

FEDERAL TRADE COMMISSION

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FEDERAL TRADE COMMISSION

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Wednesday, June 9, 1999

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U.S. PERSPECTIVES ON CONSUMER PROTECTION
IN THE GLOBAL ELECTRONIC MARKETPLACE

WEDNESDAY, JUNE 9, 1999

9:15 a.m.

ELECTRONIC COMMERCE IN AMERICAN TRADE POLICY

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MS. BARSHEFSKY: Good morning. I want to thank Chairman Pitofsky for inviting me to speak with you today.

Our topic today is by no means a simple one. Electronic commerce, and the broader phenomenon of the Internet, are in their infancy. They are developing with great speed and unpredictable consequences, and are already forcing governments to think differently about many issues.

Trade is no exception. And today I would like to offer some thoughts about the principles and specific objectives we believe can be a guide to trade policy as this new world develops.

The Information Revolution, to begin with, is changing life and work in almost every field.

In health, telemedicine is transforming rural health care as family doctors consult online with the NIH and the Centers for Disease Control.

In science, virtual reality guides microscopic camera through blood vessels or a

robot across the landscape of Mars.

In travel, the Global Positioning Service helps safeguard shipping, makes family vacations easier and safer through immediate warnings of bad weather or traffic jams ahead or fights with kids.

In the public life, democracy is strengthened as web site and e-mail gives students and citizens access to news information and debate. Of course, this has its darker side as hate groups and criminal organizations can use it as well.

Information revolution is also changing business and trade. Global electronic commerce, the use of Net and other forms of electronic transmissions to buy and sell, will make companies more efficient as computers allow them to cut inventories, provide better and more timely customer service and meet consumer demand more effectively.

To give a concrete example, estimates are that when you go to a bank, your transaction with the teller will cost about a dollar; when you use an ATM, the transaction will cost about 50 cents; when you use the Net, it drops to 13

cents.

Likewise, the Net will make trade and make international business far easier than before. It will allow businesses and customers to find one another more rapidly, reduce the complexity of finding and filling out paperwork and erase borders completely for products available in digital form. Especially interesting and exciting is the potential of electronic commerce to spur entrepreneurialism particularly in disadvantaged areas where cost of capital are too high and risk adversity is common.

And for consumers, electronic commerce will raise living standards and create new tremendous sources of leverage over companies. It gives consumers the power to compare price and quality among vendors all over the world. It makes daily life more convenient as consumers bypass, for example, department stores or malls in favor of ordering things off the Net and getting delivery directly at home.

Electronic commerce, though, also raises a number of troubling questions. Governments must reflect on the way ways to adapt national

trade and crime-fighting policies to a borderless world. Consumers and businesses, too, know that together with raising living standards and better prices come questions about Internet scam artists, abuse of credit cards, a collection of personal data and so on.

And so, our immediate challenge emerges. Consumers should get the maximum benefits of these new technologies. Our companies, our national economy and our trade partners should be able to use them to the best effect. And at the same time, we must maintain high standards of public safety, privacy and consumer protection to help define the quality of life.

This is a very complex challenge, made more so by the rapid growth of the Internet and e-commerce. The Net, with 3 million users in 1995, now has about 140 million, with 52,000 new Americans logging on each day. By 2005, it may reach a billion people around the world. Electronic commerce, which totalled about \$200 billion, may reach 1.3 trillion in the U.S. alone by 2003. And new product and services develop every moment: From remote monitoring for forest health to long-distance education and more.

At the same time, though, we're not necessarily faced with an utterly new and alien set of concepts. Electronic commerce and the Internet are new developments which depend on state-of-the-art technology. But they also represent something of a logical developments of earlier innovations in communications and information technology dating to the telegraph and the telephone a hundred years ago and more.

So, while we must adapt our thinking and our policies in certain important ways, our traditional principles remain valid. We have generally believed that the government policies shall be in the form of self-regulation where possible, rather than attempts to control the development of industries and technologies. Where this does not succeed, of course, the government has an obligation to protect citizens, especially those most vulnerable, through impartial means. And in either case, we have maintained an open and non-discriminatory market, believing that trade generally creates competition and raises living standards.

These principles, we believe, will be valid in the electronic commerce. It will be

very difficult to predict precisely how an electronic marketplace will develop, so we don't propose to try; rather, we will whenever possible leave this to the private sector and to the market.

Further, while government action to fight crime, protect children and protect privacy will be necessary, evaluating the need for new regulations will be a very complex task. Unless the decisions we ultimately make rest on a strong consensus among the private sector and consumers alike as well as governments, we will most likely see a set of regulations that are both burdensome for businesses and consumers and ineffective in their primary objective.

And finally, there are no natural borders to cyberspace and the development of policies and solutions must ultimately be a worldwide effort.

This action takes place in many different arenas. Over the past several years, we've been developing an institutional infrastructure for e-commerce to give businesses and consumers confidence and predictability we enjoy in traditional form of commerce. The issues involved ranging from managing domain names to

establishing standards and a legal framework for digital signatures, ensuring adequate privacy protection, addressing tax implication as and so on. All of these issues are very important to the future of e-commerce and our colleagues in other agencies are addressing them through international talks and in our domestic agenda.

But in trade policy, we are developing our broader principles through specific objectives at the WTO and through advisory committees in the regional and bilateral trade initiatives we have under way in each part of the world. These goals fall into three major categories: First, guaranteeing the unimpeded development of e-commerce. Second, ensuring enforcement of existing regulations to protect consumers, fight crime and so forth; and third, extending access to the electronic marketplace worldwide.

Let me just review briefly each of these objectives in turn. First, we want to help ensure the unimpeded development of e-commerce. And here, we have several specific objectives: Duty-free cyberspace, technological neutrality, and ensuring the most liberal treatment of

products carried on electronic transmissions.

The most immediate initiative is to keep cyberspace duty-free. That is, to prevent the imposition of customs tariffs on electronic transmissions on the Net. To impose tariffs will be terribly burdensome. It will burden, of course the technology. That will be lightened only by the difficulty of collecting the charges.

It would both slow the growth of e-commerce, and encourage that growth ultimately to take place outside the law.

Today, there are no customer duties on phone messages, on fax, on data transmissions and that kind of cute duty-treatment should be applied also on a permanent basis to electronic transactions on the net. We have a temporary standstill in the WTO in this issue and we look forward to renewing that this year in Seattle in the fall.

At the same time, through the longer-term WTO work program seeks consensus on this issue, we also seek consensus on the principle of technological neutrality to ensure that products delivered electronically are protected by trade principles through the WTO.

New technologies and telecom services make possible a vast range of new activities. Whether it's call centers located in Nebraska, Internet radio out of Texas, software production in India or inventory monitoring in Ireland, a cheap, powerful global network now brings activities to the area in which they are carried out most efficiently. We can predict neither the new activities that will become possible in the next decade, nor the new methods which will deliver them most rapidly and cheaply. Neither, in fact, can technical experts. You may recall that Alan Turing, one of the inventors of the computer, thought in 1940 that one of its major uses would be, and I quote, calculating range tables for artillery fire.

We've come a long way since then. What we can predict is that with freedom to develop new ideas and technologies, we'll find better and easier ways to conduct business. The principle of technology neutrality in the trade perspective means that countries should not deny firms and consumers the benefits of newer or cheaper goods and services simply because they are delivered electronically or because of the way they are

delivered electronically. To do so would be to choke off innovation before it begins.

We also believe the world should keep an open mind as to the classification of the types of products delivered on the Internet. As you know, the distinction between goods and services in tangible form is a rather bright line in international trade terms. This may not be the case with respect to electronic commerce and we need to keep an open mind on that issue.

And last, of course, the protection of intellectual property rights is essential if e-commerce is to reach its full potential. This issue raises an extraordinary array of challenges. The biggest challenge, as you know, is an explosion of online piracy as many of the technologies and modes of delivery of copyrighted material merge and then explode. Our principle vehicles to preventing this from happening is to show our support for wide ratification of the recent WIPO treaties addressing Internet piracy and we're working very actively with other countries on this. And of course, we support establishing in parallel with ratification rules that outline the liability of networks and

manufacturers.

Together with, and fundamental to, the unimpeded development of e-commerce is ensuring high standards of consumer protection and that is our second broad policy goal. This is a fundamental American principle and a consensus policy goal. Consumers don't want to be cheated or exploited. Businesses who see their future in electronic commerce don't want the medium to gain a reputation as rife with fraud and scams and those same businesses do not want to gain a reputation for themselves as abusers of privacy.

Thus, in the majority of cases, we believe businesses can and will police themselves and one another. Many, as you know, have voluntary privacy programs, backed up by good enforcement, allowing consumers who visit Web sites to choose whether to offer information about themselves to the site operator. Those who refuse to adopt these programs will likely see business drop off but at times, particularly with, for example, children, voluntary programs will likely need to be accompanied by government regulations and enforcement.

As government and industry groups proceed

to develop consumer protection regimes, we believe governments worldwide should apply basic WTO principles like transparency and non-discrimination, and ensure that their regulatory processes are fair and open to advice from businesses and civil society groups. If not, the result in policies will most likely impose burdens on consumers and business while failing in their primary task.

The specific issues we'll face, as you know, are very complex and are largely the subject of this conference. The jurisdictional question, for example, of whether laws where the provider is established or the consumer resides will apply to contracts and business transactions conducted electronically. No consensus yet exists on these issues. And our approach, frankly, is to accept that fact and to encourage broad-ranging discussion as is going on here so that we can develop consensus on these issues among the broadest group of people. But in the case of the jurisdictional issue, I don't think the market will provide the solution. I think ultimately people like you in this room will have to provide the solution.

With respect to looking at the range of difficult tasks ahead, not only the jurisdictional question, but including the jurisdictional question, we have bilateral and regional discussions through our various trade policy initiatives.

Bilaterally, we've endorsed a broad series of principles on electronic transmissions such as duty-free cyberspace, the need for broad consumer protection with Japan, Ireland, France, Korea, Australia and other countries.

On a regional basis, we have forms for addressing e-commerce issues in The Free Trade Area of the America's negotiations with our hemisphere, our Transatlantic Economic Partnership with Europe, and the APEC Forum, the Asian-Pacific Economic Cooperation Forum with our Asian partners.

In every one of these arenas, we have proceeded on the basis the best way to reach our goals is full discussion, close collaboration among all interested parties, full transparency as approaches and regulations are being thought through and defined.

The third policy goal has to do with

universal access. We believe that electronic commerce should be available around the world to everyone in all strata of life.

One of the most profound and exciting implications of e-commerce is the potential to speed development on a more rapid basis of the poorer countries and the disadvantaged regions at home. Rural areas, Indian nations, small towns, entrepreneurial associations in developing nations are all finding that Internet access requires little capital, helps entrepreneurs find customers and supplies quickly and eases technical and paperwork burdens.

E-commerce is ideally suited for developing countries and people with a good idea but very little capital. We're stressing these opportunities, for example, in our trade initiatives with respect to sub-Saharan Africa. These initiatives, together with concrete technical assistance, help create competitive private, sector-driven electronic markets. We have worked closely with AID, for example, and it helped eight African nations set up national gateways and begun to start with

four more and AID has now reallocated existing funds to promote the development of e-commerce among entrepreneurs in Jamaica, Guatemala, Uganda, Bulgaria, Egypt, Ghana, Morocco, Haiti and other countries.

This is a very, very exciting development for the poorest countries, particularly those in sub-Saharan Africa where the greatest concentration of poor countries resides. The result, if we succeed, will be a seamless, genuinely worldwide network which allows people in these countries to enter trade quickly and to spur economic development on a much more rapid basis.

For these countries, and for us as well, e-commerce is in its infancy and we have a great luxury of being there at the beginning helping to define and channel this new phenomenon.

If we act sensibly today, e-commerce can develop, as you know, into an extraordinary force certainly for consumer benefits, for national and international economic growth and extraordinary creativity in the years ahead. That's the prospect our trade policy aims at in our own narrow way in this field and so, we believe it's

worth the time to get it right.

Thank you very much. This is a great
pleasure to be here.

(Whereupon, session one concluded.)

FEDERAL TRADE COMMISSION PUBLIC WORKSHOP
WASHINGTON, D.C.

U.S. PERSPECTIVES ON CONSUMER PROTECTION
IN THE GLOBAL ELECTRONIC MARKETPLACE

OVERVIEW OF THE HISTORY AND FUTURE OF THE
INTERNET

VINT SERF

SENIOR VICE PRESIDENT FOR INTERNET
ARCHITECTURE AND TECHNOLOGY

MCI WORLDCOM

WEDNESDAY, JUNE 9, 1999

10:00 a.m.

REPORTED BY: LINDA BAHUR

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MS. SCHWARTZ: So, what next? I think at this point we invite the panelists to come up and join at the table and if I could make a couple other just administrative announcements.

As was the case yesterday, this is being Web-audio cast and one can listen at Broadcast.com. We're still accepting written questions from the audience here and also at the e-mail address, e-Marketplace@FTC.gov.

Vint Serf, the father of the Internet because he co-designed the architecture and the basic communication protocols that gave rise to the Internet. Over the years, his contributions to the development of the Internet have really truly been staggering and they've been well recognized with honors ranging from the National Medal of Technology presented by President Clinton to honorary degrees from universities around the globe.

Also, he just keeps going. In addition to his position as Senior Vice President for Internet Architecture and Technology for MCI WorldCom, he is currently engaged also in a jet

propulsion laboratory effort to design an interplanetary Internet. So, although we up until now have been thinking we were engaged in global big-picture thinking, by comparison, we're still on earth and he's in the, beyond that.

With that, although this introduction could go on for some time, I'm going to turn over the microphone to Vint. His topic is the history and future of the Internet and Vint, you can actually stand or --

MR. SERF: I'm actually going to approach it here. Thank you so much for that kind introduction. Is this thing working okay? And I'm audible. All right. I may not make any sense but at least I'm audible.

I have a couple of tasks this morning. One of them is to do a synchronizing thing so that I don't have to go like that and show my bald spot any worse than I already do. I'm going to try to keep my slides in the same order that have there and we're going to click them simultaneously. That's what it says anyway.

So, if I suddenly drift off to talk about something that isn't there, it's because we're out of sync. I also am going to try to focus my

remarks on the consumer side of the Internet but I am going to try to accomplish my other task, which is to give you a sense of where it is, where it's going and what is happening to it, but most particularly with respect to its use in electronic commerce.

So, if we go to the next slide. I am also going do forced to make a few predictions and I am very conscious of how dangerous this is.

In fact, I have a couple of examples that show you how dangerous it can be. The next slide -- wait a minute. I'm not in sync. There we go. Okay. Now, hit the button again.

"This telephone has too many shortcomings to be seriously considered as a means of communication. The device is inherently of no value to us." Who could possibly have said that?

If you hit the button again, It's Western Union back in 1876, a small era.

The next one is almost equally as much fun. Hit the button again. "640K ought to be enough for anybody," Bill Gates, 1981.

Well, let's go on now and talk a little bit about the Internet. It's not like I haven't made any bad predictions either, but I've left

out what bad ones that I made. You'll discover them soon enough.

Next slide. Everybody understands that the Internet is not a single network. It's actually a network of networks and there are about 300,000 of them connected around the world.

And the only reason that it works at all is that they're all running a common set of protocols and communication procedures among the computers and the routers, things that move packets around in the network.

It all uses this thing called TCP/IP which is a suite of protocols. About 200 of them now and counting. It was designed way back in 1973 and the intent was the system would operate on communications technologies which had not necessarily yet been invented. And so, the basic Internet protocol was as simple as we could possibly make it and all we asked of the underlying transmission system was that you take that bag of bits and deliver them from point A to point B with some probability greater than zero. So, we didn't even ask that it be reliable. We just said, do the best you can and that's the origin of the terms like best efforts

communication.

Well, I got very enthusiastic about trying to put the Internet protocol, or IP, over all these various transmission system as they came along and so, as the next slide should show, I got a T-shirt that says "IP" on everything which is what I've been doing for the last 25 years. I even got one of these for my dog, so when I take her on a walk, she does the same thing.

That, in essence, is what Internet is all about. It's trying to get the simple set of protocols to run on top of all the new communications technologies that have come along like asynchronous transfer mode and relay and Sonnet and dense wave length division multiplexing and point-to-point radio links and satellite and so on.

Next slide. We're the middle of a kind of gold rush in the Internet right now. You can't turn a page of a magazine or a newspaper, particularly a financial section without seeing something going on, either stocks skyrocketing or stocks plummeting related to Internet. It's a classic gold rush phenomenon. People are not

quite sure what it's all about but people are making money in it, so others are running around trying to figure out how to make money in the Internet.

Back in California in 1848, it was looking for gold in the hills of California. 150 years later, it's really looking for gold in the stock market, but the fact of the matter is we've learned lessons from gold rushes. We know that the people who make money in the gold rushes are often the people who are not looking for gold. They are the ones who sell picks and shovels and tents to other people who are looking for gold and that's what the telecommunications companies are doing now. They are selling the electronic equivalent of picks and shovels to other people who are looking for gold in the Internet.

Well, if we're in the middle of a gold rush, we should have some things on how big it was. So, on next slide. You're really good at this. Thank you. We get some idea of the scale of the system. Everyone knows what a domain name is by now, right? WWW.w.com.

The second level of the domain are the things that have two components, wcom.com, for

example. There are about 3 million of those that have been registered by July of last year and here it is June. It's probably about 6 million by now. I just don't have the data from NSI, but if I did, I would give it to you.

There were 34 million computers in the Net as of January of this year, probably on the order of 50-plus million, maybe 55 million by now. It operates in 206 countries and territories around the world, but the penetration level in different countries is quite varied. In fact, yesterday I had the pleasure of visiting the Finnish embassy where it turns out that there is in Finland, the highest number of posts in the Internet of any country in the world, even including the United States. We don't know why. I mean, we can speculate. Maybe it's those long, cold Finnish nights and they don't have anything else but, you know, to surf the Net. But whatever it is, they are heavily penetrated not only with Internet technology, but also with cellular telephony.

There are estimated to be 165 million users of Internet today. That's up from about 80 million a year ago. And I have some more data on

the next slide that gives you an idea of how that distributes around the world. But to put it all in perspective, remember that the Internet is quite small compared to the telephone system. Today's telephone system has 830 million terminations, 700 million wire line and 130 million cell phones, most of which seem to be in Bangkok because it's incredible of how the density of cell phone use in Third World countries where it's very hard to get wire line service, so cell phones go in much more readily. In fact, in some parts of the world, cell phone rate of growth is of 65 percent year to year. Ordinary telephone service typically is about 15 percent or less per year. Internet, on the other hand, is growing at more than a hundred per year in many parts of the world.

Next slide. We'll see that still, the bulk of the users of the Internet are in Canada and the United States. About 90 million of them.

In Europe, about 40 million. The Asia-Pacific rim is disappointing compared to the populations there with huge countries China, India, Indonesia, Malaysia. Only 27 million users are understood to be in that part of world.

There are a lot of impediments to the penetration of Internet there, some of which have to do with poor telecommunications infrastructure. In China, for example, there's still a very weak telephone system. As time goes on, of course, they are add 14 million lines a year which is equivalent to 1 RBOC, which is a new measure of growth now. How many RBOCs per year are you growing? Even after growing at 100 BOC per year after three years, they still have about only 10 percent penetration.

The other problem in the Pacific rim is that languages there are not always using the Latin character sets and that makes them not so easy to keyboard and so, keyboarding and non-Latin characters conflict with each other and that, too, may be an impediment.

In Latin America where there's also a fairly substantial population, there's only about 5 million users but the country is beginning to wake up, particularly in countries like Brazil, Chile and Peru where there are increasingly competitive markets, we found a strong correlation between growth of the Internet and competitive telecommunications markets.

Africa, I'm sorry to say, is the least well represented in the user population and that's almost certainly attributable both to very, very weak economic situations in that part of the world and except for, for example, Egypt and South Africa, and also an extremely weak telecommunications infrastructure.

I did learn one statistic with the World Bank recently which impressed me very much. World Bank is now investing in telecommunications resources in Third World countries because they say that one dollar investment in telecommunications resources produces a \$3 increase in GDP and that statistic is, of course if it holds up, a very impressive reason for developing telecommunications infrastructure in the Third World.

Next slide. In terms of scale of the Internet, I'm particularly concerned about this as an engineer is how big is thing going to get and how fast and how hard do I have to run? I estimate that there will be almost 900 million devices in the Internet by the year 2006, which will place the Internet on the same scale as the telephone system in just seven years' time. In

fact, it may become the telephone system if Internet telephony turns out to work as well as many people hope that it can. So, this is the reason that the telecommunications industry is so interested in Internet because it is going to become a very, very large part of our business.

Next slide. This is the piece of history that I wanted to cover. I'm not going to go through every single bullet here, but I have a couple points to make. One of them is that the basic technology of Internet is still very old. Packet switching, which is the core design, was invented in the 1960s and manifested itself in a wide area network in 1969 with a system called Arpinette developed by Bolger and Acumen for the Advanced Research Projects Agency at the Defense Department.

Internet's design was not done until 1974 when Bob Kahn and I published our first paper on the subject and all of us who worked on it spent almost ten years before we could deploy the technology in a wide area way in 1983. So, it's only 16 years ago.

The first money made on the Internet was by Cisco Systems selling routers to the research

and academic community. You all remember how we used to build routers? You get a graduate student and a computer and you wrap the graduate student around the computer and you turned it into a router. But we ran out of graduate students and Cisco figured out that they could actually sell this stuff. So, nobody made any money until 13 years ago in this business.

It wasn't until 1989 that the U.S. Government, which had responsibility for policy and the use of Internet, allowed a commercial Internet connection on the network. In fact, I specifically asked them to permit me to interconnect MCI mail, which is a commercial e-mail service, to the Internet in 1989 in part out of a belief that if we didn't turn it into an economic engine that could support itself, that it would not scale. It would not grow because the government couldn't afford to pay for everybody's Internet service. Well, I'm happy to say that the government permitted me to do that and shortly after that in the following year, we started to see the emergence of the first commercial Internet services, specifically UnionNet, which is now a company owned by MCI

WorldCom, and PSI WorldNet, both of which are in this area. So, in some sense, this part of the world can claim to be the birthplace of the commercial Internet services.

In that same year, the Defense Department retired the arcinet, sort of the granddaddy that started all of this. The general public didn't know a thing about this until about 1994 when Netscape Communications released its commercial Netscape web browser and web server software. And, so, it's only in the last five years that there's been a great deal of public visibility of the Net. It wasn't until the last five years, or four years ago, 1995, that the National Science Foundation retired its academic backbone, the NSF net, and left the field to commercial enterprises to compete for backbone Internet services in the United States.

And just last year, as Becky Burr will tell us painfully, the U.S. Government has started to extract itself from the responsibility for supporting administrative services on the Net, the registration of the main names and the assignments of numbers by the formation of the Internet Corporation for the assignment of names

and numbers.

So, by all reasonable metrics, the Internet is still very early in its commercial evolution, which means that business models are in homogenous state of flux, our procedures and practice for the use of the Net in electronic commerce are also still very early in their evolution, so you are not too late to be considering questions about how this service should affect the general public and how we should protect the interests of the general public as Internet becomes an important part of our daily lives.

Next slide. We know that electronic commerce is becoming an important portion of the Internet because we see some companies getting started with wonderful names like Amazon.com, Yahoo, Dell Computer, Cybercash and eBay and First Bank of Internet. I really like that one. All of these companies are really experiments in different ways of using the Internet to make money and it is, in fact, in some cases they haven't made money, Amazon.com being a remarkable example of that. Generating lots of revenue, generating lots of value in the stock market, not

clear whether there's profit in the business yet.

That hasn't stopped anyone in the Internet game from getting in anyway.

Another thing which has become quite visible is the importance of cryptography to electronic commerce on the Net. This raises policy questions about how cryptographic software gets used, whether or not it can be exported, what level of cryptography can be used outside the United States, if it's exported by someone inside. How do we authenticate transactions? How do we authenticate people who are exchanging traffic on the Net, doing business on the Net? These are all issues which I will return into a few minutes.

Next slide. I gave you a sense for the scale of electronic commerce on Net already and how powerful doing business through the Worldwide Web can be. Let me just give you three statistics. Cisco Systems, which is now reaching a run rate of over \$10 billion a year, selling \$20 million a day worth of its equipment through the Worldwide Web site. In fact, that's between 75 and 80 percent of their total sales and I am told by John Chambers that they save almost more

than half a billion dollars a year in costs because the customers configure the order, can interact with the Web site rather than having to call up an employee and get them to help do it. So, they are not only more efficient, but they are aggregating a very dispersed market for their products. The global market comes to the Web site in order to place orders.

Dell Computer, an \$18 million a year company, sells \$14 million a day worth of their personal computers through the Web site. That's 35 percent of their total. And Intel, last year, opened up its Web site and within 15 days, had booked a million dollars worth of business through that Web site. This gives you a sense for the kind of leverage that the Worldwide Web is giving to industry for both business-to-business and consumer-to-business interactions, and eBay, of course, is almost consumer-to-consumer as yet another example.

Next slide. It is estimated by Forester that the value of business-to-business transactions on the Net will reach \$327 billion by the year 2002. That's not very long from now and my first reaction was that's a really big

number until one of my economists friends here in Washington pointed out to me the world economy in 2002 would be \$30 trillion. When you do the math, \$300 billion is one percent. So, I can stand here in Washington especially and with a straight face, say \$300 billion is a small number. Now, in fact, if the estimates are off by a few percent, it may, in fact, be a low estimate. In fact, the next slide tells us that other estimates of total commerce, including the consumer component, not just business-to-business, could range anywhere from 1.8 trillion to \$3.2 trillion in 2003, just for years from now. That's getting on close to 10 percent of the world's economy carried on the Net.

Now, at that point, you can be sure everyone will be quite concerned about the reliability and accuracy and confidentiality of transactions on the Net and governments, local, state, federal, will be very interested in trying to figure out how to generate revenues from those transactions on the Net. How do we tax the transactions on the Net? As you know, the U.S. Congress has wisely chosen not to impose

specific taxes on Internet transactions. They have haven't taken away any taxes for those things that should be taxed or would have been taxed, for example, the sale of a book, in any other medium. They are just not applying taxes specifically because the transaction was done on the Net.

I think it is inescapable that at some point we will have to deal with taxation in this context but it's going to be a complicated process because Internet is a global phenomenon. Anyone anywhere in the world can place orders. We faced this surely in the past because anyone placed a telephone phone call and placed an order, you know, against the catalog. So, this hasn't been, it's not anything dramatically new, but somehow the fact that it's so global and still open that there are jurisdictional questions about where these transaction have taken place, just make it a little more complicated.

Next slide. Your machine is faster than mine. I'm impressed. Just to give you an idea what people do on the Net, we got some statistics about last Christmas on the Net from Greenfield

Online. Some 63 percent of the users who had been surveyed had bought something on the Net in the last 90 days during Christmas season, and they bought a variety of things, computers, software, books, airline tickets, computer hardware. Twenty-five percent of them did banking on the Net, 12 percent did hotel or travel time reservations and 12 percent did securities trading, like E*trade, for example. So, you can see that there are a variety of things that people do.

The next slide tells us something else about the Net which I find quite fascinating. I don't know who invented self service but if there's a Nobel Prize for that, that person ought to get it. Think about the way this works. Self service means that the customer serves himself or herself, which means that if the customer doesn't like the service, it's his fault. And second, since you don't have to hire a salesperson to take care of the customer because the customer takes care of himself, then, you know, it's cheaper. So somehow everybody wins, right?

