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inside:

OVERVIEW:

NATIONAL LAWS AND THE NET



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# national laws and the net

## The Good, the Bad, and the Ugly (or, Why You Should Pay Attention and Get Involved)<sup>1</sup>

“Think globally, act locally” has been an effective motto for the environmental movement. It would also be a useful guide for national governments attempting to regulate the Net. Unfortunately, even in technologically advanced countries, governments have shown an impressive lack of understanding for the nongeographic nature of the Net. It is not the purpose of this article to provide an extensive catalog of different countries’ laws that impact the Net. Not only would such a discussion be longer than this magazine, but also it would be out of date even before it was finished. This article is intended to provide a few examples of how governments are currently dealing (or not dealing) with the Net and to encourage you to understand the ways that these national laws can impact you and how you can try to influence the formation of these laws.

There are three general ways that a national government (including its judiciary) can react to the Net: (1) recognize that some aspects of the Net extend beyond its local control and (a) cede control to an international body such as ICANN or WIPO or (b) harmonize its laws with those of other countries so that the rules are standardized (both the “good” approach); (2) ignore it (the “bad” approach); or (3) act like the Net is subject to geographic boundaries and, therefore, attempt local control and pass laws that conflict with other national laws or attempt to give extraterritorial effect to its own laws (the “ugly” approach). The majority of this article address the ugly, because that is the area that can cause the most problems and is the approach that most governments appear to be taking.

### The Ugly

To visualize why the ugly approach is bad, imagine a sporting event where multiple teams compete in the same space, each with a different idea of the rules of the game and with multiple referees enforcing different, and changing, sets of rules. While such chaos might be amusing to watch for a little while, eventually it would just get frustrating for everyone. It would be expensive and inefficient.

### UNITED STATES

Starting close to home, in 1999 a 15-year-old Norwegian hacker,<sup>2</sup> with the assistance of two other friends, developed a program capable of decrypting encrypted DVDs. The hacker then posted the object code of the program, called DeCSS, on his Web site. In addition to hundreds of other sites on the Web, the Web site 2600.com offered the DeCSS object code for downloading and also contained links to other sites where the code was available.

The US Digital Millennium Copyright Act<sup>3</sup> (DMCA) states that:

No person shall . . . offer to the public, provide or otherwise traffic in any technology . . . that

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. . . it is not clear whether simply providing the relevant URL in text that could be copied and pasted into a browser is illegal.

- (A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under [the Copyright Act];
- (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under [the Copyright Act]; or
- (C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under [the Copyright Act].<sup>4</sup>

Various movie studios filed suit against 2600.com. The trial court granted an injunction against 2600.com and forced it to remove the DeCSS code.<sup>5</sup> However, 2600.com retained its links to other sites where the code was available. Following a trial, the judge ruled that it is a violation of the DMCA for a Web site to provide a link to another Web site that provides a technical means of circumventing intellectual property protections.<sup>6</sup> According to the judge, links to sites that initiate DeCSS downloads without prompting the user are violations, as well as Web sites that “display nothing more than the DeCSS code or present the user only with the choice of commencing a download of DeCSS and no other content.”<sup>7</sup> For a Web site containing the DeCSS software or a link to such a Web site not to violate the DMCA, the judge said that the site must “offer a good deal of content other than DeCSS.”<sup>8</sup> This case, as of this writing, is under appeal.

From the opinion, it is not clear whether simply providing the relevant URL in text that could be copied and pasted into a browser is illegal. It is also unclear whether it is also illegal to provide a link to a Web site that provides such an “illegal” link.

So what? Although 2600.com is subject to US law, based on this ruling, the Motion Picture Association of America (MPAA) has reportedly already begun sending cease-and-desist letters to other Web sites, including at least one outside the US, that provide, or provide links to, the DeCSS code.<sup>9</sup> The MPAA is trying to extend US law to Web sites outside the US. In addition, for US residents, the ruling has an impact on freedom of speech, as well. So far, T-shirts listing a portion of the DeCSS code have been banned and a song with the code as the lyrics has been pulled by MP3.com.<sup>10</sup> Finally, in an example of the effect that ownership of news providers by large companies may have, CNN, which is a subsidiary of Time/Warner (one of the plaintiffs in the lawsuit), had a news story on its Web site about the case that contained a link to a DeCSS download site. Around the time the MPAA began sending out the cease-and-desist letters, CNN removed the link (but not before the CNN page could be mirrored on several other Web sites).<sup>11</sup>

How can you get involved? In US courts, parties with an interest in a case are allowed to file “friend of the court” briefs. These briefs allow you to explain to the judge issues related to the case. If you feel strongly about the potential impact of this case, talk to your company's legal department about whether it makes sense for your company to either file a “friend of the court” brief or to join in someone else's brief. Another option is for you and/or your company to contact your representatives in Congress to express your opinion.

