

# ASSOCIATION OF AMERICAN LAW SCHOOLS 2001 ANNUAL MEETING: SECTION ON LAW AND COMPUTERS

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## ELECTRONIC COMMERCE POLICIES FOR THE EMERGING MARKETPLACE

*Elliot Maxwell\**

*MICHAEL MEURER:*

I am Michael Meurer from Boston University. I am the moderator for the E-Commerce Section. I have a couple of announcements before we begin. First, I want to thank Maureen O'Rourke sitting over here for organizing this presentation session. And, be sure to stay around at the end of the presentation if you are interested in participating in the business meeting. One other announcement—the Berkeley Center for Law and Technology is sponsoring a reception tonight. Pam Samuelson up here has directions for people. The reception is from seven to nine at the Forest Hill Club. Our first speaker is Elliot Maxwell, who is the Special Advisor to the Secretary of Commerce for the Digital Economy in the Commerce Department. He is a lawyer who has previously worked at other positions at Commerce and the FCC and has done corporate strategy for Pacific Telesis. Elliot will be speaking about electronic commerce policing for the . . .

*ELLIOT MAXWELL:*

Policies.

*MICHAEL MEURER:*

. . . Policies —thank you—policies for the emerging marketplace. That was

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a Freudian slip.

*ELLIOT MAXWELL:*

And a genuinely unfortunate Freudian slip. Now, if people cannot see the PowerPoint slides because of the column, you can either move so you can see or I can describe the slides, which would really be boring. I am very quickly going to run through some of the numbers about what is happening in electronic commerce, and then go to the set of issues that I think are raised by the emergence of electronic commerce. The early discussions of policy and the role of government in this space could be characterized by two polar positions. One was the Libertarian thread. "Everything will be okay if the government just keeps its hands off the Internet."<sup>1</sup> That is what government policy should be. On the other hand, there were those who saw the Internet as really disruptive to established industries and existing practices; they argued that government should control it to make sure that nothing bad happens.<sup>2</sup>

I think neither of those polar positions is particularly useful or sustainable over time. But we do need to think about the ways in which the government can respond appropriately to real and genuine concerns about how the Internet and electronic commerce will develop in the context of the values that we have as a society.

Now for some numbers. By July 2000, there were approximately two billion Web pages.<sup>3</sup> There are estimates that go as high as seven billion Web pages. The number of Internet hosts has reached ninety-three million.<sup>4</sup> This number was about one million in 1993.<sup>5</sup> Internet traffic is growing 100 percent a year.<sup>6</sup> As of November, there were about four hundred million people online around the world.<sup>7</sup> That is still a relatively small number, compared to a global population greater than six billion, and the vast majority of users are in the industrialized north. Until last year, the majority of online users were in the United States and Canada.<sup>8</sup>

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<sup>1</sup> See *Stop Signs on the Web*, ECONOMIST, Jan. 13, 2001, at 22 ("Libertarian thinking . . . ran through early Internet scholarship.").

<sup>2</sup> See generally *id.*

<sup>3</sup> See Janet Kornblum, *More Useless Info: 2 Billion Web Pages*, USA TODAY, July 11, 2000, at 3D, available in LEXIS, News Library, Usatdy File.

<sup>4</sup> See *Press Release: Internet Survey Reaches 93 Million Internet Host Level*, MATRIX NET, Sept. 30, 2000, available at <[http://www.matrix.net/company/news/20000930\\_93\\_million\\_hosts.html](http://www.matrix.net/company/news/20000930_93_million_hosts.html)>.

<sup>5</sup> See Mei Kobayashi & Koichi Tadeka, *Information Retrieval on the Web*, ACM COMPUTING SURVEYS, June 1, 2000, at 144, available in LEXIS, Busfin Library, ABI File.

<sup>6</sup> See *id.*

<sup>7</sup> See, U.S. DEP'T OF COMMERCE, *DIGITAL ECONOMY 2000 v (2000)* (reporting that Internet access will reach an estimated 304 million people world-wide in 2000), available at <<http://www.esa.doc.gov/de2000.pdf>>.

<sup>8</sup> See *id.* at v-vi.