Well, interestingly enough, we're finding

that companies are using the Internet as a way of providing self service to customers. And frequently answered questions or I guess answers to frequently asked questions is one example which I kind of pooh-poohed at first. I thought, well, that's kind of a cheap shot and you just put down a bunch of questions and answers and maybe if you're lucky, you know, your question will be in the list.

Well, I had a personal experience a few months ago which tells me that this idea is pretty good. Saturday morning, I get up, turn on my Macintosh and it announces that the year is 1956. So, I turned it off and I turned it back on again. It still said 1956. So I thought at this point, this is weird. And I went to the Apple Web site and I went to the FAQ and I got down to about the fourth FAQ and it said, if your Macintosh says it's 1956, it's because your lithium battery is dead. So, I opened up the machine and sure enough, there was a dead lithium battery in there, the one that kept the calendar going. And so, I saddled up old doc and went down to the computer store. Got myself an 80 cent lithium battery, came back, plugged it in,

turned it on and it was 1999 again. So, I was impressed because on a Saturday morning, instead of having to sit there for an hour waiting for a reduced staff telephone answering service, I got my answer right away, Solved my problem for 80 cents plus the cost of gas. So, I came away a believer that customer service online 24 hours a day is, generally speaking, a pretty good thing.

Now, some companies are actually letting their customers communicate with each other, you know, on a kind of a talk room or a chat room or a forum on the hope that they'll solve each other's problem. You know, somebody comes and says, I got a problem, and another customer says, I have a solution. Sort of like people meeting at a bar and entertaining themselves. You don't have to entertain them. You just feed them drinks and they entertain themselves.

Well, the problem here is that sometimes the customer will discover they all have the same problem and since they have a chat room to coordinate, they will gang up on you using the resource that you gave them to do that. This happened to AOL at one point when AOL was debating what kind of pricing they should apply

to the service and all the customers were in this, you know, sort of forum, got together and used it to organize kind of a mass complaint about the direction that AOL is heading in.

I also see an increasing amount of interest in presenting bills and accepting payment through the Net, saving time and paper, speeding up the processing of the bills and reducing the delay for the receipt of payment. So, that's also an attractive thing to do on the net.

Next slide. Well, part of the focus of your attention today and the area where I wanted to spend some specific time is what kinds of bad things can happen to customers on the Internet and what can we do about it? And I remind you again that this is very much a global setting. The Internet is truly global in nature and that mean that is any decisions that we make, any policies that we take, any laws that we pass may not have, I'm talking probably don't have global jurisdiction. And so, at the very least, if we want to protect people, we're going to have to learn how to work with other governments to pass laws that instead at least are compatible at the

boundaries between countries. That might mean working with World Trade Organization. It might mean working with WIPO. It might mean working with other international frameworks. Not to have identical laws necessarily, but to at least understand that protection of customers has to work everywhere or it's not going to work for everyone.

Worse, a customer who is unprotected by some law which is relatively compatible around the world will find himself or herself at some risk because there's some country where abuse is permitted and since you don't know necessarily where the Web service site is that you're going to, you may find yourself getting service from the place, physical place that doesn't observe these protections.

Spam is a good example of this. Everybody knows what that is. It's unsolicited e-mail which shows up in your mailbox. That turns out to be a difficult and pernicious thing to stop because part of the value of the Net is that you can send messages to essentially everywhere.

There are some tools that Internet

service providers can use that help detect spam and try to filter out. But in the end, the real problem is with the customer who says I don't want it. It's consuming time for me to look at it and throw it away. It's eating up space on my disk drive and I want you to stop it. Sometimes we have a hard time stopping it. Sometimes we have a lot of trouble finding where it came from it. Sometimes an abusive spammer will get a temporary account or a dial-up account, send, you know, a hundred thousand spam messages, which doesn't take very long, and then disappears and you can't find him.

So, if it is occasionally a temptation, I think, either for lawmakers or others trying to protect consumers to point to the Internet service providers and say, it's all your fault, you have to fix it. I can tell you, being on the receiving end of that, sometimes you can't. It's really hard. However, it would not hurt to have laws, as I understand we have in Virginia, that say you're not supposed to do that. Just like the laws that were passed saying that sending faxes, broadcast faxes are stealing sources from the recipient, interfering with the recipient's

use of the fax to do business with the recipient the fax business or to make use of for private purposes.

So, it might not hurt for us to say if you spam and if we catch you, that there's a law that says that's criminal behavior and we will prosecute you for that.

Fraud is another example of concern that we should all have about the use of the Net. Fraud, as you know, is not something new with the net. People have committed fraud for many, many years and I'm sure from now until Kingdom come, they will continue to that.

Internet simply provides another opportunity for fraudulent behavior. Some people will put up storefronts that emulate legitimate businesses. Sears, spelled S-E-E-R-S, and if you can't spell, you might think that you are on the Web site for the well-known company or, in fact, you can put up a Web site that says S-E-A-R-S and simply steal the trademark, pretend to be that company, appear to offer products for sale and go through the entire set of transactions, capturing the credit card from the customer and then use the credit card for your own purposes.

That's not the same as snatching the credit card out of the air because it wasn't encrypted or something. In fact, the concern that someone will steal credit card numbers by watching packets flying through the Net has largely dissipated. People understand that when you go to a restaurant and hand your credit card to a waiter and he disappears for 15 minutes, you're probably at more risk than you are when you're sending your credit card through the Net.

The problem, however, is where does it end up? Where does it land? And if the putative service that you're getting or the product that you're trying to buy is at a Web site that's actually a fake storefront, then you have a problem.

We can look for technical ways of allowing a consumer to authenticate that storefront. For example, and I'm not going to try to go through this in detail because I haven't actually gotten through all of it myself, but I can imagine registering your company with the Better Business Bureau, with Dun & Bradstreet and with others, getting cryptographic certificates that will allow the consumer to

verify that the storefront was, in fact, the one that was registered with the BBB or with Dun & Bradstreet or others, and technology should allow us at least filter out somebody who is pretending but has not registered that site.

So, we can do something to protect against that, but fraud is fraud and fraud is illegal and where it's detected, it prosecutable and we hope that that's true in all jurisdictions, not just here.

Privacy is another big issue as I'm sure you're all aware. The issue here is not so much that your personal something is somehow snatched off the Net like the credit card problem, but rather, that personal information is collected by legitimate businesses that need it in order to service you. For example, I need your address in order to deliver a product to you, but if I take that information and I abuse it by selling it to somebody else or I capture information about your buying behavior, as many of the credit card companies can do, and then turn around and sell that information to somebody else, it's a legitimate concern that your privacy may have been invaded, and once again, it is policy that

counts, not technology, to try to combat that.

Technology can help us with some matters that are highly confidential like medical information or financial information. We can use cryptography as a way of protecting information while it's in flight or even while it's stored away, but it is the policy that really is critical here. After the information is available to the legitimate target, there's a legitimate target. The medical service, the health management organization actually protect the information and properly treat it so that your privacy is protected.

And finally, harassment of all kinds, nastygrams that come in by the mail, people stalking you electronically, people interfering with the Web site, hackers who modify contents of the Web site, those are all problems that we need to address. Technology can help the many ways but it is not the sole solution and I want to double, double emphasize that because many people want the technologist to somehow fix so that this problem will go away. It won't go away. And in many cases, we can't fix it technically. All we can do is ask for help in prosecuting by making

certain behaviors illegal and, therefore, subject to punishment.

We can go to the next slide now. I have an even longer list of policy issues here which we claim that we do not have time to go through but I want to just alert you to a phenomenon which will become more and more common. As the Internet becomes an infrastructure in the same sense that the telephone system is or the road system or power generation system that we rely on day-to-day, then our concern for public safety and public protection increases as it does today.

When someone destroys the power generation system or interferes with it, that has a negative impact on economies. It has a serious impact on our life lives and in some cases, literally can kill somebody because you were in the middle of an operation in the hospital when the power went out. So, we say those things are wrong and abusive and illegal and we prosecute them. We will have similar kinds of problems with the Internet that we have to face.

I already mentioned the cryptography and export situation. Let me just underscore this. In order for electronic commerce to flourish

around the world, it is really important that confidentiality and authenticity be contained for those transaction, and answer to do that, we need good quality cryptography. We don't need military-grade cryptography, but we need quality cryptography and we are right now constrained not to export adequate quality cryptography out of the United States. And so, in my view, we are, in fact, risking a great deal of our economy increasingly so as we get to the 10 percent of the world's economy on the Net by not having a policy that allows business to build good quality cryptography into electronic commerce.

Trademark and copyright should be obvious areas of deep concern. Once you put things in digital form, once they can be transmitted around the Net, the protection of intellectual property becomes a major headache. That is, again, an area where technology can help but it doesn't solve all the problems. We need global agreements on how to treat, protect and deal with disputes connected with intellectual property.

Taxation, I mentioned already. It's a nightmare waiting to happen. There are 30,000 taxing authorities in the United States and if

every one of them decided they wanted a little piece of every transaction on the Net, you can imagine what life would be like. You order a book from Amazon.com and they'll say that will be \$19.95 and in a few weeks, we'll let you know what the tax is if we can figure it out.

Another thing which is of great concern to me is that this oft-used term "convergence" says that telephone, radio and telephony are all going to wind up riding on top of the Internet. I believe that to be the case. I'm not suggesting that the other media will be replaced.

I'm not saying that broadcast television will disappear or that cable or digital broadcast satellite will go away, but Internet will take its place as another bearer of those services.

But then the question arises, how do I deal with that? What policy should I apply? The regulatory policies that the FCC associates with these various distinct services is, in part, a function of the technologies, but if everything is being carried on the Internet, we have one of two possible outcomes. One of them is we should apply the union of all the restrictions of radio and television and telephony through the Internet

because it's carrying all them. That's not an outcome that I would advocate.

The other alternative is that Internet is a relatively unregulated territory. Maybe we shouldn't regulate it at all, even when it's carrying television, radio and telephony. Somewhere between those two extremes, we will have to end up with something.

Well, there are other issues here which I'm not going to take time on, but you get the sense, I hope, that policy matters are going to be as important, possibly more important for Internet's future than its technology and that, of course, is a tough lesson for the engineers to learn because up until now, the engineers have had all the fun. Now, the policymakers are going to have to mix it up.

Next slide. Well, I'm going to take a few moments -- oh, isn't that great? This is a wonderful example of Microsoft's inability to keep things compatible. On my version, the two little dots go into the Os and you can't see that and what we did was take a copy of this program and put it in that machine, which is essentially the same version as Power Point. Dear Bill, I

have a problem. All right. Thanks a lot.

It was alluded to earlier that I'm working with the jet propulsion lab on an interplanetary Internet. I want to underscore that this is a Vint Serf and JPL Nasa project and not MCI WorldCom. Bernie is not planning on taking over the solar system as far as I'm aware.

But, in fact, we are very interested in the problem of building up communications capability for exploration of the solar system.

Up until now, most of the exploration has been done with spacecraft and communication systems that are integral to each mission but subsequent missions don't get to take advantage of the previous investments. So, what the JPL guys and I are doing is trying to standardize a set of protocols around an Internet-like concept so that, in fact, subsequent missions will be able to take advantage of previous investment. And so, finally, after a 20 or 30-year period, we will have an Internet backbone, so to speak, in the solar system that we can use for the exploration of the planets and satellites in the near area.

The basic idea is simply to run standard

Internet on each of the planets and run a special interplanetary Internet protocol which takes into account the fact that there are really long delays between the planets. It takes ten minutes at minimum, ten minutes for information to go from earth to Mars. When they're at their farthest apart, it takes 40 minutes for the signal to go one way and 80 minutes to do one trip. So you don't expect too much interactive computing if it's 80 minutes after you hit the key before anything can happen. So, the TCP protocols which rely on a very rapid interaction, just doesn't hack it in interplanetary space and so, we had to devise a different protocol suite to do that.

The short story, if I go to the next line, the short story here is that we will have, we're part of the Mars mission plans. The Mars missions are being launched every 26 months starting last year and will continue to be launched until about 2018 or so. We expect to have a two-planet Internet in operations by the year 2008 with some seven satellites in orbit around Mars communicating down to the planet surface and back down to earth. I imagine that

we may have manned missions orbiting Mars by 2018 and possibly a manned Mars station that is to stay on the planet perhaps as soon as 2030.

So, at the Internet Society where we have a motto that Internet is for everyone in light of the new project with NASA, we concluded the Internet is for everyone, even Martians. And that, ladies and gentlemen, if I could have one more slide, is the end of my prepared talk. You can find those slides as soon as I get them on to the Net after I get back at this Web site and, of course, you're free to use every bit of it because it's all public material.

Thank you all very much and we'll go on from here.

MS. SCHWARTZ: Vint, are you able to take a few questions?

MR. SERF: Absolutely. I have time.

MS. SCHWARTZ: Audience? Panelists?

MR. SERF: I don't know if I will be able to answer any of them, but I'll make up something.

MS. SCHWARTZ: Do any of the commissioners have a question they'd like to

pose? Okay. The floor is open then.

MR. SERF: I think this is called information overload. Yes, sir?

COMMISSIONER SWINDLE: I'll ask you a question about something that was asked in the presentation I heard several weeks ago. One gentlemen was talking to you about, you were talking of the fragile nature of a lot of technology. He asked you, could you, knowing what you know about it and having been involved, could you destroy the system?

MR. SERF: Could I destroy the system? Is it safe for me to answer that question? The answer is probably not. There are fragilities in the Internet and I'd be the first to admit that. There are fragilities in the system and I do worry about the fact that it's mostly software and we talk about optical fiber and routers and all this other stuff, but as you pointed out, Mr. Swindle, it is really fragile because it's all based on software and as we just saw a little tiny example of, software ain't unreliable. But the Net, on the other hand, is highly distributed. It was designed not to have any central functional site, so there isn't any one

place that you can go after it to attack. And so, while we've had various failures in parts of the Net, I don't think we have ever had a complete meltdown of the Internet since it was started and deployed in 1983.

That doesn't mean, though, that we can simply relax. As it becomes an increasingly important infrastructure, we have to make it more and more reliable in the same sense that we have had to make the telephone system increasingly reliable. My challenge to my engineers is I'm not satisfied until we're all comfortable doing 911 calls on the Internet and when we get to that point, I will feel like we've got something that's a little bit closer to where we need to be. So, the answer is, I don't think I could deliberately take the whole system down but I can mess up some parts of it pretty well.

Interestingly enough, when it does foul up, it's often our own fault. It's not a hacker at all. We just screw up something, like we put the wrong things into the domain name cables or the routing get messed up or somebody with a buzz saw cuts through a fiber cable. We don't need hackers to cause trouble. All we need to do is

just, you know, our usual daily bungling which causes a great deal of trouble. So, that's what worries me more than anything is that it's not the deliberate attack against the Net, but it's the accidental mistakes that can cause such trouble. Nonetheless, in spite of all of that, it's pretty phenomenal.

I remember there was an earthquake in San Francisco and the telephone system was completely jammed and the only way we could find out what was going on was to get information through the Net because it survived. Pieces of it broke, but the basic communications was still there. So, I have a kind of positive and negative feeling here. The thing is pretty damned robust but it could be better and we'll make it better. Yes, ma'am?

AUDIENCE MEMBER: Question about spam.

MR. SERF: You can get it at the store at 99 cents from Hormel. Do you want to holler into the microphone so everyone else will hear the question, too.

AUDIENCE MEMBER: You observed that right now, it's not possible all of us to identify the senders of spam for a variety of reason.

MR. SERF: Yes, including the fact that they sometimes hide their source addresses or they put fake sources on.

AUDIENCE MEMBER: Right. Do you think that global, unique identifiers or some other technological solution might emerge to make it possible to trace sources that are now masked?

MR. SERF: Now, the answer is probably not, and the reason is that unless you can enforce the appearance of such an identifier, which in today's technology is quite hard to do, it won't help because somebody could put someone else's global identifier on it. So, the problem of forging or failing to put the identifier on at all is a real problem.

One of the things that we found it necessary to do is not only against spam attacks, but denial of service attacks, is to actually build special tools that look for traffic flowing in that's trying to interfere with the network's operation. Now, spam is particularly scurrilous, right, because all it takes is one message with thousands of addressees. You're sort of into the system, throw the message into the mail forwarding engines and get the heck out and then,

you know, all this stuff gets replicated everywhere.

I have noticed, however, that there are an increasing number of tools available at the mail forwarding sites to distinguish between the legitimate user and someone who is not recognized as a user of that mail forwarding site and therefore, mail is rejected. In fact, occasionally I get stung by that because I put such filters on my mail service at MCI and my engineering group and it knows which IP addresses I'm supposed to be sending mail from except every once in a while I'm someplace in the world where I'm just plugged into somebody else's local area net and the IP address is not recognized by my mail server and it won't send any of my mail and, so, I would up having to do fancy things like building a cryptochannel between where I am all the way back to my virtual private network access point in order to convince my mail server that I'm actually a legitimate user.

So, there are things that we can do to help filter some of that abuse behavior out.

MS. SCHWARTZ: Vint, I have a question if I could take the prerogative of the chair to ask

about, will you give us a prediction about when that convergence will take place?

MR. SERF: It's starting to happen already in some respects. Radio is now a very popular thing to do on the Internet. There are something like 3,500 to 4,000 radio stations that are putting their audio on the Net today and a few of them don't even bother with radio transmitters. They just put their audio on the Net. It leads to the following bizarre phenomenon. In the ordinary radio world, the radio audience is determined by how powerful the transmitter is and how far away from it your receiver is. So, it's a very local, geographic phenomenon.

In the Internet, you tune to a URL. That means anyone anywhere in the world could listen to the "Internet radio station." The same is true for watching an Internet television show. So, the notion of radio audience is no longer a geographic thing. It now becomes a logical thing. I don't know what that does to the radio business but I have a feeling you have to rethink who it is you're advertising to if that's the way you support it. So, radio is working pretty well

because it doesn't require a lot of bandwidth.

Television is not working too well. Good morning, Roger. How are you? Television is not working awfully well yet because in order to get reasonable television quality, you need 400 kilobits a second, their data delivery rate. That's about eight times what you get with a typical dial-up modem.

Now, there are technologies that will let you get that kind of data rate at the edge of the Net. Digital subscriber loops that reuse the twisted pair that go between your telephone and the central office but drive it much harder than the telephone does or cable modems on the cable plan or digital broadcast satellite, all of will, and even point-to-point radio links, all of which can give you much higher data rates.

So, you'll see those technologies begin to emerge. There are lots and lots of complicated business reasons why they won't emerge as quickly as we would like but when they finally get there and when we have at least as half a megabit of bandwidth going from the Net to you, you'll see Internet television showing up.

Internet telephony, which has been something of a cause celebre in the last couple of years, is in a funny way harder than either the radio or the television challenge, not because of bandwidth requirements, but because of delay.

A telephone conversation with a lot of delay in it is really awkward. If any of you have ever had a phone call with someone with a double satellite hop, it takes one second from the time you finish your statement to the time you could possibly hear any response. And so, it's socially awkward. If you say, "What do you think of that idea, Joe?" And there's one second before you can hear anything coming back, that second feels like a minute and you think Joe is trying to tell me that is the dumbest idea he's ever heard but he's trying to say it nicely. In fact, it's just physics that's getting in the way.

So, the Internet, because it's a storing forward package switching system, has the problem that it introduces more delay than a typical circuit-switched telephone network. So, we have to work really hard to reduce delay in the Net in

order to make it work as comfortably as telephony does today and we are doing that. We are busy reengineering the inside of the Net to color some of the packets higher priority than others so that they can get there faster than they would otherwise.

We still have speed of light delay problems. I mean, you can't make anything go faster than the speed of light. We're working on that but it hasn't -- actually, the guys at NASA are working on that, believe it or not. It's called quantum communication entangled photon communication. It's pretty fascinating stuff, but if I tell you any more, they'll kill me, so that's as far as --

MS. SCHWARTZ: So, you're not going to give me an exact date, right?

MR. SERF: So, actually, I think what you're going to see is radio here now. Telephony is here for networks that are relatively controllable as to their capacity. That means virtual private and corporate networks, and you can do this over 1800 frame relay as well as Internet. Doing it in the public Internet is probably three or four years from now in any

significant quantity and in terms of having most of the telephone network running over Internet-based systems, I think we're looking between 2007 and 2010.

MS. SCHWARTZ: Good. Okay. One last question. Does anyone one want to ask? Okay.

MR. SERF: Yes, ma'am. Why don't you take this thing. We'll play "Geraldo" here.

AUDIENCE MEMBER: Thanks very much and thanks for the fun presentation. Those impressive figures that you had there in relation to e-com and the growth rates, in terms of business to consumer, it's obviously predicated on trust developing in this medium of interaction and I wondered if you'd give us a bit more detail on your thinking about one of the key issues that we've got to tackle today, which is jurisdiction.

MR. SERF: Wow. That's a tough one. Let me just remind you of something. Many people get the feeling that the Internet is often some ethereal place somewhere that you can't quite touch. But the fact of the matter, it's built in the real world. The wires and the routers and the servers and the people that use it are physically somewhere. So, the fact that the

transactions are taking place in this cyberspace may not actually be as critical as it has been made to seem. Nonetheless, it is fair to ask exactly, how do I characterize the transaction that takes place and in which jurisdictions has the transaction materialized?

I would submit to you that the Internet does not pose any more of a problem nor any less of a problem than transactions conducted over the telephone. Anyone anywhere in the world can place a phone call, can talk to someone offering services and products and a transaction can be had. The delivery point can be someplace other than the parties who are having the telephone conversation. The method of payment can move money between accounts that could be anywhere in the world, not necessarily where the parties who are talking let alone where the service is being delivered.

And so, I guess I'm going to do a really dirty trick and I'm going to, you know, hand this back and say, how are we doing it now with the current infrastructure? Forgetting Internet for a moment. Don't we have the same problem and do we find a solution to it?, he says hopefully see.

Eric, do you have an answer to that?

AUDIENCE MEMBER: I have another question.

MR. SERF: You have another question for me? You're no help.

MS. SCHWARTZ: You know, what I think what we're going to have to do is every minute has been worth a thousand minutes, so thank you for coming but you've just also introduced our panel perfectly so I don't have to do it. We're going to thank you so much for coming.

MR. SERF: You're welcome.

MS. SCHWARTZ: Actually, I was going to suggest that you join the panel here for the discussion of jurisdiction since I think you can contribute a lot. We did not actually plan for a break this morning. I think it would be a good idea if we took a very, very short one so you can get some coffee. Five minutes. No more than five minutes. Twenty-five to 11 we'll start back again with our panel.

(Whereupon, session two concluded.)

(Break taken from 10:30 to 10:35 a.m.)

FEDERAL TRADE COMMISSION PUBLIC WORKSHOP
WASHINGTON, D.C.

**U.S. PERSPECTIVES ON CONSUMER PROTECTION
IN THE GLOBAL ELECTRONIC MARKETPLACE**

JURISDICTION AND CHOICE OF LAW
FOR CONSUMER PROTECTION IN E-COMMERCE:
U.S. PERSPECTIVES

WEDNESDAY, JUNE 9, 1999
10:35 a.m.

REPORTED BY: LINDA BAHUR

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COMMISSIONER THOMPSON

PETER HARTER

TIM PHILIPS

CARLA MICHELOTTI

P R O C E E D I N G S

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MS. SCHWARTZ: Someone said to me there is no such thing as a five-minute break and I think we came very close, however, to making our deadline. We are a little bit behind so we're going to get right to work.

There are just a few things I would like to mention. One is to thank the Direct Marketing Association for our breakfast, for coffee, our rolls and we appreciate that very much. We have one substitution on the panel that I will mention. That is Becky Burr from the Commerce Department is taking the place of Andy Pincus who is on the schedule. We are going to start this morning, we're very fortunate to have with us Professor Jack Goldsmith of the University of Chicago to open this panel with an overview of the rules of law governing personal jurisdiction, choice of law and enforcement and, you know, I think that this is a new emerging field and he already has been writing prolifically in it and therefore, we are very appreciative of his coming and playing this role for us.

We thought it would be a good way to

start the discussion and then we would begin to focus on a few specific examples that we have on our mock Web sites. So, Jack, I turn the microphone over to you.

MR. GOLDSMITH: Thank you very much and thanks to the FTC for inviting me. I learned a great deal yesterday and today already. I'm going to try to just lay out a legal framework. I'm going to try to be descriptive, try to describe what the layout of the land is, try not to make normative judgments about whether this is a good or bad idea whether the world should be different. I assume we can talk about that after I give us the layout of the land.

As recently as three or four years ago, the conventional wisdom was is that territorial sovereignty couldn't regulate the Internet. The idea was that Internet protocol addresses don't necessarily correlate with physical location. Therefore, you can't always read and usually know where the entity with whom you're communicating is located in real space and often, you can't control the geographical flow of your content over many Internet services, and over many Internet services, information can appear

simultaneously in every jurisdiction, but because the content provider was thought to be able to easily escape the regulation of any particular territory, it was thought that territorial laws wouldn't be effective, that the scope of their territorial focus wouldn't be able to get so-called offshore content providers.

And so, the first wave of conventional wisdom on the Internet was that nations can't regulate that stuff. We wouldn't be here today if that weren't true. And indeed, the problem today seems to be the opposite problem of everyone regulating the stuff. What people who embraced the first bit of conventional wisdom forgot was what Mr. Serf just talked about. Namely, cyberspace is not a separate space. It's real people and real space communicating with one another in different geographical jurisdictions using software, hardware and other physical tools located physically within jurisdictions. Nations can do a hell of a lot of regulating within their jurisdiction and the problem, the difficult problem is if Internet, if many Internet services and Internet communications can appear simultaneously in many jurisdictions and if every

nation can regulate based upon the local effects of those jurisdictions, then we have a jurisdictional quagmire.

I don't think the jurisdictional quagmire is quite as bad that picture is as it might lead one to believe, so what I'm going to do is focus on how far the United States can legitimately within our domestic legal framework, how far the United States can extend its territorial jurisdiction territorially in Internet regulation and I think what I mean by that would be clear as I go along.

Some caveats, first of all. I'm only focusing on jurisdictional questions, international jurisdictional questions, United States regulating transactions that have some origin or some connection outside of the United States. There's a whole 'nother difficulty about how we regulate within the United States among the 50 jurisdictions. It's the same problem, it's actually a different kind of problem because the jurisdictional laws are a little bit stronger within the United States. There are analogies but I'm just going to focus on the international situation.

The second is I'm going to focus on sort of the what current case law says about this sort of legitimate scope of jurisdiction. How far can the United States assert its jurisdiction on the Internet? Now, to say that the United States can assert jurisdiction to certain transactions that are offshore, either directly or indirectly, not to say should, of course. I'm only focusing on the question of how far, if the United States entities want to regulate, how far they can, not on what the appropriate substance of the regulation, whether we should have broad rules, disclosure rules, whom they should apply to and the like.

I'm just considering once we decide the substantive question, how far abroad and we push them. And I'm not taking into account the, because jurisdictional legitimacy doesn't require us to do so but this is an important consideration in any regulation; namely, the effects on other countries and other parties in other countries.

The problem with every nation regulating or even a couple of powerful nations regulating locally is that it produces a spillover effect on

the activities of persons in other jurisdictions and on the regulatory efforts of other countries.

That is a harmonization problem which I'm not also not going to focus on much but perhaps we can talk about that a little bit later.

