FINDING AN APPROPRIATE GLOBAL LEGAL PARADIGM FOR THE INTERNET: UNITED STATES AND INTERNATIONAL RESPONSES

Benjamin A. Pearlman*

I. INTRODUCTION ......................................................... 598

II. UNITED STATES CASE LAW ........................................... 599
    A. First Amendment Nature of Internet "Speech" ............... 599
    B. The Internet as a Commercial Vehicle ..................... 602

III. THE UNIFORM COMMERCIAL CODE (UCC) ....................... 610

IV. INTERNATIONAL PERSPECTIVES .................................... 618

V. CONCLUSION ............................................................ 623

* J.D. 2001, University of Georgia.
I. INTRODUCTION

When the global computer network known today as the Internet was formed, idealists envisioned it as a tool for efficient exchange of information.¹


What we now refer to as the Internet grew out of an experimental project of the Department of Defense's Advanced Research Projects Administration ("ARPA") designed to provide researchers with direct access to supercomputers at a few key laboratories and to facilitate the reliable transmission of vital communications. . . . ARPA supplied funds to link computers operated by the military, defense contractors, and universities conducting defense related research through dedicated phone lines, creating a "network" known as ARPANet. . . . Having successfully implemented a system for the reliable transfer of information over a computer network, ARPA began to support the development of communications protocols for transferring data between different types of computer networks. Universities, research facilities, and commercial entities began to develop and link together their own networks implementing these protocols; these networks included a high-speed "backbone" network known as NSFNet, sponsored by the National Science Foundation, smaller regional networks, and, eventually, large commercial networks run by organizations such as Sprint, IBM, and Performance Systems International (commonly known as "PSI"). . . . As faster networks developed, most network traffic shifted away from ARPANet, which formally ceased operations in 1990. . . . What we know as "the Internet" today is the series of linked, overlapping networks that gradually supplanted ARPANet. Because the Internet links together independent networks that merely use the same data transfer protocols, it cannot be said that any single entity or group of entities controls, or can control, the content made publicly available on the Internet or limits, or can limit, the ability of others to access public content. Rather, the resources available to one with Internet access are located on individual computers around the world. . . . It is estimated that as many as forty million individuals have access to the information and tools of the Internet, and that figure is expected to grow to 200 million by the year 1999. . . . Access to the Internet can take any one of several forms. First, many educational institutions, businesses, libraries, and individual communities maintain a computer network linked directly to the Internet and issue account numbers and passwords enabling users to gain access to the network directly or by modem. . . . Second, 'Internet service providers,' generally commercial entities charging a monthly fee, offer modem access to computers or networks linked directly to the Internet. . . . Third, national commercial 'on-line services' . . . allow subscribers to gain access to the Internet while providing extensive content within their own proprietary networks. . . . Finally, organizations and businesses can offer access to electronic bulletin-board systems—which, like national on-line services, provide certain proprietary
While the Internet does serve that idealistic purpose today, businesses have realized its potential for sales and marketing purposes also. It is impossible to live in today's society and not be bombarded by messages from corporate entities touting their products and directing the consumer to the company's website. Even the United States Postal Service has marketed itself as the choice of "e-tailers," in the hopes that the obsession of society with everything Internet-related will boost its products' appeal by association.

Certainly, the influx of huge amounts of capital that has resulted from business's interest in the Internet has driven quantum leaps in the technology of both hardware and software and provided a seemingly infinite supply of jobs. However, legislation has been much slower to make similar advances. Furthermore, in common law countries such as the United States, precedent has been strained to deal with the new issues posed by the pervasive nature of the Internet today. Legal practitioners and businesses are left uncertain as to how various issues will be interpreted by their opposite numbers, not to mention the court system. A myriad of potential legal problems are associated with the Internet, beginning with the very basic idea of personal jurisdiction, and growing to include property issues involving e-mail on company-owned systems, digital signature verification, exportation of encryption technologies, and, most importantly for the purpose of this note, issues of contract formation and enforcement. These issues are difficult enough to resolve on a national level, but when issues of international jurisdiction and choice of law doctrines arise, the problems become massive in scope. This note examines first domestic solutions to these problems and then how international agreements can mirror and/or complicate them. Finally, it suggests how the international community can effectively harmonize the law and custom extant today and in which direction novel law should point for a more effective regulation regime in the future.

II. UNITED STATES CASE LAW

A. First Amendment Nature of Internet "Speech"

One of the most high-profile issues in U.S. Internet regulation is pornography. This issue was brought into the public light with the Computer Decency Act of 1996 (hereinafter CDA). A constitutional challenge of the CDA content; some bulletin-board systems in turn offer users links to the Internet.

Id. 2

resulted in an injunction against enforcement of certain provisions and provided a forum for discussion of perspectives on the Internet. 3

On appeal, the Supreme Court conceived of the Internet first and foremost as a communications medium, similar (though different in certain significant ways) to radio or television. Justice Stevens, writing on behalf of Justices Scalia, Kennedy, Souter, Thomas, Ginsberg, and Breyer (Justice O'Connor wrote an opinion concurring in part and dissenting in part, in which Chief Justice Rehnquist joined), noted the dual conception of the World Wide Web in the eyes of various parties. To Stevens, the “reader” likens the Web to “both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.” 4 The “publisher” sees the Web as a “vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers.” 5

Justice Stevens’s opinion included observations of the three-judge District Court panel—opinions that also seemed to view the Internet as a mode of communication. Judge Buckwalter concluded that the “unique nature” of Internet communication aggravated the Government’s argument that the vagueness of the CDA’s “patently offensive” requirement should be considered “in context.” 6 Judge Dalzell, considering the findings of the court and the nature of the Internet, went a step further and concluded that Internet communication was entitled to the “‘highest protection from governmental intrusion.’ ” 7 He pointed out four qualities of communications offered by the Internet, which he described as “the most participatory form of mass speech yet developed.” 8 Examining the extensive findings of fact before the court, Dalzell described the characteristics of the Internet that made Internet speech unique:

First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak.

---

5 Id.
6 See id. at 863 (quoting 929 F. Supp. at 865 n.9).
7 Id. (quoting 929 F. Supp. at 883).
8 929 F. Supp. at 883.
in the medium, and even creates a relative parity among the
speakers.\(^9\)

This "unique nature" argument seemed to appeal to Justice Stevens, as this
concept is an undercurrent throughout his opinion.\(^10\) Stevens also distin-
guished the Internet from broadcast media based on the unique characteristics
recognized by Judge Dalzell and his District Court counterparts. The Court
recognized that some of its prior decisions were predicated on special
justifications for regulation of broadcast media and were inapplicable to other
speakers.\(^11\) Stevens cited precedent in which the Court acknowledged that
"each medium of expression . . . may present its own problems,"\(^12\) and
recognized this statement as the basis for having a "special justification" for
many of the cases in which the Court granted limited First Amendment
protection to the broadcast media.\(^13\) Stevens distinguished the cases that might
arise under the CDA from those dealing with broadcast media by noting the
inapplicability of the "special justification" factors relied upon in other cases;\(^14\)
the "vast democratic fora of the Internet" were not historically (and have not
subsequently been) subject to the vast regulation broadcast media have been
and the Internet is not "invasive" in the same manner as radio or television.\(^15\)

Furthermore, Stevens noted an especially salient point, which, unfortu-
nately for the purposes of this note, he judged unnecessary to discuss in the
context of this case. One of the appellees' briefs argued that because so much
of the Internet's content has an overseas origin, the CDA can not be
"effective" and therefore fails a strict scrutiny test.\(^16\)