## EUROPEAN UNION

The European Commission (EC) has released a proposal that would require non-European Union (EU) businesses to register for Value Added Tax (VAT) in the EU if they make supplies of “services” to non-EU VAT-registered persons.<sup>12</sup> The definition of “services” includes entertainment services (such as subscription and pay-per-view TV;

streamed music and video; downloaded games, music, films and books; educational services such as online training and distance learning; and a “catch-all” list including software, data processing, and “computer services,” which includes Web-hosting, Web design, or similar services and information.

This proposal demonstrates several of the major problems that hasty or ill-considered legislation can produce:

First, the EC is attempting to apply its own laws to companies that are not physically located in areas governed by those laws. The EC proposal would impact companies that sell at least 100,000 Euros’ worth (currently around \$90,000) of “services” to EU consumers, regardless of where those companies are actually located. Thus, the EC system requires companies to identify the location of their customers in order to determine whether the company is subject to the proposal. Such identification can be difficult when consumers are downloading digitized goods. The US argues that taxation schemes like this should be subject to some kind of global regime under the auspices of the Organization for Economic Co-operation and Development (OECD).<sup>13</sup>

Second, the EC has proposed a system that favors one geographic location over others. The EC has proposed that non-EU companies covered by this proposal would be allowed to register in any one of the EU member states and to charge that state’s VAT. (Thus, the likely choice would be Luxembourg, since its VAT rate is currently the lowest in the EU.) This option has irritated companies registered in the other member states, since they do not have such an option.

Third, the EC has proposed a system that differentiates between e-commerce and traditional commerce. The EC has not proposed any method for harmonizing the VAT rates for physical goods and “digitized” goods – thus a book imported into a country and a book downloaded into the same country could be subject to dramatically different VAT rates.

Under the rules of the EC, a unanimous decision from all member states is required before the proposal can be implemented. The target date for implementation of the proposal is January 1, 2001.

How can you get involved? If your company could sell more than 100,000 Euros’ worth of “services” to EU consumers, discuss with your legal department and other relevant executives (accounting, sales, etc.) the potential impact this tax proposal may have on your business, including the IT costs of developing the ability to track the location of your customers. If your company decides that it wants to support or oppose this proposal, then if your company is located or does substantial business in a particular EU member state, contact the relevant government officials in that member state. If your company is in the US and does not have sufficient leverage with a particular EU member state, contact your representatives in Congress and/or the US Department of Commerce.

## UNITED KINGDOM

The Regulation of Investigatory Powers Act 2000 (the RIP Act) is expected to come into force in the United Kingdom in October of this year. The RIP Act regulates the surveillance and interception of communications.

Among other things, the RIP Act contains provisions requiring all ISPs to install and maintain interception equipment for the benefit of law enforcement, to disclose encryption keys to law enforcement on demand (or face prosecution), and to keep the

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fact that the email is being intercepted and decoded a secret from other parties (or face prosecution). These provisions have resulted in several ISPs (including PSINet, Poptel, Claranet, and GreenNet) announcing their intention to remove their operations from the U.K.<sup>14</sup>

Despite the furor over the interception and encryption provisions, the RIP Act may have a larger problem. Originally, the regulations implementing the RIP Act would only allow businesses to intercept communications on their own systems for compliance and investigatory purposes.<sup>15</sup> Among other things, originally, businesses would have needed consent from both parties to a phone call or email before intercepting it. How can you notify someone that their communication (particularly email) could be intercepted before they send it to you? In response to pressure from industry, however, the U.K. government relaxed the proposed regulations to allow businesses to monitor their networks more freely.<sup>16</sup> Unfortunately, the official Data Protection Commissioner has drafted a code of practice under the European Human Rights Act, which recently went into effect in the U.K., that lays down strict rules for electronic monitoring and provides that a worker should have the right to a degree of trust and to work “without constantly being watched.” The code will also have the status of law, causing confusion as the courts try to decide which law is the real one.

Another problem created by this aspect of the regulations is how it impacts businesses with subsidiaries in the U.K. but whose IT systems are managed in another country with different regulations.

