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# Discussion Following the Remarks of Mr. Graubert and Ms. Ladouceur

Discussion

## DISCUSSION FOLLOWING THE REMARKS OF MR. GRAUBERT AND MS. LADOUCEUR

QUESTION, MR. YOSOWITZ: I have one question for our speakers. There is a paper in our conference materials which states that restrictive trade practices of developed countries are inhibiting the access of developing countries to digital technology and other technologies, such as the Internet and medical technology.[1]

My question is, how do the agencies in these developed countries view actions by their citizens in putting restrictions on technology that goes to developing countries?

ANSWER, MR. GRAUBERT: That is a fascinating question, and I have to confess at the outset a lack of experience in this area myself, so I will have to defer to others. I would say that, as a general matter, the jurisdictional approach that both the Federal Trade Commission and the Department of Justice usually take is that, if there are effects in the United States, even if the conduct is abroad, we have jurisdiction over that activity.

ANSWER, MS. LADOUCEUR: I think I can give a very broad answer to that, but I think that, with respect to restrictive trade practices, Canada has always played a lead role on the international front. As for commercial activities, it is certainly breaking down certain barriers regarding restrictive trade practices. So I would say that, through its role on the Internet in the international arena and its presence on a variety of organizations, I do not see Canada as being any more encouraging of that type of conduct.

QUESTION, MR. WOODS: There was some reference to "legitimate" and "illegitimate" a few minutes ago. In last year's session we got to use big words like "extraterritoriality" and "convergence" a lot. This year, the focus has been more on the technology and less on the policy, but nevertheless this brings me to a question.

Last year, we talked about the case of an American computer manufacturer that was advertising its products in Europe, and they were using comparative pricing as part of their advertising. Apparently, this comparative advertising is not legal in some European jurisdictions, such as Germany. What do you do about that case?[2] If you turn it around a little bit, suppose

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[1] *See* Guo Qingjiang, *Restrictive Business Practices Bar Technology Flow to Developing Countries*, 1987 COLUM. BUS. L. REV. 117 (1987).

[2] *See Discussion After the Speeches of Joseph Griffin and Crystal Witterick*, 24 CAN.-U.S. L. J. 327, 331 (1998).

somebody in Cleveland who makes bathing suits, or somebody in Toronto who makes underwear, wants to advertise on the Internet, but a great number of countries in the world find that offensive and illegal. What is legitimate to one person may not be legitimate to the other. Are our guidelines as per the OECD approach the proper way to deal with this, or is something more needed?

I know it is a very difficult and problematic subject, but I would like to hear the views of both speakers in terms of some day reaching a convergence of what is, in this case, legitimate and illegitimate, so that the poor private sector person does not get nailed by extraterritorial jurisdictions when he or she puts things out on the Web with no intention of having them picked up in jurisdictions where they are considered to be illegal or illicit practices.

ANSWER, MS. LADOUCEUR: I know that this situation has already happened in a couple of areas. I referred to the International Marketing Supervision Network, and I have received a couple of calls from my French and Danish counterparts who objected to certain types of advertising that was taking place in their country via the Web. It is a very difficult issue, and this is one of the issues with which the OECD Consumer Policy Committee is struggling. If the Internet knows no borders, so be it. However, in terms of the application of laws, there are still jurisdictional issues, and I know of no country yet that is willing not to apply its legislation to the advertisements that are coming into the country via the Web for a host of reasons.

There is, of course, a sovereignty issue, but it is a much more fundamental issue than simply looking at it from a business perspective. Our advertising laws allow on-line marketing to children, for instance, but there are a lot of countries that simply do not allow that. I know that in Denmark, for instance, the Danes are currently in a big dispute with the United States about the Walt Disney Web site.[3] That, of course, is on-line marketing for children.

As far as I can see, the practical solution that has been undertaken so far by many businesses is to indicate on the Web site that the advertisements do not apply to particular residents of a particular country. Given that exception or disclaimer, countries have then tended to back off and say, as long as it does not apply to my residents, then that will be fine. That has been the case, at least until now.

COMMENT, MR. WOODS: But that does not work if the message itself has the text or the context which in some jurisdictions is not legal, such as in the case of comparative advertising in terms of the prices, or the image of the person in a bathing suit. In the Gulf states, you could go to jail for that. I do not think that, in some cases, the disclaimer is enough to answer the essential

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[3] *See* Kimberly Strassel, *Disney's On-line Scheme Has Danish Watchdog Barking*, WALL ST. J., Jan. 12, 1999, at A1.

issue. The reason I use the bathing suit example is that you have to look at it from both sides. What we might find totally illicit in terms of market practices in North America might be quite fine in Europe or someplace else, but what we might find unobjectionable, like advertising *Baywatch*, whether it is called culture or entertainment, on a Web site, some people would find that objectionable.