\(^9\) Id. at 877.
\(^10\) See, e.g., 521 U.S. at 867. Stevens distinguished FCC v. Pacifica Foundation, 438 U.S.
726 (1978), by stating that the FCC had "decades" of experience in regulating radio
communication, whereas the CDA provided no opportunity for evaluation by an agency
"familiar with the unique characteristics of the Internet." Id. Stevens also pointed out that the
FCC's order in Pacifica applied to a medium which historically had received limited protection
under the First Amendment. Id.
\(^11\) See id. at 868.
\(^12\) Id. (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)).
\(^13\) Id. See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (relying on the
historic extensive government regulation of the medium); Turner Broadcasting System, Inc. v.
FCC, 512 U.S. 622 (1994) (relying on scarcity of broadcast frequencies available at the
inception of the medium); Sable Communications of California, Inc. v. FCC, 492 U.S. 115
(1989) (relying on the "invasive" nature of the medium).
\(^14\) See supra note 13.
\(^15\) See 521 U.S. at 868-69 (citing Red Lion, 395 U.S. 367 (1969), and Sable Communications,
\(^16\) See id. at 878 n.45. Appellees' Brief cited Church of Lukumi Babalu Aye, Inc. v. City of
The government’s attitude toward the Internet, manifested by Congress’ apparently cursory manner in enacting the CDA,\(^1\) shows that, at least on some level, the government fundamentally misunderstands the nature of the Internet. If Congress truly wishes to effectively regulate the Internet, a full understanding of the nature of the beast is necessary. Technology that changes daily is not susceptible to ill-considered regulation.

B. The Internet as a Commercial Vehicle

The preceding analysis is predicated on the idea of Internet communications as speech. American jurisprudence has followed another course entirely in dealing with Internet issues; however the Commerce Clause\(^1\) \(^8\) rears its head almost unavoidably when considering the interstate commercial nature of the Internet is considered; the dormant aspect of the Clause is particularly relevant in light of the federal government’s uncertainty in regulation of the Internet.

This analysis underlies the court’s invalidation of New York’s Internet Decency Law\(^9\) in *American Library Ass’n v. Pataki.*\(^20\) Judge Preska found that

\[^{17}\] While all six other titles of the Telecommunications Act of 1996 were discussed extensively in committee in both houses of Congress, the provisions of the CDA were, in large part, added in executive committee after committee hearings were concluded or offered as amendments on the floor during debate. *See* 521 U.S. at 858 (citing 141 Cong. Rec. S8120 (June 9, 1995) (Exon Amendment No. 1268)). Also, there was questionable need to enact the CDA in the first place, as United States law already criminalized the transmission of certain types of material sought to be controlled by the CDA. *See* id. at 877 n.44 (citing 141 Cong. Rec. S8342 (June 14, 1995) (letter from Kent Markus, Acting Assistant Attorney General, to Sen. Leahy); 18 U.S.C. §§ 1464-65 (1994) (criminalizing transmission of obscenity); 18 U.S.C. § 2251 (1994) (criminalizing transmission of child pornography). It should be noted further that under the current “community standards” test of obscenity, the standards of the community most likely to be offended would be used in considering Internet material. *See* 521 U.S. at 878.

\[^{18}\] U.S. Const., art. I, § 8, cl. 3.

\[^{19}\] *See* N.Y. Penal Law § 235.21(3) (McKinney 1997). It states:

A person is guilty of disseminating indecent material to minors in the second degree when: . . . (3) Knowing the character and content of the communication which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he intentionally uses any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor.

the New York law violated the precepts of the Commerce Clause for three reasons:

First, the Act represents an unconstitutional projection of New York law into conduct that occurs wholly outside of New York. Second, the Act is invalid because although protecting children from indecent material is a legitimate and indisputably worthy subject of state legislation, the burdens on interstate commerce resulting from the Act clearly exceed any local benefit derived from it. Finally, the Internet is one of those areas of commerce that must be marked off as a national preserve to protect users from inconsistent legislation that, taken to its most extreme, could paralyze development of the Internet altogether.21

For these reasons, Judge Preska decided that, even though there was no explicit legislation from Congress that spoke to this issue, the wide-ranging repercussions of Internet regulation reserve to Congress the exclusive right to legislate in this area.22

From the beginning of her opinion, Judge Preska eschewed analogies that sought to place the Internet in traditional media categories, such as radio or television, and likened it more to a railroad or highway.23 This comparison takes on great importance for her dormant Commerce Clause analysis in general, but nowhere does it play a greater role than in her discussion of the infrastructure of Internet communication. It is impossible to categorize any Internet communication as interstate or intrastate based solely upon its state of origin. The manner in which information is physically transferred makes any discussion of interstate or intrastate communication meaningless. Two practices contribute to this fact. First, an actual transmission over the Internet can be broken up into units, referred to as “packets,” which are transferred independently from the originating computer to the receiving computer, which then reassembles the packets into the proper order. These packets do not necessarily take the same route across the Internet, and, in fact, may travel through any number of states.24 Also, a common practice is the holding of copies of material or portions thereof on separate machines to keep the

21 Id. at 169.
22 Id.
23 See id. at 161.
24 See id. at 171. This practice is known as “packet switching.”
requests for the original material from the original server to a minimum. Given this organization, it is practically impossible for a user to know the origin of the material accessed; so, even if the location of the original server is known, there is no guarantee the material being accessed is actually issuing from that server.⁵⁵

Judge Preska relied on these practices to point out that it is impossible for the owner of a server to avoid routing communications through New York State or for a user to ensure that his or her communications stay within the boundaries of New York. In other words, it would be impossible for server administrators or users to avoid New York’s jurisdictional reach.⁶⁶ Thus, the act is “necessarily concerned with interstate communications.”⁷⁷ Even with that issue settled, Judge Preska still found that a determination had to be made as to whether or not this communication constituted “commerce” so as to be under the purview of the Commerce Clause.

The court began its analysis by noting that various kinds of activity, perhaps not intuitively considered “commercial,” nevertheless have been brought into the realm of the Commerce Clause by the Supreme Court.⁸⁸ Also, a potential problem with the New York act in this case is that the parties jointly stipulated that “[t]he Internet is not exclusively, or even primarily, a means of commercial communication.”⁹⁹ The court quickly disposed of this issue by noting express holdings of the Supreme Court that the non-profit nature of activities do not take those activities outside of the ambit of the Commerce Clause.⁵⁰ Judge Preska also noted that the commercial nature of

---

²⁵ See id. This practice is known as “caching.”
²⁶ See 969 F. Supp. at 171.
²⁷ Id. at 172 (citing Virginia v. American Booksellers Ass’n, Inc., 484 U.S. 383, 397 (1988) which held that only statutes “readily susceptible” to a narrow construction will be so narrowed to save their being struck down as unconstitutional).
²⁸ See id. Preska cited Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997), for the proposition that the dormant Commerce Clause applies to a discriminatory real estate tax deduction over objections that camp attendees are not commercial items and that the camp’s “product” is “consumed” only within Maine. Further, though, there is another useful statement from the Court in this case: Stevens stated that “the economic incidence of the tax falls at least in part on the campers. . . . [T]he Maine statute, therefore functionally serves as an export tariff that targets out-of-state consumers by taxing the businesses that principally serve them.” 520 U.S. at 580-81 (citations omitted). Preska also cited Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), as a unique case in Commerce Clause jurisprudence, holding that race discrimination in a hotel burdened interstate commerce by impeding travel.
²⁹ 969 F. Supp. at 171.
the Internet grows almost daily, an observation which even the most casual observer of the Internet, or any medium, for that matter, cannot help but share. Regardless of commercial activity on the Internet, many users contribute to interstate commerce simply by purchasing Internet access from an Internet service provider, patronizing an "Internet café," or paying an access fee for a dial-up BBS.

Further, the court reflected upon the fact that the Internet itself is a modality of interstate commerce, akin to a highway or a railroad: "The Internet is more than a means of communication; it also serves as a conduit for transporting digitized goods... which can be downloaded from the provider's site to the Internet user's computer." All of this leads to the conclusion that transactions occurring over the Internet are clearly commercial, at least as much as travel over a "real" superhighway is so.