One last caveat and then I'll run through the jurisdiction. These are important qualifications. Technology. I'm probably the least competent technology person in the room but I know enough to know that all of the jurisdictional rules I'm going to be talking about are premised on certain technological assumptions, technological assumptions about information appearing everywhere in every jurisdiction about nothing, about an inability to control information flows along a variety of dimensions, be it geographical, age, network or the like.

Now, that's a false assumption. That was an assumption made about the Net three or four years ago. The technology, identification, authentication, filtering and the like is changing this and jurisdictional rules will change as it's possible to control and as it becomes cheaper and cheaper to control

information flows and more effective to control information flows. Okay. With those caveats in mind, here's the basic layout of land.

Jurisdiction, and I'll try to be as nontechnical as possible but I am a lawyer and that's probably not going to be possible. Jurisdiction basically divides into -- the question is, what can the United States do to regulate, I think the example we're going to be using is a seller that has a Web page located on a server abroad. That's the hypothetical we're basically going to be using. So, what is the legitimate scope today which permits the federal government to regulate the content of the same and the activities of that server abroad?

Jurisdiction divides into three parts: Adjudicative or personal jurisdiction, prescriptive jurisdiction and enforcement jurisdiction. Enforcement jurisdiction, it turns out, is the most important part and this is the part that most people have ignored. I'm going to run through all three of them because they're all three relevant to the jurisdictional scope.

First is adjudicative jurisdiction or personal jurisdiction. This is the power of a

court to bind an out-of-country or out-of-jurisdiction defendant with its judgment. Another way of thinking about it is the power to issue a valid default judgment against the defendant if the defendant doesn't show up to adjudicate a lawsuit. And this is, of the three jurisdictional areas I'm going to discuss, this one is the one that's by far been the most litigated. There are probably a hundred cases, maybe more now, about personal jurisdiction in the Internet context. They're most interstate cases, but the same basic principles apply.

The basic idea from our constitutional law is that the defendant cannot be forced to show up into another sovereign jurisdiction and litigate unless the defendant has done something to purposely direct its activities to that forum.

So, for example, if I place an ad in a newspaper in a particular state and that contract grows out of that, I can be sued in that particular state. If I get in a car accident in a state I'm not from, I can be sued in that state because I was purposely driving in the state.

This immediately creates a problem for the Net because it's difficult to know where

information is going, right, where it can be accessed and it's also difficult to know in a lot of contexts the extent to which the access, excuse me, the information is purposely going from the content provider to a particular jurisdiction.

And courts have been struggling with that problem. There's some conventional wisdom on this now. It's not completely coherent, but here it is. Here's the doctrinal overlay the courts have basically imposed on the mass of different possible contacts that can happen on the Internet. First, it seems clear that the mere posting of an ad or information on a Web page in one jurisdiction is accessed in another jurisdiction. That alone will not permit, so if I put information on a server where I live and I'm on my Web page in Illinois and it says something, has some information, someone accesses that in Florida, the mere placement of information on the computer in Illinois without more cannot, even though it's accessed in Florida, cannot, does not justify me being held to personal, does not justify Florida in asserting personal jurisdiction over me.

Something more has to happen. I have to do something more either in the Internet or outside of the Internet to purposely direct my activities to Florida.

Mere Web page information alone is not enough. That's fairly clear. There were some early cases in 1996 and '97 that they were a little bit more aggressive but the conventional wisdom seems to be now that they were overreaching and that mere Web page alone does not give rise to jurisdiction everywhere it can be accessed.

MS. SCHWARTZ: Vint has a question.

MR. SERF: Will you entertain a clarification?

MR. GOLDSMITH: Yes, sir.

MR. SERF: It's a technical matter but it is not closely the place where you physically are. It is also where your Web server is. And worse, sometimes we replicate content in different places in order to include access. The customer may not know that.

MR. GOLDSMITH: Right.

MR. SERF: So, if you don't know, it's 11 o'clock, do you know where your Web page is? If

you don't know, are you, is the jurisdiction still confined your physical location or is it actually associated with where the Web page servers are?

MR. GOLDSMITH: Excellent question and I don't have the answer. I can try to guess. I haven't seen any cases that raise the problem. In all the cases that I've seen are the actual location of the page.

The first generation of cases have been fairly straightforward. Someone living in Illinois has a Web page in Illinois that's doing something that violates allegedly the trademark of someone in Florida. These are all difficult questions and the question is how did they, in the jurisdictional context, how do they apply in this? And there are obviously other examples like that. I just don't know. I can hazard a guess but we don't have enough time to go into it.

The other extreme also fairly clear is that Web commerce, commerce done, actually transactions done over the Internet between someone in one jurisdiction and someone in another jurisdiction can give rise to personal

jurisdiction in the other jurisdiction. So, if I sell, if I have a Web page in which I offer a book and someone in Illinois and someone in Florida buys it, either digital information or if it's sent in real space, that transaction which is thought to be more purposely directed to Florida suffices for personal jurisdiction in Florida for a lawsuit for some kind of case arising out of that transaction.

Now, one question is immediately raised that I don't think is quite settled yet is what if I'm, that's easy enough when I'm delivering a good in real space and I know where it's going. It's not like Amazon.com. They know when they send me a book, it's coming to Illinois. In some sense, they purposely directed their commerce to me.

What if it's digital information sent over the Net and I don't really know for sure? I can find out at some cost to let me know for sure where it's going in another jurisdiction. That's still kind of unsettled. I wouldn't say there's a definitive answer yet, but I think that the cases can be read to say that there's personal jurisdiction even in that circumstance. A

transaction with someone and electronic commerce and, of course, there are a variety of ways of engaging in electronic commerce, either purely on the Net or on the Net and outside the Net. A transaction with someone in another jurisdiction suffices to establish personal jurisdiction. That also seems fairly clear.

Then there's a large intermediate category of mush called, and it goes under the label of interactive sites, sites that allow you to exchange information, sites that have information available in which the consumer in one jurisdiction can communicate with a site in another jurisdiction, get information from the sites. And in this large category, and you can start thinking about hypotheticals.

There are a lot of different things going on with this category. A lot of different types of communication. What about an ad put up on someone's, on Yahoo? Is that, and then I respond to the ad, or I get information from someone. I get information based upon not, well, I get information from an ad that was posted on a Web site that wasn't placed there by the content provider.

There are a million different contexts where you can exchange, just exchanging information by e-mail, sending files and the like. In this large middle category, the law is not settled and basically, the courts are muddling through and the more purposeful and directed and the greater to the extent of the contacts, the more likely they are to assert jurisdiction. The fewer the contacts, the more discreet that they are, they're less likely to assert jurisdiction. That in a nutshell is the overlay of personal jurisdiction, about what it takes to assert adjudicative jurisdiction over an out-of-state defendant.

Next is prescriptive jurisdiction or this is really choice of law. The ability, to put it more accurately, the ability for one country or one to apply its laws to an activity that takes place, in part, abroad.

Now, there's a lot of law on this outside the Internet and very little yet in the Internet context, at least in the international situation.

But I think the law is going to be fairly clear. Namely, the test for personal jurisdiction and legislative, or prescriptive

jurisdiction -- I think I should stop using all these different labels -- prescriptive jurisdiction, they're not the same but similar, and it has to go with effects. And the basic idea is if someone, if a transaction has effects within a particular jurisdiction and causes harm within that jurisdiction, say, to a consumer, then it's legitimate from a jurisdictional perspective for that jurisdiction to apply its laws to the source of the harm even if the harm is offshore. And I'll say there are very few cases but an effects test is basically the rule for allowing regulations to be applied for transactions offshore that have effects within the jurisdiction.

So, the first step in any lawsuit if that's what we're talking about is you can try to get personal jurisdiction over the defendant. If you get personal jurisdiction, the next question is, can you apply your law? That's prescriptive jurisdiction. Then you get a judgment.

Now, the problem is is you can't do much good with that judgment for offshore content providers. The real challenge from a regulator's perspective is enforcement jurisdiction. How did

the power to compel compliance with local laws. And the problem is is that judgments cannot be, the general matter is very hard to enforce judgments matter abroad, especially judgments related to public relations like anything the FTC would do, for example. The general rule in context is saying that one country will not apply the public regulations of another. In addition to which, even if there weren't that hurdle, there's another hurdle, namely that even if the transaction were illegal, according to a regulation where it occurred, illegal in the United States where you get a judgment and if you take that judgment to the place where the transaction originated, there are public policy exceptions for the enforcement of foreign judgments that have particular bite in a regulatory context.

So, there's a problem with enforcing judgments abroad. There's a problem with extradition. It's very difficult to extradite someone for technical reasons I won't go into. It's very difficult for the United States to extradite someone who does something abroad that violates U.S. Criminal laws, criminal regulatory

laws. If it was legal where it took place. It's something called the double criminality requirement that makes extradition at least under current law very difficult.

So, this, and this as we heard from the enforcement panel yesterday is essentially the problem with a regulator's perspective. You might be able to get personal jurisdiction and get a judgment against offshore content providers, but what do you do with it then? How do you make, how do you enforce compliance, in effect, the law? And the answer is is that, and by the way, let me mention one more thing because the Hague Convention was mentioned yesterday by someone. There are negotiations going on in the Hague right now to try to develop an international treaty for the enforcement of judgments. I'm very pessimistic that this is going to solve any of these problems for a variety of reasons. Anyone who read the Hague draft outside saw that it was in the very early stages. Most of the important issues not been flushed out. Even if they are, more importantly, it's quite clear that the Hague Convention on judgments is not, is about private, enforcement

of private judgments. It's not meant to circumvent the traditional rule that one country does not apply the judgments based on regulations of another country. So that the whole scope of the Hague Convention is not even addressed to this problem. It's about private money judgments and tort and contract situations essentially.

So, what does this mean? Does this mean that enforcement is impossible? No, it's not impossible. You can enforce against offshore content providers indirectly by going after in-state entities and this is what governments have been doing. They've been going after end users within the state. They've been going after, in different ways, in different parts of the world, access providers, financial intermediaries. These are the tools that you heard yesterday that the enforcement authorities are doing.

This has problems of its own, subject to regulatory problems on its own, but by regulating the means of the transaction with the offshore content providers, you can indirectly, you can raise the cost of those transactions to the

offshore content provider and thereby regulate it, and that's what's been happening.

There are other strategies obviously. Harmonization strategies of various sorts. These are very hard to do in regulatory contexts. They're usually, they've rarely been successful at least in the treaty context. We may be moving into a different world that makes, that sort of gives nations greater incentives to sort of compromise about regulatory protections to avoid these jurisdictional problems.

More likely it is what we heard yesterday again on the enforcement panel for soft forms of harmonization. Regulatory cooperation. You go after this, we'll go after that. We can live with different-- this is on what's important to us, this is what's important to you. Cooperation with foreign governments in that sense.

So, to summarize, enforcement is the key.

Enforcement jurisdiction is the key to the effectiveness of regulation of the Internet from a regulatory perspective. There's lots of regulatory power that can be brought to bear on entities within the state. That's why we're here today. And because there are a lot of people in

the room worried about what the FTC might do in regulating entities in the United States as a way of getting at offshore entities and that is the most effective way to regulate the Internet. That's why Internet regulation is a real possibility.

Final point about, this is the part about hypotheticals, about choice of forum clauses and choice of law clauses. One of the questions we're going to see is whether or not if a Web page has a disclaimer saying all disputes will be adjudicated in Italy or Italian law will govern this site. As a general matter, consumer protection laws have been viewed as what's been called mandatory law, i.e., not subject to party consent. And it's been generally true in real space. They're not subject to waiver. This is a general matter in a transverse jurisdictional context.

Now, that might have to change. That was developed in a regime in which there were, frankly, relatively fewer transporter consumer transactions. We're now moving into a world where there are going to be a lot more. And the only point I want to make about that is it's not

really a jurisdictional question. The question whether an individual can consent to a consumer protection law or consent to the adjudication of a dispute in a particular forum.

We shouldn't think of about it just as a jurisdictional question. That's a question of substantive regulatory policy. It's a question of do we want to permit consumers to waive certain rights or not? How paternalistic are we going to be? So, it seems like a jurisdictional question, but it's really a question of substantive regulation. With that, I'll stop.

MS. SCHWARTZ: Thank you. We're going to get right to work. We'll put up the first Web site and with Jack's framework in mind, maybe we can just flip through these. Oh, and let me say just a couple of things. One is for the overflow room which I think cannot see the screen, the Web site is in the program at page 17, the first one.

And for the panelists, I would suggest when you want to speak, to put your name cards on edge like that and I will try to keep my eye out and try to keep track of who is lined up. You're going to keep yours there just as a constant or do you have a question?

MR. SERF: I actually wanted to ask a question.

MS. SCHWARTZ: Okay.

MR. SERF: Remember, I'm an engineer so I can ask really dumb Internet questions. Is contract law going to help us at all in this thing? You pointed out the possibility of changing it in the way which do mandatory enforcement and consumer protection laws, but can I use contract law to establish an agreement for giving transaction leeway?

MR. GOLDSMITH: That is exactly the question I was pointing to at the end. As a general matter, there are exceptions to this. But as a general matter, both in the United States and abroad, no. This is something that, it doesn't have to be this way but that's the way it has been as a general matter. There are exceptions, but as a general matter, when I say something is a mandatory law, I mean, it's not something that's subject to certain mention by contract.

MS. SCHWARTZ: To start, actually, just to start because the transaction --

MR. GOLDSMITH: Can I just add one more

thing to that? I will say this is a trend that many people think is changing. The Supreme Court in the last decade has been much more open to permitting, even in regulatory contexts, waivers of foreign rights. So, waiving your ability to sue in foreign court, you can go to arbitration and they've done this even in consumer context. They haven't yet extended the choice of law context directly. They've given suggestions that they might, so it's something that's legally in flux and it's, as a general matter, what I said is correct.

MR. SERF: Thank you.

MS. SCHWARTZ: We wanted to start with a series of questions related to what might be called advertising online, that at the outset, we would discuss without any consumer transaction having taken place. The idea here is to talk really about public agency law enforcement for deceptive advertising online and we tried to make it a fairly clear case of deception.

The special offer from Mom and Pop Books which located in Foreignland is that Midsummer Night's Dream is offered in paperback, signed by the author for \$20.50 in foreignese dollars.

Now, this may be over the top in terms of trying to create a, on the face of it, a deceptive ad but we wanted to stay away from the substance and for all of us to make the same assumption, this is deceptive perhaps by anyone's standards, including the Martians if we're going interplanetary.

If there is no transaction and if the seller has, in fact, limited the offer to citizens of Foreignland, is there anyone that believes that the U.S. would have jurisdiction to bring a case to stop this kind of advertising? Maybe we can have a consensus.

AUDIENCE MEMBER: How about another six months where you can get them to come (inaudible.)

MS. SCHWARTZ: This would be then perhaps for the first time in the two days we have a consensus. No U.S. Jurisdiction with respect to this deceptive claim made online.

To slightly complicate the matter, move to the second, Nicole, if you could, the second Web site. And actually, this is on page 19 in your book. You wanted to go to a slightly different scenario where the advertising is to

the world. There's no limitation as we had in the first instance to Foreignland and, in fact, there's an indication that there's every intention here to sell beyond Foreignland. You can choose your currency, you can choose the language. The only mention of Foreignland here is the address at the bottom, which at the very bottom, you have the Mom and Pop address and e-mail. What about U.S. Jurisdiction there? Jean Ann?

MS. FOX: Well, let me ask it back. What would you do if this ad ran in a magazine that was available in United States? If it ran in newspapers that was available in the United States, would the FTC think that you could bring an action because of deceptive advertising with or without victim? I would think so.

MS. SCHWARTZ: Well, Vint?

MR. SERF: What happens if you carry, suppose to carry in a newspaper in Foreignland and you bring it back, you were there in Foreignland and you carry it back and then you place an order and the order is delivered in Foreignland?

MS. SCHWARTZ: Well, even before the

delivery, though, because I think once we get delivery, it's a whole new set of circumstances that get introduced. David Johnson?

MR. JOHNSON: Well, I want to just fight the hypothetical a little bit, remind us that another question that might be posed by this site is whether it had tried to become an AOL-quality merchant. For example, and whether, instead of asking are you a resident? Or not asking are you a resident?, the question posed on site was, do you want to interact with us on the agreement between us that we will be bound by, we the site agree to be bound by the U.S. Law and available in a convenient forum to you?

It's easy if you're dealing with this, what we would agree is a fraud and the only question is finding a way for a regulator to get out there and get their hands on something to enforce what everyone agrees on.

From the standpoint of a commercial vendor, the questions that are hard arise in the context of something like disclosure regulations where you're facing lots of different jurisdictions with different rules, none of which speak directly to fraud. You're just trying to

figure out how to do the right thing. And I think the entire hypothetical is a little misleading insofar as it doesn't look at the contractual possibility. With all due respect to Vint, this is different from a phone call. There is no telephony because when you hang up, the thing goes. This a persistent social space in which multiple parties can come together to, by contact, agree to be bound. And the recent Supreme Court case, Carnival Cruise versus Shoe, for example, do allow both choice of forum and choice of law where the net impact of that is not to take away fundamental protections and not to render resolution of the dispute too inconvenient so as to be unfair.

So, I think you get a different answer to this question depending not on where the parties are physically, but instead, depending on whether the site has offered to contract to be bound by a certain law, whether that's a clear offer, whether the consumer has, in fact, can be said to have accepted it and then ultimately, whether we will allow consumers to make that kind of bargain when the overall impact on them is to be roughly as protective as most nation's consumer

protection laws are.

MS. SCHWARTZ: I think the one thing that the study showed yesterday was that many sites don't have any indication about any of these things, so that's what's on the site is similar to this, which is roughly an advertisement that has none of these conditions on the site.

MR. JOHNSON: Yes, but I'd just like briefly to respond. I heard yesterday a very interesting a deal in the making. The transatlantic business dialogue and the transatlantic consumer dialogue are both calling for what they are saying is a disclosure of applicable law on the site. If you change that very slightly to say calling for sites to make clear what they will agree to be bound by, then you may well have the contract solution as generally accepted across both the consumer and business side of this debate.

MS. SCHWARTZ: Just back to the jurisdictional issue and our site which does not have any of this information. I think Jack would say there's no jurisdiction in the U.S. Because it's a passive site even though it --

MR. GOLDSMITH: No.

MS. SCHWARTZ: Is that right?

MR. GOLDSMITH: This falls, for personal jurisdiction, this falls into the mushy gray area of interacting.

MS. SCHWARTZ: And why is that?

MR. GOLDSMITH: Because it invites participation and I take it that you can --

MS. SCHWARTZ: Because of e-mail?

MR. GOLDSMITH: That you can make it work.

MS. SCHWARTZ: So you can make it work?

MR. GOLDSMITH: But I say this falls on the mushy side of personal jurisdiction. This falls on the passive side of the mushy area of personal jurisdiction. And some of the cases in that mushy area have said that even though if it's potentially interactive, if there is no actual interaction, that's not enough. Okay. But I would also say enforcement here is a problem. You might get personal jurisdiction. You might have a harder time applying your law but it's useless if this is Mom and Pop in Italy.

MS. SCHWARTZ: Okay. Lots of hands up. I think, Dave Fares, you had yours up for a

while.

MR. FARES: Thank you. I just wanted to respond to Jean Ann's question and to make a factual distinction between this Web site and placing an ad in the newspaper because placing an ad in the newspaper, that company has specifically targeted consumers in a given jurisdiction when there's not a specific target to any specific jurisdiction everywhere, but there is not I am seeking out consumers in the United States, so there's not that very specific active act.

And if I could also go back quickly to the very first hypothetical and just say I definitely agree that the U.S. Doesn't have jurisdiction, but I think companies being forced to place such limitations on their reach to consumers is a detriment to consumers because the Web site may be doing this because there's not legal certainty in a business to determine what laws apply to them and they may be subjected to inconsistent laws. So, therefore, consumers can't receive the benefits that Ambassador Barshefsky was talking about today, about comparing prices and gaining price reductions and

books being sold in other jurisdictions and those types of benefits that electronic commerce can really bring to consumers, so I actually think that that's a very unfortunate step for consumers that businesses may be forced to limit their reach to a specific jurisdiction based on legal uncertainty.

MS. SCHWARTZ: Jonathan Rusch from the Justice Department. I should be identifying who you are.

MR. RUSCH: Thank you, Teresa. It occurs to me that one of the things that we ought to bear in mind in this whole discussion is that to some degree, when we talk about jurisdiction, we are engaging in discussion of legal fictions in this sense.

If, for the sake of argument, it turns out at the end of the day that MomandPopBooks.com is, in fact, a fraudulent operation, and we're not talking about one person who has bought a book in Florida, but, in fact, many, many people.

So, you have the very substantial consumer loss in the United States and, in fact, even though the Web site purports to be offering books only to residents of Foreignland, in fact, their

course of conduct can be proved to be contrary to that, that, in some respects, would, in fact, be proof of that fraudulent nature of the transaction and, therefore, would help to, in fact, enhance our ability to argue in favor of our exercise of jurisdiction from the United States in Foreignland if we wanted to extradite Mom and pop or who ever is really running that site.

So, it's something that I think we think about from the standpoint were criminal enforcement in the area of fraud, that as a practical matter, there's a certain one-hand-washes-the-other-hand phenomena. We talk about jurisdiction and we talk about substantive offenses, but, in fact, when it comes time to seek to extradite somebody from a foreign jurisdiction to get them back here to stand trial on the substantive offenses, part of the way in which we are able to establish sufficient credibility with the fraud jurisdiction to show that we have, in fact, have jurisdiction and that it's an appropriate exercise of jurisdiction, have the person sent back, is by showing that there is, in fact, a substantive offense. And I

think the more proof we can show that actual conduct diverges from the initial representations, but I think it moves away from that weaker side from the and starts to push closer to the strong end of that area.

MS. SCHWARTZ: John, pretransaction, do you think the U.S. Has jurisdiction?

MR. RUSCH: I'll take easy case and say with respect to enforcement of criminal statutes, probably not because we're going to be looking for actual effects. Even if you've got wholly extraterritorial conduct, unless you feel the effects in some tangible way in the United States, jurisdiction probably will not be recognized.

MS. SCHWARTZ: I had failed to look to my left here. I think Carla, you had your sign up first. This is Carla Michelotti, who's with, well, representing the American Advertising Federation.

MS. MICHELOTTI: The American Advertising Federation, which is advertisers, agencies, media and in a very simple way, the way that I have, unlike Vint Serf, the way that I understood the Internet is the world's largest magazine rack.

And as the world's largest magazine rack, you can walk down the street in London or in Paris or in Chicago and you can find various magazines and you can find French magazines and Indian magazines and Japanese magazines and they're all written and designed and legal in the country of origin. And that's very comparable to what we're looking at here as an ad put together in a country and legal in the country of origin and from a baseline, you've gotta start somewhere.

When the designer is creating this Web page, if the Internet is currently operating in 187 countries, some law must be understood as applying to this advertising, and that law being the country of origin gives the advertising community some kind of baseline understanding of what type of law should be applying and it is exactly consistent with the precedents that exists today. And it would be consistent with a newspaper that if you buy the Parisian paper, if you buy a Paris newspaper in London and it has a French ads in it and you carry that newspaper from London and you get on the plane -- I'm sorry. You buy the newspaper in Paris and you get on the plane and you fly to London, it's the

same newspaper. It's the same ads. Has the law changed as it affects those ads in that newspaper? It has not. It's just that you're reading and receiving those kinds of advertisements and if you happen to fill out some kind of subscription that was in the magazine or a subscription in the newspaper and you completed it and ordered some goods from London as a result of buying a newspaper in Paris, these are precedents that already exist.

MS. SCHWARTZ: Mark Silbergeld from Consumers Union, do you want to respond to this? Is it a magazine rack analogy?

MR. SILBERGELD: Well, I don't know if that's what I wanted to respond to. There is a magazine rack analogy. What was just said is exactly right. But this is too simple. This is too simple to raise real questions. What if, instead, we're assuming, for instance, that this is a book in English offered by sellers who speak English as a first language and offered in a site which the respective seller is located in the site in which English is the primary language, but if this is a book in German, what if these are autographed copies of Johann Gaither's, Dr.

Faustis, in the original German, offered for sale from a town in Germany and the Web site's in English? The FTC is going to start looking at that and saying ah, ha. They're trying to get active with the U.S. Or at least English-speaking, including the U.S. Customers. This is not meant to be local. No matter what their lawyer in Germany may say, and I'm sure it's a lawyer in Germany who will say oh, no, there are lots of people in Germany who speak English because this is what a smart lawyer does.

You're going to then start having criteria for, that are more complicated than the yes-no question that this asks.

And interestingly enough, going back to some of the things that were said yesterday, the folks who say oh, let the industry do it, we don't need any government decisions about this, we're going to come to the FTC crying. How about some guidelines? We want to know what your criteria are. That's one point I want to make.

Secondly, I want to pick up on something Jack said. The question may be in some tran -- the question that should be looked at is there may be some transactions in which you want just

public law to govern this. There may be questions in which situations, types of transactions which you want private law, private agreements to decide this and that's going to be a complicated and interesting discussion, too.

If somebody is selling a mass product, that may be one question. If somebody is selling, say, one book, autographed and if it is a true autograph, original by some famous author, and offering it to customers in many countries, sort of like an auction, but there's only one-- there may be a number, first come, first served, and it's expensive, maybe you want contract law to, as the Supreme Court now says, override public consumer protection law. That's a unique transaction.

On the other hand, there are situations where if you have that kind of possibility for consumers and sellers develops, you may want to do it the other way. You may want to have regulatory standards that say you can only go so far and I invite your attention back to your own holder in due course law where regulation limits what may be possible in certain situations.

So, I think that the answer to this, if

there is no transaction is no, but that doesn't really get you very far.

MS. SCHWARTZ: Well, I think that the group would like to move on to transactions because we are trying to talk about the passive Web site and the advertising.

Our third example, Nicole, you can show us what that one was, which was more targeted advertising but still without a transaction. It was targeted to the United States. But I think that the interest here is in moving on and we don't have as much time as we would like, so I'd like to go back to the first Web site which was the, you're locked? Okay. If we can look back at it or you just remember from the handout material. It's the targeted Web site to Foreignland but with a transaction. In other words, the Web site says that the sales are to citizens of Foreignland but, in fact, a U.S. Citizen, and I think we located that citizen in Florida in our hypothetical questions, orders a book and it is delivered offline to the resident in one of the states in the United States.

Let's, perhaps, assume it's in Tennessee. We have a member of the Attorney General's

Office from Tennessee and if that Tennessee consumer purchases this book, it turns out it is not signed by the author, would the Attorney General in this state have jurisdiction there?

MR. PHILIPS: Yes, I think you do.

MS. SCHWARTZ: Oh, I'm sorry. This is Tim Philips, who is with the Tennessee AG's Office.

MR. PHILIPS: I think we do and I'm going to backtrack. Sorry. On the first one, this one, you do have, you certainly have someone has delivered the material there. You have a certain reach there, but I think on the screen before, if they're advertising anywhere, I think they've already reached into the state. And in the first screen where they say they're only delivering to customers or consumers within that Foreignland, I think we're assuming that they're following through on that. I think that would be, you would be hard put to argue jurisdiction.

In the state of Tennessee or under most consumer protection laws, we don't need a victim.

We certainly are concerned about this site and it actually does come up on our screen. I don't think in reality it actually is going to. We

like to think of ourselves as proactive but I'm not sure it's actually going to get to us, but if it does, we don't need a victim to be concerned about what this Web site can do.

