has not prescribed a code on fraud, in such instances local law (which may influenced by UNCITRAL rules) applies.[57] In the arena of electronic commerce, merchants may also draft a self-regulatory system utilizing the resources of ICC.

The most important lesson to be learned is that currently all three systems of regulation, international, national, and self-regulatory, effectively co-exist in the international banking community. These three instruments are all examined by United States courts, when resolving disputes concerning letters of credit. While it may seem a very unlikely manner of dealing with questions of international commerce it is a system which has worked in the past. There are, of course, still questions as to self-regulation when one considers that in international trade finance the parties to the contract are savvy businessmen, rather than the average simple consumer which may be "surfing the web".

3. Intellectual Property Protection

Many conflicts exist in this area between the United States and the European Union. The United States is content with the World Intellectual Property Organization's (WIPO) adoption of a copyright and performance and phonograph treaties.[58] However, the WIPO treaties do not address the issues of online service provider liability or trademarks. The European Union is very concerned that in the US Green Paper, the United States has failed to address the issue of trademarks internationally, and fails to mention the ongoing preparation of a dispute resolution procedure for the Internet under the auspices of the WIPO.[59] Instead the United States makes no reference to the results of this international approach, but envisages a separate dispute resolution procedure for each of the Internet registries.[60]

Issues of online service provider liability might best be dealt with under a choice of law convention.[61] It is possible that the United States has not addressed the possibility of a WIPO convention on trademarks, because of the sensitivity of the issue. Trademarks existing in one country may also exist in another country. Furthermore, certain trademarks may be invalid because of language differences. For example: If the Spanish bakery company "Bimbo" tried to trademark its name in the US it could not, because this is an offensive word in the English lan-

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56 Ralph H. Folsom, et al., International Business Transactions 206 (1995).

57 Id.

58 Clinton & Gore supra. note 41.

59 European Commission, Communication from the Commission to the Council, International Policy Issues Related to Internet Governance, COM (1998) 111 final, Brussels (Feb. 20, 1998).

60 *Id.*

61 The possibility of a choice of law convention will be further discussed in section III (B) of this paper.

guage and would be considered an untrademarkable term in United States. The WIPO trademark convention would have to take into account these very difficult issues of coinciding trademarks and cultural differences.

The United States separate dispute resolution procedures for each of the Internet registries could prove troublesome. If separate dispute resolution procedures are implemented by the Internet registries, then common rules to all the registries approved of by the international community should be adopted. At least with a common set of rules, there would be greater legal certainty as to the rules that applied to the registries and there would be no forum shopping for registries with more favorable rules.

4. Privacy

The European Union has adopted a Directive that prohibits the transfer of personal data on the Internet.[62] Differing privacy policies throughout the world may impede the flow of data.[63] The United States' proposed solution to differing privacy laws is to implement "industry-developed solutions to privacy problems". This solution may not seem troubling in a society where one's credit information and shopping habits may already be sold by credit card companies. Countries may need to enter into very serious negotiations to resolve this controversial issue. One could envision here an international privacy convention, protecting the minimum levels of privacy. Minimum levels of protection have already been drawn up by the Organization for Economic Cooperation and Development (OECD).[64] These minimum standards for protection could include: that data-gatherers should inform consumers what information they are collecting, and how they intend to use such data; and that data-gatherers should provide consumers with a meaningful way to limit use and re-use of personal information.[65]

5. Security

Security on the Internet is currently offered encryption, authentication, passwords and firewalls. Security is very important because it is the one factor that worries consumers, impeding the further development and investment in electronic commerce. One of the most popular

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[62] European Parliament and European Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the procession of personal data and the free movement of such data, OJ L 281/31, Brussels (Feb. 23 1995).

[63] Clinton & Gore *supra.* note 41.

[64] GUIDELINES GOVERNING THE PROTECTION OF PRIVACY AND TRANSBORDER DATA FLOW OF PERSONAL DATA.

[65] Clinton & Gore *supra.* note 41

forms of security on the Internet is encryption. Encryption may come in the form of mathematical encoding such as, elliptical or exponential.[66] Encryption is in the best interests of the government because it may promote faith in electronic commerce. However, encryption that is too strong can be used by criminals to exchange illegal information in a manner that can go undetected by law enforcement authorities.