The court's subsequent Commerce Clause analysis is tripartite. First, Preska found that the New York law projected its effects beyond state borders; second, Preska used the balancing test from *Pike v. Bruce Church* to find that the burdens placed on interstate commerce outweigh the local benefits the act

U.S. 470, 491 (1917); Hoke v. United States, 227 U.S. 308, 320 (1913)).

31 See 969 F. Supp. at 173.

32 See id. (citing Katzenbach v. McClung, 379 U.S. 294, 300-01 (1964), stating that a purchaser of goods from interstate sources which are used in the provision of its services is participating in interstate commerce, even in connection with the provision of services within one state).

33 Id. Preska cited *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981), as an example of the invalidation of a state regulation of interstate highways and *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) as an example of the invalidation of a state railroad regulation. This aspect of the Internet is one of the main reasons Preska's analysis is so persuasive; many critics of her decision fail to recognize the "transport" function of the Internet. See, e.g, James E. Gaylord, Note, *State Regulatory Jurisdiction and the Internet: Letting the Dormant Commerce Clause Lie*, 52 VAND. L. REV. 1095 (1999). Gaylord claims that Judge Preska's decision is more analogous to early telegraph decisions, rather than transportation decisions like *Kassel* and *Southern Pacific*, and, like in the case of the telegraph, the Court will eventually allow states more latitude in regulation. Id. at 1117-22. However, this analysis completely fails to appreciate the fact that actual goods can be transported over the Internet; it is possible to purchase software or music, for example, over the Internet (goods traditionally available in some sort of physical medium) and have those goods delivered almost instantaneously to one's computer, without any intervening medium. Therefore, a comparison to the telegraph is inartful—a telegraph may be capable of transmitting crude "data" concerning, say, the terms of a contract, but the Internet is capable of transmitting the data necessary for the formation of the contract and the subject of the contract itself. In this respect, the Internet is much more akin to a highway than a telegraph. For all his claims of appreciating the technical constructs of the Internet, Gaylord falls into the trap of failing to understand the actual functioning of it.

confers; and third, Preska found that the New York law regulated an area that demands uniform national regulation.

Using a series of tests developed in recent Commerce Clause jurisprudence to examine the nature of the Internet and the actual effect of the New York law in this case, the court found that it would be "impossible to restrict the effects of the New York Act to conduct occurring within New York." Given this fact, Judge Preska found that, regardless of a user's intent, her communication may be accessible to any citizen of any state—a result that would render the user liable for prosecution in New York, even if her communication might be legal in her home state. This result also means that New York was suborning the user's home state's policies to those of New York, an impermissible imposition of New York law onto Internet users (and citizens) of other states, which led to the court's finding that the New York law was "per se violative of the Commerce Clause."

The court also turned to a more traditional dormant Commerce Clause analysis using Pike: balancing the local benefits of a statute against the burdens of the statute on interstate commerce. The first prong of this test the court found rather easily met; "the protection of children against pedophilia is a quintessentially legitimate state objective..." Nevertheless, no matter how compelling the state's interest may be, the dormant Commerce Clause inquiry does not end only by a state's showing of a legitimate state interest.

As insistent as the state's interest is in the area of Internet decency, the benefits garnered by this act may be minimal. First, since a significant amount of communications covered by this act originate from foreign nations, the

---


36 See 969 F. Supp. at 177.

37 Id.


39 969 F. Supp. at 177.

40 See id. at 178 (citing Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333 (1977) (unconstitutional burden placed on interstate commerce by state "consumer protection" statute); Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959) (unconstitutional burden by state highway safety regulation); Dean Milk Co. v. Madison, 340 U.S. 349 (1951) (unconstitutional burden of state health and safety regulation); Southern Pac. (unconstitutional state railroad safety regulation)). None of these cases explicitly used the Pike test; they are merely cited for the proposition that a state statute, no matter how legitimate the state interest, cannot unduly burden interstate commerce.
"speakers" of those communications have little or no motivation to comply with the act.41

The court also examined other New York laws that may achieve the same goals as the act. Judge Preska found laws prohibiting obscenity and child pornography to largely cover the communications covered by the act.42 Therefore, the class of cases reached by this act, and not covered by other penal laws, is very limited in scope. Furthermore, New York's jurisdictional reach of cases within this class is limited by practical considerations (e.g., obtaining jurisdiction and securing a defendant's presence before a New York court).43

The burdens on interstate commerce on the other side of the test were found by the court to be "extreme."44 Judge Preska listed many communications in the stream of normal business that might be subject to the act, including booksellers, libraries, and on-line art galleries.45 Requiring sites such as these to self-censor their materials in order to avoid prosecution would be "a Hobson's choice that imposes an unreasonable restriction on interstate commerce."46 Given this evidence, the court found that "the severe burden on interstate commerce . . . is not justifiable in light of the attenuated local benefits arising from it."47

Topping and Gaylord both disagree about the validity of this analysis. Gaylord finds it a "First Amendment analysis in the guise of a dormant Commerce Clause test,"48 and Topping focuses on the economic burdens the court highlights: "the higher transaction costs that the Act imposes on the Internet cannot be disputed. The Act clearly externalizes these costs to Internet users outside of New York."49 This disparity in interpretation goes to the very heart of the problem with Internet regulation. The Internet, as has been shown, is both "speech" and "transport." It would be difficult, if not impossible, to try to regulate the Internet based exclusively on either of these

---

41 See 969 F. Supp. at 178 (citing 929 F. Supp at 882). This is the only place in her opinion Judge Preska mentioned international implications of the act.
42 See 969 F. Supp. at 179.
43 See id.
44 Id.
45 See id. at 179-80.
46 Id. at 180 (citing Allen B. Dumont Labs., Inc. v. Carroll, 86 F. Supp. 813 (1949) (holding that a state law which required the approval of a state censorship board before motion pictures could be shown in the state was an unreasonable burden), aff'd 184 F.2d 153 (3d Cir. 1950)).
47 969 F. Supp. at 181.
48 Gaylord, supra note 33, at 1116.
concerns. For libraries, museums, and galleries, speech is inextricably part of their commercial activities (even if they are non-profit). Placing these organizations on-line only complicates this problem; the mode of access is also carrying on the commercial interests of a variety of businesses. The court’s analysis may well involve First Amendment speech issues, but the conveyance of the speech is a commercial transport medium. Therefore, analyses of Internet regulations will, almost by definition, include intermixed concerns.

Finally, the court turned to a long-standing Supreme Court interest in protecting certain kinds of commerce that are most properly regulated exclusively at the national level. Judge Preska found that the Internet constitutes one such kind of commerce; “effective regulation will require national, and more likely global, cooperation.” Conflicting state regulation will have an ultimately deleterious effect on the functioning of the Internet, and would unduly hinder its development.

Judge Preska found the root of this reasoning in Wabash, St. Louis and Pacific Railway Company:

Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. For the regulation of commerce, as thus defined, there can be only one system of rules, applicable alike to the entire country; and the authority which can act for the whole country alone can adopt such a system. Action upon it by separate states is not, therefore, permissible.

---

50 See 969 F. Supp. at 181.
51 Id.
52 See id.
53 Id. (quoting Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U.S. 557, 574-75 (1886)). The Illinois regulation in Wabash attempted to set interstate railway rates. The Court further said in its reasoning, “[t]hat this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and regulations, we think is clear from what has already been said.” 969 F. Supp. at 181 (quoting Wabash, 118 U.S. at 577). Preska again cited most of the dormant Commerce Clause jurisprudence. See 969 F. Supp. at 181 (citing Southern Pac., 325 U.S. 561; Bibb, 359 U.S. 520).
Basing her reasoning again on the “transport” analogy, Preska found that Internet traffic, like railway and highway traffic “requires a cohesive scheme of regulation so that users are reasonably able to determine their obligations.”

