

exclusively to lawyers, judges or parliamentarians.

Today I speak for the often silent voice of creative people and encourage a consideration that creators should be invited into the fold. There does exist a danger that copyright law reform will be driven by economic concerns of trade and competition rather than by an understanding of art and culture.

Finally, John Mountbatten in "Law: The Big Picture" has made the following comments with which I concur:

*"Like art, at its best, law should aim, more often than it does, to challenge and, where necessary, shatter the shibboleths of received orthodoxy which inhibit human flourishing. Law should positively encourage the liberation of our deepest personal and social aspirations and point us -*

*wherever possible - in the direction of the sublime".*

For me, that is the big picture and that is the challenge - not just for legislators but for us all.

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## Protection for Internet Consumer Transactions - A Purpose-Built International Consumer Protection Convention

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**Consumer protection for the Internet is a growing concern for governments across the globe. Daril Gawth argues the case for an international consumer protection convention.**

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For the first time in history, because of the Internet, we have a technology which allows and encourages literally millions of people to engage in minor consumer transactions to purchase goods and services internationally (those where the consumer and the merchant aren't in the same country); but only a new body of international law - a technology-neutral international consumer protection convention - would be effective in legally protecting such transactions. Why is that? The need for an international consumer protection convention arises for four major reasons.

Firstly, current international trade protection laws, such as the *Vienna Sales Convention*, are simply inapplicable to consumer transactions, those where the buyer is a private individual.

Secondly, national consumer protection laws, such as the *Trade Practices Act* and the *Sale of Goods Act* in Australia, whilst applicable to consumer transactions, are not applicable to international consumer transactions - they just don't operate outside their own national boundaries.

Thirdly, even if an extremely-determined legitimately-aggrieved consumer were to try to pursue a remedy via (say) an action in contract in a foreign court, virtually insurmountable problems would arise.

There implicitly exists an approximate monetary threshold below which it would simply not be cost-effective to pursue such an action. For convenience, that threshold could be set as low as about \$50,000. Thus, if you spent \$50,000 or less on purchasing goods or services internationally (via the Internet or otherwise) and the deal went wrong, then you've lost your money in the present legal regime - possibly a very large sum of money. Also, there will be enormous complexity, delay and uncertainty involved; and that will follow a dispute about who has jurisdiction.

Fourthly, one solution being explored by some - industry self-regulation ("improved" or otherwise) - just isn't practical, unless you think asking the fox to look after the chickens is a good idea.

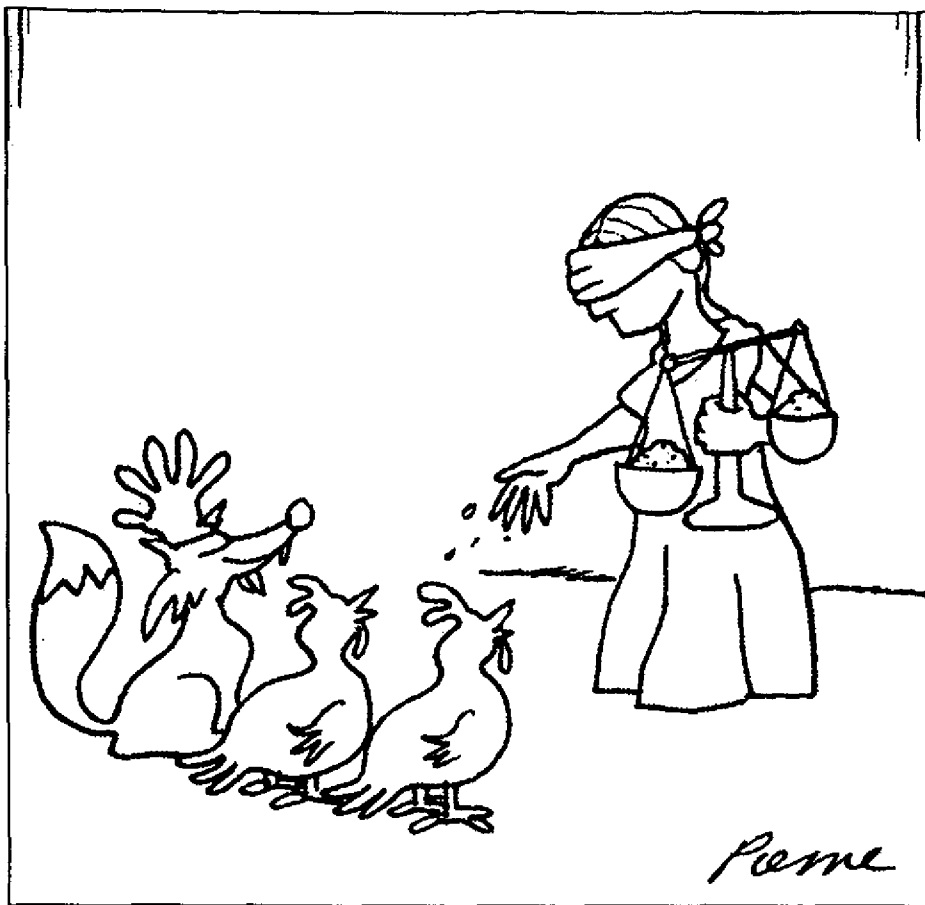
Thus, in practical terms, there currently aren't any means which offer effective (relatively cheap and simple) avenues of redress for aggrieved international Internet consumers. This fact is recognised by many, but no solution has yet been provided.

