

## CONFERENCE REVIEWS

- A Free Information Ecology in the Digital Environment: NYU Law School, 31 March-2 April
- Computers, Freedom, Privacy: Westin Hotel Toronto, April 7-1
- Internet and Governance: Kennedy School, Harvard, May 30
- Internet and Society: Harvard, May 31 – June 2

by Christopher T. Marsden

### **“The Open Internet and Its Discontents: Living in the Age of the Ostrich, the Gilded, or the Military-Intellectual Property Complex?”**

This review of the US intellectual scene is one-sided, biased, ill-informed and jaundiced. As a European whose specialism is constitutional and competition law, I am at once critic of both

- the social libertarian naivete of the technologically determinist computer ‘digerati’ and
- the corporatist inheritance which makes European society and industry so hidebound, hierarchical and unsuited to the Internet.

I am thus conservative constitutional critic of the Internet’s insiders, and radical competition critic of the old socio-economic interests. It is uncomfortable having a foot on either side of the Atlantic, especially when the American foot is trying to reach to ‘West Coast’ code, the libertarians both social and economic, and the other foot spans US ‘East Coast’ code, and the chancelleries of Europe. This review of a series of conference attempts that impossible task: my apologies in advance for its failure. I am in good company.

Larry Lessig described and forewarned readers of ‘Code and Other Laws of Cyberspace’ that the libertarian critics of regulation would continue to dominate Internet regulation in the US, in an unholy alliance of open source cyberlibertarians and red-in-tooth-and-claw corporate interests, the latter ominously represented by the Motion Picture Association of America, the single greatest lobbying power known in Washington D.C. European constitutional lawyers are aware of the awesome power of these corporate interests, even if expressed in the ‘public’ broadcasters and telecommunications operators who stand in the way of competition. Lessig declares it the ‘Age of the Ostrich’, when social libertarians will not join with supporters of gov-

ernment provision of public goods and exclusion of public harms, for fear of the dead hand of bureaucracy.

I have increasingly concluded that it may hearken back to an earlier, 'Gilded' Age of American capitalism, in which government inaction and private corporate power grew to such uncontrollable levels that the eventual crash shook the debtor and dependent economies of Europe, Latin America, East Asia and others. Thus, I suggest that American ostriches are mistaken by European chancelleries for geese laying golden eggs, with the unfortunate result that Europeans – individually and collectively – gaze in awe at the economic miracle born of government neglect, and conclude that the recipe in Europe must be similar.

How does this happen? The success of 'Silicon Valley Code', of creative destruction, of venture capital financed high technology, of individual entrepreneurship, created a cluster of success factors including human capital sucked out of hierarchical institutions, such as old-style telephone and computer hardware companies, universities and governments. It is claimed that in 1998 there were more French software programmers in Silicon Valley than in Paris. The abundance of this environment created thousands of 'Microserf' and other millionaires, in their paper share options. In time, the 'Wintelciscos' emerged from merger and other competitive litigations to dominate parts of the personal computer and internet industries. They created a superhighway for the owners of content. The abundance created by digital networks, which combine many of the functions of print publishers and libraries, railways, automobiles, telegraphs, telephones, electric and gas power, radio and television, led to merger mania and a huge investment bubble. This is consistent with market behaviour in previous such investment booms in the industries cited.

At a certain point in time – for convenience let us describe it as the Microsoft antitrust trial, though in truth it was a continuous tightening of the regulatory noose as industries matured, merged and interoperated one with the other – regulation became an instrumental part of these booming industry sectors, as dominance and abusive behaviour, towards competitors, consumers, suppliers, investors and others, were perceived by government through the labyrinthine channels of lobbying in a complex federal representative democracy. In consequence, this 'Silicon Valley' code – innovate, capitalise, exploit opportunity – was joined with 'Hollywood' or 'Madison Avenue' Code – intellectual property and trademark law, antitrust and First Amendment law. The boundaries are somewhat artificial, but the lobbying communities are not. Hence the Sonny Bono Copyright Term Extension Act and Digital Millennium Copyright Acts of 1998 (the extension was not to an entire millenium, however compliant Congress in what Yochai Benkler has termed the Mickey Mouse Copyright Act, after 'Hollywood Coders' the Disney-ABC Corporation). Again, the ability of incumbents to maintain power, whether it be content companies in the Internet Age, film studios in the television age, or merchant banks in the railway age, should not be surprising to political scientists, however bewildering to ostrich libertarians.