Local regulation of Internet issues would leave an inconsistent patchwork of rules and regulations which would be nearly impossible for users to decipher. In support of this argument the court noted other state’s statutes—Oklahoma’s which like New York’s, prohibits on-line transmission of material harmful to minors, and Georgia’s, which prohibits anonymous Internet communication. Even when two states enact statutes with similar language, like those in Oklahoma and New York, the definitions of the salient terms may not be similar at all, leaving a user in even greater confusion about what is illegal where. Preska eventually pointed out where her transportation analogy breaks down; whereas in Southern Pacific or Kassel the train or truck can be reconfigured in order to meet one state’s regulations or even to avoid the regulating state entirely, the Internet user has no such option. The court found that:

Further development of the Internet requires that users be able to predict the results of their Internet use with some degree of assurance. Haphazard and uncoordinated state regulation can only frustrate the growth of cyberspace. The need for uniformity in this unique sphere of commerce requires that New York’s law be stricken as a violation of the Commerce Clause.

Topping points out one problem with this conclusion: it leaves very little, if any, space for state regulation of the Internet. I am not convinced that leaving Internet regulation entirely to the federal government is undesirable, however. Certainly, Internet regulation will require transnational cooperation. Since states are prohibited by the United States Constitution to enter into foreign treaties, they are by definition incapable of securing this international cooperation. Judge Preska did not discuss this aspect of the Internet as

---

54 969 F. Supp. at 182.
55 See id.
57 See 969 F. Supp. at 183.
58 See id. at 182.
59 Id. at 183.
60 Topping, supra note 49, at 222.
61 U.S. CONST. art. 1, § 10, cl. 1.
commerce in her opinion, but I think it is a very fruitful line of inquiry which fits nicely with her Commerce Clause analysis.

III. THE UNIFORM COMMERCIAL CODE (UCC)

In order to examine contracts for the sale of goods on the Internet in the United States, one must deal with the UCC. Slowly but surely, the UCC is catching up to the extreme growth of on-line commerce. The July 30, 1999 Proposed Revisions to UCC article 2 specifically include a section on electronic agreements, and definitions and concepts that have come about in the course of Internet commerce are included in the Draft.

At a fundamental level, the very concept of "signature" has been altered. The Draft UCC substitutes "authentication" for the current concept of "signature"; this includes all of the old connotations of "signature," but recognizes that on-line transactions do not always provide an opportunity for signing an agreement.62 Wisely, the UCC also distinguishes between "computer information" and "computer programs," recognizing that what constitutes goods sold for computer use are not solely limited to software (covered under "computer programs").63 A series of definitions also covers the concept of "electronic," the most important being "electronic agent,"64

---

62 See U.C.C. § 2-102(a)(1) (Proposed Draft, July 30, 1999) [hereinafter U.C.C. Draft]. The actual language is as follows:

(1) "Authenticate" means:

(A) to sign, or
(B) otherwise to execute or adopt a symbol or sound, or to use encryption or another process with respect to a record, with intent of the authenticating person to:

(i) identify that person; or
(ii) adopt or accept the terms or a particular term of a record that includes or is logically associated with, or linked to, the authentication, or to which a record containing the authentication refers.

63 See id. section 2-102(a)(7) & (8). These sections define "computer information" and "computer program" as follows:

(7) 'Computer information' means information in electronic form that is obtained from or through the use of a computer or that is in digital or equivalent form capable of being processed by a computer. The term includes a copy of the information and any documentation or packaging associated with the copy.

(8) 'Computer program' means a set of statements or instructions to be used directly or indirectly in a computer to bring about a certain result. The term does not include separately identifiable informational content.

64 See id. § 2-102(a)(17).
"electronic message," and "electronic event." Since most on-line transactions are conducted through user interaction with a form on a web page, it was necessary for this transaction to be covered by the UCC. "Electronic agent" is defined as a "computer program or electronic or other automated means used to initiate an action or respond to electronic messages or performances without intervention by an individual at the time of the action or response." This definition fits into the UCC sections dealing with contract formation, which make it explicit that "interaction of electronic agents" can form a contract.

The Draft UCC makes an interesting distinction involving the sale of computer information with the sale of goods. The default supposition, if computer information and goods are sold together, is that article 2 only covers the sale of the goods. However, article 2 applies if "computer information is contained in and sold as part of primary goods or sold as a replacement for a copy contained in the primary goods." There are exceptions to this exception. If the "primary goods" are computers or computer peripherals, article 2 does not apply, nor does it apply if "giving the buyer of the primary goods access to or use of the computer information other than for the use or operation of the primary goods is a material purpose of the transaction." The practical upshot of this exception is that if data or information is sold along with hardware, unless that data is required for the operation of the hardware, the sale of the data is not covered by the UCC. The comments provide no explanation for why this situation is treated thus.

In addition to inserting electronic contracting issues into the existing sections of the UCC, the Draft adds subpart B to article 2, entitled "Electronic Contracting." These sections first deal with the legal status of electronic records, stating that, even though no hard copy may exist, the existence of an electronic record cannot be denied legal status solely because of its "virtual" nature. The Draft also firmly states that a person who is responsible for an

---

65 See id. § 2-102(a)(18).
66 See id. § 2-102(a)(19).
67 See U.C.C. Draft § 2-102(a)(18).
68 See U.C.C. § 2-203(a). Comment 2 to this section states that subsection (a) states the flexible principle that a contract may be made 'in any manner sufficient to show agreement.' This includes but is not limited to offer and acceptance and the conduct of both parties or the interaction of electronic agents that recognize the existence of a contract.
69 See id. § 2-103(b).
70 Id.
71 See id. § 2-103(b)(1).
72 Id. § 2-103(b)(2).
73 See U.C.C. Draft § 2-210(a). This section establishes that the UCC does not require
electronic agent is responsible for the actions of that agent, even if no person is directly aware of the specific actions taken by the agent. This section settles any potential disavowal of the actions of an electronic agent by one party. Also covered, in general terms, is contract formation by electronic record (such as an e-mail) and by electronic agent (such as a form on a web page). Of particular note is the exclusion of any terms included in the agreement by a party not using an electronic agent if that party had reason to know the agent could not respond to those terms.

All of these general principles cross-reference the specific section of the UCC dealing with electronic contract formation, section 2-206. This section deals with specific issues of offer and acceptance between electronic agents, between persons and electronic agents, and between persons where an electronic record is generated as a part of the agreement.

The practical implications of these provisions are less than clear in practice, however. Many on-line agreements for services (which it bears mentioning are not covered by the UCC) seem to implicitly follow the precepts of the Code. Even the 1999 Proposed Draft does not recognize an e-mail account as a “good.” But what does it mean when an e-mail service explicitly tries to disclaim an implied warranty of suitability for a particular purpose? First, I am unable to find any case law to guide an interpretation of a company’s actions in this respect. So, it is perhaps no surprise that the guidelines of the UCC are followed, as they at least give some concrete footing as to how implied warranties may be disclaimed for service contracts. Even so, the

records to be kept electronically (subsection (b)), and reaffirms the general contract principle that a person may set his or her own standards for the types of record or authentication acceptable to him or her in a transaction (subsection (c)).

See id. § 2-211. Responsibility is determined by the laws of agency.

See id. § 2-212.

See id. § 2-213.

See id. § 2-213(c). The comments to subpart B provide a useful example of how all of these sections may interact and their ramifications in the formation process.

See U.C.C. Draft § 2-206.