Interestingly, the recent arrival of the Internet (with its projected usage growth rate) hasn't created the problem - international consumer transactions can be mediated by other means - but the Internet has intensified it, and powerfully

stimulates demand for an effective remedy. The Internet is a social and technical phenomenon to which the law has not yet adjusted.

Protection is required to provide an appropriate mechanism for resolving post-transaction problems. These could arise where there are fully-performing consumers but, post-transaction, such consumers *prima facie* have some legitimate grievance concerning performance by a foreign Internet vendor, and where the vendor is hostile, uncooperative or unavailable, or there is some other problem with them preventing resolution of the problem. Such grievances will typically involve non-delivery or wrong-delivery of goods and services.

There are some who consider *any* regulation to be excessive; that regulation will simply strangle an emerging new economic force in its infancy, and that "market forces" will regulate the market. In recent times even the US Government appears to have taken a similar view - in "A Framework For Global Electronic Commerce", President Clinton stated that "governments must adopt a non-regulatory, market-oriented approach to electronic commerce" - but apparently to allow it room to grow in its formative years only (it stretches credulity to suggest that any government would allow any



implementation of, and compliance with, the convention. Under that would be a judiciary (possibly an "International Consumer Court"). A fourth organ would be a technical-support body whose main function would be to provide the means of, and on-going development and support for the operations of the judiciary as a court operating in real time through the Internet, by means of appropriate tele-conferencing and data-processing technologies. The technical support body would also provide general support for the other organs of the Organisation.

The first part of the convention would thus contain provisions for the powers, functions and responsibilities of the various organs noted, including the procedural rules of the judiciary.

The second part would consist of "harmonised" (internationally acceptable) consumer protection laws, concerned with such matters as normative consumer protection laws (concerned with the general duties of vendors, consumer rights, remedies, etc.), and possibly with such matters as the requirement for the registration of vendors' unique identities (in a register administered by the convention), the requirement for such identity to be transmitted by prescribed manner within all transactions with consumers, rules about the filing of actions with the judiciary, and many other matters.

What would the convention do? Broadly speaking, it would provide cheap and simple remedies to the kinds of problems noted above. From a consumer's viewpoint, it would operate as a kind of global Small Claims Tribunal, with enforcement of court orders being effected by the national representative body of whichever nation the vendor is principally located. It would do this through provision of a court operating on-line in real time via the Internet, with all parties and the court visible and audible to each other wherever they may be.

The facilities for the hearing of matters to be heard by the court, would initially be provided in existing courts throughout the territories of each member nation. In most cases, the underlying infrastructure *already* exists (most courts already have Internet access). Eventually, parties might attend hearings *anywhere* there is Internet access - even from within their own homes.

Facility for the filing and receiving of court documents will be found wherever the parties have access to the Internet,

sector of the economy to go unregulated and untaxed forever). And might "industry self-regulation" and "voluntary codes of practice" be enough to do the job? Probably not. It is likely, in the light of experience, that true self-regulation, as the only or principal form of consumer protection, would be ineffective and undesirable, and would set up roguish vendors as judges in their own cause. It is practically certain then that a balanced interventionist approach will be justified, between an over-regulated system and a completely unregulated laissez-faire system.

Without going so far as protecting consumers from themselves, Internet consumers will require some form of protection or Internet commerce will (already does) suffer from lack of consumer trust. What would they be protected from?

Apart from the sharp practice, negligence, etc. of vendors, they need to be protected from the ignorance they suffer relative to the knowledge the vendor has about their goods, services and business practices, and from their own ignorance concerning consumer rights and remedies available in the event of legitimate grievance.