You guys asked us to on faith accept some self-regulation. We would ask that the industry do the same with respect to local agencies and state government that when we do find sites like this, we are going to give great thought to whether or not we actually foresee against someone who is actually not delivering material in a state of Tennessee because I just know as a trial lawyer how difficult it is to go even before the local bench, the local trial judge and ask them well, no, we don't have a victim here. We want to stop this. I think that's difficult and I think when you don't have, when you don't have an injury in the state, I think you're going to have a long, you're going to have a difficult argument as far as jurisdiction.

But once they reached into the state, and I think in this instance, I forget where the comment came earlier, we're talking about a deceptive practice that is legal in Foreignland, I think that might add to the hypothetical a

little bit, but if that's the case, this is just what we're afraid of, where this type of deception can be on the Web.

Now, I would hope to a certain extent that self-regulation could stop this and I guess one of my questions would be, we are going to self regulate this, how long would it take the industry to get this Web site repaired? Because obviously, I think another hypothetical might be if this Web site is offering Mark Maguire autograph baseball cards and we think that maybe they don't actually have any. Mr. Maguire calls us up and says they're not actually there. Excuse me. I haven't authorized that. I know that they don't have them. Well, I think you're going to have more people signing on than buying the autograph of William Shakespeare.

But when you do that, you've actually, I think, reached into the state of Tennessee for probably numerous reasons. But when you do that, you've actually, I think, reached in to the state of Tennessee and to the extent that, you know, you're dealing with not just contract law between the consumer and the business person, but you are also dealing with tort law, which is our consumer

protection laws. And to a certain extent, I think we need those base tenents, which consumers in the United States are going to understand they're getting, and I think without those basic laws, I think you're going to have an erosion of consumer confidence or you're not going build consumer confidence you need to make the Internet go.

MS. SCHWARTZ: Peter Harter from e-music.

I'm sorry. You've had your card up for some time and I haven't gotten to you.

MR. HARTER: This is from a business point of view. E-music is just about a year and a half old, about 40 employees and we might be the best poster child for e-commerce in that we don't have a physical product. We sell music on line. We don't ship CDs or any physical product.

We might do that in the future but for now we're all digital in what we do. So, I think, touching upon what Mr. Goldsmith said and something Mr. Serf said at the very beginning. Many* people in Silicon Valley that's in California elsewhere.

Some executives often joke that we often don't, in high tech, and I don't agree with this

point of view but I put it out there for humor, that some executives who run multibillion dollar companies don't want to normalize relations in Washington, D.C. And I think that Jack said at the top that for a while, people thought that the Internet was a wild, wild West and it couldn't be regulated, but I think many high tech companies, while they may dismay Washington or other sites in government as being unable to regulate or too slow to regulate or their intention in their attempts to regulate, I think many high tech companies, especially ones that are all digital, really depend on good enforcement of property laws, piracy. Ms. Barshefsky talked about piracy in her remarks this morning.

So, I think at a very high level from an industry point of view, especially a small company that's growing, it depends upon good e-commerce policy both in this country at the state, local level and also internationally, that if there's no certainty of the rules where we set business, who we do business with and what we judge them by, doing contracts with them, like AOL's merchant arrangements, it throws risk into the business and more risk makes business more

difficult.

So, I think from a small business, all from a consumer point of view, if we're relying upon interpretation of case law in this country, and we're not even talking about similar legal regimes in other developed countries that have discussed choice of law or jurisdiction forum, which I'm not aware of and very ignorant of actually, it's a very uncertain market to go into because I don't think my company will get into fraud.

I've been coming to these FTC workshops for five years. One of the first things I did when I joined e-music two months ago was put a privacy policy up. That's pretty straightforward. And what other policies I put up in terms of state and jurisdiction or how we deal with royalty payments in multiple countries with AFSCE and a lot of issues to chew through with here.

I mean, jurisdiction cuts across, not just consumer protection. It cuts across copyright, obviously. It cuts across taxation tariffs. It cuts across authentication rules and standards and some countries require you license

authentication methodologies. Germany does that under their multimedia law passed two years ago?

Also, enforcement has various jurisdiction issues we have just been talking about. Now, I threw another one on there, the GSM phone. Technical standards cause jurisdictional issues and if people push proprietary format on the Internet, do we go with the GSM phone system or the American phone system? There are going to be successor to that dispute on the Internet in terms of digital audio format, which I won't go into, but who's law applies? What's government's role in helping shape a solid, reliable, consistent legal environment are very important to small businesses. So, jurisdiction is not so much a matter of consumer protection enforcement, but it's also an e-commerce enabler.

I think this perspective may not come out in hypotheticals, which are very important, and it's important to start with where we come in the history of the case law and what this country has done at the state and federal level in terms of enforcement of the consumer protection rules, but I think to encourage small businesses to do the

right thing on their Web site, do the right thing by the consumers, government needs to be aware that there's not much property law enforcement. There is a role the government needs to play to help business flourish in this kind of environment.

So, I just wanted to bring out a couple remarks going forward here and not directly commenting on any place I want, but a small business, jurisdiction has a much larger significance and it always makes me laugh when I hear people say we don't want to normalize relations in Washington, D.C. It's like, well, If you don't normalize something, you're going to lose a few billion dollars in market capitalization or find yourself getting your butt kicked in court some day. In Washington, when you pooh-pooh the government too long, you come back to town with hat in hand and you get investigated.

So, I think one less we learned about government regulation is having good relations with those who are going to regulate your business or write regulations to help your business to become enabled. Because without

these rules, e-commerce business don't exist, and that goes right to what Vint Serf said, that technology is used to create the market. Now, it's public policy that will help create the market going forward and others like Steve Case from America Online have said that in speeches here in Washington. I really believe that's the case. Now, whether my engineers in my company group may not, well, they're watching us on the Web, so I'll hear from them later when I go home and see them on my e-mail.

MS. SCHWARTZ: Peter, our hypothetical involves the delivery of a tangible book by the mail or delivery service. Your goods are delivered online. Your music is, that's the only product you're selling, right?

MR. HARTER: Yes. We demo files. You pay by credit card and eventually we'll apply it to mechanisms which are a whole host of other jurisdiction enforcement issues, what's currency?

MS. SCHWARTZ: Do you know where you're sending your goods when you send them online? Do you know the location of the recipient?

MR. HARTER: I'm glad you asked that because I wrote down that point preparing this

morning, that we may take a Visa or Mastercard or some other kind of credit card or charge card, and that might be associated with some person, but we're not going to go back and validate that that person is actually using that credit card from where the billing address. Credit card people ask when I check in with the hotels or buy airplane tickets, what's your address on your credit card? It's 2000 Mobile Street in San Francisco. Well, I'm never really there. I live on airplanes these days, so I use my credit card all the time and when I use it, I'm never really actually using it from the point of where the bill physically hits me and where it paid out of, my Bank of America account in California.

Online, are we going to take the time to see that Wolfgang, using a credit card to buy some music? He may be from Germany but he could be on business in France and he may be using IBM.net. Sorry, Ben. IBM.net is his Internet service provider because it has good worldwide access and he may be accessing actually not a server in California because my company outsources its Web site operations. It's not a competence we have. We outsource it to company

called Above.net and they may have the particular page Wolfgang is accessing on a server in Australia because the load on the Net is such that it's more efficient for him to get the bits of that page from his server in Australia.

So, are we going to go through all that rigmarole to find out where he is? Do we care where he is? I mean, as long as we clear that money from his bank account, that's all we're worried about. But if we can't get to the bank account, then we need the government to help enforce payment because we want to make money on the Net. Despite what other people are telling us, we'd like to return something to our shareholders and make money some day.

MS. SCHWARTZ: Would anybody like to address that issue about delivery of goods online? Because I think it might be easier to apply traditional jurisdictional rules when we're talking about tangible goods and mail addresses that the vendor knows and this may be a new world. Vint, do you want to say anything about that?

MR. SERF: Actually, two things are going on here at the same time. Not only do we have

this ethereal delivery of bits of some target which may not even be where you are at the time, and when you're asking to deliver something, it could be that it's being delivered to somewhere that you'll have access to. So the notion of "where is it?" Becomes very misty.

I was just thinking also about the credit card situation. Even though you get billing address verification to somehow verify your credit card, when we start delivering bills online, it'll never be at that address when paying bills or receiving it or looking at it. So, in a very funny sense, we have unbound ourselves from the real world by indirection in all of these things. And that suggests to me that we may not be able to use, in spite of the fact that I pointed out that all of this stuff is billed on physical facilities, the fact that you can be anywhere interacting with things may mean that we really have to rethink what jurisdiction means regardless of whether things are delivered physically or not. And I would submit it you to you that we have this problem today because a book might be delivered physically to a place anywhere where you are. You might be having it

delivered to a third party as a gift. So, I'm not sure that that question of where things are going is necessarily very relevant. We already have this problem.

MS. SCHWARTZ: And that introduces, I think, David Johnson, who takes this position, I think, in general that this is unlike our real world.

MR. JOHNSON: Well, I don't know we have to rethink the fundamental principles of jurisdiction, one of which is after getting through deciding what court can hear the case and before you worry about who can enforce the judgement, the fundamental question is choice of law. What is the source of rules? And if you're talking about fraud, it doesn't really matter because most countries do prohibit fraud, so the difficult questions come in, are there particular regulations for the way you should to a disclosure or that kind of distance.

The concept of comity which underlies the choice of law says that even if any forum that has control over the parties in the case ought to ask itself what is the group of people who have the highest stake in getting the answer right.

So that even if Tennessee, if it got jurisdiction physically because there was a book that came in to Tennessee, whatever, ought to ask itself, who are the group of people? How do we decide where to look for the substantive source of the rules so that the people who are most impacted by the rules will have the most say?

And one thing that's going on online when we deliver electronically and when you go through these meaningful boundaries going into AOL space or signing into a Web site a that says only come here if you agree to be bound by a particular kind of law, we are defining the set of people who will be most affected by where the rules come from. So, I think we should look seriously at contract and a clear disclosure of what rule set is being adopted by the parties, not because that's a convenient way to give warning that you're about to leave the comfort and safety of your local jurisdiction or at least go into a situation where enforcement may be more problematical, but also because we are essentially by that means defining who ought to set the rules and that in this case is the vendor and the people who decide voluntarily to deal

with the vendor.

And I just want to make one other quick point in response to the self-ordering challenge here of self-regulation challenge. The question of how quickly the industry can deal with this site is a very difficult question, of course, because this may be Mom and Pop and they may not even hear about the Code of Conduct promulgated by large companies and so forth. But there are a lot of other self ordering mechanisms on the Net.

One of them just announced, this may or may not be the product that does it, but I think there's a whole new functionality represented by a company called Third Wave which is just beginning to download a plug-in for the browser which allows anyone to post comments on any Web site. The way it works is you don't change the Web site but somebody who has subscribed to this browser can see public comments left by others who also have that Third Wave browser. Sorry. Third Voice. Sorry.

And the point is that it won't take very long for the Net. If it's operating in the way we've become accustomed, to start having posting in the First Voice format from people who have

discovered that this is a fraudulent site and one of the questions that the government might ask itself is whether it ought to be a voice and it ought to provide an FTC channel that people can tune into to get the commentary of the enforcement staff. Even if they can't reach out physically and enforce a judgment, maybe it can reach out through the Net with its cautionary voice with that kind of system.

MS. SCHWARTZ: Becky Burr from the Commerce Department and then Caitlin Halligan.

MS. BURR: I think David's comments have moved us where I was thinking we should be moving because in some respects, this case is not very hard and I don't suspect that there's either a consumer advocate or an Internet businessperson sitting around the table who wouldn't say to the Attorney General from Tennessee, that kind of fraud, go get them, you know, any way you can. We're behind you. It's the tougher cases where you're not talking about the things that we all understand as fraud but you're talking about things like whether the advertisement is comparative or legal in some places but not in others, or whether the size of this type of this

disclosure needs one set of rules and not another.

And so, I guess I have a question for Jack, which is, is there a way of refining what you described as this mandatory rule so that in the cases of clearcut fraud, whatever that is, and that's part of the difficulty, that falls into one category, but with respect to a whole host of other things where the harm is certainly less clear, that contract law can help us out here?

MR. GOLDSMITH: The answer is theoretically yes and that happens in real space.

One of the limitations on the party's ability to choose law or choose the forum today, many contexts is a reasonable standard. So, just to throw out one possibility. It's not a very bright line but you can say that the parties online engaging in e-commerce can, consumer will be allowed to choose a governing substantive law governing dispute resolution unless it's manifestly unreasonable, manifestly fraudulent. Whatever. And so, there are all sorts of intermediate possibilities by contract which would still let you have lots of private

ordering and even an escape hatch for enforcement against the kind of transactions that regulators might be especially worried about. There are lots of possibilities.

MS. SCHWARTZ: Well, Caitlin, I was going to call on you. Maybe we can turn to the last Web site in which the consumer acknowledges or there's an indication that the laws of Foreignland are to apply, but go ahead, Caitlin.

MS. HALLIGAN: First of all, I want to build on one of the points that Tim raised. I think that some of the hypotheticals that we're talking about for enforcement purposes may remain hypothetical for a little while, at least when it comes to the states. I think that most of our resources, because they are scarce resources, are targeted at this point at finding people who are engaged in really bad behavior, the kind of behavior that I think everyone at this table would probably agree is the sort we ought to jurisdiction over, as Beck was just pointing out.

Or where if we're not talking about an outright fraud, in other words, I take your money and you never hear from me again, the violations of other kinds of substantive standards that might be in

play in the states or at the national level are really pretty egregious. So. I think that we may not be pushing the boundaries of jurisdiction for quite a while.

I also think this Vint Serf raises an interesting point about whether or not all of this is really so new. At least when we're talking about the shipment of tangible goods as opposed to information that you simply download, that may pose some more difficult problems. There are a lot of ways in which you can order goods and services and effectively leave your physical location. Most likely, you can pick up the telephone and do that and dial another jurisdiction either in another state or in another country and we haven't found it so difficult to apply jurisdictional and choice of law rules in those situations and so, I'd like to ask whether or not we really need to treat this as such a new set of circumstances here.

MS. SCHWARTZ: I sense from the group you'd like to move on, I think, beyond fraud which is the more difficult issue and there is a sense that, at least with respect to jurisdiction over deception, fraud, serious consumer

mistreatment, that there's a sense that jurisdictional reach of the public agencies. You're comfortable with the more traditional approach to that. But with respect to, what shall I say, other categories of consumer protection, short of that, what would be the role of contract or provisions such as this that we have on the Web site that the consumer, before you actually click that you want to buy something, that you agreed to be bound by the jurisdiction of Foreignland or the laws and jurisdiction of Foreignland. I don't know. We've got some hands up here. I don't know whether Carla, you'd like to address that? You also don't have to. You had your nameplate up for some time, so if you want to go back to earlier titles.

MS. MICHELOTTI: I'll give you my one quick answer to that and then go back to what I was going to address before.

MS. SCHWARTZ: All right.

MS. MICHELOTTI: If a consumer is entering into a contract and specifically it says very boldly there that they're subjecting themselves to the laws of Foreignland, it's comparable to when I bought a rug in Istanbul.

And I was in Istanbul and I bought a rug and I understood I was in Turkey and I understood that I may never see it again and I was taking that risk and I agreed to do that.

I wanted to address some of the perspectives on self-regulation because just to avoid any confusion, I think there's more agreement up here than disagreement and just to underline that, the self-regulatory mechanisms that we talk about and are proud within the industry and that exist in many countries around the world, most countries around the world are mechanisms that do not say "please get rid of the law." It is not in lieu of law.

There is also a need and understanding and respect for a baseline of law and industry self-regulation which is the quick and efficient and economical, I mean, you understand what issues are in favor of the self-regulatory mechanism. When applied on a country of origin basis, it, in fact, does provide a reach to the person who created that Web site in that country in a very efficient and timely and economical fashion.

One of the things that Chairman Pitofsky

referenced yesterday and the same thing that Becky Burr just mentioned now, and I'm very glad it came up, is the very daily problems of creating the content on the Web sites. Whether you can show children's characters for a Web site that is going to be shown and brought in and visible in Scandinavian countries, whether you can do comparative advertising, whether you can have promotional opportunities on the Web that the German government would see as completely out of the book and illegal. These are real world problems that the Web creators, major league companies are dealing with today. And to the extent that the Web will grow as we've heard about it and will not become graffiti out there, we need to understand that there is a need for a baseline country of origin approach with the legal framework when applying the advertising standards for some of the daily problems.

You know, there were pirates on the high seas long ago because no one understood what laws would be applying to the high seas and the last thing we want is an Internet to have a pirate mentality or no laws that apply. We want to understand what law applies and move forward from

there.

MS. SCHWARTZ: But your country of origin then would have some basic, universal, minimum legal requirements that everyone would abide by which -- no?

MS. MICHELOTTI: The country of origin? This is the original July 1st document, July 1, 1997 framework for global economic commerce. It was a White House publication at the time from the Global Information Infrastructure Working Task Force and as to advertising, what it read was what it says is that the rules of country of origin should serve as the basis for controlling Internet advertising to alleviate national legislative roadblocks and trade barriers.

MS. SCHWARTZ: And that's premised on the assumption that all countries outlaw fraud?

MS. MICHELOTTI: That's premised -- exactly. We also agree that the outright fraud, there were going to be -- there's opportunity to enforce intentional fraudulent behavior in most countries around the world.

MS. SCHWARTZ: Peter?

MR. HARTER: When you start talking about transactions, money's being made and governments

being more interested in applying their own laws, so, going back to that point, Mr. Goldsmith mentioned the problem is not so much can or cannot regulate the Net, but how many governments will regulate the Net. And I think, emphasize in a point I made a few months ago, there will be a huge barrier for business, not so much the uncertainty but even more so having the compliance burden of not just 150 national countries, but also all of the regional and subnational governments hauling into court on fine regulation.

And I think maybe at some point, possibly David on the contracts, let our contracts be our conscience point he made back in '93 at a law school forum and something Vint mentioned before he left, that there may be a need to have some kind of free zone, not a free tax zone, but a zone where if you agree to abide by certain baseline principles as an e-commerce company, a safe harbor, if you will, as we've come to come to know that term of art and for legislation in this country recently. For example, the Digital Minimum William Copper Act (sic) has a safe harbor provision. Those instruments have

e-commerce law and policies for safe harbors or a duty-free zone, that we have the WTO for tax and for tariffs, rather.

Those kinds of instruments may be the ones governments have to come together on to give up the bit of their sovereignty in order to enable more, to enable as a medium to grow because what I see from my vantage point of a small company or a young company, if we not just only have the uncertainty of having laws not become enforced nor enabling us to go forward, IP laws, for example, but also to do with potential litigation by various parties who want to just keep us out of their markets or keep us away from their customers for competitive reasons, what are we to do? So, I think enforcement in transactions has many facets from a business point of view, just to make you aware of.

MS. SCHWARTZ: Commissioner Swindle, did you want to say anything?

COMMISSIONER SWINDLE: Yeah. I'm just listening to some of the words that are being used, and Teresa, I think you used in a rhetorical question, do we envision some legal baseline, a core of laws and then we talked about

the slowness of some of the, Tim talked about the slowness of self-regulation and I think curing along with that, it leads to perhaps a belief that we might be able to stamp out all fraud for all people. And I think from a practical standpoint, first, I cannot possibly, and I know you heard me say this in Australia, since we've had such a difficult time bringing the EU together. I mean, we've been working on this for how many decades? We still don't have the UK on board in totality. Getting some universal world agreement from 200 and whatever number of countries we have in the world is just not going to happen.

Secondly, we're never going to stamp out fraud if we just forget about the Internet and look at what the Federal Trade Commission does and I think does quite well. We only touch a smattering of the crooks in the world. We hope by touching enough and getting enough attention to it that the word gets out and that consumers and businesses alike will reform their conduct, be they selling or buying, and become wiser for it.

As far as self-regulation not working

fast enough, it may not, but I would venture to guess just on intuition alone that it is quantum leaps ahead in speed of the federal government or state government or anybody else.

As far as states imposing a jurisdiction imposing their own laws, what they will run afoul of eventually if they put so many laws that restrict the people within their on how they do business, those restrictions will invariably migrate to the marketplace where they will become impediments to the consumer, so the consumer will go somewhere else and seek a better deal, if you will, something that is less restrictive, binding, corrupt or whatever. And what I'm saying is I think it is almost folly to think we can achieve utopia -- I know nobody's talking seriously about Utopia -- and one of the dangers we encounter if we do try to go in that direction is that we will put more impediments out there than we find solutions and the cost benefit of what it will do to the Internet, I think will be very negative.

MS. SCHWARTZ: Thank you. I want to call on Jean Ann. I would like us to not leave completely, though, this Web site that includes

some language about choice of law and whether that would serve to solve some of the problems. If on the Web site you give clear indication that the laws of Foreignland will be applicable if there's any dispute, how far does that take us? Jean Ann?

MS. FOX: Let me address that specific question. I'd like to get back.

MS. SCHWARTZ: That's okay.

MS. FOX: On the disclosure when you get down to the final point where you're making your decision, if you're going to have a disclosure, it needs to have been on the front end of this transaction so the consumer hasn't wasted their time and committed themselves of at least emotionally for the purchase and then find out at the last minute that whoops, all of the laws, I think, that allude to you aren't going to apply here.

I was involved in work on the resolutions that were adopted in April and I did want to correct my maybe misunderstanding of what the meant. It's sort of an interim proposal that during the time we were working out all of these problems with jurisdiction, at the very least,

should be telling consumers what jurisdiction they're in, so it seems to have that knowledge, not a sign-off on that we can contract this away, part one.

On the general principal of what we're talking about here, as I listened to Mr. Serf talk about how complicated it is to know exactly where the Web site is coming from, this is the difficulties that businesses have in understanding exactly what the jurisdictions are.

We really need to step back and say, how does an ordinary individual consumer react to all of this confusion and uncertainty about whether the business is located and which laws apply and what we're going to do? And it's because of the need to give consumers confidence to build consumers' trust in doing business online and to help online commerce thrive that consumer groups are urging policymakers where possible to apply the law of the country in which the consumer lives. That's what you're familiar with. That's where you have access to the court.

We know that's a difficult proposition. We'll have to have international guidelines. We'll have to have harmonization of international

laws, that there will have to be self-regulatory mechanisms in place. We may need to have funds that everyone puts into for your claim where you have a judgment against an Internet company and you can't get your hands on the money to collect.

There are all kinds of solutions that could be crafted but the starting place should be what works for consumers and what makes consumers best so they feel comfortable and safe in venturing online? Our theory is that if you go to the country of origin, if that creates an incentive for all of the sharp dealers to locate in the jurisdiction that has the least possible consumer protection, you end up with a raised bottom and that will expose the legitimate online business to the spillover bad public relations and bad reaction that consumers had.

We're early enough in the development of e-commerce that we should learn the lessons from the 900 number industry and the coin-operated pay phone and all of the other businesses where the bad actors were allowed almost to destroy new technology before consumer protections were put in place. We really ought to do this right the first time.

MS. SCHWARTZ: David Fares, you've have your card up for a while. Do you want to either respond to that or -- speak on any topic you like.

MR. FARE: I was going to address this specific issue on this disclosure of Foreign, actually Foreignland laws apply. I think that this is a direct, this addresses directly the concerns. It provides legal certainty for the business because they know what law apply as well as informing the consumer that they may be traveling beyond their own jurisdiction and subjecting themselves to jurisdictions beyond their home country.

It also, it doesn't prevent that consumer from deciding not to interact with this Web site.

So, they can make an informed decision about their interaction with the Web site and whether they want to engage with the company beyond their own jurisdiction. I think it's an informed decision and it's something that you have to allow a consumer to make in this specific situation. I mean, my position is that it all should be the country of origin and we don't need to go back and forth on that because it's a legal

certainty for business and business won't engage in online commerce if there isn't legal certainty for them as well. I was addressing this particular situation and that it informs all parties and all parties can make an informed decision.

MS. SCHWARTZ: Okay. To respond to that, Mark Silbergard, Consumers Union.

MR. SILBERGELD: Yes. This is not like going to Turkey and buying a rug. And the reason is that you don't go to Turkey and buy a rug very often. When you're on the Net, you can go to Turkey every night or somewhere else every night and still go about your daily business and only in the sense that this one transaction may put you in the same situation, is this like going to Turkey and buying a rug. But people start using the Net a lot and having lots of transactions and it's not \$29.95 that's at risk, but lots of different transactions in that and many other perhaps greater amounts. You start to have questions of cumulative effect.

Now, I think Jean Ann said, and I agree, if up front there is something that says the seller only wants to sell to people who agree to

be tried, to try disputes under the law of Turkey, if you don't like that, bug out of this site. I think we ought to have some serious discussion about how that would work. The ultimate question is really, are you by adopting or not adopting that mechanism, inviting huge numbers of transactions in which consumers are dissatisfied and law enforcers can't handle the volume of transactions in which there really are violations of somebody's consumer protection laws.

The fraud is the easy case because everybody has laws against fraud. They don't all enforce them, of course. It is when you get to bigger questions of what are material nondisclosures, what are regulatorily-required disclosures in connection with particular kinds of transactions, and where are these conflicting among civilized nations that you have the kinds of problems.

And so, I don't think you can say that this is settled by characterizing this as being identical to an individual situation where you make a purchase abroad.

MS. SCHWARTZ: David Johnson?

MR. JOHNSON: Directly on that point, I agree we ought to have a serious conversation about how this ought to work and we ought to focus on the real convenience to the user.

First of all, I think we haven't paid enough attention to the fact that consumers, as well as vendors, as can set their browser to deal with certain kinds of parties. We have the W3C has the, in the privacy area I worked on, a platform for privacy protection in which, in principle, would allow the consumer to, if applied to this set of terms, jurisdictional instead of law terms instead of privacy terms, allow the consumer to say just don't show me a site that isn't prepared to be subjected to the regulatory laws of jurisdiction with which I'm comfortable.

Secondly, this is troubling in part because obviously, it allows the consumer to choose but it could be the case that a court of competent jurisdiction in the country of Foreignland is very inconvenient from the standpoint of the consumer.

One of the reasons to look hard at alternative dispute resolution and online dispute

resolution is that we are dealing with consumers who are online and may well find it more convenient to go to an online dispute resolution arbitration than they would to go to their own local courts. And what we have here, I think, is sort of a contest between jurisdiction to provide clear rules and convenient resolution of disputes.

What we know works on the Net is branding. Foreignland is a brand. U.S. Jurisdiction is a brand. We should be taking a lesson from the private sector and allowing Web sites to compete among themselves by offering to do business and be available for dispute resolution either on their own brand by saying satisfaction guaranteed, we'll always take care of your problem, which works better than any court, or by saying at a minimum, we will be available to you in a given online dispute resolution forum. We will hold ourselves out as being subject to a particular law.

That holding out on the vendor site is the willful availing that makes the jurisdictional questions go away because if a Web site puts itself up, it doesn't make at first the

problems to go away, but it does makes the jurisdictional and choice of law problems go away. And so, I think what we should be trying to catalyze here is what would be in the end a race to the top, not a race to the bottom.

MS. SCHWARTZ: Tim, you've had your hand up. Tim Philips.

MR. PHILIPS: Yes. Just a couple items. I had mainly suggested earlier that self-regulation would not be helpful nor did I mean to suggest that it would take an inordinate amount of time. My question was not rhetorical. I guess you could characterize it as a challenge, but it was not rhetorical. I think here we see a Web site. We don't know what Mom and Pop may be associated with. Are they part of the CPA group we heard from yesterday? Are they part of AOL?