See id. § 2-102(24). The 1999 Draft requires that goods be “movable,” a requirement which an e-mail account cannot meet. However, I see the potential for a creative argument to be made in this respect. Since most widely available e-mail accounts (such as the Yahoo™ mail service) can be accessed from any computer connected to the Internet, the service can be said to be “movable”—the user is “moving” their account from one computer to another. However, the flaw in this argument is obvious. It seems logical that the UCC requires the goods to be physically movable, which an e-mail service is not. A user may access their account from different computers using various software, but the actual account does not change locations—the user is still contacting the same physical server from whichever computer he/she is using.
provisions to which the service providers may be looking are not being followed closely.

Putting aside the possibility of various services' representations creating express warranties, most on-line services can be said to create implied warranties of fitness for a particular purpose in their user agreements.\textsuperscript{80} However, almost all agreements attempt to disclaim these warranties in some way in their user service agreements. Assuming that the same rules of disclaimer contained in the UCC apply in these situations, there are a number of reasons why such disclaimers may be ineffective. Section 2-405 deals with the creation of an implied warranty for a specific purpose. The key prongs of this section require the seller to know of a specific purpose for which the buyer may use the purchased item, and that the buyer rely on the skill of the seller in this area.\textsuperscript{81} As an example, take the case of a user searching for an e-mail service. A service provider, even though it may not do more than advertise its service, may qualify as having "knowledge" that a buyer will be using its service for a specific purpose. By offering an e-mail service, the provider knows (at least constructively) that the buyer will be using the service to send and receive e-mail—the specific purpose. There may be some question as to whether the seller possesses knowledge that the buyer is relying on the seller's knowledge, however. As the Comments to the UCC mention, this information is usually something that would be communicated in a face-to-face setting.\textsuperscript{82} In an electronic sales forum, this sort of knowledge is extremely difficult to ascribe to a seller, because the buyer's "purchase" may be no more than interaction with an electronic agent; no human on the seller's side may ever interact with the buyer in this sort of transaction. Therefore, to what extent may knowledge be imputed to them? Intuitively, the nature of electronic communications should put the seller on notice that a buyer both has a certain purpose in mind for a service and that a buyer is relying on the seller's

\textsuperscript{80} Most of my analysis deals with electronic communication services, such as e-mail or on-line paging. Other service agreements may fall under other sections of the UCC, or other applicable law, such as service agreements for on-line brokerage services. Section 2-403 of the 1999 Proposed Draft discusses the creation of express warranties. Subsection (a) states that any representation that is communicated to the buyer through media such as advertising (including, impliedly, on-line advertising) which becomes the basis for the agreement is included in the agreement as an express warranty. Subsection (b) excludes "puffing" from this requirement, and subsection (c) provides exceptions from (a) for some representations. Since these questions involve quite a few fact-specific inquiries, it would not be worthwhile to discuss them here.

\textsuperscript{81} See U.C.C. Draft § 2-405.

\textsuperscript{82} See id. § 2-405, cmt. 2. Although the comment in its discussion of knowledge of a specific purpose refers to normal buyer/seller communication, the reasoning is equally applicable to the seller's knowledge of a buyer's reliance on the seller's expertise.
expertise in the field of electronic communication. Many on-line consumers in the market today have little or no expertise in the technologies behind the Internet; people use this technology every day without a full understanding of the underlying processes. Therefore, perhaps it is not improper for the law to err on the side of the electronic consumer in construing agreements, and the presence therein of implied warranties.

If an implied warranty does exist in an electronic communication services agreement, then the question arises of how to properly disclaim that warranty. Section 2-406(b) deals with the steps necessary to disclaim an implied warranty. The first rule is that the disclaimer must be conspicuously present in a record.83 There is no problem with an electronic agreement constituting a “record,” thanks to the new definition of that term in the Proposed Draft, but the question of what is “conspicuous” suggests a difficulty in some cases.

In written agreements, a “conspicuous” disclaimer has been ruled to be one which is printed in all capital letters.85 But what effect does a clause typed in capital letters have in an electronic agreement? Some services do not even display the terms of service for the consumer's perusal before requiring their consent. These services, do, of course, allow the buyer to read the terms before assenting to the agreement, but, no matter how conspicuously the terms appear in the record (however that may be constituted), does that appearance count under the UCC when the buyer is not absolutely required to read a copy of the agreement at the time of the transaction? With a written, tangible agreement, it is not unreasonable to apply the principle of 

The different nature of electronic agreements from other agreements indicates that the situations are not exactly parallel. It would make more sense

---

83 See id. § 2-406(b)(1).
84 See id. § 2-102(33).
85 See, e.g., Commercial Credit Corp. v. CYC Realty, Inc., 477 N.Y.S.2d 842 (N.Y. App. Div. 1984). This case, in interpreting New York’s enactment of UCC section 2-306, concerning the disclaimer of warranties, holds that “conspicuous” means that a reasonable person would notice the clause when its type is juxtaposed against the rest of the agreement. While, on the one hand, this language is seemingly applicable to electronic agreements, it also serves to underline my point. A reasonable person may very well not notice a disclaimer on-line when juxtaposed against the rest of the agreement if it is displayed in capital letters—though boldface print, as I recommend, may very well meet this criterion.
for a disclaimer to qualify as conspicuous only if it is reasonably apparent to the buyer. Hence, in order for the disclaimer in an electronic agreement to be effective, it should be presented to the buyer before she assents to the agreement, and it should be in boldface type. Since most service agreements exceed one displayed page on a user’s monitor, a user cannot absorb the whole thing in one glance. Therefore, any variation in pitch of letters may not be immediately significant. Boldface lettering would stand out in a more noticeable manner than all capital letters.

Nevertheless, as the Practicing Law Institute (PLI) has pointed out, there are distinct advantages to the revised article 2B approach. As an example, the Proposed Draft preserves consumer rights under state consumer protection statutes, while replacing the varied procedural rules under each of these state statutes with a uniform UCC rule. Article 2B, as originally conceived by the Drafting Committee, was supposed to dovetail with the provisions in article 2 (2A) and a separate uniform law crafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL), the Uniform Electronic Transactions Act (UETA). However, the view of the PLI is that the NCCUSL needs to construct its projects to assure uniformity; when the NCCUSL began all of its e-commerce projects, the stated intent was to develop them consistently and leave the primary rules for electronic contract formation in article 2B.

This approach does have advantages in uniformity and clarity, but it ignores the basic problem inherent in the UCC—it applies to trade in goods between merchants. Since the great majority of electronic commerce occurs between individuals, or between individuals and merchants, this problem is quite important. To the extent the UETA applies to situations where the UCC is inapplicable, this problem is solved, but the UETA is far from a panacea.

---


87 See 557 PLI/Pat at 718. The Uniform Electronic Transactions Act “applies to electronic records and electronic signatures relating to a transaction.” Unif. Electronic Transactions Act § 3(a) (1999) [hereinafter UETA]. The exceptions to the applicability of the UETA to a transaction are when the following laws apply: laws which govern the creation of wills and trusts; the UCC (except sections 1-107 and 1-206, article 2, and article 2A; the Uniform Computer Information Transactions Act; and any other laws a state enacting the UETA may designate). See UETA § 3(1)-(5) (1999).

88 See 557 PLI/Pat at 719.
Its provisions seem to apply primarily to the formation of agreements, and looks to other laws to give effect to those agreements. Nevertheless, the UETA as it stands now provides a general basis for a broad range of transactions which occur daily on the Internet, and the proposed article 2B adequately addresses the potential problems with the formation of contracts between merchants.

The history of the creation of articles 2 and 2B also reflect certain application problems. Article 2 as it now exists reflects the end product of centuries of jurisprudence and legislative action. The concept of "usage of trade" as embodied in article 2 is rationally connected to this historical background, as these many years of practices served as a background to modern formation of agreements, even if only on the most remote levels. The same history cannot be said to be operative in the field of electronic commerce. As this note has demonstrated in various circumstances, the problems the law faces in regulating electronic transactions derive mainly from the constant innovation in the field. Article 2B does not have the same history to work with in attempting to formulate rules for on-line negotiations and agreements; for instance, "usage of trade" has practically no meaning in the context of electronic negotiations.