Note that the Ostrich figures here only in relation to domestic policy: my interest as a foreigner was to see whether the US would offer a framework for international governance, as in 1945, or play a role only in emergencies, as in the period 1919-1941. Would it indulge itself or

others? Where there was no Versailles or Bretton Woods conference, given that there was no land to resettle in the wake of the end of the Cold War, there have been smaller, less public meetings, including those under IMF-World Bank auspices in Washington, the WTO in Geneva, Marrakech, Singapore and most recently and infamously Seattle. There have also been private financier-corporate meetings, notably those with government in Davos at Annual Meetings of the World Economic Forum, and World Bank-IMF annual meetings, most infamously in April 2000 in Washington D.C. The closest to any kind of 'Bretton Woods' for the Information Age has been the G8 meeting in Brussels in April 1995, now repeated in Okinawa in July 2000.

When industrial economies collapsed under a US information flood in Eastern Europe and Russia throughout the 1990s, in East Asia in 1997, or in Africa on a continuous basis since 1982, the US looked away, except in that brief 'New World Order' from 1991-3. Since late 1993, when successful NAFTA, TRIPS, WTO, GATS agreements contrasted with failed interventions in the real property of Haiti and Somalia, the US government's economic diplomacy (surrounding Information Age issues) has been far more noticeable than its military intervention. The 1950s scenario repeated in international governance is that the US leads where it perceives a strategic interest for its corporations and capital, as it did with IMF, World Bank, GATT, Marshall Plan, all created to secure export markets for industrial goods and investment in the 1940s-50s. In the current period, it is GATS and TRIPs which represent that aim, with Permanent Trade Status for China, the Agreement on Basic Telecoms and High-Tech Goods, and IMF reforms in East Asia and Latin America the drivers.

#### *Intellectual Property, Privacy and Internet Governance*

But has the US led? Is there political leadership or public support for an expanded role? Given the imminent industry consolidation driven by entrenchment of the compromised Congress' *fait accompli* for the Internet, in which the favourites of 'East Coast' and 'West Coast' capital will merge one with the other, and prosecute vigorously the Napsters and others who infringe on their newly constitutionally enshrined property (Hollywood and Madison Avenue Code), can we draw parallels with previous ages? Has the Internet really changed anything in the power relations of public policy, or is it a repeat of previous economic transformations, which were controlled and manipulated to the advantage of vested interests, after a brief honeymoon period of heady entrepreneurship?

Though not the immediate project, it was these questions which repeatedly emerged in the course of the four conferences which I attended in the spring of 2000. The first two can be characterised as the libertarian pair, in late March in New York and Toronto. The latter two were largely about money and power, suitably set at Harvard at the end of May. Common threads were the intellectual framework offered by Lessig's book (though he himself spoke only at the NYU Law School conference), the open source debate of the first two, where Jessica Litman, Pamela Samuelson and Yochai Benkler (organiser of the NYU conference) were prominent speakers, and the governance debate's focus on the meritocracy-to-adhocracy-to-bureaucracy developments of the V-chip filtering software, ICANN trademark tribunals, and IETF-W3C attempts to continue their traditional Internet self-governance model. Jean Camp of

Harvard convened panels in Toronto and both Harvard conferences, focussing on the crisis of legitimacy in the Internet self-governance community. In Toronto, the chairs of W3C and IETF met for the first time in public. Were these two heads of state or of international organisations, the protocol can be imagined. The Internet 'protocol' of their meeting was a simple 'How do you do'. It demonstrates both the informality and the lack of formal hierarchy of the current merit-adhoc methods of regulating. Much will be lost as well as gained with the increasing formalism which appears to be emerging (witness ICANN voting scandals – Esther Dyson attended both Harvard conferences as ICANN chair, but made clear her discomfort in the role and wish to escape to private life to tell the 'real' ICANN story).