Frankly, I heard some things from the panel yesterday that were great. Lightning may strike me, but I like what I heard from AOL. I think that type of resolution or that type of communication with a consumer, so many times you see businesses that just aren't communicating with the consumer and all the consumer wants to do is speak to someone and get some type of

resolution.

On the choice of law issue, I think in this particular instance, I think you start at the end. When self-regulation doesn't work, when letters from the Attorney General doesn't work, when we can't get jurisdiction for whatever reason, what is the consumer going to be, where is the consumer going to be? The consumer is going to be contacting Mom and Pop and saying what are we going to do? And Mom and Pop is going to say, look, you bought it, you come here overseas and litigate the matter over a \$20 book.

The consumer will not have any redress, I think, in the hand for this particular hypothetical.

MS. SCHWARTZ: One thing we might think about, if there's some sense that putting this information on the Web page alerts the consumer and the consumer can then choose, does this actually do the trick? That is to say that the laws of Foreignland will apply is not perhaps telling a U.S. Consumer very much, but Becky, I'm going to call on you because you have your card up. You don't have to answer that but I'm just putting that out on the table.

MS. BURR: Well, one of your questions is, do you have to say, and there are no consumer protection laws in Foreignland? I mean, it's an interesting question. I think that the discussion we've been having points out that we shouldn't be dealing with the jurisdiction question in a binary way here. The fact is that David pointed out that Foreignland may be very inconvenient to somebody. On the Net, in a global environment, for a court in Foreignland will be inconvenient to somebody because somebody is going to be far away from that. So, in order to make something like this, approximating this, be an alternative or to get close to what the business community is saying, they need in terms of certainty and clarity with respect to rules, there's going to have to be something in between like a consumer complaint resolution system that's online and easy to use and cheap and available to everybody.

I don't know if it's ADR as we formally think about it, but there is a need for reaching out and assisting consumers to avoid this situation that Tim talks about, which is for \$19.50, a consumer in Tennessee is not going to

Foreignland to recover.

COMMISSIONER SWINDLE: Nor is the State AG going to pursue it in court.

MS. BURR: Well, that's probably right. Caitlin brought up the notion of prosecutorial discretion with respect to these harder or less clearcut cases of fraud and that may be something we need to think about more as well.

MS. SCHWARTZ: Carla Michelotti? You had your card up.

MS. MICHELOTTI: I think that's an excellent point and I agree. We are at a very premature stage. I think we should also underline that, that we are at a premature stage to be defining the law will be there and this is the way that it will work forever more. I mean, we can all start by saying -- I had someone in the Internet business say to me that anyone who tells you about the Internet and says this is the way it is, absolutely doesn't understand the Internet because it's so premature that there's nothing that's constant. We've looked at numbers and they've changed incredibly over a period of six months.

I'm glad that we have some folks

representing the European community, both from the business side and the government side because I think we can learn from European community a lot about the addressing of regulation across borders because they've been dealing with this issue of cross borders even before the Internet.

From a regulatory framework, there's a directive in the European community on electronic commerce addressing the issue and encouraging a country of origin approach for electronic commerce. From an industry self-regulatory standard viewpoint, the International Chamber of Commerce, the ICC has already established guidelines on Internet marketing and regulation. This is not being waived around as saying that is the absolute answer and boy, this is absolutely, it's going to work and it's going to work tomorrow, but it's going to be worked on. It's going to be a framework to work forward from.

And within the European community, what the district did to address the cross-border issue is to create the European Advertising Standards Alliance which creates communication among the self-regulatory mechanisms so that a consumer in one country can bring a complaint

through the self-regulatory mechanism in another country through communication established at a self-regulatory to self-regulatory level. That greater communication, in fact, encourages a greater and more effective and cheaper enforcement of self-regulation for the \$20 book deal because there isn't one consumer in the world in Nashville or anyplace else that's really going to litigate over \$20. But if there were a way to bring a complaint cheaply, as cheaply as bringing a complaint to the BBB and actually enforcing some action locally and wherever this is, Transylvania, I forget, but in Foreignland, through the self-regulatory mechanism of Foreignland, that would be very good. And we need to continue to talk about these things with an emphasis on building the electronic commerce network and encourage the reputable folks out there with an understanding that the bad guys will never be stopped. The fraud. We have to continue to encourage action against fraud, the hardcore fraud.

MS. SCHWARTZ: Caitlin, hailing in from the New York Attorney General's Office.

MS. HALLIGAN: With respect to the choice

of law question, Becky said that approaching this issue in a binary fashion might be sort of awkward and I think that's right for a couple of reasons. One is that there might be certain substantive rights that a legislature or a regulatory body decides shouldn't be waivable or certain kinds of conduct that a legislator decides is impermissible regardless of whether both sides want to engage in it and that's particularly the case, I think, with criminal laws that may apply online.

So, I think the question of whether this kind of disclosure on a Web site is sufficient may not really answer the entire question. It may be something that's had little bit more nuance than yes or no.

MS. SCHWARTZ: If we're talking about something, not a criminal violation or fraud, but say, cooling off rules vary or other consumer protection might vary from state to state which wouldn't constitute a serious perhaps you could say consumer protection problem as fraud, then I think one of the questions would be how do you tell consumers when they decide to do business with such a company just what those differences

might be or what the basic protections might be?

Yesterday, we had a suggestion about international road signals, road signs that you could click on to get information because that offers you a chance to get almost too much information, but if you had these signals and you said law applicable and you click that on and it could provide all of the protections or a lack thereof, would that be a device by which consumers could make these choices, do you think, in a knowing way? Peter? You don't have to answer that. You can say anything you like.

MR. HARTER: I love the permissive policy in commenting in the proceedings. It just seems to me that if we have a precedent that this country's government wants to promote a view that e-commerce, but people look to this government for forward thinking in the framework that commerce was path-breaking at times and kind of stopped competition amongst governments to get the hottest and coolest and commerce policy out there and convene CEOs for conferences and fancy places and locations and all that kind of stuff. And that's nice, but people do look to what comes out of workshops such as that one and I think if

there is thinking from folks in this workshop that the jurisdiction, the consumer has some weight, that's going to cause some significant reverberations. Not to dismiss it completely, but what is going on here has some significance outside of this room. At least I believe it does. And many things will pass by here.

My own personal observation, things to matter that come out of this kind of workshop, so it does, to me, it has some gravity to hear that.

There is sentiment that a law of consumer rule may work because frankly, I can just be very upfront, not that my company will engage in fraudulent activity. We have a pretty progressive management team that wouldn't hire a lobbyist full time as its 24th employee if they didn't think privacy policies weren't key to the company being successful.

So, we'll do our best to abide by whatever laws we are told to be applicable, we think are applicable. But ultimately, our business decision is going to be made on what Jeff Basos and Amazon is famous for evangelizing, that the consumer has to rule, consumer convenience. I think, as Tim mentioned in his

remarks a few moments ago, that even if the government is not able to enforce something, eventually it's going to catch up with the merchant and that the marketplace, consumers won't go to that Web site.

If we don't treat consumers well at our Web site at e-music, they're not going to come back and because we're a very young business and a very new business model taking on established legacy companies and just intermediate in their business models, before they can come into our business, we have to win customer loyalty and build traffic and if we do anything to offend a customer, that's going to set us back as a business. That's what we get to first before we look at what is better, country of origin or the country of the consumer first.

So, I think we're trying to grow e-commerce, yes, let's get some principles in place. As I said before, we need a framework for e-commerce but I think, what is most convenient for consumers? If my company can offer attractive music for \$1 that you have to buy in a store for \$4 or \$5, which is what a single costs in a compact disk these days, I think having all

the rules of music available online for a few clicks at a dollar a track is a far more enticing proposition for a consumer and they'll follow up to that Web site, hopefully, if they have decent bandwidth and decent computers and some other factor are taken care. But if I, because of a country of consumer law's precedent comes up, I have to say to myself I cannot do business in France or Germany or Canada or Tennessee or somewhere else and that would be inconvenient to consumers and to ours as well. It produces a greater content because ours want to get their music, their content out to the widest possible audience, their fans in Germany, France and Tennessee.

And I want to touch on something Vint Serf said in the very beginning about encryption.

This country needs to have an effective encryption policy. Very important issue for a lot of reasons, but I think we need only to look at France and the harmonization, the common market and the EU. For years, France tried to regulate the importation and domestic use of encryption and for a long time, that interfered in all kinds of services being offered in Europe.

In my former job at Netscape, trying to sell strong encryption software into Europe for banking and other legitimate business practices, it was very difficult and finally the consumers in France, major corporations in France were consumers of that technology from companies like Netscape, IBM or Microsoft. They allowed the French government to change. So I think you'll actually on the Internet a new phenomenon where consumers actually lobby governments to change the laws, not from a national perspective but to have a more global perspective because consumers want to give up benefits of national law to benefit from local choice and that's something that hasn't come up today.

I want to bring up the encryption experience in France. French consumers lobbied their on government to break away from national law to the different law. It was in that context the country or origin law. But I think consumers have a lot more to say than we're giving them credit for and we may not need to protect them because as we said yesterday, consumers in this medium are very smart. You get on a computer, I

think Commissioner Swindle said this at the end of the day yesterday, that people that use computers are perhaps smarter than the average person, despite what they might say in their e-mail because they say pretty dumb things, and I think consumers are going to have, want to have a smart e-commerce policy. That is, sophisticated from the global point of view and not pulled down necessarily to a very all-too-local point of view, for local point which may not serve in terms of choice convenience and price.

MS. SCHWARTZ: Jonathan Rush, the Justice Department.

MR. RUSCH: As I listen to this discussion, one of the things concerns me a little bit is that while we've been willing to say well, we can't be too binary in our thinking about this issue or that issue, when it comes to the issue of consumer deception and fraud, we shouldn't be assuming that the line is always going to be as bright as it is today.

In the area of the Internet fraud right now, the kinds of cases that the FTC, the SEC or the Justice Department have brought to go after Internet fraud schemes have typically, not

invariably, but typically involved some fairly outrageous and very straightforward deceptions. I promise through eBay that I'm going to send you a Patek Phillipe watch and I send my thousand dollars back to you and you simply default on the transaction. You do it time again and there's no question that consumers are being defrauded.

If we've learned anything in our experience with any types of mass marketing frauds over the last 10 to 15 years, it is that even as we assumed that we are doing more to benefit consumers and giving more information so that they can be better informed, the people who engage in deliberate fraud become more sophisticated. And it may, in fact, become more difficult for consumers even with the global reach of the Internet to reach the kinds of information that will allow them to determine whether or not something that holds itself out to be just like e-music or just like Amazon.com is, in fact, not just like them but, in fact, is an outright fraud except for the fact that they try to mold themselves to make them appear to the public just like legitimate concerns.

So, part of what we need to be thinking

about in a sense in wrestling with these issues of jurisdiction is whether we can assume that consumers will be as able, even with the reach of the Internet, to be able to get the kind of information they really need for informed consumer decisions, especially when we know in some instances that people who engage in fraud take advantage of the characteristics of the Internet to control and shape and in some respects, distort consumer perceptions about whether or not it's a legitimate enterprise.

COMMISSIONER SWINDLE: Teresa, a comment.

Yesterday, a comment was made by one of the presenters and it said, and I wrote it down. It says, we all agree on what they consumers need. That's a hell of a statement. I think consumers know what they need. The vast, vast majority them, and I certainly recognize the dilemma we face with the shrewdness of these scam artists. But historically, that has evolved with every new innovation. It seems like the scam artists are out there on the leading edge of this wave. We all catch up later and people were damaged.

My comment would be yes, better education and consumers are pretty educated. They get

fairly sophisticated quick, especially after been burned once or twice. You don't keep going back to that same site. But if we assumed that we must do something, we, the regulators, my question is, what is it that we must do? We haven't solved that problem in two hundred years in this country in stamping out corruption and evil and I guess you can go back to Adam and Eve and we haven't managed to stamp it out then.

And I'm not trying to diminish the concerns that we have. I guess my concern is that in our enthusiasm, someone gave yesterday that said my God, so many helpless victims and so little time to do good for them. We need to be vigilant. We need to continue to promote education and we all need to be sophisticated because the game is more sophisticated. But to rush out and create new laws when the laws basically work fairly well is to jump off a cliff not recognizing that there's some rocks down at the bottom of it.

MS. SCHWARTZ: There does seem to be, I think, some agreement that with respect to basic fraud, there are some consumers who really cannot protect themselves because the technology is used

in such a way that consumers hardly know what's happening to them. It's not our Shakespeare-signed document. That we do, at least yesterday, the discussion was along the line that is there was much more that needed to be done internationally to equip the law enforcement agencies to get at these problems and that more in the way of agreements and perhaps extending the MLAPS so as to cover civil law enforcement and so forth really was probably going to be the next step with respect to law enforcement of the kind that most around the table would agree with at a very basic fraud level. But then beyond that, it does get more complex as far as the protections consumers should be provided and the ability to enter into contracts along the lines of what we've been talking about and where consumers have choice.

How they exercise that choice and the kind of information, how you disclose that information is getting into even finer detail, but it does seem as though there's some sense that these categories of consumer protection are somewhat discreet. That is, the serious basic frauds and the other areas of consumer protection

and the different approaches might be developed, but I speak too much.

Let me see. I can't remember who hadn't spoken earlier. Let's see. Dave Fares, I don't think I've called on you in while.

MR. FARES: I just want to build on something that Carla Michelotti had started to develop, that that's something we've heard throughout the 1st day and a half. That's the development stage of the business consumer of electronic commerce.

We still are in the very developing stages of this and that business is working to assess what consumer demands are in the area of consumer protection. Many are addressing this issue, the ABA, the Internet Law and Policy Forum, International Chamber of Commerce, Global Business Dialogue. We're working to assess what the market wants from businesses in this area of consumer protection and we have some precedent to show that this can work.

Last year, the FTC did its Web survey and 14 percent Web sites have posted privacy policies. In one year, there was a concern about posted private policies. Business heeded that

concern and 66 percent of the Web sites now have posted private policies. So, if you give the time for businesses to react and for business to develop approaches that are tailored to the needs of the online environment that are tailored to the consumers as they engage in online activities, it's effective. And it is also helps overcome the self-regulatory approaches that can develop, help overcome the enforcement problem that we have because what kind of benefit does a consumer get from applying a law, a country of destination principle if they expend money to bring an action in a foreign court, applying their country's laws and they can't seek restitution or injunction or whatever the recourse may be from the offending party?

Private sector mechanisms commit the private sector to do that and they can address these concerns and I just think we need to allow some time to assess the market and to allow business to respond to the demands of consumers which there is evidence that we do do that.

MS. SCHWARTZ: David Johnson put down his flag, so apparently you've covered the terrain he was going to do.

MR. JOHNSON: I agree with that. I can just briefly add that what we do as a country will send a very important signal to all the other much more pro-regulatory jurisdictions who are waiting for an opportunity to impose their particular view of public policy. We really need to come back to the basic. Why shouldn't we enforce a contract which clearly disclosed and chooses the rules and when someone is not being confronted by a door-to-door salesman, but exploring on their own volition with lots of time to think it over to get advice from third parties?

Well, there are some public policy reasons why particular contracts are not to be enforced, but the question is, what's the public who gets to say what those public policies are? And I think that's an area where harmonization on the core rules of reasonableness, what you cannot contract away from is really the opportunity presented here.

MS. SCHWARTZ: Caitlin Halligan?

MS. HALLIGAN: I think all of us here would agree that we want to see e-commerce flourish and we don't want to unduly restrict any

of the benefits that are promised to consumers. But having said that, I want to build from a point that Jonathan made. I think that only are we seeing con artists who are using increasingly sophisticated techniques, but I think we also need to test a little bit this notion I'm hearing of a very shrewd and sophisticated consumer online.

Some e-commerce consumers are certainly extraordinarily sophisticated, but not all of them are. I think if every e-commerce consumer was as sadly as perhaps I'm hearing, we wouldn't be all here today and our office certainly wouldn't be getting the thousand of complaints we get every year from folks who maybe are as gullible or more gullible online as they are offline. I think that that is exacerbated, that has a negative connotation, I guess, which I don't really mean. But I think that problem is heightened by the fact that the base of Internet users is growing exponentially and as the costs of Internet access and computers continue to come down, we're reaching an increasingly broad base of people. So, I think that before we can assume that the consumer can adequately take care of

herself, we need to think a little more carefully about exactly who that consumer is.

MS. SCHWARTZ: I'm going to call on Carla and then Jean Ann and then I'm going to give the professor, whose been sitting here very quietly, the final word here because we're quickly running out of time.

MS. MICHELOTTI: We need to know, just to pick up where she left off, we need to know where the consumer is but we need to educate the consumer, also. The Phillipe Patek watch example. There are Phillipe Patek alleged watches being sold right today on Third Avenue in New York, also, but consumers are not buying those Phillipe Patek watches.

There are also, we heard 3,500 to 4,000 radio stations playing over the Internet which means allegedly if this country does not embrace a county of origin approach, those radio stations are now violating the laws of over 100-some countries that I'm sure have licensing regulations before the radios can be broadcasting those signals.

Today, there are Internet sites that incorporate cartoon characters, that ombudsman in

Denmark are contacting American corporations and claiming that Danish law prevents these Internet sites from being shown, although the Internet sites claim American law in our English.

Today, there are nutrition claims that are very helpful to consumers, medical information on the Internet, all of which can be illegal in many countries around the world and maybe not even illegal to share with consumers.

Brands are very important on the Internet. We heard that. The brand incredibly is important, but the brands are the credible, large corporate entities, that as of right now, are hoping that a country of origin approach be used and utilized so that there is some kind of established understanding of what rules should be applied from when the Web sites are created, when they're initiating their communication with the consumer, that they understand from some point of view that what regulation should be applied at the outset. We must be careful not to stifle the growth of the Internet.

MS. FOX: I'd like to respond to David's question about whether who or not self-regulation works based on the privacy situation. It's true.

This year when the survey of Internet site was done to see if they posted privacy policies, more sites had something posted. But when you test those privacy policies against the Fair Information Practices Standards that the Federal Trade Commission laid out as the bare minimum last year, we found that less than 10 percent of the sites had complied with all of those fair information practices. Just in their disclosed policy was no test to see whether they actually followed the posted policy. So, if that's the example of how self-regulation works, then we need to enforceable consumer protection.

MR. SWINDLE: May I make a comment on that? That is not the only example that I've heard in the last day and a half of how self-regulation is working and I wasn't at all of the sessions yesterday but I heard enough to know that industry is working hard to make this new commercial avenue flourish. It can be no doubt of that, and to try to put a negative look onto what they are doing, I think is a misrepresentation.

MS. FOX: May I respond? We value the self-regulatory effort. We think that is

essential to protect the consumers and commerce. The self-regulation without enforceable limitation will always fall short of just from on the very basis, that the outrighters will never comply with the self-regulatory program. The folks who intend on doing the wrong thing will not bring themselves under self-regulatory regimes. We count on enlightened self interest to benefit the consumers but that's not sufficient. That's necessary but not sufficient.

MR. HORTON: The outrighters will also not comply with the law. We find that every day here.

MS. SCHWARTZ: Okay. With the last word, Jack, you started us out and --

MR. GOLDSMITH: Just a few thoughts from someone who knows a fair amount about jurisdictional conflict but not much about consumer protection law. I listened a lot about consumer protection law and how jurisdiction is implicated there.

Just a few thoughts. First, it seems to me as an outsider to the problem of consumer protection, that a lot of this discussion is

talking past one another. Seemed to be two kinds of issues: Fraud and disclosure. Some people have made this point. There's an agreement that the bad actors in the fraud context need to be, that regulation by the government appears more justified here and perhaps something like a general consensus that is perhaps less justified or you can have more private ordering in the disclosure context.

Now, having said that, the second point I want to make is we've all been operating on the assumption that I think you all know is false. Namely, that there's a sharp distinction between government regulation and private ordering. Of course, the private ordering operates in shadow of government regulation, of the threat of government regulation and that's a point that should always be kept in mind.

We see in so many Internet contexts, we see technological innovation and Internet change in terms of self-regulation and response to regulation or the threat of regulation.

Third point is that the real problem here is enforcement. That's what everyone keeps saying. And this is exacerbated by the fact that

these are transnational transactions with very low value on a individual basis and it's not cost effective for the government, obviously, to go after all of those cases or even any of them.

In this context, it's a very, very old problem. It's been around for a long time and it's not something that's completely new, especially when transactions have low values. There are incentives for private dispute resolution mechanisms. We see these all over real space, dispute resolution process outlined in their submission. EBay has a dispute resolution process where they can cheaply and effectively, online and in the small value transactions, establish a regime for enforcing consumer standards and pass along the small cost along to all of the participants.

Seems to me that has to be for low value consumer protections the right way to go. It doesn't make economic sense for the government to go after small value transactions.

The role for the government is to, it seems to facilitate those kinds of private orderings and I don't know how to do that, but that should be the role of government. And then

to worry, to help facilitate that, it sounds like what we're hearing is, the way to facilitate that is is not only by figuring out what sort of reasonableness is and sort of articulating that, but harmonizing it with other regulatory regimes so that there's a uniform standard. That's one goal for regulators.

Another is to try to discreetly lop off this other set of concerns where governments have a heightened interest. That seems to be another challenge. How do you go after the really, really bad actors while at the same time not having undue spillover effects on the private ordering? There's probably a more efficient way of resolving a lot of these consumer transaction problems.

MS. SCHWARTZ: Thank you. It's a good summary and also a good segueway into the afternoon sessions. We have two breakout sessions, one on private sector initiatives and the other is on the public international bodies and agreements. And when you come back in not too long, we will resume our discussions. We'll start at 1:30 and the first breakout session on private sector is in 432. That is here. And

downstairs, 332 is the international bodies and agreements. Thank you all very much.

Thank you, panel. You've done a great job.

(Whereupon, session three concluded.)

FEDERAL TRADE COMMISSION PUBLIC WORKSHOP
WASHINGTON, D.C.

U.S. PERSPECTIVES ON CONSUMER PROTECTION
IN THE GLOBAL ELECTRONIC MARKETPLACE

WEDNESDAY, JUNE 9, 1999

1:30 p.m.

ALTERNATIVE FRAMEWORKS:

ROLE AND EFFICACY OF PRIVATE SECTOR INITIATIVES

REPORTED BY: LINDA BAHUR

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LLEWELYN GIBBONS

RUSSELL SCHRADER

ETHAN KATSH

ERIC WENGER

P R O C E E D I N G S

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MR. MEDINE: Good afternoon. Thank you all for returning. We are going to move now into the breakout session on the alternative framework, particularly the role and efficacy of private sector initiatives. Commissioner Swindle will be co-moderating this session.

COMMISSIONER SWINDLE: I'm going to sit here and critique everything today because he wrote the outline. I don't agree with everything that's on the outline but I'm just going to let him wander on in and I'll knock his head off before it's over. We'll have a good time. We have a great moderator in David and as you've seen the other staff members on the panels, I think they've done extremely well. There were a couple times where I thought certain people would come to physical harm to one another. Our very capable moderators took control and did it well and I'm sure David will do the same thing. His problem is me. Press on. You're it.

MR. MEDINE: Thank you. Nothing like a little pressure to start you off.

COMMISSIONER SWINDLE: Well, Commissioner

Anthony is going to join us. She's a lot prettier than either one of us.

MR. MEDINE: Well, thanks again. This morning we heard a lot about the complexities of jurisdiction and choice of law and what I found very telling is that a lot of times during the discussion this morning, they didn't really want to stick to the subject; they wanted to get into our panel which is they recognized the difficulties of mapping, current legal structures on the Internet and they all really wanted to start talking about alternative dispute resolutions and alternative frameworks.

Now, this is our panel. We're going to discuss it, but I think it's interesting that even the panel, groping with what the legal standards are to be, quickly recognized that maybe they don't work in this context and that there are better ways of addressing some of these concerns. So, the Internet is really challenging the way we resolve disputes, the way we provide consumers information.

This afternoon, we have assembled a very impressive panel of nontraditional thinkers who offer their views on alternative framework on two

issues. The first issue is how do we make consumers better informed decisionmakers? Because of the extent that consumers can shop around, assess the nature of the companies they're doing business with, the less likely there will be disputes. But, obviously, it's a challenge across borders to educate consumers about companies. And then the second issue we'll discuss is if those disputes do arise, how can we resolve them, again, outside of the existing legal structures?

So, starting off the question of how can the private sector initiatives facilitate informed decisionmaking, there are three models that the comments put forward. One is the online seal programs; second is consumer rating programs and the third is self-regulatory efforts by advertisers.

I'll call on Steve Cole first to offer some background for this subject and also to get into how online seal programs can work.

MR. COLE: Could I have your dispensation to have a minute's worth of background, if I may?

MR. MEDINE: Yes, one minute.

MR. COLE: I'll try my best. I think, to jump off from this morning, I think much of the issue was posed this morning as governed regulation versus self-regulation. I don't believe personally that's the issue. Commissioner Swindle made a point this morning that reaching consensus and negotiation of treaties to allow international choice of law and jurisdiction solutions is going to be a very, very slow process. Compared to that self-regulation is going to be fast and is fast. But the private sector needs predictability and it needs consumer confidence now, so I think we have a real opportunity to offer something positive, not as a substitute for regulation but as a reality check that we really can do it faster and provide the confidence that's needed.

Another reason I think we have an opportunity is even if eventually these treaties are in place and we have an effective global protection network and we find the choice of our framework, that's not going to be helpful to give consumers confidence at the level that is desired.

First of all, we have our own experience

here in the United States. Consumers do not utilize judicial remedies as much as we talk about them. The garden variety of consumer problems is not about going to court to get a solution. So, even if we figured this out, whether it's because cost or convenience or fear or just not suitable for the low dollar volume of the dispute, negotiating and treaties, these traditional remedies are maybe irrelevant.

Secondly, the need goes beyond detecting fraud. We heard about that this morning. We need to find many ways. That's the first question we posed, how to help consumers find companies that are worth doing business with that are reliable. There are lots of techniques to doing that but that is the most important question.

And lastly, I think both the business and consumer communities need some minimum baseline protection. Some given, some expectancies so that we will remember the marketing need as to give confidence to consumers in using the Web for electronic commerce and that's not going to likely come from government.

Again, I remind us all about the

preemption debates in the United States between the federal government and the states and think of that on an international scale. We're not going to get minimum protections through governmental efforts that easily.

Thank you for the dispensation for the introductory remarks but let me answer your question. In 1995, in a workshop that was chaired by then Commissioner Varney, I gave a presentation about how the Internet allowed us to get to consumers at the right time and right place and we have realtime education that's possible, that with all the good work that the business community and the consumer advocacy groups and the networks and everybody has done has never been able to be as effective offline as it can be online. We can get information to people that help them make choices about who to do business with at the very point in time they're considering doing business. That's new.

As David mentioned, a seal program which we operate, BBB Online, is one of the number of techniques that can get that information out on a realtime basis. Our program awards a seal to companies meeting certain standards. They have

to agree to accept its standards in truthful advertising. They have to agree to cooperate in a voluntary self-regulation program that we operate in conjunction with a major trade association in the United States. And they need to cooperate and agree to abide by decisions of those of that program. They need to have a good marketplace record. In our case, with the Better Business Bureau. They need to agree in advance that if a dispute arises, they'll participate in a convenient, free and complete dispute resolution program.