This circumstance should not, though, be viewed as negative. The NCCUSL has a great opportunity to shape desirable practices in the on-line context. For instance, article 2B approves of what O'Rourke calls "buy now,

---

89 See, e.g., UETA § 5(e). The titles of the applicable substantive sections of the UETA are:
Section 5. Use of electronic records and electronic signatures; variation by agreement,
Section 7. Legal recognition of electronic records, electronic signatures, and electronic contracts,
Section 8. Provision of information in writing; presentation of records,
Section 9. Attribution and effect of electronic record and electronic signature,
Section 10. Effect of change or error,
Section 12. Retention of electronic records; originals,
Section 14. Automated transaction,
Section 15. Time and place of sending and receipt;
Section 16. Transferable records.


91 See id. (citing U.C.C. § 1-201(3) (1998)).

92 See O'Rourke, supra note 90, at 651.
pay later” contracts where a user may signify assent through clicking on an icon or through shrinkwrap contracts.93

Instead of the PLI’s desire for uniformity, O’Rourke advocates a legal arena in which there are parallel rules for different circumstances (i.e., a regime for face-to-face, hard-copy agreements and a separate regime for electronic negotiations).94 She uses the example of mass market dealings to illustrate why her view is more persuasive. In a standard article 2 negotiation, communication difficulties, either in personally conveying information to the buyer or providing such information on the packaging, make it reasonable to develop a rule whereby a seller can provide terms subsequent to payment through an insert in the packaged good and to allow a buyer to reject those terms once they are read.95

In opposition to this situation is an on-line deal. Communication between parties is uncomplicated and practically instantaneous, so it is fairly simple to make available to the buyer any post-payment terms on the Internet and insure that the buyer cannot accept the terms without first reading them (or at least being exposed to them).96 The question this dichotomy presents is the propriety of codifying rules which may be appropriate in one market but not in the other, simply for the sake of uniformity. What may recommend mass market rules in “tangible” transactions may not pertain to electronic mass market rules. For example, should “course of trade” codify the practice (to the extent a practice can be determined and deemed common) of placing terms of an agreement on a website in a location which the consumer may not be required to directly access, or should the propagated rules seek to require conformity with another practice?97 The different capacities to facilitate communication and provide information in an on-line setting and in a

93 See id. at 651-52 (citing U.C.C. § 2B-207 cmt. 3 (Proposed Draft, Dec. 1998)). O’Rourke cites an earlier draft of the UCC than that which I am using. The July, 30, 1999 Proposed Draft to which I refer has incorporated what was termed Article 2B into Article 2 (though a “Subpart B” is delineated in the July 1999 draft). Comment 3, dealing with what O’Rourke terms “layered contracts” is consistent between both drafts. See U.C.C. Draft § 2-207 cmt. 3.
94 Shrinkwrap contracts” are agreements which are contained on the packaging material of goods (most typically software), usually consisting of licensing agreements. For an excellent examination of shrinkwrap agreements under the UCC Proposed Draft (among other topics), including useful examples, see Diane W. Savage, The Impact of Proposed Article 2B of the Uniform Commercial Code on Consumer Contracts for Information and Computer Software, 9 LOY. CONSUMER L. REP. 251 (1997).
95 See O’Rourke, supra note 90, at 652.
96 See id.
97 See id.
traditional face-to-face setting seems to require tailoring rules to different settings.98

Also, the lack of a rigid historical context for the electronic trading rules of proposed article 2 allows the NCCUSL to learn from problems that the current UCC has encountered in the arena of consumer protection, specifically that states' consumer protection statutes have resulted in a certain degree of non-uniform implementation of the UCC's basic rules.99

All of these observations recognize that the Internet is a unique forum for contract formation, a forum which requires as much creative thinking on the part of lawmakers as it does on the part of the technological innovators that have made the Internet as it exists today possible. Maybe there should be entirely separate rules for contract formation on-line, but this idea is somewhat complicated by the facts that the UCC is still widely applicable to sales of goods and that a wholesale change in these rules, even a small part of them, may pose implementation problems—problems which will be compounded the longer lawmakers leave unanswered the question of electronic commerce rules.

IV. INTERNATIONAL PERSPECTIVES

Unsurprisingly, the United States is not the only nation that has experienced wide disparities in the growth of technology and the growth of law to deal with that technology. O'Rourke follows up on her discussion of article 2B flexibility by examining how the European Union handles similar problems. To her, the "key in enabling global electronic commerce may be in obtaining agreement on jurisdictional issues including what contractual choice of law and choice of forum clauses will be enforceable."100 This concept, though admirable, can be characterized best. Such a solution would allow a merchant to know what law will govern in a particular transaction, decreasing the financial and physical effort necessary to explore all possible laws that may apply to a transaction.101 However, under both the UCC Draft and a European Commission proposal for a directive to implement electronic commerce laws, the state's (be it nation/state or federal state) law can

98 See id.
99 See id. at 653. O'Rourke points to the UCC Draft's willingness to recognize the applicability of state consumer protection laws, if the state determines their primacy. See id. n.76 (O'Rourke cites section 2B-107 in the Dec. 1998 draft, which appears to comport with section 2-104 (most notably subsection (a)(2) in the July Draft to which I have been referring).
100 O'Rourke, supra note 90, at 653-54.
101 See id. at 654.
control. If the state decides that a certain provision of its law is mandatory, either through the Draft UCC or the Commission Proposal, that provision will control.

O'Rourke suggests a response to this problem with a focus on international harmonization of mandatory law. If, for instance, consumer protection laws in various nation/states cause uncertainty on the part of on-line merchants, national governments should seek uniform agreement on a minimum level of consumer protection acceptable to all nations, which merchants then could look to in order to prevent these merchants from having to meet several various nations' requirements. O'Rourke's other suggestion is that the United States bring the UCC Draft into the international arena, where ideas can be exchanged and perhaps harmonized with other proposed legislation, such as the Commission Proposal.

There is much to be gained from such a proposal—the Commission Proposal, for example, explicitly discusses caching issues. By comparing proposed legislation with each other, nations can perhaps craft more relevant and more accurate regulations. Nevertheless, two problems remain with this idea. First, what is the appropriate forum for such discussions? Certainly, national governments can pursue bilateral agreements to resolve these questions (negotiations between the United States and the European Union, for example, may fall into this category, also), but multilateral negotiations are the key to a truly globally harmonized regulation regime. (For example, where is, say, Japan left while the United States and European Union are negotiating their regimes?) Where, then should these negotiations be held? The United Nations

102 See id. at 654-55. The applicable provision of the UCC Draft section 2-104(a)(2) and (a)(3). Comment 4 of the UCC Draft discusses international sales, mainly by reference to the United Nations Covenant on the International Sale of Goods (CISG). "In the absence of a choice of law term contracting out, see article 6, CISG applies to "contracts of sale of goods between parties whose places of business are in different states . . . when the states are Contracting States." U.C.C. Draft § 2-104 cmt. 4. The comment also points out various exceptions to the applicability of the CISG. O'Rourke, when discussing the European Commission Proposal, simply cites an article by two other publicists. See O'Rourke, supra note 90, at n.71. The applicable article in the Proposal which embodies this idea seems to be article 3, especially paragraphs 1 and 3. See Commission Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market, art. 3(1) & 3(3), 1999 O.J. (C 30) 4 [hereinafter Commission Proposal].

103 See O'Rourke, supra note 90, at 654. A good working definition of a mandatory rule is that which cannot be explicitly contracted around, or through the "back door," such as designating a forum in the choice of law clause that does not use a rule the parties wish to avoid.