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While many trumpet the implosion of the dot-com economy, e-commerce retail sales have continued to go up. In fact, last quarter, e-tail sales were up fifteen percent.<sup>9</sup> Conversely, retail sales, as a whole, were down eight percent.<sup>10</sup> Business to consumer (B2C) e-commerce retail is still less than one percent of retail sales.<sup>11</sup> So e-commerce is still a very small part of our very large economy. Business-to-business e-commerce is likely to be much more important than B2C. Jupiter Research, among others, projects numbers that are very, very big—\$6.8 trillion by 2004.<sup>12</sup> While the government does not endorse any particular forecast, we continually found that people were systematically underestimating the economic effect of e-commerce. Thus, while e-commerce is not the dominant part of the economy, it will become a very, very significant part of our economy.

In 1997, the President released a policy “framework” for global electronic commerce.<sup>13</sup> The principles that he set out have been very robust in terms of accommodating changes in electronic commerce. There were five principles. One was that even though government had been profoundly involved in the development of the Internet, electronic commerce had been largely the product of the private sector—and therefore, the private sector should continue to lead policy development.<sup>14</sup> There are a couple of reasons for believing this. One was that it is easier for a policy to be adopted by the private sector if the private sector had been part of its formulation. Second, to the extent that the private sector was involved, it was more likely that solutions could be adopted more quickly and easily on a global basis than if governments were the primary policy driver. This is particularly true as legal rules are likely to differ among countries because of different cultures, legal traditions, and history.

The second and third principles were reasonably straightforward.<sup>15</sup> They attempt to minimize regulation, and to make sure that if regulation was put into

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<sup>9</sup> See *Retail E-Commerce Sales in Fourth Quarter 2000 were \$8.7 Billion, Up 67.1 Percent from Fourth quarter 1999*, Census Bureau Reports, U.S. DEP’T OF COMMERCE NEWS, Feb. 16, 2001 (reporting that there was an increase of 35.9 percent in e-commerce sales from the previous quarter), available at <<http://www.census.gov/mrts/www/current.html>>.

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> See Matthew R. Sanders & Bruce D. Temkin, *Global eCommerce Approaches Hypergrowth*, FORRESTER BRIEF, Apr. 18, 2000, available at <<http://www.forrester.com/ER/Research/Brief/Excerpt/0,1317,9229,00.html>>.

<sup>13</sup> See generally WILLIAM J. CLINTON & ALBERT GORE, JR., A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE (1997), available at <<http://www.ecommerce.gov/framework.htm>>.

<sup>14</sup> See *id.* § 1 (the private sector should lead).

<sup>15</sup> See *id.* §§ 2, 3 (detailing the second principle as “[g]overnments should avoid undue restrictions on electronic commerce” and the third principle as “[w]here governmental involvement is needed, its aim should be to support and enforce a predictable, minimalist, consistent and simple legal environment for commerce”).

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place, that it be predictable, minimalist, and designed to enhance the growth of electronic commerce as opposed to controlling it.<sup>16</sup> The fourth and fifth are interesting and under-appreciated.<sup>17</sup> One, is that the Internet is different.<sup>18</sup> And so, in thinking about policies, one should look at what the existing policies are, why they were put into place, and how they might be applied to this new medium. In many cases, you need to make adjustments because of the different nature of the medium. The final principle was that the Internet was intrinsically global.<sup>19</sup> And we needed, as a fundamental challenge, to find ways in which policy could be made interoperable across nation-states.

I think that there are six principal sets of issues for government to be addressing. One is establishing a legal framework.<sup>20</sup> Some of the people who said government should keep its hands off the Internet soon came to the government saying: “We need to do electronic contracts. Can you change the law so that we can do electronic contracts?” Part of the legal framework means making sure that you can sign things electronically, and that those signatures will be valid if challenged in court. Another set of legal issues revolves around taxation and tariffs.<sup>21</sup> Are these electronic transactions going to be treated differently from those in the physical space? Is there a good economic or social reason for doing so?