We now have the largest seal program on the Internet. It's somewhere between 3,000 and 3,500 participants right now. We're very proud of that but we all know that needs to grow significantly to really have that kind of impact and it needs to grow beyond the United States, but it's a darned good start. We sort of have in place the authentication mechanism that Vint Serf said wouldn't it be nice if the BBB had such a mechanism? And really, there is one out there.

We have reviewed maybe about 4,000 Web sites in the course of this program and the experience we found is what you might expect with

respect to the Internet. Fraud is an issue but the real issue is new entrepreneurs who are entering the market who don't really know the rules of the road and as a consequence, they need a lot of help. The business community needs a lot of help. So, we found maybe 88 percent of the sites don't qualify and don't want to qualify after they find out how difficult it is. It's really not difficult if you want to do the right thing, but they see it that way.

We find that about 13 percent of the sites need to make changes in order to qualify and they need help in making those changes and they're willing to take that help. So, that's been a very positive experience.

The limitations of all of this is, it's focused on the United States now and what we need to find in partnerships with some of the types of organizations on the panel and others that we haven't even identified, Carla, this morning, mentioned the ICC efforts. There's a lot of efforts going on around the world. We have to find techniques that are maximizing the brand recognition and trust that consumers have for an organization with the local recognition that

different organizations have throughout the world.

MR. MEDINE: Thank you for your comments and just to build on that, you described something that works very well in a domestic environment. The question of this workshop is, how do we apply those same principles internationally? And I'd like to get Edward Johnson's view on behalf of Webtrust, who is offering healthy competition to the Better Business Bureau's seal program, to see what Webtrust views are on how does the system work and how can we make it an international program.

MR. JOHNSON: Thank you very much and it's a pleasure to be here representing the 350,000 members of the American Institute of Certified Public Accountants and if you put the international hat on, there's our counterparts around the world. Perhaps double that number.

I think the CPA profession is best known for its role as the independent and objective verifiers of financial information and the underlying systems that produce it through the financial statement audit that many of you may be familiar with. In short, we have a long history

of helping build investor trust and confidence about financial information.

With the enormous potential for the Internet, we thought it would be appropriate for us to take the experience that we've had as independent objective verifiers and see if we could meet a need that obviously exists to build investor, consumer trust and confidence on the Net.

Our program, the CPA Webtrust programs is based on three principles. The first is a Web site should disclose its business practices and should follow these business practices and we, as CPAs, would verify that that is, in fact, happening.

The second principle is that they have to have the right kinds of control and processes in place to ensure transaction integrity. So, if I order five green sweaters at \$20 each, I get five green sweaters at \$20 each, not a rainbow of colors something else.

And the third is they have to have appropriate measures to protect private customer information and agree up front that they will either get customer permission or get, they will

not distribute that information to other entities not related to their business. So, you can think of it like an audit of a Web site that a site has a pass and they have to meet the principles and their supporting criteria under those principles. If they pass and meet all the criteria, they get the CPA Webtrust seal and this needs to be updated every three months's outside to retain the seal. So, it has the benefit of, again, the independent objective third party verification that they are actually doing what they're saying they're doing.

MR. MEDINE: I guess the question, then, is how do we take what I assume is a domestic product and how do we make it an international product so that when consumers are shopping on foreign Web sites, they have the same degree of assurance they have as on U.S. Sites?

MR. JOHNSON: We are in the process of doing that. We have our brother and sister institutes of CPAs or chartered accountants, whatever they're called in various parts of the world. The seal program, by the way, was developed jointly with the Canadian Institute of Chartered Accountants. So, that was the first

step we recognized very early we needed to do it.

We've set up arrangements now formally with the institutes in the UK, Australia and we have a number of other institutes that are very rapidly moving forward to becoming a part of the program.

Also, the large CPA firms that are participating in this that operate around the world essentially can provide the service anywhere in the world. Again, to a common set of standards.

MR. MEDINE: Do you have any indication of international interests in joining these programs?

MR. JOHNSON: Fairly significant. We've just had a seal go up in the Netherlands, one go up in Australia. A lot of interest in Hong Kong, Japan, a number were European countries, and this is without promoting the seal at all in those countries.

MR. MEDINE: Thank you. Just for all panels, as was before, if you want to have a comment, put up your flag and we'll try to get to you.

Turning to the, I guess, the third perspective on seal programs, Marla Pollack, who is with the Florida Coastal of Law, would have the government operate seal program. We'd be interested in hearing your views on how that might work.

MS. POLLACK: Thank you very much. I've heard a lot of discussion about consumer empowerment and government slowness and industry self-regulation and it's very good that consumers are active on the Web, at least some of them are.

The more active they are, the easier it for people like me who don't go on that often. And I'm very happy that accountants are willing to certify people and that the Better Business Bureau was willing to get into it.

The problem is, though, that if I get online, what I want to know isn't necessarily what they're telling me. What I want to know is if I get into a hassle with this company, that it will be nice to have an ADR, but if I can't get an ADR, that I can go to my local small claims court, or I can appear without a lawyer, that I can get a judgment on them, whether they show up or not. Of course, we'll serve them. And that

once I get that judgment, if it goes that far, that they will actually pay it.

Now, I'm limiting my discussion to what I thought was the core topic of this whole meeting:

The delivery of physical goods inside the United States by a firm outside the United States. And I've heard a lot of talk about brands. Also heard a lot of talk about wanting to empower people to do business with small businesses and medium-size businesses outside the United States. Now, we all know that it's safer to do business with someone whose reputation you know. But those are big businesses and the further away from you they are, the odds are the bigger the business has to be before you really understand its reputation.

The seal programs are ways of giving inexpensive branding to small businesses, but the CPA one, with all due respect, is relatively expensive because CPAs are relatively expensive. And the Better Business Bureau Office, though good, is not promising, at least not right now, maybe it will be in six months, exactly what want, which is the ability to get a refund if I get a judgment. So, what I suggest is that the

government get involved not in its normal regulatory manner, but by providing a choice and if consumers start using this choice, perhaps business will step in and do the same thing so government can step completely out. And the program I suggest can be whittled down to very basics so you could add more.

The very basics would be that the government promote to foreign companies perhaps who are embassies or trade representatives, that the United States government will be willing to supply them with an official Seal of Approval. This Seal of Approval will be a hyperlink to the government Web site which would explain it to the consumer. At a minimum, this seal should promise that under certain conditions you will get your money back, like total non-delivery or you didn't order it, that your privacy will be respected at least to a minimum extent, though that is possibly optional. Most importantly is the seal should represent the seller's promise to abide by United States courts' judgment made under United States law where the consumer lives and this should be backed up by a bond.

Now, the bond could be posted on behalf

of small businesses in Indonesia by the Indonesia Trade Council. I don't care. It could be posted by international sales of foot-squeezed olive oil by the Trade Association of Foot-Squeezed Olive Oil Producers. I don't care. All I care is, or it could be an insurance company. Beautiful private business. Wonderful. But someone should post security with the government, the United States government, who I normally trust to some degree, without the need for lots of advertisement. That way, I know that if I send a \$50 check to Tuscany to the olive oil producer and what I get is a bottle of something that I think is olive peelings and I take my bottle of olive peelings to the local small claims court and they give me a judgment for 50 bucks, all I have to do is mail this copy of the judgment to the address on the government seal program page and I will actually get the \$50.

Now, I would hope that if consumers see this and use it, that business will step in and make it totally unnecessary. But this is something where the government can give out a choice that can give the public a chance to say to business, this is, yes, this is what we want.

And once consumers get a chance to say that, then I'm sure that all the entrepreneurs in the world will step in and take it over and the government will step out.

MR. MEDINE: Frank Torres is with Consumers Union. You've heard three seal programs. As a consumer representative, does this give you the comfort that you need to move in to international cyberspace?

MR. TORRES: Well, I have written down here in my notes in listening to these three discussions about the different types of seal programs out there, is that a seal program is only as good as the standards that govern that seal program are. And so, the real question is if we want to use these seal-type programs as kind of a self-regulatory means of gaining consumer confidence in the Internet, they better be pretty darned good programs. And so, I think there's kind of merit in all of these things. I mean, certainly, to have the government step in and kind of provide this seal would truly help maybe level the playing field, big business, small business, and add some certainty to it.

I don't know how many consumers are aware

of the Webtrust program and knows what it means right now when they go on a site, to see the seal, to click on the seal, to read it. Same with BBB Online. I know we're, at Consumers Union, concerned with privacy and right now, you can have a privacy policy and to get into a seal program, it might just be that you Web site might have to be or you business operating on the Web has to have a privacy policy, so you set up a privacy policy and you get the seal. And your privacy policy, essentially you have no privacy policy. Your privacy policy is I can use the information for however I want to use it, whenever I want to use it. You kind of hide it three clicks away but you see the seal as a consumer and say oh, they've got a seal, so I'm protected, when the protection is really a sham.

And so, we've got these competing seal programs, some of them, you know, might be good but then watch out because if we see a proliferation of seal programs, Mom and Pop seal programs and so, all's you know as a consumer is check for a seal. I look for a seal. Mom and Pop seal program. Great. You know, I'll go to this Web site. So, there's got to be something

more than that. There's got to be some meat on the bones.

COMMISSIONER SWINDLE: Do you contend that that has to be government-endorsed, in effect, that seal? I thought I heard you say that.

MR. TORRES: I'm not saying that it has to be government-endorsed, but I just heard from somebody this morning that the OECD has actually come down with a set of guidelines and I'm not sure which at which stage these guidelines are, but more people who want to set up a self-regulatory programs, here's what a self-regulatory program should contain.

COMMISSIONER SWINDLE: Can correlate?

MR. TORRES: Right. And so, it kind of gets the government involved but at the same --

COMMISSIONER SWINDLE: Does not endorse it?

MR. TORRES: Doesn't endorse it but at least you've got a set of guidelines to go by.

COMMISSIONER SWINDLE: Just out of curiosity, as you were saying, because I thought I understood you were saying that it has to have government endorsement, which I obviously

misunderstood, but it caused me to think about two, I think fairly reputable, at least I'm fooled enough to go and look at them, one that I remember from as far back as my childhood, which is a very long time ago, and that was a Good Housekeeping Seal of approval and Consumer Reports. I mean, we never think about buying a car without looking at Consumer Reports. Do you consider those rival? Is that something reputable? And we might as well get into lawsuits here, too. But the comment that only --

MR. TORRES: The answer to question is yes. Absolutely.

COMMISSIONER SWINDLE: The comment that only big business, to go back to that for just a second. The comment, and I think you were referring mostly to the image of brands being big business like Coca-Cola and General Electric, but I think it came out that only reputable companies would be big companies and I know an awful lot of small companies that are incredibly reputable and would take offense to that.

MR. TORRES: I certain didn't mean to offend small companies.

COMMISSIONER SWINDLE: No, you didn't.

You didn't make the statement.

MR. TORRES: And absolutely. I think if you are a reputable organization that has built up reputation for solid reporting on products and things over a period of time, you build up consumer confidence and you build up trust and I think that's what it's going to take and that's what the seal programs can provide if done in the right way and that could be a direction to head into.

MR. MEDINE: I suppose as a matter of full disclosure, we should have indicated that Frank's organization publishes Consumer Reports. Farhad Mohit?

MR. MOHIT: Yes.

MR. MEDINE: And you're with BizRate?

MR. MOHIT: BizRate. Actually, I'm going to thank the FTC for having us in here. I'm one of the entrepreneurs that you referred to coming in and doing something. I'll preface this by saying that BizRate has no brother and sister organizations or affiliations or anything like that. My company has taken a look at this with a complete blank slate. As a company coming into the area with no agenda, no CPAs that need to use

my seal, any other thing. But also, so, it's a blank slate. I start from zero but it also leaves me completely open to try anything that works.

Now, here is my position on this program.

What is a theoretical best way to judge a reliability of a vendor, a merchant regardless of size? I would say that if you could ask every single one of their customers on a continuous basis to provide you with feedback about the transaction, both at the point of sale as they're making the transaction and after the delivery of goods when the goods have been promised and have been delivered and take that information and present it to consumers.

Again, the Internet here is about information and connectivity. That's what we're revolutionizing here with the Internet. It's a medium. E-mail is a perfect example of that. Bringing information and connecting people together. So, if you connect people with that information, the information of every other consumers' reliability rating, individual reliability rating of vendors that they have transacted with, that is a theoretical best you

could do, is judge the reliability of this vendor.

That's what we put in place with BizRate.

We sit on the receipt page of 1,100 vendors right now. The cost to the vendors is zero. The cost to the consumers is zero. Continuously on every transaction, taking information about the transaction at the point of sale, following up after delivery of goods and presenting that information, the ratings on dimensions such as price, customer support, their privacy issues, from the mouths of the consumers themselves, people that are dealing with these people on a Web site that is freely available to consumers themselves.

Now, I totally agree with your contention that these are not valid programs unless consumers know about them and I think that's the biggest hurdle a company like mine has is to let people know that this is a working Web site. It works. There's thousands of vendors, over a thousand vendors on it, a lot of leading sites onboard already. And if you look at the information that we provide and we update it on a weekly basis, continuous, it's free to the

vendors, there's just no way to beat it.

Certification systems are good, but once every three months an audit by a CPA -- by the way, I don't think all CPAs are created equal. My venture backers would not accept my personal CPA's audit of my accounting firm. They wanted Ernst & Young to do the audit.

And so, a seal program by a CPA is not the same as the a seal program by Ernst & Young. And once every six months is not enough. And knowing the name of the CEO of the company as the information that you provide to me as a consumer, that's not enough either. I want to know who's reliable and who's not and I want to know who is relying for this transaction, not who was reliable six months ago. We're in a medium that moves very quickly.

Your other point was about international enforcement. Again, the consumers are everywhere. Wherever there's a consumer making a transaction with the vendor we are there. We are able to collect the information for free and present it to consumers for free. Our business model is around aggregating research and presenting e-commerce research to third parties,

whomever is interested, consultancies and ad agencies, etc., so we don't have to charge the vendors anything to be part of the program.

MR. MEDINE: Are any of your vendors international Web sites?

MR. MOHIT: Yes, they are and increasingly we are. There are lots of large vendors coming on board that are multinationals and increasing. That's going to be happening. But there's no limitation for us other than the fact that a lot commerce is not yet taking place overseas. But to put the seal up on the site is a two-minute thing and it begins to collect information. As enough surveys are collected, they're presented on the Web site. Simple as that. Consumers rating vendors continuously. Doesn't beat, doesn't get --

MR. MEDINE: Thank you. I see number 5 is up. If you can keep comments brief, we have lots of people to participate. We have Malla, Everett, Eric and then Roger.

MS. POLLACK: I just wanted to raise a point of clarification about how easy it is for even the best informed people to be ill-informed.

I was under the impression that the Good

Housekeeping Seal of Approval went poof because it was a scam.

COMMISSIONER SWINDLE: I didn't know.

MS. POLLACK: You see, the Commissioner didn't know. If you had --

COMMISSIONER SWINDLE: It's not a good deal? It was not a good deal anymore?

MS. POLLACK: It was not a good deal. I mean, I do not want to be sued for libel. I am saying that my memory.

COMMISSIONER SWINDLE: Remember, Malla, I asked the question. I said --

MS. POLLACK: Yes.

COMMISSIONER SWINDLE: Is it not good a question? Nobody responded.

MS. POLLACK: You see, the question is, from the consumer's point of view, can I rely on this particular transaction? Now, BizRate?

MR. TORRES: Right.

MS. POLLACK: Sounds like a wonderful program. I don't understand how you manage to stay solvent if nobody's paying you. But it sounds like a wonderful idea.

MR. TORRES: We sell research. All the vendors themselves are also interested in

learning how does Nielsen or IRI --

MS. POLLACK: Wonderful. I wish somebody would pay me to do research. I do what I want to do. And certainly, the reason I want to get the government involved is not because I want the government to regulate anything, but because consumers are proactive in a very odd way in the business world. To a large extent, they can only accept or reject the choices that are out there. Not completely. Certainly, it's a little bit better on the Internet but they can only accept or reject.

The way to take a survey of whether consumers really want this kind of program is to have somebody put it up. Who better who doesn't have to do any more advertising to show how reliable they are that we use but our own government?

MR. MEDINE: Thank you. Everett.

MR. JOHNSON: Yes. Everett Johnson from Webtrust. I just wanted to try and address my neighbor's points. First off, the point that you raised about being able to handle that internationally, I think that's one of the benefits and certainly where we're trying to go

with Webtrust through the alternative dispute resolution process. We will have a common set of criteria that will have to be followed for this process no matter where it happens in the world so you will know as a consumer what to expect if you do want to get your \$50 back.

In terms of having a privacy policy that says we have no policy, the Webtrust program actually spells out in quite a bit of detail what has to be included in those policies in order to qualify. Similarly, but different on the business practices side, we have said these are the issues you need to address but if you ship, you say we ship within one year, we're not trying to judge whether that's good or bad. We'll let the consumer make that decision. But at least the consumer knows what to expect and we do audit to make sure that what they've got in the way of policies, they are following during that each three-month period.

MR. MEDINE: Thanks. I want to call on the one, Eric Wenger, who is a regular visitor at FTC workshops. He's with the New York Attorney General's Office.

MR. WENGER: As you know, I have to start

off with my reverse Miranda warnings, which is nothing I say can be used against me in a court of law. The views I express are not necessarily reflective of those of the Attorney General or even myself and the telecast is intended for the private use of this audience. Any rebroadcast or retransmission without the consent of the Commissioner of Major League Baseball is prohibited. Okay.

MR. MEDINE: We'll all adopt those documents.

MR. WENGER: I think that we feel very strongly that self-regulation is very important and that its role is to supplement and not supplant consumer protections. Programs such as the BBB Online and the National Advertising Review Programs that the BBB runs and other programs as well for self-regulation serve an important purpose in that they help businesses to make sure that they're abiding by the law and self-regulation, without a baseline of legal protections, will be rendered meaningless, I'm afraid. Because what happens is self-regulation alone generally lacks enforcement.

If somebody chooses not to participate in

the self-regulatory program, they may experience some sort of peer pressure or market pressure but there's no legal penalty and that's a critical difference between violating a self-regulation and a law. We may choose or not choose to prosecute based on the resources that are available to us, but the fact is that if somebody violates a law, there is some recourse that can be taken against them by the relevant authorities.

The big change that the Internet brings to the idea of self-regulation is that the barriers to entry are so low that small actors, garage.com type businesses who may not care enough about the reputations but care about self-regulation may not be compelled to follow along with self-regulation programs.

I think the privacy policies is an excellent example of this. The DMA earlier this year announced that any DMA member that didn't post a privacy policy by some time this summer was going to be ejected from the DMA, and that is an admirable stance that they've taken. It shows also the effect of marketing forces and, in addition, it creates an enforceable standard

because of the exception laws that we have. If somebody posts a privacy policy and then they don't abide by it, then we have the ability to go after that company for violating a stance that they've taken in public. And if that did not exist, there's nothing else that requires right now until COPA, the Children's Online Privacy Act, there will be no obligation for the company to have a privacy policy. So, in that instance, failing to post a privacy policy would have eliminated the possibility of law enforcement and self-regulation alone, without, you know, might not reach small companies that don't really care about joining the DMA.

The Children's Online Privacy Protection Act sets a really good example of how you mix together self-regulation and legal standards. There's a baseline standard of consumer protection at the national level that Congress has decided on. The law will be fleshed out by the FTC through its rule-making process and then industry has the ability to propose alternative self-regulatory safe harbors which can be reviewed and approved by the FTC. And then once those things are in place, the oversight and

enforcement of both self-regulation programs and the law will be concurrently handled by the FTC and the State Attorneys General.

So, it really does bring together the idea that we'll have some baseline protections that are applicable to everybody and then if industry can come up with flexible ways that, you know, that are maybe more sensible from a market perspective than to accomplish the same goals, they can convince FTC that that's the case and they can implement those, those flexible self-regulations, and in either case, we can go in and enforce any violations. And I think that's really an excellent model that hopefully will be followed in the future.

MR. MEDINE: Thank you. Roger Cochetti from IBM.

MR. COCHETTI: Thank you, David. First, I'd like to begin by saying that we in IBM think that there's an enormous value to seal granting organizations in the Internet and I'm happy to say that we support several such organizations that work in different sectors and I happen to have had some personal experience since I sit on the boards of two different, what I think are

fairly successful Internet-based sea-granting organizations. And I want to share a little bit of my experience in them in the generic sense that is applicable to your question.

I think the first things you'd have to say about seal-granting organizations is that part of their value is due to the fact that they can be flexible and they can evolve and they can be transnational in the way that they do things. Because they are private sector based, they are not bound by the politics or regulations of the single country, but they look at an issue from the perspective of consumers or users in multiple countries. Also, because they are non-governmental, they can be updated and modified as the Internet changes and certainly in the cases of both organizations I'm involved, with the standards for what constitutes a seal have been improved as time has gone on.

And that point, I think, leads me to the second comment I wanted to make and that is the more time you spend in seal-granting organizations, the more you realize that they are compelled over time to be more specific about what the substance of the seal really conveys and

if for no other reason than because disputes arise and answers have to be given to questions in order to move one. There's a requirement where as you may begin with something which is quite general, there's a requirement to move towards specificity as you go forward.

Having said that, I want to raise a flag of caution, not concern, but caution and I think our friends in both Better Business Bureau Online and Webtrust, two programs, by the way, which we support completely and hope to work with both of them to their successful completion, I think the people from both organizations have heard of concern which is that achieving a seal program that is genuinely multinational in character is not a lam. It takes some time and it takes a lot of diligence.

I'll cite two examples. We in IBM are in the process of completing a six-month project in Holland where we and other companies and consumer groups have been sort of working on what would be considered a consumer protection seal program for Dutch culture, Dutch economy, Dutch society, Dutch legal system. It is, of course, a similar law system which is every bit as Internetcentric

I think as the United States is and certainly every bit as consumer-oriented as the United States is, but it's sort of remarkable when you get into discussions of any detail that people have completely different ideas as to what a term means, as to what a phrase means. They have completely different ideas as to what would be considered a sort of baseline of good conduct. These differences can be bridged but they can't be bridged in a matter of minutes and they can't be bridged sort of instantaneously.

So, I would say that I think the goal of seal, private sector seal-based programs is an important one and one that I think can and will be achieved. It won't happen overnight. If it's going to be effective, it will require some degree of specificity. If it's going to incorporate some degree of specificity, it's going to have to bridge different legal systems and different cultures.

The last point I'd make is to comment on the prospect that the United States government might be able to manage such a seal program. And here, I speak as someone who used to work for the United States government for a period of time and

I can think of few institutions less qualified to manage a program of this sort than the United States government and, in part, because I can only imagine the interagency committee that would have the responsibility for crafting the terms and conditions, and I can only imagine the flock of lobbyists who would be surrounding this committee or the members of Congress and their staff, would be telling the committee what they can do and can't do, and I can only imagine the camel with wings that would come out at the end of it and I can only imagine what other governments would think about whatever the U.S. Government seal wound up standing for.

So, I think that there are many things that governments can do well but Internet seal programs with any degree of specificity is a reach for the United States government.

MR. MEDINE: Thank you and in speaking solely on my own behalf, we appreciate private sector initiatives in this area. But let me call on a couple more different people and then I'd like to move on to dispute resolution mechanisms.

Becky Burr has had her flag up.

MS. BURR: Actually, I was going to

suggest that if anybody in the government has to do it, it must be the Federal Trade Commission and maybe my comment is going to move us on to the dispute resolution thing if my pager stops beeping.

I just want to address Eric's question or Eric's point first. I think I've heard from a number of people that there's this notion that we're going to abolish consumer protection law in favor of self-regulation for consumer protection and I think that that's sort of not even on the table and never was on the table and nobody that I know at the federal level certainly was advocating that. In the United States, we have some of the most robust consumer protection laws in the world and I think we're pretty committed to them and keeping them.

What the private sector initiatives, like seal programs, like dispute resolution can do, however, is help us enforce those, make those consumer protection laws meaningful in an environment that's changing very quickly. And so, what I would say to your example of the Children's Online Privacy Protection Act is that, you know, if there are places with respect to

privacy that we did not have established laws, but there are very few places with respect to consumer protection that at the federal level, in the state of New York certainly, they're not very robust, very well-developed laws. So, let's use these private sector initiatives to help us not have to go out and pass a whole bunch of new laws that are Internet-specific, which would be essentially very, at least put significant drag on the system here in terms of development of e-commerce.

Roger made the point that seal programs, at least in an international level, will take a long time. People have heard me say before that if we did anything, got anything really wrong in terms of the framework paper, it was understanding how complicated the process of building these private sector self-regulatory regimes and understanding clearly how long it takes to do that. So, I just want to say even domestically, you know, it takes a while. Steve Cole can tell you how much work and effort and money has gone into developing it. And so, we ought to be patient with respect to the development of some of these seal programs.

But it does seem to me that there is something that is sort of a more readily available to us and that is really easy to use, not kind of law constrained and bound, consumer dispute resolution facilitation. So, yes, we have to get to the seal programs that, you know, and that's going to be a very interesting journey, but let's look quickly at what we can do in terms of facilitating disputes on a global basis online.

MR. MEDINE: Thank you for moving in that question. Ethan Katsh is a professor at the University of Massachusetts at Amherst.

MR. KATSH: Thanks. I'm more involved in dispute resolution than dispute prevention but I'd like to add a comment to the previous conversation. It seems to me that perhaps even self-regulation is the wrong way to look at this.

Self-regulation doesn't involve regulations or rules. And I'm not sure that it's the, our focus of the attention should be necessarily on the self part, those parties who are offering items for sale. It seems to me, though, what you have both with dispute prevention and dispute resolution are entrepreneurial opportunities.

BizRate is an entrepreneurial opportunity. Dispute prevention, in this environment, can be a service business. Companies should wish to pay for mechanisms for preventing disputes because clearly, a dollar spent on dispute prevention is worth more than a dollar spent on dispute resolution and I say that, even though I would like to get your dollars for dispute resolution.

Well, let me, I forgotten exactly what I was going to add to that but let me talk a minute about dispute resolution online. I've run an organization called the Online Ombud's Office for the last two years. In March, we were the organization eBay asked to do a pilot project to handle mediation for disputes arising out of online activities there.

EBay, I've said, is a business model from heaven and a dispute model from hell but they've done extraordinarily well at dispute prevention. As you saw yesterday, they've got 2.2 million items for sale at any one time. They've got hundreds of thousands of transactions. They've got transactions among people who don't know each other and they have put in place feedback mechanisms and other mechanisms for building

trust, which is what all this is about. So, we received in a two-week period about 200 disputes which we mediated, I think, reasonably successfully. It was partly a learning experience for us. But it certainly is possible to do that and it's possible to have a service business that does this at fairly low cost.

What I think we are headed for are, again, business opportunities. The best dispute prevention mechanism on eBay is really escrow service. Now, if consumers, I shudder to say this, but if consumers were smarter, there wouldn't be even 200 disputes on eBay. If they use credit cards, there wouldn't have been 200 disputes. If they had verified identities, there wouldn't have been 200 disputes. But given the growth, consumers are not going to be models of wisdom in a perfect marketplace, so there will inevitably be disputes.

I think you can handle these things but I don't think the, I'm not sure why the industry or commercial entity has to be the one doing it. I would think there are all kinds of opportunities here for outsourcing and contracting out.

COMMISSIONER SWINDLE: May I ask you a

question? You said you resolved about 200 cases?