104 See id. at 656.

105 See id. at 656-57.

106 See Commission Proposal, supra note 102, art. 13.
would seem a logical place, especially since UNCITRAL (the United Nations Commission on International Trade Law) has already propagated agreements such as the CISG and the Model Law on Electronic Commerce.

This course of negotiations leads into what has developed into a common theme—time. The round(s) of negotiations necessary to result in a workable and effective agreement between concerned nations will undoubtedly take a large amount of time, during which the conditions being discussed may well change. I have no cogent suggestions as to how to remedy this particular problem, though it is certainly necessary for nations to realize the enormity of the end result, and how important that result will be for the course of the world economy. The gravity of the situation should impel nations to take steps as quickly as possible.

This statement is not to imply that the world is unaware of the problem; there have been examples in both bilateral and multilateral spheres of the willingness of nations to develop quickly the necessary regulatory framework. For example, the United States and the United Kingdom recently concluded (Jan. 30, 1999) a joint agreement concerning the use of the Internet in the context of securities exchanges. Both countries recognize the importance of e-commerce laws, noting that "[t]he information superhighway promises to utterly transform commercial transactions." The general principles, as stated in the agreement, show both a recognition of a need for uniformity, and, inexplicably, an almost total abdication of government action in favor of business-driven regulation, stating that "the private sector should lead in the development of electronic commerce and in establishing business practices." Further:

Governments should ensure that business enjoys a clear, consistent and predictable legal environment to enable it to do so, while avoiding unnecessary regulations or restrictions on electronic commerce. Governments should encourage the private sector to meet public interest goals through codes of conduct, model contracts, guidelines, and enforcement mechanisms developed by the private sector. Government Actions [sic], when needed, should be transparent, minimal,

---


108 Id. at 620.

109 Id.
non-discriminatory, and predictable to the private sector. Cooperation among all countries, from all regions of the world and all levels of development, will assist in the construction of a seamless environment for electronic Commerce.\textsuperscript{110}

This statement clearly places the primary power to create electronic commerce practice and procedure in the hands of private businesses. It seems to be a contradiction in terms, as well as an unforgivably rosy view of business, to think that private businesses will act to further public interest goals. It is a basic tenet of free enterprise that businesses only implement provisions that are in the public's interest if it is economically feasible for them to do so or if such provisions are specifically negotiated in an agreement. It is government's role to speak for the people in determining what restraints this free enterprise system should face in dealing with the public. It is nonsensical to expect that businesses will act both in their own best interests and those of the public. Furthermore, business lacks an effective measure to gauge what may be in the public's interest. Government is constructed to determine such interest, through fact-finding commissions and the legislatures themselves. Therefore, from a strictly practical viewpoint, it seems that businesses should concentrate on making money, and government should concentrate (at least in this context) on protecting the people.

This is not to say that I disagree with the principles embodied in the United States-United Kingdom agreement; businesses should be the actors responsible for developing a course of trade in electronic commerce, but the government may ultimately have to choose to embody a certain practice in legislation for the sake of uniformity (see UCC discussion above). Businesses are undeniably in the best position to recognize and adjust to innovations in on-line trade and can more efficiently react to these innovations. Government should certainly recognize this situation and defer to established practices to the extent they are effective and acceptable. On the other hand, to place the primary responsibility for the creation of "codes of conduct, model contracts, guidelines, and enforcement mechanisms" is a betrayal of the public trust in government.

On its own, the United States does not seem to place such power in the hands of business. President Clinton and Vice President Gore developed their own, independent statement concerning global electronic commerce.\textsuperscript{111} Their

\textsuperscript{110} \textit{Id. at} 621 (emphasis added).

\textsuperscript{111} \textit{See President William J. Clinton & Vice President Albert Gore, Jr., A Framework for Global Electronic Commerce, in Securities Law & The Internet: Doing Business in a
general principle in developing a legal regime regarding electronic commerce is that "parties should be able to do business with each other on the Internet under whatever terms and conditions, they agree upon." However, the statement stresses the need for uniformity in developing a global legal regime for Internet commerce, where such law can provide a baseline for market participants to shape their agreements. While the Clinton/Gore principle states that market players should "define and articulate most of the rules that will govern electronic commerce," it also recognizes the need for government to develop a common legal framework upon which parties can build in developing their agreements.

This statement outlines four basic principles which the United States government holds as guides for the formation of global electronic rules:

- parties should be free to order the contractual relationship between themselves as they see fit;
- rules should be technology-neutral (i.e., the rules should neither require nor assume a particular technology) and forward looking (i.e., the rules should not hinder the use or development of technologies in the future);
- existing rules should be modified and new rules should be adopted only as necessary or substantially desirable to support the use of electronic technologies; and
- the process should involve the high-tech commercial sector as well as businesses that have not yet moved on-line.

While these principles point to a perhaps disproportionately large role for business, and do not indicate a role for consumer advocates to play in the process, they do fairly state the concepts lawmakers must consider in the development of a global regime.

The statement also recognizes the potential for uncertainty regarding liability in a multijurisdictional context. The United States calls for a multinational response to this problem to "clarify applicable jurisdictional rules and to generally favor and enforce contract provisions that allow parties


112 Id. at 516.
113 See id. at 516-17.
114 Id. at 517.
115 See id.
116 Id.
to select substantive rules governing liability."\textsuperscript{117} The United States further sets a goal for the achievement of a substantive international agreement concerning model law within the next two years.\textsuperscript{118}

V. CONCLUSION

The conclusion of the Clinton/Gore statement returns to the disturbingly business-deferential attitude previously identified. The private sector, in the administration's view, must lead the "partnership between the private and public sectors."\textsuperscript{119} Soon thereafter, however, the statement seems to recognize that government has an important role to play in the regulation of electronic commerce: "The variety of issues being raised, the interaction among them, and the disparate fora in which they are being addressed will necessitate a coordinated, targeted governmental approach to avoid inefficiencies and duplication in developing and reviewing policy."\textsuperscript{120} These factors are the very reasons why government should take the lead in regulation, at least insofar as they are more capable to address these issues. To reiterate, I do not hold that business is inherently unfit to self-regulate on the Internet. Rather, as more and more companies become involved, many of them traditionally based and experienced in the physical exchange of goods, a coherent, business-driven plan will be well-nigh impossible to create. It is then government's job to establish baselines for the operation of electronic trade—baselines which may indeed be formulated from the efforts of on-line businesses.

The Organisation for Economic Cooperation and Development (OECD) seems to embrace such an approach in its work regarding electronic commerce. In November of 1997, the OECD held a conference in Turku, Finland to begin to seriously explore international issues involved in the projected worldwide explosive growth in electronic commerce. Donald Johnson, the Secretary General of the OECD, posed two questions at that conference which exposed the basic electronic commerce concerns with which business and government must struggle: "What regulatory barriers must be removed to allow such commerce to develop and prosper? . . . what regulatory frameworks are necessary to ensure a fair and competitive marketplace in the electronic world of tomorrow?"\textsuperscript{121} Secretary General Johnston does state, as many others

\textsuperscript{117} 1128 PLI/Corp at 518.
\textsuperscript{118} See id. The date of the PLI statement is given as "June-July 1999," so the world should look for this agreement in the summer of 2001.
\textsuperscript{119} Id. at 529.
\textsuperscript{120} Id.
\textsuperscript{121} Dismantling the Barriers to Global Electronic Commerce, OECD Doc. DSTI/ICC/98(98)
have, that business should take the lead in moving the electronic market forward but recognizes the importance of the work of government in dealing with the issues posed by an international market that requires global cooperation. "Business will develop new markets, new products and new trading relationships, but for electronic commerce to thrive, industry must seek with governments to establish a stable framework for transactions that will inspire confidence."122