Electronic payments raise very significant issues for treasuries around the world. They raise issues about the creation of credit and management of the money supply. Obviously, the treasury folks have a very strong interest in taxation and tariffs. The tariffs issue, so far, has not been an important issue in practice, but the United States has advocated a moratorium on tariffs on digitally delivered goods to send a signal that we wanted to encourage electronic commerce.<sup>22</sup> There are no tariffs now on digitally delivered goods, whether they are e-mails or facsimiles, or electronic commerce transactions, but there is a concern that countries would potentially begin to tariff them.

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<sup>16</sup> *See id.*

<sup>17</sup> *See id.* §§ 4, 5 (detailing the fourth principle as “[g]overnments should recognize the unique qualities of the Internet” and the fifth principle as “Electronic Commerce over the Internet should be facilitated on a global basis”).

<sup>18</sup> *See id.* § 4 (characterizing the Internet by “its decentralized nature and . . . its tradition of bottom-up governance” and advocating reexamining existing laws and regulations in light of “the needs of the new electronic age”).

<sup>19</sup> *See id.* § 5.

<sup>20</sup> *See id.* § II.3 (recommending that such a legal framework is necessary for the continued success and growth of e-commerce).

<sup>21</sup> *See id.* § II.6.

<sup>22</sup> *See generally* Internet Tax Freedom Act, Pub. L. 105-277, div. C, title XI, 112 Stat. 2681-719 (1998) (codified at 47 U.S.C. § 151 (1994 & Supp. IV 1999) and 19 U.S.C. § 2241 (1994 & Supp. V 2000)); *see also* CLINTON & GORE, *supra* note 13, § I.1 (stating that the United States would advance this position before international bodies, including the World Trade Organization).

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In the United States we have focused on sales and use taxes.<sup>23</sup> The tax issue becomes more complex when we also have to address the value-added taxes applied by the Europeans and most other governments.<sup>24</sup> The Europeans have now proposed a set of value-added taxes that would be applied to digitally-delivered goods delivered from outside the European Union.<sup>25</sup> We are suggesting to them that they not go forward with this until the OECD reaches consensus on principles of electronic taxation. Unless this is resolved, it could result in a major controversy in the next year. Antitrust is another issue that may need to be rethought given the economic attributes of digital goods.

Perhaps the most knotty of the legal issues is that of jurisdiction.<sup>26</sup> If I have a server in California, and a company headquartered in Paris, and a customer uses the Web in Benares to order a digitally-delivered good, and the transaction goes bad, who has jurisdiction? Who chooses what rules apply? Who interprets the rules? Who enforces the rules? At this point, the U.S. government has not taken a position on this issue. But it is unlikely that the U.S. government will take a position in favor of country of origin, which is what businesses in general would like to have as a jurisdictional model because it gives them certainty about the rules that apply. Nor is it likely that the United States will support a country of destination model of jurisdiction, which has been advocated by consumer groups for the same reason—to allow consumers to easily know what rules apply. Neither businesses nor consumers want to be hauled into other jurisdictions. Neither wants to have to be familiar with all the rules in all the potential jurisdictions. So, in the absence of agreement on jurisdiction, we have been putting our attention on the creation of alternative dispute resolutions to minimize the number of cases that reach the courts.<sup>27</sup>

There is a second set of issues, those that affect the development of the infrastructure on which the Internet rides. These are largely questions of telecommunications competition policy and spectrum policy.<sup>28</sup> Right now,

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<sup>23</sup> See Dep't of the Treasury, Administration Policy Statement Advisory Commission On Electronic Commerce Meeting ~ Dallas, Texas (Mar. 20, 2000) (recommending that the states and localities develop simple sales and use tax systems), available at <<http://www.ustreas.gov/press/releases/ps492.htm>>.

<sup>24</sup> See Statement by Treasury Deputy Secretary Stuart E. Eizenstat, TREASURY NEWS, June 7, 2000, available at <<http://www.ustreas.gov/press/releases/ps687.htm>>.

<sup>25</sup> See *id.*

<sup>26</sup> See Jack Goldsmith, *Regulation of the Internet: Three Persistent Fallacies*, 73 CHI.-KENT L. REV. 1119, 1119 (1998); Daniela Ivascanu, *Legal Issues in Electronic Commerce in the Western Hemisphere*, 17 ARIZ. J. INT'L & COMP. L. 219, 221 (2000).