How can you get involved? If your company operates in the U.K., have your legal department look into the RIP Act and the European Convention on Human Rights and discuss the impact these provisions could have on your company.

## FRANCE

The French have been taking a particularly aggressive approach to extending French law to the Net. In May, a French court ruled that French Net users cannot take part in online auctions except by using a government-approved auctioneer and paying French VAT.<sup>17</sup> The French company Nart.com argued that its sales were not subject to French VAT because all online sales were handled by its New York subsidiary, where the relevant Web servers were located, and paid for in dollars to a US bank. The French court held that because Nart.com had an office in France and the sales were advertised in the French media, the sales were subject to French law and, therefore, illegal. Because Nart.com had a French parent and an office in France, this ruling is not totally unreasonable, although it should serve as a warning to companies planning to operate in France. France is holding a non-French subsidiary of a French company liable for failing to comply with French law when dealing with French users.

Also in May, however, a French court ruled that the French subsidiary of California-based Yahoo! Inc. must “make it impossible” for French users to access online sales of Nazi memorabilia, which violate French “anti-hatred” laws.<sup>18, 19</sup> Yahoo!’s French site has complied by blocking access through its own site to the illegal auctions, but French users can still access Yahoo!’s US pages via other providers. Yahoo! has argued that there is no technical means of blocking French citizens who want to from seeing the Nazi memorabilia auctions. Although the French court originally demanded that Yahoo! comply by July 24, the judge has now asked a panel of experts to study the technical evidence and provide a report in November.

So what? France is attempting to hold a business in another country to a content standard defined by the French government. If the French succeed, then what is to prevent any country from legislating the content of any service available on the Web, regardless of the location of that service?

How can you get involved? If your company does business in France, these two cases should make you sit up and take notice. You should discuss with your legal department what your company needs to do from a technical standpoint. If you do not specifically do business in France, then you should pay attention to the outcome of the Yahoo! case. If the French government continues to attempt to regulate the content of non-French Web sites, then your company should consider how best to respond.

## GERMANY

In Germany, courts have decided that German retail laws preclude group purchasing business models that aggregate the purchasing power of individual consumers in order to lower the final purchase price. In a particular case, a German court held that such purchasing schemes create illegal discounts and violate Germany's Retail Act and Act Against Unfair Competition.<sup>20</sup>

Given this ruling, companies such as LetsBuyIt.com and Powershopping, regardless of where the company is located, must identify the location of consumers and prevent German consumers from participating in the group purchasing schemes.

So what? This is similar to the French ruling against Yahoo! discussed above. Germany is trying to prevent German users from using a service available to non-German users.

How can you get involved? The German unfair competition laws are very complicated. If your company has German customers, you should discuss with your legal department how best to respond to the German position. At the very least, your legal department should be aware of the issue.

## The Bad

The Net is here to stay, and the amount of business done worldwide via e-commerce is growing rapidly. The "bad" approach to Net laws is to ignore the Net and to think that current laws will be sufficient to govern activities and crimes on the Net. A perfect example of this is the recent arrest of the author of the "Love Bug" virus.

According to various sources, the Love Bug virus cost the global economy over \$7 billion.<sup>21</sup> Philippine authorities captured the person believed to be responsible for the virus, but were unable to effectively prosecute him because a hastily passed e-commerce law could not be applied retroactively. The Philippine government was forced to try to shoehorn the prosecution into a law that covers credit card fraud.<sup>22</sup>

So what? The ability to protect the Net from criminal activity is only as good as the weakest laws around the world. However, these laws should be drafted intelligently and in harmony with those of other countries to prevent them from falling into the "ugly" category.

How can you get involved? If your company is located or does business in a country that has not kept its legal structure up to date, discuss with your legal department how your company can get involved.

## NOTES

1. This article provides general information and represents the author's views. It does not constitute legal advice and should not be used or taken as legal advice relating to any specific situation.

2. Depending on which side of the DeCSS debate you are on, you might call him either a hacker or a cracker.

3. 17 USC §§1201 et seq.

4. 17 USC §1201(a)(2).