The United States proposes a mechanism that provides users a high level of encryption.[67] The United State government would retain the key to the encryption. This may be another area where the international community may ask for a treaty mechanism, to have a higher level of cooperation and other nations may demand access to the encryption key.

6. Content

The United States also advocates self-regulation in the area of content. The United States points out that parental controls or filtering devises can effectively block offensive Internet sites from their children.[68] In this area it seems natural that United States advocates such a liberal view. Here the United States is protecting its very broad principles of freedom of speech that are protected by the First Amendment. Especially, if the Internet is regarded as a public forum rather than as a forum for commercial speech.[69] Another issue is that it is normal for a common law country as the United States to leave such constitutional laws like those governing the Internet open for court interpretation. Currently, a case was decided by the Supreme Court of Oregon on Free Speech and the Internet.[70] For the United States government these issues are areas where the courts have yet to define the Internet publisher and user's rights. Adopting rules in this area will prove troublesome, because content can be very culturally sensitive.

In the upcoming era of convergence it will also be difficult to regulate content control as to broadcast quotas. It will be more difficult to regulate the content rules, because one can no longer count on television stations. There are countless Internet sites making broadcast regulation difficult to control simply because of the sheer quantity of broadcasts. In addition, the consumer can regulate the amount of local sites he visits, or if he decides to visit local sites at all. For this reason it is unlikely that broadcast quotas be adequately applied in the Internet.

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66 Klaus W. Grewlich, Information Technology in the Competition Sector, class notes taken in the College of Europe in Bruges, Belgium (Feb. 9 1999).

67 Clinton & Gore supra. note 41

68 Id.

69 Free speech in a non-commercial public forum has the most onerous protection offered by the United States Supreme Court.

70 Lauren Dodge, Abortion foes told "Butcher List" illegal; jury finds web site threatened doctors, The Rec. A01 (Feb. 3, 1999) (in a recent case, not yet published, anti-abortion rights groups were publishing private information of doctor's performing abortions; the posting of this information was interpreted to violate doctor's rights to perform an abortion; injunctive relief to shut down the web site is currently being sought).

7. Internet Governance

The European Union is very concerned that Internet governance will for practical purposes remain under the natural monopoly that is Internet Assigned Numbers Authority (IANA). The United States seems unwilling to alter IANA's role in Internet domain name and number assignment. According to the United States, changing this the registration system so early in the development of the Internet may disrupt businesses that have grown to trust the IANA structure.[71]

For the time being the rest of the world's international players may have to content themselves with the consolation that at least the sale of domain names will be liberalized.[72] Unfortunately, like all other infrastructural natural monopolies complete liberalization of registration will take time and the impetus of the business community.

The European Union is very concerned because the registration system will be run by IANA. Therefore, United States' laws will prevail in registration, dispute settlement and Internet name trademarks.[73] The European Council has even mentioned that it could take possible action via its competition laws.[74] A European competition law action could do little but create pressure, because European Internet interests would still have to register using the IANA system. Furthermore, the United States would try to remind the European Union of how long it took to liberalize all of its natural monopolies.

One anecdote that while not alleviating the European Internet community's demands may at prove entertaining, is that United States banks are currently subjected to Belgian law in the area of international electronic letters of credit. Most bank-to-bank communication concerning letters of credit are routed through the lines of the Society for Worldwide Interstate Financial Telecommunications (SWIFT).[75] SWIFT is a Belgian not-for-profit organization owned by banks as a cooperative venture for the transmission of financial transaction messages.

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71 Clinton & Gore supra. note 41

72 Kenneth Cukier, U.S. offers users bigger role in running Internet, 197 Communications Week Int'l at http://www.totaltele.com/cwi/197/197news2.html .

73 European Commission supra. note 60.

74 European Council, Internet Governance Reply of the European Community and its Member States to the US Green Paper at http://www.ispo.cec.be/eif/policy/goreply.html .