<sup>27</sup> See generally Frank A. Cona, *Application of Online Systems in Alternative Dispute Resolution*, 45 BUFF. L. REV. 975 (1997); E. Casey Lide, *ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation*, 12 OHIO ST. J. DISP. RESOL. 193 (1996).

<sup>28</sup> See Craig D. Dingwall, *The Last Mile: A Race for Local Telecommunications Competition Policy*, 48 FED. COMM. L.J. 105, 130-32 (1995).

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there is extraordinary interest in finding spectrum for third-generation wireless systems.<sup>29</sup> We are also looking at how to increase telecommunications competition, how to stimulate broadband development and how to deal with convergence. How do I deal with a policy regime that differs in how it treats similar services based on whether they are delivered by wireless, satellite, cable or telephone wires? For example, what happens when cable systems offer not only cable services, but what traditionally has been considered telecommunication services over an integrated plant?

Another issue is how to open markets abroad and how to extend Internet infrastructure to other countries.<sup>30</sup> We need to understand what we and others have learned through privatization and liberalization, particularly in the developing world, and help customize it to each venue.

Another infrastructure issue is standards. The U.S. government is not in the business of setting standards, but it is a major player because it is the largest consumer of technology in the country.<sup>31</sup> As you know from the wireless industry, standards have enormous impact. There is some very useful work being done in partnership between the government and the private sector, such as the development of standards for data delivery in manufacturing supply chains.<sup>32</sup> These are the plumbing systems of e-commerce and, I think, are under-appreciated by lawyers, but they are critical to the growth of electronic commerce.

With John Weinberg in the audience I will not say very much about domain names management. I will leave it to him to tell you what a great thing it is to be involved in ICANN.<sup>33</sup> I think this is one of the most interesting experiments in the creation of new governance systems, and therefore it is difficult and contentious. But I think anybody who does not try to help make this work is missing a very important exercise.

So let us say you have a legal framework and a robust infrastructure. By robust infrastructure, I mean an infrastructure where broadband is widely available. There is a set of issues which will encourage or discourage

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<sup>29</sup> See Howard Shelanski, *The Inaugural Telecommunications Policy and Law Symposium Speech: Regulating at the Technological Edge: New Challenges to the F.C.C.*, 2000 L. REV. MICH. ST. U. DET. C. L. 3, 5 (2000).

<sup>30</sup> See, e.g., Andrea M. Corcoran, *The Uses of New Capital Markets: Electronic Commerce and the Rules of the Game in the International Marketplace*, 49 AM. U. L. REV. 581, 582-84, 596-97 (2000).

<sup>31</sup> See, e.g., *Doing Business in the U.S.*, CAN. BUS., Aug. 21, 2000, at 25, available in LEXIS, News Library, Canbus File.

<sup>32</sup> See *Hearings Before the Subcomm. On Tech. of the House Comm. on Science*, 106th Cong. (2000) (statement of Karen H. Brown, Dep. Dir. of Standards and Technology of the U.S. Dep't of Commerce), available at <<http://www.nist.gov/testimony/2000/kbecomm.htm>>.

<sup>33</sup> See *About ICANN*, ICANN.COM, May 1, 2001, available at <<http://www.icann.org/general/abouticann.htm>>.

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participation in this new medium. The issue that jumps out is privacy.<sup>34</sup> But when you start to unpack the polling data, what you find is the issue of privacy is part of a larger set of issues about trust.<sup>35</sup> People want to know with whom they are communicating. They want to know that the communication has not been tampered with. They want to know that if there is an agreement, that it will be implemented. They want to know that information about them will not be exploited without their permission. Thus, there are a set of conditions that facilitate trusted interactions. Consumers want these in both the physical space and in cyberspace.

Privacy is likely to be a major concern in the coming Congress. The need for consumer protection continues and we have been looking at alternative means of dispute resolution.<sup>36</sup> There will be issues regarding authentication, security and reliability that will need to be resolved in order for people to feel confident about using this new medium.