The solution is not just an easy lawyer's answer of putting in block letters, "don't look at this, because if you do you're going to find out things that your country doesn't want you to know or see." It is much more fundamental than that.

COMMENT, MS. LADOUCEUR: This is an area where technology may also have come to the rescue. There is also blocking technology. You can ask the Internet service provider (ISP) not to disseminate certain information in certain countries. For instance, in Canada it is illegal to advertise drugs, whether in magazines, in newspapers, or on the Internet. France has the same law, as well. In the United States, that obviously that does not apply; just look at most U.S. magazines. So, it is going to pose a problem in terms of advertising, and I think this is one of the reasons why the OECD countries are getting together in an attempt to resolve some of those problems. There are going to be certain limits or thresholds for whatever reason, be they health or cultural reasons, and I do not see a lifting of that type of ban.

COMMENT, MR. GRAUBERT: I think it is an interesting question. There was an interesting potential domestic analogy from my background as a litigator, which may or may not be helpful on the cultural issues. There has been a lot of litigation over whether people who put up Web sites make themselves amenable to jurisdictions everywhere that the Web site can be accessed. There is conflict in the law right now, but there is a sense that you are not automatically exposing yourself to liability everywhere that your Web site can be accessed, unless there is some degree of interactivity and you have customers in particular areas.

At least in the domestic litigation area, there has been some resort to traditional tests of jurisdiction. Are you availing yourself of the jurisdiction purposefully to try to protect people from innocently getting into situations like that? Whether or not that is going to work, as an analogy in the international context, I have no idea.

QUESTION, MR. ATKEY: I have a question for both the American and Canadian speakers related to domestic jurisdiction and responsibilities with other agencies, particularly with regard to securities trading frauds on the Internet. The question to the American, of course, is what is the nature and extent of your cooperation with the Securities and Exchange Commission (SEC) with regard to consumer fraud on the Internet in trade and securities.

In Canada, it is a slightly different question. What is the extent of cooperation with the federal authorities and with provincial authorities who have primary responsibility for securities trading and regulation?

ANSWER, MR. GRAUBERT: In that area and many others, in fact, in every other law enforcement agency area I can think of, I can say confidently that we have a high degree of cooperation with other federal agencies and with state enforcement agencies. We are delighted to do joint efforts or, in the case of the SEC, for example, to defer to them if the case is clearly in their area.

I know of one case personally where there were potentially both securities law issues and competition law issues. For a variety of reasons, our investigation was closed, but the SEC continued with their investigation. There may be areas in which there are parallel joint investigations for some period, and then one agency or another, or even both, takes action. But I think there has been a significant change over the last five or ten years in the degree of cooperation between the FTC and other state and federal agencies.

ANSWER, MS. LADOUCEUR: I can only reiterate John's comments with respect to heightened cooperation. I know that, in Canada, there has been the creation of a Cyber Fraud Securities Task Force among agencies that are very closely monitoring the Internet.

Curiously enough, businesses in Canada are reacting to security frauds over the Internet by asking the government to intervene and to regulate the Internet. Very curiously, some of those same businesses were, just a year or two ago, telling government not to regulate the Internet and to let there be a free flow of trade and ideas and advertisements, basically telling the government to take a hands-off approach.

About the frauds, there was one just last week again on the Internet. It had to do with securities and some stock manipulation and how it had basically floored a company in terms of stock prices.[4] Companies now are coming to the government and are asking that something be done. I just thought it was a curious reversal here.

QUESTION, MR. ATKEY: But which government? Are they going to the Bureau of Competition Policy, or are they going to the Interior Securities Commission?

ANSWER, MS. LADOUCEUR: I think the comments were being expressed to the government in general. They were asking government in general to regulate it.

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[4] *See* Ronald G. Atkey, *Technology Change and Canada/U.S. Regulatory Models for Information, Communications, and Entertainment*, 25 CAN.-U.S. L. J. 359 (1999); Jonathan Gaw, *Acquisition Hoax Sends PairGain Up 31%*, L.A. TIMES, Apr. 8, 1999, at NC1.

QUESTION, MR. ATKEY: But what tools are you going to use? I mean, do you not have a bit of a jurisdictional problem in Canada when it comes to who is actually going to carry out the investigation and prosecution?

ANSWER, MS. LADOUCEUR: It depends. Canada has a framework in terms of legislation. It also has an agreement with the provinces called the Internal Trade Agreement.[5] That goes to harmonizing our laws and our enforcement methods, so it is a cooperative approach within Canada.