MR. KATSH: Right.

COMMISSIONER SWINDLE: We were talking earlier about reputable businesses, non-reputable businesses, big versus little.

MR. KATSH: Yes.

COMMISSIONER SWINDLE: Of the 200 you dealt with, could you share a little bit of the nature of the companies and the willingness to reconcile a dispute?

MR. KATSH: Yes. That's an interesting question. On eBay, one doesn't know whether one is dealing with an individual or a small business. Conceivably, there are large businesses, but we didn't encounter any of them. I mean, my view of eBay is that it's a mall with low overhead. There are a lot of people there, small businesses who have discovered that they can sell lots of things but you don't know they're a small business when you make a bid for something. So, there's certainly not large businesses but I think you've got to take into account that there are changing business models here. I mean, eBay is a place where there's a

lack of a fixed price. I mean, all of this contributes to what I said was a dispute model from hell but relatively few disputes. We didn't handle fraud cases. These were largely misunderstandings, problems, things that go wrong between good faith parties.

One interesting thing we found but your last question was the willingness of the parties to cooperate with us. When we get people who are involved in a dispute who simply find us and ask us to resolve, to mediate their dispute, we have a hard time persuading the other side to participate with us. Even though it's mediation, even though it's voluntary, there's a great reluctance of one side or another to participate.

With the eBay parties, the rate of participation was above 80 percent. I consider that very high, partly because of reputation.

COMMISSIONER SWINDLE: This seller had a willingness?

MR. KATSH: The seller had a willingness but the seller was operating in the shadow of this environment. The seller was not simply owner of a Web, owner of the Mom and Pop Web site

on his or her own. The seller was operating within the eBay environment and that, I think, shaped the willingness of these people to participate. Because everybody on eBay is operating with an eye towards their reputation.

COMMISSIONER SWINDLE: Illustrate the point that Malla said -- Molly. I see it in an outline as Maria and Malla, but it's Malla. To show you how knowledgeable people can sometimes not know the truth or perhaps even react properly. I had occasion to meet Rich Caplis behind eBay about a year ago and I never heard of eBay and he said this is a company to watch and they have about 40,000 products online at any one time. I think you just said two million?

MR. KATSH: Yes.

COMMISSIONER SWINDLE: And I didn't heed his advice, for God's sake.

MR. MEDINE: Ethan, you said there might be fewer disputes if people had used credit cards, so I think that's a nice transition to -- Sally Cowan from American Express, unfortunately, was unable to be here due to illness, but Russ Schrader from Visa is here and maybe you can talk briefly about an existing free international

system of resolving disputes that exist today.

MR. SCHRADER: Sure. Thanks. We've talked about resolving disputes by regulation or by small claims court or other judicial manners. What Visa has done is resolved it by contract. Visa doesn't issue Visa cards. Visa is a consortium and what we've done is we have 21,000 financial institutions worldwide. We're bound by contracts, 6,000 banks and other financial institutions in the U.S. Bound by contract. On the issuing side, they have their own contracts. There are 800 million Visa cards, Plus cards, Interlink, Visa checks, Visa cash, Visa credit cards out there, each held by an institution.

On the merchant bank side, we've got contracts at 16 million worldwide locations. So, that's a hell of a lot of contracts and a hell of a lot of cards and it seems to have worked pretty well so far.

What Visa has done is to try to build confidence. The one theme that keeps coming out in the last two days of these hearings is the importance of consumer trust and of consumer confidence and of a consumer predictability and reliability of what they've done. And there's

one thing that the Visa brand has sort of gotten out through its ads, and I guess the numbers already speak, that it's pretty much everywhere you want to be. But the basic rule is, and people have said is, when in doubt, put it on your card. Consumer Reports travel letter, when they write about dealing with startup airlines or something like, they published that advice: When in doubt, put it on your card. If you don't get it, you don't pay. If it's not what you ordered, you don't pay. That's a pretty simple message that has allowed the kind of growth of Visa and allowed payments through there.

Now, how does that work? It's basically the chargeback mechanism is a contract between the issuing bank and the merchant bank and basically, there's a certain number of days when you get the transaction from the merchant to put it through and settle.

And there's different kinds of chargebacks. There's a point-of-sale processing, it's the wrong account number. It wasn't signed.

There's other things like a host transaction processing. It wasn't presented on time. There's no authorization. A lot of the technical

settlement things. Whenever you're settling these kind of transaction volume, \$1.4 trillion worth of volume last year. At the same time, there are consumer protections as well. Reg. Z certainly is part of it. The claims and defenses is there. That's a chargeback; we settled that.

But at the same time, Visa as a brand has gone further with people. There's a thing for goods not received. It's the wrong good that you've gotten. It's a failure to deliver. There are other things that a cardholder raises with the issuing bank and the issuing bank will then push it through the dispute resolution of the chargeback process. It will then be passed through with the merchant. It will be presented, talked about, gone back with the merchant, with the merchant bank, but at the end of the day, there is a settlement but the loss to the consumer is zero.

We have been able to go forward and expand these things beyond the statutory framework because the fraud that we've been experiencing has been going down. That's been a part because of a lot of fraud detection things that we've done. In part because of some of the

good work we've been doing with the FTC and catching some of these unscrupulous merchants and we worked very closely with some of the false and deceptive practices and fraud and we appreciate your help and look forward to working for closely together.

But all of these contracts in place have allowed us to put together the kind of basic rule and the kind of protection that seems pretty much attuned to the Internet. Taking a Visa card seems to give people an inherent sense of comfort that if they don't get it, they don't have to pay and if it's a bottle of olive peelings instead of a bottle of Tuscan olive oil, call up the issuer, say this isn't what I ordered.

We heard yesterday in the University of Utah study, ordered a bottom of champagne beginning in December. Still waiting for it. Got it in February. Now, God love them. If I don't get it in time for Christmas, I would have been on the phone. I would have cancelled that thing. You know. But in an academic world, I guess you have to study those things out. But in the real world, we're on top of this stuff and it seems to be work out pretty well.

MR. MEDINE: Thank you very much.

Carolyn Crawford is with the European Advertising Standards Alliance and has been waiting patiently for a time. Thank you.

MS. CRAWFORD: Thank you very much. I just wanted to pick up on a couple of points that I hope might clarify what we mean by self-regulation actually in Europe. Mr. Torres said that few minutes ago that a seal is only as good as the standards that are set. I think there are two crucial elements that come into play with self-regulation. One is that those standards only work effectively if they work within a framework of law. Self-regulation doesn't attempt to replace legislation but it aims to complement existing framework of legislation.

Secondly, it's important that the self-regulatory rules that are set up by the industry are subject to independent scrutiny because otherwise, they won't have any consumer trust and confident. Certainly in the UK when the advertising industry set up the self-regulatory system 37 years ago, it quickly realized that that meant nothing for consumers unless an

independent Advertising Standards Authority was supervising those rules in the public interest.

Secondly, I just wanted to pick up on something that one of my colleagues said earlier about self-regulation and perhaps the implication about what he said about self-regulation not that having any teeth. That is quite wrong. Self-regulation does not mean that there is no sanctions to back up the rules that are made by the self-regulatory bodies.

Now, certainly, our experience with the Internet in resolving complaints over the Internet which we have been doing is that the Internet itself lends us a huge sanction which is adverse publicity. Fortunately, the companies that we've asked to change advertisements on the Internet have most often actually complied with the requests that we've made of them. But where they haven't been convinced entirely about the benefits of self-regulation, as soon as we posted our ruling on our Web site, they have very quickly come into line with the rules that we've made.

Fifteen percent of people accessing the

ASA's Web site every day are doing so directly from search engines into individual rules and we've been threatened with legal action by companies who take great exception to that because those consumers are deciding not to transact with that company because they have upheld complaints against them. So, it's not true to say that self-regulation doesn't have significant powers where it needs to, but also that we work very closely with the law enforcement agencies in the respective national countries to make sure that we are blazing very closely because self-regulation is just that. It does really rely on consensus and persuasion in order to be effective.

I just wanted to say a little bit about dispute resolution and complaints handling because within the European Advertising Standards Alliance, we have developed a cross-borders complaint procedure which has actually been in place since 1992, but earlier this year we developed it for Internet for resolving complaints coming from one country about advertisements that originated in another and again, that procedure is now starting to work

very well.

Part of that, though, is it comes back to the point about seals, and that is that we're very keen to encourage verification systems because if you think of the Internet a little bit like a dark alleyway, what we want to create for consumers is areas of light, safe trading areas where they can transact with a degree of safety and security, but those safe harbors need to be verifiable so those consumers are sure that who they think they're trading with are exactly who they say they are. So, we're very keen to develop verification systems. And certainly, the UK, Germany, Spain and many other countries within the European Advertising Standards Alliance are developing those schemes for the Internet.

I also just wanted to finally say, actually rather thanks to the Federal Trade Commission because the invitation to join the panel gave me an opportunity to talk much more directly with our American counterparts. We've had some contact for many years with the Direct Marketing Association and also with the Better Business Bureau and coming here has enabled me to

talk to directly to those people. It's one of the glitches, I'm afraid, of the new world that we live in that we are more often than not talking about e-mail and don't actually meet face-to-face, so it's very welcome that I've been able to come over here and meet those people and talk to them about what we're doing within the Alliance to resolve complaints and give consumers trust and confidence in the advertising that they see online.

MR. MEDINE: Thank you. We appreciate your joining us today. With the indulgence of people's whose flags are up, I'd like to at least call on a few people who haven't had a chance to speak yet. Llewelyn Gibbons is an assistant professor at the University of Toledo, College of Law. On the theme of dispute resolution, it would be helpful to hear your views on what we heard on mediation about what role arbitration might play in resolving consumer disputes internationally.

MR. GIBBONS: Thank you. First of all, I'd like arbitration. The problem I have is historically, it's been talked about in the Internet commerce context, particularly in the

consumer context as being the savior. The question is, arbitration is only as good as arbitrarial process and the arbitrator him or herself and I've sort of gotten recently involved with this issue about a year ago.

There's a case called Hilby-Gateway which required a consumer arbitration be done under the rules of international court -- I'm sorry, International Chamber of Commerce, filings to be done in Paris, a \$4,000 filing fee minimum plus the arbitrarial costs. What does the consumer win if he or she wins? A \$4,000 computer replaced. I mean, obviously, it's a procedure, whether intended or not to frustrate the rights of the consumers. That same consumer could went to a court in Illinois, my guess is pay a small claims filing fee of \$5 or \$10 and gotten a fast, efficient resolution.

That's one of the things I would think when we talk about arbitration, we say what is the next step in the arbitrarial process? In the arbitration in the cyberspace world, you can do anything you want to but when you take that award and you try to reduce it to a state court judgment to get a levy on assets of a debtor

somewhere in the world, at that point, courts look at these arbitrarial awards very skeptically. Traditionally, commercial arbitration, courts give a great deal of deference to arbitrarial awards, absence fraud or manifest disregard of the law.

In the case where the consumer is being disadvantaged or an arbitrarial, again, as part of a long (inaudible) has said yes, maybe the court should give some shifting burden of proof. For example, if some self-regulatory organization, Better Business Bureau, says all those rules were complied with the arbitrarial award, a great deal of deference, clearly erroneous standard review. On the other hand, if it's just a pay \$4,000 or you lose, maybe the court should refuse to enforce those kinds of arbitration. And basically, I want to say this. Let's look at the arbitration process itself. Thank you.

MR. MEDINE: Thank you. Christine Varney is a former commissioner and currently a partner at Hogan & Hartson. She's of the advantage of being on both sides of the consumer business issue and it would be helpful to get your

perspectives on the alternatives to the legalistic discussion we heard earlier this morning.

MS. VARNEY: Unfortunately, my views never changed. They're fairly consistent and what strikes me about this conversation, David, is it's very similar to the conversation that you and I and Becky started having back in 1994 when we first started talking about privacy. And what's really apparent to me is that we're basically at the same place now on consumer protection. And I want to echo the comments that a lot of people have made. It is not about regulation or self-regulation. That is just not the issue and for those that want to pursue that, it's a red herring and it's not worthwhile.

I think Eric, in large part, put his finger on it, if I can sort of restate what I heard you say. And that is, where's existing law adequate and where is it not? We have a robust set of consumer protection laws worldwide. Where are they adequate? Where aren't they? And then an additional parallel question is where does it work and where doesn't it? Which gets you into the very difficult issues that I know you've been

talking about already for a day and a half on conflict of law, choice of law, something David Johnson has been convening dialogues about for a long time.

I think that at this point what the FTC ought to realize is that what they're doing is absolutely the right thing and doing, I think, in large part, what they did on privacy- start the dialogue. What ought industry be doing? Should we be getting together on a national basis or an international basis and figuring out what are the best line practices with reference to existing law with reference to consumer expectations? Then where do we go? Do we continue to promote it inside the industry? Do we look for partnerships within the government? How do we grow this? Is consumer protection in cyberspace the same thing? What's the difference between hard goods and soft goods? What are consumer's expectations? How do we develop a robust system?

Maybe the seal programs that I am familiar with as being in place for privacy and legitimately so grow and encompass more than privacy. After all, privacy is merely a subset of consumer protection on some level.

So, my view is caution. Let's take the best practices that exist. Let's build on them. Let's think about how we work at this internationally because it's actually Malla's point, is the one at the end of the day that we're going to have to answer. How does the consumer in one jurisdiction a half a world away from the seller in another jurisdiction get satisfaction? And I don't know the answer to that and it's too early to try to figure out the answer to that.

And oh, by the way, it's not broken yet. The vast majority the last time I looked at the statistics, the vast majority of e-commerce was within national borders and the vast majority of e-commerce overall is U.S. So, we are a good place to start. We are a good place to look and I think that the gentleman from Visa answered your question about olive oil. Don't buy it if they don't take Visa.

MS. POLLACK: The gentleman from Visa slightly, I think, implied things that are not quite accurate about the Visa process from consumer's point of view. Now, I'm sure that the Master Charge and Visa chargeback system works

wonderfully on many occasions. I'm under the impression that the American Express system, which is different, is even more pro-consumer and I was very disappointed that the American Express representative wasn't here with us. I don't understand the details but I did speak on the phone to Mr. Peterson, who wrote these actual comments to the FTC, to clarify things that weren't said quite clearly in their comment. And I was advised that, one, I could not get the statistics about what consumers thought about the chargeback process because Visa didn't keep them; that the chargeback is up to the issuing bank, not Visa, which is quite different than American Express; that the extent to which any Visa issuing bank would actually bend over backwards to chargeback when the consumer is unsatisfied and the merchant bank is unhelpful is entirely up to the individual bank, not Visa; and that the issuing bank's relationship with its consumer customer is up to that bank and not up to Visa.

Now, I have no statistics showing that consumers are unsatisfied. I have anecdotal evidence of dissatisfaction with Visa and Master Charge. I have anecdotal evidence that consumers

love Visa and Master Charge. From the commercials that have been shown at least on my local television cable, I would think that I should switch to American Express because they promise they'll take it back. So, what I need to say is as with the Good Housekeeping Seal of Approval, consumers quite often don't quite know what they know until they hit the odd situation and then they wish that they had thought about it earlier.

MR. SCHRADER: I assume I get a moment or two.

MR. MEDINE: For rebuttal. Only fair.

MR. SCHRADER: Thank you. The fundamental difference between Visa and American Express is that American Express is what we call a closed system. It's this monolithic issuer and it's this monolithic merchant bank. It does everything itself. It is the only party involved.

As I explained perhaps not clearly, Visa is a consortium of 21,000 banks worldwide, all dealing by contract. So, Visa itself, think of it as the rulemaking body. Think of it as the railroad running the switch. But each of the

21,000 or 6,000 banks in the U.S. Issues a wide variety of Visa cards. Do you get the same protection with an American Express Platinum as American Express Gold, as American Express Green, as an Optima, whatever colors they come in? Hell, I don't know. But at the same time, I do know that as a consumer, you look at the different options, but Visa cards, there's a trade-off. Do you get a Gold a Platinum, a Classic? Do you get airline miles or whatever? But what is consistent throughout the Visa system is the chargeback right and it is, as I explained, between the issuing bank and the merchant bank. It is not Visa and "the railroad." It is the Visa system.

There is intense competition for your business. Open your mailbox. If you don't get satisfaction from your Visa card, you have 20 other people who want your business and they will act on your behalf because otherwise, they'd be out of business. And, you know, I think the numbers I've shown has shown how the Visa system is satisfying a great deal of people. In fact, our last survey, and I'll promise, David, this is the my last bit of a commercial, is that 63

percent of the people have rated Visa as the best card. Is it ever going to be a hundred percent of the people? No. Because there are people who have American Express cards. We're working on --

MR. MEDINE: Thank you.

MR. TORRES: David, can I make one quick comment? Just one quick one?

MR. MEDINE: Very quick.

MR. TORRES: Responding to something that both Becky and Christine said and that is I completely agree that they're, self-regulation and regulation is kind of a red herring fight, but there seems to be this kind of growing consensus that consumer protection somehow is going to stop the viability and the future growth of e-commerce and it's kind of this underlying thing that I've heard in a couple of these panels and I know, you know, it hasn't been actually stated that way, but it's kind of out there and I don't think that that's it at all. The consumer protections will actually, to me, help e-commerce grow and move ahead because that will give consumers greater confidence in the system.

MR. MEDINE: Thank you. If people want to skip their break and go for four more minutes,

I'll have to continue.

MS. VARNEY: Okay. Well, Becky and I will both respond to that and say that --

MS. BURR: She can't speak for me.

MS. VARNEY: I can't speak for her. I'm going to try to. I think the thing that I would be cautious of is an assumption that existing consumer protection laws either don't apply in cyberspace or are inadequate. I don't have either one of those assumptions. I believe that every single consumer protection law and enforcement action on the books absolutely applies in cyberspace.

The question of whether additional law is necessary is in my mind what's open. Now, if you take the advertising workshop that we just did on Internet advertising not too long ago, a lot of the rules about advertising is talking about things like type point and relationship to the good advertise. Well, guess what? You can't do that on the Internet because the consumer controls the configuration of what they see on their monitor. So, yeah, that doesn't mean it doesn't apply. I look more towards what's the principle? If you're buying fake pearls, the

principle is that right where it says pearl, it has to say cultivated. Okay. Let's take that principle and let's apply it in cyberspace. Let's not try and get the typeface side in relation to the picture because it doesn't work on the Net. So, my assumption is all laws apply.

My question is, are they adequate? Becky?

MS. BURR: She actually did a pretty good job and would add that my comment at least was certainly consumer protection is critical for e-commerce to take off, but unnecessarily or overly burdensome new legislation will create a drag on the system. I don't think there's any doubt about it. But it's not the consumer protection part I was objecting to.

MR. MEDINE: We'll hear from Steve and Eric and until we start getting the next group in. They're here.

MR. COLE: I'll be quick, but first let me advise Malla that we run with the cooperation of the advertising industry really the most respected self-regulation program in this country, so if you have any questions about any advertisers advertising, just get in touch with your New York office and we'll see what happens

with that and Visa and American Express are terrific supporters of that program.

More to the point. David, you separated this discussion into self-regulation and ADR and you did it for convenience reasons, but in my mind, they may be very much the same subject at the end. We have some experience in last year alone, we handled 50,000 online complaints. Now, they weren't all about online transactions, but the Internet provided the vehicle for complaints to come in. For 30 years with the advertising industry, we've been administering a self-regulation, dispute resolution program for advertising.

Where I come out of this is related to the comments that Ethan and Eric made from different directions. Ethan said that the willingness to cooperate in the eBay situation depended on the environment and reputation was the issue that was mentioned there. And Eric said he thought penalties and government enforcement sometimes is necessary because the marketplace and peer pressure isn't enough.

The experience I draw from the dispute resolution we've done, particularly in

advertising and elsewhere, is that if dispute resolution is in a vacuum and it's not tied to a commitment self-regulation, then you're going to get exactly the same enforcement problems that you had this morning, an hour-and-a-half or two-hour discussion on. The reason it works in the European advertising situation and it works in the American advertising situation is the advertising industry has made a commitment to comply. So, 98 to 99 percent of the advertisers voluntarily comply with decisions. Those few who don't do respond to the marketplace but want it when we publish decisions or we send it to the FTC, but even if we just publish non-compliance, why do they that? It's because it's a part of a branded self-regulation program and the public knows that it's a bad thing to be labeled as a non-complier.

So, I guess the bottom line, I'm saying, is we would go down a mistaken path if we ADR systems that are substitutes for the court and we separate that from real commitments to self-regulation.

MR. MEDINE: Eric, we have crowds of people outside, so if you have a very brief final

comment.

MR. WENGER: Okay. Very brief. I'm going to go with a lot of the things people said about my comments afterwards. The best self-regulation is built on a legal system with enforceable and remedies or the best self-regulation is built on a commitment to comply with the outcome of the self-regulatory mechanisms.

The situation I was talking about, and maybe it wasn't a good example with privacy, because if you didn't have self-regulation, then there weren't laws in place. And so, in that instance, then, you would have a situation where there was nothing that could reach those parties that weren't participating. But we do still see if you have small companies or small operators that they don't really care about their reputations, that self-regulation isn't necessarily as effective.

I think that the situation that we see that most in, it's not only auction, but it's the person-to-person sales where somebody doesn't necessarily have a reputation that they're worried about having sullied if they don't comply

with some sort of finding that's against them.

And I would leave with one last point about that, that it's absolutely true that credit cards are a great way to help solve that problem because of the dispute resolution mechanisms that are built into them. Unfortunately, many person-to-person sellers don't take credit cards because they're not sophisticated enough to have that, although that's being solved by many of the online broker systems now where they allow you to escrow payments or have them put through a credit card system that's run by the Web site itself. So, I'll leave it at that.

MR. MEDINE: On behalf of Commissioner Swindle, I thank you very much for a lively session.

(Whereupon, session four concluded.)

FEDERAL TRADE COMMISSION PUBLIC WORKSHOP
WASHINGTON, D.C.

**U.S. PERSPECTIVES ON CONSUMER PROTECTION
IN THE GLOBAL ELECTRONIC MARKETPLACE**

JURISDICTION AND CHOICE OF LAW
FOR CONSUMER PROTECTION
IN E-COMMERCE: INTERNATIONAL PERSPECTIVES

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P R O C E E D I N G S

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MR. STEVENSON: I think we're ready to begin our panel on the international perspectives on the jurisdiction and choice of law issues that we have been talking about today. This will be moderated by Commissioner Thompson.

One other announcement I wanted to make is just again a reminder that we continue to solicit comments on any of the subjects that we've covered here and the Commission has reopened, extended the comment period through July 1st and we would certainly welcome any thoughts you have based on the discussions that you've heard here or based on any surveys or data that you're aware that you think would shed light on of the issues that we've been talking about. With that, I'll turn it to Commissioner Thompson.

COMMISSIONER THOMPSON: Good afternoon. Glad to see everybody refreshed after their break. Either that or it's so hot outside that no one wants to leave. But it's good to see you nonetheless.

Today, we're going to have a very interesting panel talking about jurisdiction and

choice of law from an international perspective and I'm not going to go ahead and introduce everybody because I think from your agenda you can see who they are and they represent a lot of different viewpoints and I think there's some very interesting ones and I want to take as much time as possible to let them speak. But at the outset, I think we're honored to have Marina Manfredi, who is the Director of Consumer Policy for DG24 of the European Commission and I think she would like to say a few words about their overall broad approach to the issues dealing with consumer protection within the European community.

MS. MANFREDI: Thank you very much, Commissioner. Thank you. First of all, let me congratulate the Federal Trade Commission for the organization of this workshop and also for having the opportunity, for giving the opportunity to the European Commission, not only to submit a paper but also to participate in the debate. And may I also say how interesting we have been these two days about the quality of the debate, the substance of what had been discussed, but also I would say about the procedure which we have chose

and which is also an interesting model for us in Brussels.

Electronic commerce refers tremendous opportunities to business and consumers. We have heard that many times today and yesterday. In many respects, the realization of these benefits here in the United States is further advanced as it is in the European Union with the exception of Finland, as you have heard this morning, where we see in the member states substantial differences in consumer use in electronic commerce between the member states. We've seen the figures this morning that Mr. Serf has put out and the penetration of e-commerce in Europe is more or less half the penetration which it has in the United States.

Electronic commerce, for the first time in history, really opens the perspective for direct cross-border business to consumer and commercial transactions globally. Although technology allows them to do so, consumers do not yet fully embrace the global market so public authorities should contribute to building consumer confidence in the global and electronic marketplace.

I would like to have the opportunity to explain how the European community and especially the European Commission is trying to address the challenge created by electronic commerce for consumer policy. Perhaps if I could have the overhead. I only have one page.

First of all, I would like to say a few words about European Union's role in consumer protection. Secondly, I will address the European Commission's perspective of consumer protection and electronic commerce in general terms. And thirdly, I would like to address some specific questions such as the question of home country control and applicable laws.

So, first of all, allow me to say a few words about European Union's role in consumer protection. One of the reasons why e-commerce protection and consumer policy have been developed is the creation of the single European market. In a market where consumers and business are free to transact across border, coordination of consumer protection standards is required to eliminate unnecessary barriers as a result of differences in rules in the different member states. More over, for a better functioning of

cross-border transactions, it's important to encourage consumers to make cross-border purchases. However, they would only do so if they have sufficient confidence in the conditions of their participation.

So, one first principle I would like to stress is that the European community consumer protection standards not aim at regulating cross-border trade, but they are there to encourage. On the 1st May, it was an important date for the European Union because the new Amsterdam Treaty has come into force and with the Amsterdam Treaty, the European Union consumer policy has become at last a fully-fledged European integrated consumer policy.

So, now, it is since the 1st of May, European community policy in its own right. And the consumer protection requirements must be, according to new Amsterdam Treaty, must be integrated in the definition and the implementation of all activities and all community policies. It's the so-called integration clause, as we say. So, no matter what European policy in designing and implementing such policy, the high level of

consumer protection must be integrated into such policy.

Furthermore, consumer confidence in cross-border transaction is supported through the development of minimum standards, what we call the Minimum Clause at European level. So, according to the treaty, member states are able to maintain or introduce more stringent protective measures. Therefore, to assess fully European consumer legislation, you should not only look at the European level, but you should also look at the level in which member states have maintained or implemented European legislation.

The second point I wanted to treat was the European Commission perspective on consumer protection in electronic commerce. There is a policy initiated through the European Commission as set out for the first time in overall strategy in electronic commerce in '97 through a Commission communication called European Initiative in Electronic Commerce. The key concept of this communication is, in my view, the one to enable. Public authorities should do everything within their realm to enable

electronic commerce. From the point of view of consumer policy, we believe that electronic commerce is not a subject of its own right. In our view, it's just a new dimension which comes to bear on the range of policy questions. So, rather than trying to address specifically electronic commerce, the new electronic commerce dimension should be incorporated into all relevant policy and issues.

Nevertheless, one fundamental question needs still to be addressed and is that of consumer confidence. What we experience, especially in Europe, is that consumers do not yet make use of the possibility offered by the electronic environment or not enough or not fast enough. Therefore, public authorities should not only work to enable the supply side by eliminating the legal and physical obstacles and contributing to technological development, we should also look at the demand side of the market and try to enable demand.