5. Preliminary Injunction, Jan. 20, 2000; Universal City Studios, Inc., 82 F. Supp.2d 211 (SDNY 2000).

6. Universal v. Reimerdes, <<http://www.nysd.uscourts.gov/rulings.htm>>, case #00-08592 (SDNY April 18, 2000).

7. Id. at 48.

8. Id.

9. See <<http://www.2600.org.au/mpaa-letter.txt>>.

10. Grice, Corey, "MP3.com yanks song with illegal DVD-hacking code" <<http://news.cnet.com/news/0-1005-2002771353.html>>, Sept. 13, 2000.

11. Tate, Ryan, "Time Warner posts a link it had banned" UpsideToday, <<http://www.upside.com/News/39a6fef00.html>>. For the screen shot of the CNN.com page, see <<http://www.scripting.com/images/cnnLinkingToDeCSSSites.gif>>.

12. Burnes, Gary, "VAT on non-EU goods", *International Internet Law Review*, pp. 46-47, Issue 6, July/August 2000.

13. Even though this is correct, the US frequently wants to have its cake and eat it, too. When it is in the interests of the US, the US frequently proposes that other countries should submit to international bodies. However, the US is generally unwilling to submit to the authority of those same international bodies.

14. Watson, Sally, "PSINet Joins ISP Stampede Over 'Snooping Bill'", <<http://www.silicon.com>>, July 21, 2000.

15. The RIP Act defines "communications" very broadly and covers telephone calls, fax messages, or emails.

16. See the DTI consultation paper at <<http://www.dti.gov.uk/cii/lbpcndoc.htm>>.

17. "France restricts Web auctions." <[http://www.findarticles.com/m0ECZ/2000\\_May\\_5/61917784/p1/article.jhtml](http://www.findarticles.com/m0ECZ/2000_May_5/61917784/p1/article.jhtml)>.

[cont'd on p. 14]

## Notes [cont'd]

18. Balmer, Crispian, "Court Tells Yahoo to Block Nazi Sales in France",

<http://www.techru.com/technews/politicsandlaw/story/0,3685,2574671,00.html>, May 23, 2000.

19. Rabbitte, Sonya, "Yahoo! falls under French legal eyes." <http://www.silicon.com>, Aug. 11, 2000.

20. *International Internet Law Review*, p. 9, Issue 6, July/Aug. 2000.

21. "Dropout to be charged for 'Love Bug'" <http://www.zdnet.com/zdnn/stories/news/0,4586,2583821,00>, June 14, 2000.

22. Ibid.

23. For more information about WIPO, see its home page at <http://www.wipo.org>.

24. <http://arbiter.wipo.int/domains/statistics/index.html> as of Sept. 13, 2000.

## The Good

The World Intellectual Property Organization (WIPO) is an intergovernmental organization with headquarters in Geneva, Switzerland, and is an agency of the United Nations. WIPO is responsible for the promotion of the protection of intellectual property throughout the world through cooperation among its member countries, and for the administration of various multilateral treaties dealing with the legal and administrative aspects of intellectual property.<sup>23</sup>

So far, the best example of how to deal with the global nature of the Net is the domain-name dispute-resolution process run by WIPO. Through August 2000, 1,162 domain-name dispute cases were filed with WIPO, with parties in 66 countries, and, so far, 492 decisions have been rendered, of which 98 complaints were denied, six domain-name registrations were cancelled, and 388 resulted in domain names being transferred.<sup>24</sup>

So what? Although the WIPO domain-name dispute resolution process has not made everyone happy (particularly not those who lost their domain names), it is the best solution so far. WIPO has standardized the rules, which means that individuals and companies can spend fewer resources tracking multiple laws. By making the process of domain-name dispute resolution standardized, WIPO has enabled all participants in the Net to understand the rules for domain-name disputes and to predict the likely outcome of a dispute. Unlike the sporting event example earlier, this "game" has clearly defined rules that are, ideally, enforced in the same way by each referee, regardless of the geographic locations of the participants.

## The Future

The "ugly" approach of attempting to apply geographically specific laws to a nongeographic service is worse than the do-nothing "bad" approach. However, neither is good. The current attempts by local governments to regulate international business means that you will have to work closely with the legal department in your company to be aware of the regulations governing your business in various countries. Given the global, nongeographic nature of the Net, it seems clear that the ideal solution is for countries either to cede control of these issues to an international body like WIPO or to harmonize their approaches so that everyone is subject to the same rules. At the very least, countries should create some system that allows companies that comply with the law in their home country to be considered in compliance with the laws of other countries.

Countries are currently struggling with the impact of the Net and how best to deal with it. If those who understand the technologies get involved, we stand a much better chance of getting laws that reflect the reality of the Net.