Unless a remedy is soon found, consumer dissatisfaction with or suspicion of the Internet will result in critical loss of consumer confidence in the Internet and its promises, resulting in disastrous impact on the enormous Internet-driven stimulus predicted for the global economy, with associated flow-on effects and losses.

### **A POSSIBLE SOLUTION : AN INTERNATIONAL CONSUMER PROTECTION CONVENTION**

So much for problems and rationales. What of solutions? What might an international consumer protection convention look like, what would it do, who would benefit, and what might be the costs?

An international consumer protection convention would need to consist of two major parts. The first part would provide for the establishment and operation of various functional organs within an overall organisation (possibly an "International Consumer Protection Organisation" or something of the like). Such organs would include a supreme governing body (perhaps a "Conference of States") consisting of delegates from all member nations. Under that might be an Executive body whose main function would be to oversee the effective

such as in the offices of their own solicitors, from a local library or other community organisation, from their own homes and business premises.

What might be the costs of such a convention, and who would benefit? Would there be winners and losers, or just winners? It is likely that the major costs of such a scheme would be the establishment and running costs of the organisation established to implement the convention. As it is necessarily a public sector initiative, funds required for it would come from governments (taxpayers). The direct and indirect

advantages to taxpayers however, in implementing such a scheme, would be immeasurably positive.

Other costs may include "compliance costs" which would be imposed upon vendors required to comply with the new regulatory scheme. What would that involve? Virtually nothing. A vendor would be required to register with a local national authority, possibly display some kind of certificate on their website, and implement a sub-system in their website-handling software to provide transmission of their unique identity-data to potential customers. All of these costs

would, in the wider scheme of general business activities conducted via the Internet, be utterly trivial. Would such costs be a problem if they were passed on to Internet consumers by vendors? They would be virtually un-noticeable; and would undoubtedly amount to a cheap form of transaction insurance the average consumer would be more than willing to pay for.

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## Love Thy Competitor - Introducing the Facilities Access Code

**Matthew McLennan explains the intricacies of the new Facilities Access Code.**

**A**re you the proud owner of a telecommunications transmission tower? Are you planning to expand your existing network by building new telecommunications transmission towers or laying more underground cables? Would you like to hang your transmission equipment from one of your competitors' transmission towers?

If you answered "yes" to any of these questions, you will be interested in the Australian Competition and Consumer Commission's ("ACCC") new Facilities Access Code ("Code"). The Code sets the parameters for any future negotiations between carriers about access to certain telecommunications facilities. It came into effect on 13 October 1999.

### WHAT IS THE FACILITIES ACCESS CODE?

The Code sets out the conditions on which a carrier who owns a facility (referred to as the "First carrier") is to provide another carrier (referred to as the "Second carrier") with access to the following telecommunications facilities ("Eligible Facilities"):

- telecommunications transmission towers (such as mobile towers);
- the sites of telecommunications transmission towers; and

- eligible underground facilities (such as the underground duct through which a wire, cable, or optical fibre may be laid).

The Code has been drafted by the ACCC in accordance with Part 5 of Schedule 1 of the *Telecommunications Act 1997*. Part 5 provides, in general terms, that telecommunications carriers must give each other access to Eligible Facilities. The Code supplements this general obligation with detailed administrative and operational procedures.

According to the ACCC, the objective of the Code is *to facilitate or encourage co-location (of telecommunications facilities) by mandating processes and procedures for timely access to facilities, to apply in circumstances where commercial agreement between carriers cannot be reached*. On this view, the Code is the safety net into which will fall access disputes which cannot be resolved commercially.

### KEY FEATURES OF THE CODE

The Code is divided into 3 parts:

- Chapters 1 to 6, which contain the rules and procedures applicable to all types of Eligible Facilities;

- Annexure A, which deals with access to telecommunications transmission towers and the sites of those towers; and
- Annexure B, which deals with access to eligible underground facilities.

In this article our focus is on the general rules contained in chapters 1 to 6 of the Code.

### First Principles

The freedom to negotiate is tempered by a requirement that the First and Second carrier comply with the timeframes specified in the Code. This requirement reflects the ACCC's goal of allowing commercial negotiation at the same time as preventing a reluctant First carrier from delaying the provision of access to a Second carrier.

### Mandatory conditions of access

Chapter 2 of the Code contains the rules which are not open to negotiation. These are clearly the rules which the ACCC considers essential to the operation of the new access regime.

In the course of providing access, carriers must provide each other with information about their Eligible Facilities and technical needs. In order to ensure the unhindered flow of this information the