QUESTION, MR. McNIVEN: I just want to pursue this jurisdiction question a little further. If something is clearly a crime – say a Canadian runs an Internet fraud scheme off of a server in Connecticut because he can get better prices in the United States than he can in Canada. The server is in Connecticut, and somebody in the United Kingdom gets defrauded. Where is the crime, and who prosecutes? It is a crime; I am not trying to dispute that. But is the jurisdiction based on the U.S. server being located in Connecticut, the perpetrator being Canadian, or is it in the United Kingdom as the place of the harm? I can see where this gets to be a real whale coming up from under the water, and it is a big, big issue.

ANSWER, MR. GRAUBERT: We would investigate that at the FTC, perhaps. The Connecticut State Attorney General might also investigate. And, if we found evidence of crimes in the United States or an effect on U.S. citizens, we might very well bring an enforcement action. We would cooperate with Canadian authorities in their investigation of the Canadian aspects of the transaction. You never know where it would end up.

ANSWER, MS. LADOUCEUR: You really do not know. This is what we talked about, cooperation. This is where we would phone the FTC and have a conference call with the U.K. authorities, and we would try to establish the strategy from an enforcement point of view. First of all, how do we shut down the site or actually get rid of the practice? Also, there is the question of where would we have the best results in terms of enforcement, and where could we really get to the individuals who are operating the Web site? It really is about cooperation. If anything, our long distance phone bills are going to be a lot higher.

COMMENT, MR. McNIVEN: There is the possibility for extradition and things like that as well.

COMMENT, MS. LADOUCEUR: Yes, of course. In fact, Canada has just streamlined its extradition act to facilitate extradition.

QUESTION, MR. ENTIN: I have a quick procedural question, and both of you are welcome to comment on it. John, you started by saying that the FTC basically treats the Internet the same way that it treats anything else.

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[5] *See* Agreement on Internal Trade, Aug. 23, 1994, Internal Trade Secretariat.

Then you referred a great deal to consent decrees and settlements. I wonder to what extent your reliance on consent decrees and settlements is a function of the newness of the problem, and to what extent it reflects the way that the FTC normally functions.

ANSWER, MR. GRAUBERT: I think it is likely the latter. A lot of these cases that I mentioned arose in the consumer protection area. These are pretty out-and-out fraudulent cases, in most instances. They are not extensively litigated. If we find somebody, we try to put them out of business as quickly as possible, using the injunctive powers given the FTC under Section 13(B),[6] and, in most cases, that is the end of the case.

We have very few consumer protection cases involving legitimate companies that have legitimate businesses, but one aspect of their practices might be unlawful and that will litigate to conclusion with us. We get some cases about advertising practices and credit reporting. But in these hard-core fraud cases, I think you have seen, even before the Internet, and are likely to continue to see, a lot of consent decrees or very quick injunction cases. What is the defense? What are they going to litigate?

QUESTION, MR. YOSOWITZ: We have been talking about consumer protection. I think it is important in the context of that last question to ask one more question, or at least have you comment on the area of merger enforcement. You have come up with some new remedies because of technology companies merging or investing. I know you have come up with things like crown jewel provisions and interim trustees. Would you care to comment on that aspect of new remedies in technological situations?

ANSWER, MR. GRAUBERT: There were, as you mentioned, up-front buyers and crown jewel provisions, which I think have been very effective in mergers generally, but I am glad you gave me a little opportunity to mention another phrase that I would leave you with, which is innovation markets. Innovation markets have been around for a while as a concept in merger analysis. The Intellectual Property Guidelines that came out a couple of years ago discuss innovation markets to a great degree.[7] Speaking generally, not just of the FTC, in high-tech markets, a lot of the competitive arena is in the innovation side of the business, and not so much in the production side. Therefore, we are going to need to be very cognizant of potential impacts on innovation markets. This is not only true in the computer industries. In *Ciba-Geigy*, the gene therapy case, we obtained divestiture of a significant research operation to make sure that there would still be potential competition

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[6] *See* 15 U.S.C. § 53(b) (1994).

[7] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property (1995), *reprinted in* 4 Trade Reg. Rep. (CCH) 13,132 (Apr. 6, 1995).

and actual competition in the development of gene therapy.[8] For those of you who are interested in this area, I would recommend to you the Intellectual Property Guidelines' discussion of innovation markets. It is an area in which we have had much experience. We are looking at those kinds of markets.

[8] *See* Ciba-Geigy Ltd., 5 Trade Reg. Rep. (CCH) § 24,182 (F.T.C. Mar. 24, 1997) (FTC consent order requiring mix of divestitures and licensing arrangements in markets for gene therapy products).