A word about the puns in the title. 'Gilded Age' refers generally to the enormous increase in American wealth and power created by mass immigration, industrialisation and the trans-continental networks created in the 1880s-1920s, and more particularly after the transfer of capital dominance from Europe to Wall Street in the 1914-18 war. 'Gilder-ed' Age is a reference to the prophet of e-commerce, George Gilder, a libertarian in social and economic terms, and an inheritor of the *laissez-faire* approach of that earlier period.

The question posed by my use of the term is:

*will America lead in the Internet Age, or will it allow private corporations to set agendas to which legislators respond purely on the captured business case it presents for their clients?*

If Disney, Cisco, Motorola, IBM, Goldman Sachs and others exert international leadership as proxies for their government, that may be a return to the collapsed international system under the farcical League of Nations in the 1920s (public choice case studies par excellence). As much was hinted by Dennis Gilhooly and Herbert Ungerer on an outstanding panel at the Internet and Governance Conference at Harvard, with bleak references to the crisis of United Nations agencies, of developing countries' policies, and of Internet self-regulatory legitimacy.

The Military-Intellectual Property Complex is an adaptation of the 'Gilded Age' scenario, in which government is still captured, is still parochial, is still in the pay of the corporations, but nevertheless admits to its international responsibilities as commercial super-power in order to secure a degree of stability in international trade and investment in the Internet Age. The 'military-industrial complex' to which Dwight D. Eisenhower referred in absolving himself of some responsibility for the nuclear arms race of the 1950s - represented by General Motors' control of the Defense Department in order to build interstate freeways – is here represented by the post-industrial power of intellectual property, not land defended by arms. The growing encroachment of private contract in cyberspace (the central theme of Yochai Benkler's conference and a sub-theme of the others – including acid commentary by Tim Berners-Lee at the Internet and Society Conference) is a real 'land grab' for digital property on a global scale by a small number of mainly US-based corporations and their legal advisors. Though this may produce complementary growth in other countries, it will be resented and resisted by citizens (witness A16 riots in Seattle and Washington D.C. in the period leading up to these conferences) even while governments and corporations pursue the American challenge with quasi-American solutions. The bile and invective aimed at French government encryption policy and the European suggested co-regulatory approach to the Internet surprised this visitor to the Toronto confer-

ence. The parochial libertarianism of that event is best summarised with the continual reference to 'here' meaning the US, when the conference was held in Canada!

The military is still important, as interceptor and designer of communications, as funder of the Internet, as awkward bed partners for their libertarian successors in regulating the Internet. More important perhaps is the role of IPR holders: the Motorolas, AOL-Time Warners and Disney-ABCs, not to mention Microsoft, Intel and others – especially Network Solutions, the 'bottleneck' in global top level domain name registration. However, suggestions of a Bretton Woods for the Information Age are greeted with resentment and scorn on the part of US policy-makers akin to Congressional responses to Wilsonian diplomacy post-Versailles 1919. Whether Information Age politics is more parochial than Industrial Age – where the US did at least provide a Marshall Plan to reconstruct the industrially devastated in Europe and East Asia – is an intriguing quandary in the 'globaloney' gushing talk of Internet-led globalisation. The 'I love you' bug with its murky Phillipines origins and Microsoft Outlook-contaminating poison might just forewarn another Vietnam, a new domino theory for the Information Age.

The conferences can be summarised crudely as showing how far the Internet has grown up and how far it has to grow: it is still a creative, expressive and spoilt American teenager which needs to get out more. Its parents, the US government and academia, have contrasting ambitions, the former wishing it to become a successful businessman, the latter a brilliant artist. Its best friends are increasingly being marginalised as naïve nerds, as its new buddies become the owners of fast cars and organisers of bright parties full of sharp suits and accomodating girls and boys. It is falling in with the wrong crowd, pirates, gamblers, porn kings, fast company all round, and is being taken on a wild ride. Living out its mistakes in public it is realising the benefits of privacy, if not yet sobriety. Soon, it might start traveling extensively in other countries, even speaking other languages and celebrating other cultures, beginning to mature. It is certainly continuing to test its potential at thirty human years old, the WWW being just eleven. More answers than this series of conjectures may emerge after its next Internet birthday in less than two months' time.