Access to content is another issue that raises important issues. The *Yahoo!* case in France is enormously important regardless of what Yahoo! does with respect to auctions.<sup>37</sup> It suggests that we may be forced to create a German Net and a Chinese Net and a French Net. It suggests that the metaphor of openness, of end-to-end connection, of access from anybody to anybody and from anybody to anything, is subject to strong pressures.

As someone once said, the information superhighway goes through some very bad neighborhoods. It goes through places where people teach you how to build bombs, where you can gamble, where you can get prescription drugs without a medical examination, where you can read apologies for the Holocaust, or where you can find something objectionable to almost every government. In this environment it is not surprising that governments will try to protect their citizens regardless of what we in the United States might think about the virtues of the First Amendment.

Another issue is that of intellectual property protection.<sup>38</sup> This too is a trust or confidence issue from the standpoint of those people who create content. Unless they know that they can protect their intellectual property on the fastest, cheapest, best copying machine ever invented, they may hesitate to make their content available.<sup>39</sup> On the other hand, we have traditional "fair use" doctrine and traditional habits of personal use that are part of our existing practices in the physical world. So we have got to find new ways of balancing these

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<sup>34</sup> Joseph H. Sommer, *Against Cyberlaw*, 15 BERKELEY TECH. L.J. 1145, 1216-18 (2000).

<sup>35</sup> *See id.* at 1217.

<sup>36</sup> *See, e.g.*, Robert C. Bordone, Note, *Electronic Online Dispute Resolution: A Systems Approach – Potential Problems and a Proposal*, 3 HARV. NEGOTIATION L. REV. 175, 175 (1998).

<sup>37</sup> *See* UEJF & Licra v. Yahoo! Inc., Tribunal de Grande Instances de Paris, Mar. 22, 2000, available at <<http://www.juriscom.net/jurisfr/cti/yauctions20000522.htm>>.

<sup>38</sup> *See* Sommer, *supra* note 34, at 1218-25.

<sup>39</sup> *See id.* at 1219.

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interests.

Another important issue related to security is that of cyber-crime. There is a Cyber-Crime Treaty being discussed by the Council of Europe that would allow law enforcement to prosecute computer crimes across jurisdictions.<sup>40</sup> But the treaty raises difficult issues about the procedural protections in place when crimes are being investigated.

Another set of issues revolve around digital inclusion. Is everybody going to be able to participate in cyberspace? And that “everybody” means people with disabilities, people in different countries, people of different income and education, age and gender, as well as workers in large and small enterprises.<sup>41</sup>

The final set of issues raise important policy questions. One is, what is happening in this digital economy? How do you measure it? How do you understand the impacts on the “old world” economy?

And, finally, there is an important question as to whether government will use these technologies to deliver products and services in a way that is more attuned to the needs of the consumers of these services than has been true in the past. Can we reorganize government to reflect what the technology allows you to do for your citizen customers.

So this is a quick and too-many-worded tour of some of the issues that people are going to need to wrestle within the Internet space. I encourage you to think about them and talk to your students about them, because we need people who are engaged in these issues to participate in the policymaking process. We need all the help we can get if we are to make sensible policy and allow electronic commerce to be a significant and dynamic part of our economy.

Thanks.

*MICHAEL MEURER:*

Thank you very much Elliot. We will have two more speakers and then we will have time for questions. So hold the questions for Elliot and Jane for a few minutes and we will get a chance for that.

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<sup>40</sup> See *Crime in Cyberspace: First Draft of International Convention Released for Public Discussion*, COUNCIL OF EUROPE, Apr. 27, 2000, available at <<http://conventions.coe.int/treaty/eu/projets/cyber.htm>>

<sup>41</sup> See generally U.S. DEP’T OF COMMERCE, *FALLING THROUGH THE NET: DEFINING THE DIGITAL DIVIDE* (1999), available at <<http://www.ntia.doc.gov/ntiahome/fttn99/FTTN.pdf>>; Paul Taylor, *The Americans With Disabilities Act and the Internet*, 7 B.U. J. SCI. & TECH. L. 26 (2001) (discussing legal issues concerning Internet accessibility for people with disabilities).