75 John A. Spanogle, United Nations: Convention on International Bills of Exchange and Internaitonal Promissory Notes, 28 I.L.M. 170, 174(1989). SWIFT is a not-for-profit cooperative company organized under Belgian law. SWIFT's Articles of Association provide that "[a]ll matters which are not provided for in these Articles of Association shall be governed by the 'Gecoordineerde Wetten op de Handelsvennootshappen' (Consolidated Acts on Commercial Corporations)." SWIFT, Articles of Association of Society for Worldwide Interbank Telecommunications, art. 43 (1979) (incorporated in : SOCIETY FOR WORLDWIDE INTERBANK FINANCIAL TELECOMMUNICATIONS, USER HANDBOOK § 7(b) (1981). (incorporating Special Newsletter: Responsibility and Liability (SWIFT Board Paper 185, Apr. 1979)) [hereinafter SWIFT USER HANDBOOK].

This is another area where self-regulation has worked among merchants in a commercial context.

B. Choice of Law

Burnstein proposes various systems of private international law to solve choice of law issues on the lack of consistent laws on the internet. [76] The author bases the need for choice of law rules, because without a coherent system of transnational Internet law there is a need to know which country's national laws apply.[77] The basic problem in applying regular choice of law principles is that they are, for the most part, related to a physical connection to a place for example: domicile, or lex loci delicti. There are various ways to implement the choice of law rules to the internet:

1. Creating forum selection clauses between contractants. (ie: America Online mentions its selected forum, Virginia, in its service contract agreement)
2. No-Man's Land, treating the Internet like Antarctica.(Choice of law would be a non-issue because there would simply be no applicable law in the land of cyberspace. Therefore, the applicable law would be the law of the forum where the suit is brought. ---This would not provide for legal certainty.)
3. Law Merchant (A system of rules evolving from the customs and practice of merchants applicable to all countries in the world. --- This would basically create a system of self-regulation.)
4. Virtual Flags of Convenience. (This system may encourage forum shopping. Furthermore, countries without a "flag of convenience" would start to impose various tests to determine the applicable law, because the flag used simply as a flag of convenience lacks other significant contacts. Furthermore, information poor countries may try to become cyber-havens. Such cyber-havens may provide less protection of free-speech, defamation, and privacy than are accorded in developed countries.)[78]

IV. CONCLUSION

We are at a very difficult stage in the evolution and convergence of telecommunications and information technology. The ideal system of regulation for the Internet governance would be an International Charter perhaps under the framework of the WTO. However, the United States felt that it was too premature to even subject new Internet service providers to the new regulatory burdens of the WTO Fourth Protocol of the GATS or WIPO.

The best possible mechanism for the promotion Internet commerce would be to adopt the UNCITRAL's Model Law of Commerce for the Internet. The Model Law would be the best

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76 See Burnstein supra. note 40 at 75.

77 Id. at 96.

78 *Id.*

means of regulating commerce between merchants and consumers. Perhaps, in order to satisfy the Internet industries a self-regulating international charter for merchants would also be desirable. A codified self-regulatory customs and practice system would grant Internet businesses a sense of self-determination and involvement in the current debate. I suggest that the UNCITRAL be adopted into national law and that these rules be applied in conjunction with the self-regulatory system's rules, as has been done in the international trade finance sector.

Until an international means of dealing with trademarks is adopted a choice of law convention seems to be the best resolution. An international convention would have to address issues of preexisting trademarks and cultural sensitivity. Because these issues may take many years to negotiate, it may be more salient for the time being to adopt a choice of law convention for these matters.

A system catered to the constitutional rights of the average user needs to be created. Otherwise, all issues that are culturally sensitive may require adopting a conflicts of law treaty. The best way of guaranteeing an individual his territorial constitutional protections may be through Antarctic style conflicts of law application. However, a system where each person carries his/her law with himself may not provide adequate legal certainty. Therefore, the best system would be a convention like that proposed by the OECD on minimum privacy protection accorded worldwide.

Internet governance this is an area which should be liberalized, as soon as, industry becomes assured in its deregulation. Without the acceptance and impetus of industry, deregulation could create a sense of chaos, resulting in reduced business investment in the domain registration mechanism. It is improbable that the United States will surrender its control of IANA until there is full deregulation. Because the Internet is the brain-child of the United States it is unlikely that the United States give up governance of IANA to simply see it fall into the domination of other countries who will also treat the registries as their own natural monopolies. As in the case of telecommunications, Internet registration is a sector that may need time to slowly liberalize.