At the Turku conference, Ira Magaziner, the driving force behind the Clinton administration's views on electronic commerce, propounded the view that almost all regulation on the Internet should originate in the private sphere, with an extremely limited role for government. He stated that government should defer to market forces to work out problems, and where government intervention is absolutely necessary (e.g., with regard to taxation and intellectual property rights), its action should be specific and limited.123 Further, he stated that "[e]ven where collective action is needed it should be private in most instances."124 Unsurprisingly, there was uniform acclaim for this view from the private sector representatives present.125

Governmental representatives expressed a somewhat different (though not incompatible) view during the second part of the conference. The President of Finland, Martti Ahtisaari, focused on the need to have internationally uniform intellectual property standards that go far to protect the owners of such property, and stressed that consumer trust was the "central prerequisite" to build strong electronic commerce, noting that international rules must be developed to foster this trust.126

Hirofumi Kawano, Director General of the Japanese Ministry of International Trade and Industry, felt that the key policy issues that must be resolved in the field of electronic commerce were the construction of an international framework, developing rules for commercial transactions, addressing

122 Id.
123 See id. at 26. Mr. Magaziner was a Special Advisor to the President of the United States.
124 Id.
125 The Turku conference was divided into two parts. One part, conducted under the auspices of the Business and Industry Advisory Committee to the OECD (BIAC), examined barriers to business operation in the on-line field and business' suggestions for removing these barriers. It was called the Business-Government Forum. The other part was an International Conference, organized by the OECD and Finland in cooperation with the European Commission, Japan and BIAC. See Turku Report, supra note 121, at 4.
126 See id. at 33-34.
consumer concerns, assuring interoperability, and the resolution of institutional issues.\textsuperscript{127}

The International Conference also identified regulatory uncertainty as an issue which must be dealt with before the rapid growth of the on-line economy made clarification impossible. In this context, the Conference identified problems in customs and taxation, intellectual property issues, and the updating of commercial codes, particularly in regard to jurisdictional and liability issues.\textsuperscript{128} The best idea concerning commercial codes was seen as the development of some sort of international framework. "International harmonisation of national commercial codes will require drafting a model law for commercial practices at international [sic] level which can serve as a common framework."\textsuperscript{129} Most of the discussion concerning regulatory uncertainty centered around taxation and customs issues, however.\textsuperscript{130}

The conclusion of the Conference's work resulted in a commitment to develop electronic taxation guidelines and uniform consumer protection rules.\textsuperscript{131} The roles of business and government were defined as well. Since most participants of the Conference felt that business should self-regulate, it was seen as inappropriate for the OECD to take an extensive role in arenas in which they have no expertise to offer. Industry groups were charged to come forward in order to develop industry-led solutions to the problems the Conference identified but were specifically urged to take consumer interests into account: "For self-regulation to be credible, the broader interests of the public must be taken into account and there must be transparent mechanisms for auditing for compliance and enforcement."\textsuperscript{132} In keeping with the view of government as a somewhat secondary player in the on-line sphere, only three areas of government action were noted: education of citizens so they could contribute to the "knowledge-based economy"; demonstrating new technology through government action, such as procurement; and providing "a key source of framework conditions for business activity."\textsuperscript{133}

In October of 1998, the OECD conducted a ministerial conference in Ottawa, both to follow up on the work that had been done at Turku, and to attempt to at least outline OECD action on electronic commerce. The nature of electronic commerce was recognized to "require a broad, collaborative

\textsuperscript{127} See Turku Report, \textit{supra} note 121, at 35.
\textsuperscript{128} See id. at 39.
\textsuperscript{129} Id.
\textsuperscript{130} See id. at 39-42.
\textsuperscript{131} See id. at 44-42.
\textsuperscript{132} Turku Report, \textit{supra} note 121, at 44.
\textsuperscript{133} Id.
approach by governments, the private sector, and international organisations to ensure a stable and predictable environment which facilitates its growth and maximises its social and economic potential across all economies and societies."

Four themes were identified as necessary for facilitating electronic commerce: "building trust for users and consumers"; "establishing ground rules for the digital marketplace"; "enhancing the information infrastructure for electronic commerce"; and "maximising the benefits." The description of these themes makes it clear that, once again, businesses will be bearing the primary responsibility for developing many of the guidelines for electronic commerce, but government will play an important role in ensuring that consumers feel safe on-line and trust electronic commerce transactions (at least insofar as they trust physical transactions); competition is stressed both as a goal of government regulation (or deregulation) as well as a means of self-regulation by businesses. As at the Turku Conference, however, the main role the OECD played in Ottawa was the development of overarching, fairly tangential (though important) matters.

No one is quite sure what to make of the Internet, or what law to make concerning it. The current trend in United States case law is to attempt to pigeonhole activity on the Internet into some category with which the courts have already dealt. While analogies of this sort may, on the surface, make it easier to solve legal problems, they do a great disservice to the use of the Internet. Both speech and commercial activity on-line, while admittedly sharing some similar aspects with speech in print or face-to-face commercial transactions, have their own unique nature. Failure to recognize this has resulted in much of the current uncertainty in national law. Some brave jurist must create a separate area of Internet law so as to preserve the unique aspects of the Internet, and not force it into the jurisprudence surrounding prior technologies.

The efforts in re-drafting the UCC show a great appreciation for at least some of the problems faced in on-line contract formation. While the Proposed Draft goes far to facilitate on-line sale of goods between merchants, there is

135 Id. at 4-5.
136 See id.
137 See id. at 12-18. These pages include the Ministerial Declarations issued subsequent to the Ottawa Conference. They consist of declarations on on-line privacy, consumer protection, and authentication.
a very large open area concerning sales between individuals or sales of services. The UETA attempts to bridge this gap, but there is still an open question as to how to deal with many issues of contract formation in these areas. The NCCUSL, or other appropriate body, must address these issues in order for both businesses and consumers to truly feel comfortable with on-line transactions.

International action, to the extent it exists, largely mirrors the United States' position that on-line businesses should be primarily responsible for regulating themselves. While the rapidly evolving nature of the Internet certainly recommends the ability of business to rapidly respond to innovation, the need for uniformity in certain situations and the need to assure certain rights of consumers requires that government action be primary in some areas of Internet regulation.

All of this uncertainty, not only about existing law, but also how best to craft future laws and regulations, leaves legislators and businesses alike wondering how best to deal with the problem. Certainly, the starting point is found in current business practice. Each national government must act to ensure that practices are uniform to the extent possible and desirable, and that consumer rights are protected at every stage, be they intellectual property rights, privacy rights, or contractual rights. National governments also have a responsibility to consider the global ramifications of their actions in this arena. "The idea of borders, between countries but also between countries and some international or supranational bodies like the European Union, is questioned by the globalization of economic and socio-cultural interactions, a globalization which is fostered by network technologies." Nations must take into account these considerations when crafting their national response to electronic commerce. Furthermore, nations should be responsible enough to realize that bilateral and multilateral negotiations will absolutely be necessary.

---

138 One law student has suggested that *jus cogens* can inform determination of these rights and help integrate national laws into a more uniform international framework. See Sean Selin, Comment, *Governing Cyberspace: The Need for an International Solution*, 32 GONZ. L. REV. 365, 584-85 (1997). I am skeptical, however. I do not see how peremptory norms regarding anything happening on-line can be said to have developed, unless by analogy to vaguely-related "real" (as opposed to virtual) rights. Admittedly, Selin refers to speech rights in his discussion of *jus cogens*, but if one aspect of Internet regulation will be covered by *jus cogens*, those norms should apply to other aspects as well. Nevertheless, the difficulty in defining international norms in the first place, let alone those that can be classified as peremptory, does not recommend the principle of *jus cogens* to this arena.

to ensure that every nation’s citizens (both natural and corporate) will enjoy uniform rights and benefits from electronic commerce, no matter where they reside.