Our policy geared for, intended for enabling demand is based on a series of considerations which you will find listed there. Consumers in the online environment should not be

less well protected than consumers in an offline environment. The level of protection of the two modes of commerce should be equivalent. This can be largely achieved by applying existing consumer protection rules and principles on that online environ only if and where online environment makes the application for enforcement of existing rules impossible or where such application would not deliver equivalent results, action should be taken. And on that, we are at present conducting a study looking at the corpus of existing European consumer legislation and examining the applicability of all these applications to the electronic environment. We will have the results at the end of the year and then we shall be able to assess the necessity to fill possible loopholes, if necessary.

Consumer policy is not the synonym for consumer protection legislation. I would like to stress that. Consumer policies should ensure that consumers have an objectively justifiable confidence to act in the marketplace. Confidence is a result of a combination of factors including consumer information, education and awareness, good marketing and business practices, access to

redress, codes of conduct, self-regulatory initiative and finally, government regulation. In the same way as cross-border activity by consumers within the European Union made it necessary for the consumer protection at the European level, we believe that to enable cross-border activity by consumers at global level, it's necessary to coordinate policy at international level.

Probably even more important than what rules, either legal or self-regulation should apply for electronic commerce, the important thing is how they should be applied and how they can be enforced. We've heard a lot about that yesterday and this morning. And also this, how it should be applied and how it should be enforced, all this requires international coordination that's and cooperation. The cooperation and coordination is in the interest of both the business community and consumer.

In a global marketplace, there should be no substantial variations in consumer protection requirements. Businesses offering goods and services across borders should not be confronted with rules and expectation with which they are

completely unfamiliar in the same way consumers buying across borders should be able to rely on the essential elements of consumer protection they are familiar with.

Consumer protection is an important dimension of all of the stages of the business to consumer commercial relationship, ranging from commercial communication to over pre-contractual information and disclosures, contract information, payment, delivery, guarantees up to sale and ultimately redress. Consumer confidence policy should cover all these stages as confidence is only as strong as the weakest link.

Let me now refer to some specific points.

Much attention has gone to the recent Commission's proposal for a directive of certain legal aspects of electronic commerce in the single market and its home country control principle. May I say that this Commission, these proposals has been put forward by the Commission at the end of last year. The European Parliament has just completed its first reading, its fill-in first reading at the level of the council and so, the European Union decisionmaking process is not

concluded yet. But the proposed directive should be seen in combination with the whole range of European community or provision.

This is not the directive governing the Internet. It addresses a number of specific problems that have been encountered with regard to electronic commerce within the European Union that were not addressed and were creating barriers.

The directive comes on top of a whole sect of other rules that harmonize at European level. It is because of existence of this level of harmonization and integration that the home county principle is proposed. So, the home country for principle is a fundamental concept of European community integration. That means that the concept must be looked at in the context of the single European market. The notion is, however, often confused with a question of applicable law and confident forum.

The notion of home country control refers mainly to which country and authorities are responsible for supervising and controlling service providers and which public laws the service providers should comply with. This

consent is loosely linked with that of harmonization of legislation and mutual recognition. On the basis of the respect of the rules of their home country, businesses are free to offer their goods and services across the European Union and host member states may not limit this by requesting, for example, of specific authorizations or compliance, also within their national provision. So, home country control is thus reliance on the standards of the country on which the service provider is established.

A. Number of areas looking at the directive on certain legal aspects on electronic commerce, a number of areas are excluded from the scope of directive and from its home country and principles. These excluded areas concern mainly the areas where the level of market integration and harmonization is not sufficient yet to justify the mutual recognition between the member states of each other's provision or as equivalent. So, contractual obligation concerning consumer confidence are covered by this exception.

Also excluded are some areas where

existing community laws specifically foresees elements of host country control. For example, in the financial services area. In addition, member states may still be in compliance with particular provision on the grounds of public health or consumer protection in general and a directive foresees a specific authorization procedure for this.

In short, on the basis of a sufficient level of harmonization, member states recognize each other's rules as equivalent. On the basis of this recognition, businesses benefit from home country control. Home country control is primarily a question of supervision. It is a fundamental principle we adhere to within the European single market. I do not believe that home country control as a basis for free movement in European Union can work at the international level as there is no sufficient level of harmonization to justify this.

So, home country control does not necessarily mean that applicable law of the competent forum is that of the whole country and I would like to say a few words on that. Because the question of applicable law is a different

subject, especially within the contractual relationship. The principles governing applicable law and competent forum within the European Union are not addressed by the proposed directive. They are set out in the Rome and Brussels Conventions and the draft directive does mention this principle.

This convention set out general principles and specific exceptions. For example, with respect to consumer policy. As far as the applicable role, it's a Rome convention which deals with the question and the basic principle of the Rome Convention is that parties are free choose which law they would like to apply to the contract. Apart from this principle of freedom of choice, the general rules is that the contract is governed by the law of the country with which it has the closest connection.

Close connection is determined by the question of the characteristic performance of the contract. In a contract of sale, the characteristic performance is the delivery of goods or services by the seller. So, the applicable law is usually that of the country of the seller.

As far as the competent forum, it is the Brussels Convention which deals with the issue and the basic principle of the Brussels Convention is that the competent court is that of the defendant. But, as regards consumer contracts, however, both conventions contain an important exception. In determining applicable law and competent forum in consumer contacts, a solution based only on the choice the parties is not convincing. Consumer contracts tend to be contracts by adhesion. Therefore, consumers have no influence on the contract provisions and one can hardly talk about free choice.

The EU member states have therefore sought to ensure certain protections for consumers. In this respect, roughly speaking to oversimplify matters, a distinction is made between active and passive consumers. When a consumer enters into a contract because the seller approached him by means of a specific offer made in the consumer's country or advertising, a choice of law not deprive the consumer of the mandatory rules of the country which he resides.

Moreover, when the parties have not

chosen an applicable law, it is law of the consumer's country that applies. When a consumer, however, on its own initiative, for example, not in response to advertising or a specific offer made in his country, enters into a contract with a supplier in another country, this protection does not apply.

Similar principles are set out in the Brussels Convention. Where the consumer is only passive, he may bring the case before the court in his country, even if he is the plaintiff and he can exclusively be sued before the courts of his country. We believe the approach in the Rome and Brussels Conventions leads to a fair balance, establishing that the applicable law is always that of the business country would be unfair on consumers. Similarly, it would be unfair to business if the consumer's law were to apply in all situations. It's interesting to know that there is revision being done to the Brussels conventions and member states have been negotiating on modification from the Brussels Convention itself and one of the amendments concerns the provision of consumer contract. This amendment aims at clarifying the rules I

just mentioned in a way that the competent forum is also the forum of the consumer of contracts are concluded electronically.

To illustrate perhaps distinction between home country cell and applicable law, I would like to give an example. The issues can be compared to the use of a driver's license. On the basis of harmonization, member states recognize each other's driving licenses and the authorities view them as a equivalent. This means that somebody who has, for example, an Italian driver's license, as I have, can drive around in any country of the European Union. However, I myself, with my Italian riding license, I go, for instance, to the United Kingdom, my Italian driver's license does not give me the right to drive on the right-hand side of the road. I would have to comply with British traffic rules and to drive on the left-hand side of the road. So, obtaining a driver's license is a matter of control and supervision. Therefore, the existence of home country control is justified on the basis of mutual recognition. The way in which you drive is more comparable to the question of applicable law. For example, how

you conclude the contract and what right and obligation what you have.

Let me conclude, Commissioner, and I'm sorry that perhaps I took more time than I was allowed to, but I would like to summarize my presentation by expressing four basic points that one can keep in mind.

First of all, electronic commerce is a more a horizontal fundamental dimension of existing policies, not so much a policy of its own right.

Secondly, European consumer policy is focused on enabling cross-border consumer demand.

Thirdly, there should be equivalence between the protection online and the protection afforded offline.

And fourthly, home country control is a typical concept for a single market. It is such not extendable to the global level. It is also quite different from the question of applicable law and from the question of the common law. Thank you very much for your attention.

COMMISSIONER THOMPSON: Thank you. I'm trying to figure out what side of the road I should be driving. I thought we might begin by

giving our perspectives on a fairly simple question and that is, and this way we can hear from a range of people on the panel. Are there specific laws or agreements governing jurisdiction for consumer protection purposes in your country? Professor Matsumoto.

MR. MATSUMOTO: Thank you, Commissioner.

The answer is quite simple: No. We have, of course, some statutory provisions on choice of laws and jurisdictions, but those are not touching on the consumer protection issues. But some scholars insist that we should have the similar law as the European Union has. For example, the mandatory law of the consumer, consumer's residence, countries should be applied, should supersede the agreement on the choice of laws, but those opinions does not come to the consensus among the lawyers.

COMMISSIONER THOMPSON: What happened to the UK?

MR. BOND: Thanks. First, I shall just like to thank you very much for asking me here. I'm very grateful for the opportunity to take part. Thank you.

Well, in the UK, we've enacted in

legislation the Brussels Convention and the Rome Convention, which Marina has just outlined, so we have those provisions in our law. That's broadly it. In addition, of course, as Marina knows, also explained we're currently negotiating the directive on electronic commerce which would, if it went through as drafted, have an effect which you would have to implement in our law on, to introduce home safe control in public law area.

COMMISSIONER THOMPSON: Michael?

MR. JENKIN: Well, we're a little bit different, I suppose, being like your country at federation, so provinces are sovereign in the area of setting contract, the legislation governing contract law largely. It's an interesting problem that we faced for quite some time in the sense that there is not a lot of jurisprudence or law in this specific area, even within the federation itself, never mind outside, although being sort of a mini situation where you've got the sovereign entities within one county. It's analogous to an international environment.

There's a couple of interesting things that I think that are worth mentioning about

that. Only one jurisdiction deals with the issue the application of consumer law, and that is the Quebec, which does insist that their jurisdiction and their laws apply as to consumers or signing contracts. In the rest of the country, legislation in each province is not that explicit or clear although reciprocal judgments can be recognized within other jurisdictions.

The interesting problem is that, quite frankly, that rarely happens in terms of consumer suits that are brought because it's very expensive to do. You have to get a judge either in your own jurisdiction and then get it enforced in another which requires another court hearing where you have to actually go to the other jurisdiction, which involves hiring lawyers, going there and so forth. The consequence of that is that consumers who seek redress in the law only do it in very extreme circumstances and very large sums of money which, frankly, excludes a large number of cases that happen on a day-to-day basis and, frankly, with respect to the Internet, don't really address the vast majority of purchases and so forth, transactions that go on there.

For that reason, we feel quite strongly that the issue needs to be addressed through getting at not so much the legal side of it, but the kind of voluntary standards and principles that have been, are being developed with the OECD, for example, in which we're working on domestically as well, and that is to get a consensus on broadly speaking what's the appropriate kind of information which we should provide to the consumers on the Net, what represents appropriate and good contract formation and how do you seek redress. Because, for practical purposes, from a consumer point of view, those would be the important issues. Going to court and having law explicit about that, frankly, is something that very few consumers can afford to exercise.

COMMISSIONER THOMPSON: Would you agree with that? Louise?

MS. SYLVAN: Yes, I would agree. To answer your question, the answer from Australia would be technically no. Pragmatically, the answer is that the framework of law that we have, this is specifically for consumer protection, the contracts between a business and a consumer, we

have a federal jurisdiction much like Canada with the states having jurisdiction in relation to consumer protection activity, but the law is actually enacted at the federal level and the state laws are mirror laws as we call them. They mirror the law at the federal level so every single state has precisely the same consumer protection law without variations.

Now, in terms of enforcing your rights in another jurisdiction than the one you live in, the Australian system has gone very much down the track of not proceeding to litigation, if at all possible. Litigation is only entered into if the sums of money are very substantial. Each of jurisdictions has last a consumer claims tribunal and in these tribunals, you can take matters up to, I think it's now \$10,000 up to \$15,000. It slowly goes up year by year. In those jurisdictions, they are run by the governments. The consumer claims tribunals have appointed arbitrators and for the sum of, you know, \$20, \$30, consumer goes to the consumer claims tribunal. The business comes. No lawyers are permitted to be present and the matter is adjudicated at very small cost and very quickly.

So, it's very quick and cheap justice and both business and consumers love it.

COMMISSIONER THOMPSON: What does the ACCC think about it?

MS. SYLVAN: The ACCC thinks it's great.

COMMISSIONER THOMPSON: Well, let's hear what Jackie has to say.

MS. SYLVAN: Don't you, Jackie?

THE COMMISSION: You know, it's also helpful if, I know I'm referring to you by your first name, but at least for the first time introduce yourself here so everyone can see. It's very hard to see these signs.

MS. PEARCE: Okay. My name is Jackie Pearce and I'm from the Australian Competition and Consumer Commission and that's the agency that actually administers our Australian law or trade transactions that Louise was talking about.

Might as well mention firstly before I go on to the Trades Practices Act, is also another a number of initiatives in Australia at the moment.

At the federal level, there's an electronic transaction bill. That doesn't look at the specific level of consumer protection that is in

the Trade Practices Act, but it does outline a number of other things to do when you can't offer the next segments and seeks just the electronic signatures and so on. That is a mission that's in the bill stage.

In Australia, we're also keen supporters of self-regulation and the Internet Service Providers Association of Australia has actually recently developed their own code of conduct, which includes, among other things, a Consumer Protection Division that apply not only to Internet service providers, but also to vendors on the Internet. That's a voluntary code, but the Internet Industry Association is quite a widespread industry association and well represented and the ACCC is also quite keenly supporting involvement in that code by industry members.

The other thing I might quickly mention is that the Consumer Affairs Division of our Treasury Department has also developed principles for consumer protection electronic commerce which are very similar to the OECD principles, and they also have a very keen consumer education responsibility there.

As far as the Trade Practices Act goes, our perspective is that the consumer protection provisions apply just as much as they do offline, online. So, the ACCC is quite keen to pursuing enforcement action when there is a potential breach of the Consumer Protection provision. In fact, we are super keen where the parties involved seem to be cross-border, particularly where there has been conduct in Australia and it seems that the parties have fled to other jurisdictions in order to avoid their responsibility.

Just a recent example, we've, well, it's still on going at the moment. Actually are taking enforcement action in relation to a company that is set up in Vanuatu (phonetic) that is in relation to a pyramid selling scheme on the Internet. Now, that's an interesting example of a case where it's important to be able to assert Australian jurisdiction and choice of law. In fact, our enforcement team has had quite a number of difficulties in pursuing that case. For instance, just before I got over to Vanuatu, the night before, I think, before the case was to be heard about the imposition of the registration

of an injunction, freezing the assets of the company, there was actually an ex parte application lodged with the judge the in chambers as our people were on the plane on the way over. So, it seems that, of course, things are done differently in differently jurisdictions and that's one of the major problems that we've encountered with those sorts of jurisdictions.

But just one other example on the other side of the coin is our recent enforcement action in cooperation with the U.S. Federal Trade Commission. We recently did a lot of work on a case called Internick which involved a domain name registration. That involved a complaint that came from the U.S. About a company that had set up the main name Internick, I can never get them right, .com or .net, the original one being the American side. Other one being more or less a broker for Internet domain name registration. Because in the similarity of the name, there is, of course, alleged misleading, deceptive conduct there, we've recently been able to get a real good outcome there as well and that was a based on good cooperation between the U.S. And Australia.

COMMISSIONER THOMPSON: Well, Morton, what happens in Norway?

MR. FOSS: By the way, my name is Morten Foss. I'm representing the Eclipse Project which is an EC-funded project that supports assistance to the European Commission. It's also related electronic commerce. I'm a research fellow at the University of Oslo but actually I'm not representing Oslo at this time, so my tag reads is not right actually.

Anyway, I wanted to, instead of discussing the situation in Norway, to discuss the situation within Europe. And the situation there is that you have to make a distinction between private law and public law. The Brussels and the Rome Convention, as former mentions, only applies in cases of private law. If the matters are concerning public law, for example, tax questions, then the courts will assume jurisdiction if the case in question falls within the scope of the public provisions over that country's own domestic law. So, that depends on the interpretation of the specific provisions.

Now, turning to the issue of private law.

Here, you have two possibilities. As a starting point, the part of the international law is part of the each country's own domestic set of rules. However, in Europe, there are also, to a great extent, been made the conventions; that is to say, international agreements, and two dimensions; namely, Brussels and Rome Conventions. In addition, we have some more which also has importance.

Concerning issues over jurisdiction, the two most important conventions are the Ugano and the Brussels Convention. However, these conventions only apply when both the plaintiff and the defendant are domiciled within the (inaudible.) In consumer cases, there are one exception from this starting point and that is Article number 13, second part of which states that if a defendant domiciled outside the convention area has a branch, agency, or other establishment within the convention area, then he may be sued in the courts in the Western Union, Western Europe. And the question is whether a Web site can be considered a similar establishment. And that might be laughed at at the beginning but actually if you see how easy

commission, excuse me, how the easy court has interpreted that provision, you will see that Web sites actually fit under the descriptions over what can be considered similar establishment. So, that would mean that American businesses conducting business by a Web site in Europe may be dragged into courts in Europe.

Now, turning to choice of law questions. Here, the European Union are members to the Rome Convention. This means that in every case that a dispute is to be settled by a court inside the European Union, the judges will apply the Rome Convention. However, within the European Free Trade Area, this is not the case because they are not allowed to become contract parties to their own convention. So, here, other provisions will be, or other set of rules will be applied.

I can mention the Hague Convention of 1955. This convention concerns international purchases on goods and that's exactly what's a large amount on the business on the Internet is about. And so, in many cases, you will find the Hague Convention of 1955 will be applied and this will also be the case within the European Union because this convention has precedence on its own

feet over the Rome Convention. So, the situation is quite clear concerning choice of law. That's the brief.

COMMISSIONER THOMPSON: I think that you raised a few issues but before I go into them, maybe Debra can explain exactly what does happen here in the U.S.

MS. VALENTINE: I'll try to be brief since I think most of you were subjected to a lot of this this morning and if I were a business, I'd be starting to panic right now actually just listening to these rules descending on me and all these different laws.

To quickly recap, we obviously have federal consumer protection laws and state consumer protection laws. To some extent, they're not --

COMMISSIONER THOMPSON: One second. Hanns, are you okay?

MR. GLATZ: I'm fine. Yes.

MS. VALENTINE: In certain ways, they're not that different from Australia in that, although not perfect mirrors, many of the state laws are essentially equivalent to the federal law.

When we get to who can actually exercise jurisdiction, we start with two basic rules. One, have you as a business purposely availed yourself of the forum? Have you purposely created contacts sufficient that you actually might expect to be hauled into court? And then there's sort of traditional notion of justice of fair play attached to it, too, and that question becomes is it fair for you to show up before this court?

Now, what I think we're ending up hearing is that when you are making sales, and I guess this is what we just heard about the EC, into a jurisdiction, whether it's through the Net or otherwise, courts will be willing to exercise jurisdiction over you. The mushy area is that middle area that we heard about this morning, the interactive sites. And here again, it's going to be a sliding scale or a spectrum that will simply depends on the extent of the context, the extent of the interactivity with the forum and the commercial nature of those context.

But in a funny way, when we get to the Net, I actually think that the good or bad news is that any country can be exercising

jurisdiction over you if the intensity of your contacts and sales in that jurisdiction are enough to meet some fundamental concept of fairness. So, what really is going to become the question for us I think is the choice of law. And since you didn't even understand what it was the EC, I certainly am not going to be able to do it and I'm not sure that a business would.

So, one thing I'm wondering, I mean, one thing if we go to U.S. Choice of law, that's somewhat striking, is that whether we talk about a thing called the restate, the first restatement or the second restatement. Choice of law is in a strange way, very geographically-based. It started out talking about the place of the contract, where the contract was signed or in tort law, the place, the *lex locus delicti*, where the tort, the bad act occurred. These are such physical concepts that, in a sense, they do become funny when we start thinking about them in cyberspace on the Net.

And so, I guess what I've been trying listen for today is more how similar are our laws? I do hear us all saying we think that the same protection should be available online as are

available offline. I think I hear a us saying something about no, people should be able to have private orderings and private contractings, but in the business-to-consumer context, I'm also hearing another theme or refrain about well, maybe we shouldn't, though, be oppressively or unfairly denying consumers in their law of their jurisdiction or a law that they're used to or something that relates to their expectations.

Maybe I'm hoping where we'll go, I don't know if you're going to go there or not, is how in the international context can increasingly harmonize our laws so we don't get into this crazy question about whose law applies? And our laws start looking a lot more similar or we have some similar minimum standards.

COMMISSIONER THOMPSON: Hanns, what did you think of this? Is this troubling? Is this a direction you'd like to see?

MR. GLATZ: Well, first of all, let me introduce myself here. I'm Hanns Glatz from Daimler-Chrysler but what brought me really here is my function in the global business dialogue on electronic commerce that David Aaron was speaking about it yesterday. And this global business

dialogue not only addresses important questions like jurisdiction but also the working group called consumer confidence. I have the great pleasure of chairing the exercise and that's why I'm here.

Now, I choose to you that business not only wants to look after its own selfish interests, business also wants to make sure that they find a partner for doing electronic commerce and therefore, as we have heard over the last two days, without consumer confidence, the whole story doesn't make any sense.

Now, jurisdiction is certainly an important element inside the field of consumer confidence and we haven't arrived at any formal conclusions here in the GBDE but I would say there are three principles in the field from which to start. The one is, and they are all obvious. The one principle is we shouldn't deal with offline business in a different, we shouldn't deal with online business in a different way than offline business except if there are serious reasons to do so.

The second is we should try to apply whenever the rule of origin or the homeland rule

or whatever you want to apply that, we'll come to that in moment. Why?

And thirdly, we should leave the contracting partners the choice of law. And again, I would say why?

However, as was explained to you in detail, and you have full knowledge now, we are not living in a legal vacuum. There is a set of rules that is sometimes in the way and sometimes promoting these principles.

Let me start with the rule of origin. One important element for any contract is the place in the jurisdiction in which this contract is transacted. Once you know that, you have already the answer for a lot of the questions. Now, looking at Internet contracts, you have, of course, the Web site and then you have somebody knocking on that Web site and saying, I want to conclude a contract. So, I cannot agree with the assessment that having a Web site on a computer in Germany means that it's the same thing as if I would put the poster glued against the wall in Germany because gluing up the poster is a deliberate action to put something on the wall in Berlin. Having a Web site appearing in Germany

is simply because somebody enters Internet. Therefore, the Web site is such normally, is a passive way of presenting my services as a vendor and the customer who voluntarily opens the Web site comes here and says, I want to buy from you the microphone or whatever, is the active part. Therefore, in most of these cases, clearly the contract is concluded under the jurisdiction of vendor and we just have to be sure that we know when the vendor is established, to which jurisdiction is established.

Now, there may be cases where I as a vendor decide that I want to be active, that I start e-mailing people offering my services and then I'm ready to discuss whether in this case the contract would have been concluded under the jurisdiction of the purchaser.

Another rule, another reason why we are insisting so much on the rule of origin is that for smaller companies, it is absolutely impossible to know that jurisdiction and the laws of all the countries in the world where somebody may enter their Web site. Sometimes we would really deprive the consumer of the possibility of buying, for instance, a product with a shorter

warranty period at a lower price if it's always case law that applies to him, just to bring you two examples.

This also brings me to the choice of law.

Why should it not be possible for somebody in a country with very low level of consumer protection to come to agree with the vendor on a law that is more interesting for him? Bringing another example than the one I just brought where a lower level may reflect in price. So, I think we should not always look upon the choice of law as something that is imposed by the vendor on the customer. It should also be his responsibility.

Of course, when you subscribe to that, we are ready to provide information or there are commercial businesses or governments. I mean, the British government, for instance, they provide or promote systems which provide information to people so they are not blindly subscribing to.

And the final point, final point still to the rule of origin, and it was mentioned here. If, for instance, a customer, a consumer has to sue a vendor in the place of the vendor, say a German in the United States. And he would sue

him in a U.S., in a Europe court and the law of the customer would apply. Can you imagine what a U.S. Court would do with German law? How complicated that process would be? I think we should avoid, whenever possible, to make forum apply a different law than the one which they know. Those who have to do with international private law, they know exactly how difficult it is. So, therefore, there are two or three principles.

Online business as much dealt with as offline business, if there is a difference, then do a specific law, and for the rest, the rule of origin and the possibility for the two parties to agree on their law applied.

Now, we do not want to change all the legislation that was discussed around the table but our strong desire is that if there's any further legislation envisioned, it should follow the principles and existing laws should interpret it according to those principles.

COMMISSIONER THOMPSON: Professor Matsumoto?

MR. MATSUMOTO: Yes.

COMMISSIONER THOMPSON: What do you think

about those principles?

MR. MATSUMOTO: The principles are interesting but with the understanding jurisdictional issue or choice of law issues has no important play in consumers in Japan because as I said before, in Japan, we don't have any statutory provisions on the jurisdictions or choice of laws in consumer contract cases. Then how about the case law? How do you decide on those cases? We have no case. Why? No consumer would sue those business in foreign countries. In Japan, as the Canadian agreed, said in Japan, the suit cost a lot of money and time and our court system is not user friendly, not consumer friendly and the parties, each party has to pay the attorney's fees and no punitive damages, no treble damages, and no group action, no class actions. And so, even if we have, say, very favorable to consumer a rule of jurisdiction or choice of law rules, consumers would not, can make use of this.

And then what should we do or what have we done? We developed the out-of-court settlement schemes. There are two lines of schemes. One is those local government-sponsored

court settlement. Out-of-court settlement schemes. The other one is industry-sponsored one. And those alternative dispute sort of mechanism is so far used to settle those domestic dispute questions, but in an e-commerce, Japanese consumer have easy access to those phony business across-border. And we expect the number of the troubles the Japanese consumer faced in those contracting with those phony business, we need some scheme of the cooperation of those alternative dispute settlement mechanisms, international corporations or some international, the alternative dispute settlement mechanism and that was (inaudible.)

I am pleased to announce that next May, a year after, Japan will host the annual meeting of the International Standards Organizations of Committee on Consumer Policy Committee, Isocapulco annual meeting next year, year 2000, May in Kyoto. And the first day of the annual meeting will be devoted to the watch of consumer protection in the globalized market and so far, the Isocapulco is involved in many initiatives for consumer protections in standardized areas. For example, the Australian initiatives, they are

doing in the area of standardization of claim handling and industry-sponsored dispute settlement and Code Of Conduct. And also, in the Canadian initiative, standardization of personal data protections.

So, Japan would like to promote those movement forward. And we'd like invite the stateholders into that workshop a year after.

COMMISSIONER THOMPSON: Well, thank you. Even if they didn't have a workshop, Kyoto is a great place to be. But following up on something now, because Michael, you talked about principles and I think Hanns, you began to focus on them. I'm sure that Louise has a few of them.

MS. PEARCE: Thank you very much. I actually would like to get back to basics in terms of what we're doing here. We're talking about consumers trustingly being able to shop on the Web and feel that they are reasonably protected, and I'm not talking about advertising rules. I'm not talking about being able to broadcast into various countries. When I'm talking country of origin, I'm talking about strictly consumer protection narrowly defined. And if country of origin is the rule, then

fundamentally asking consumers to try to take legal action in a another country's jurisdiction that they don't know, may not speak the language of so on and so forth is basically, I think, to start denying them redress. And I think if you deny redress to consumers, you start to build an enormous distrust of what happens in relation to e-commerce and I don't think any of us want to do that.

Let me deal with the alternative which is, of course, choice between where, you know, where the contract occurs, choice of law. If you put up that statement that we had this morning which said, you know, the country, that the law that applies is going to be that of Foreignland and you ask consumers hopefully at the beginning of your Web site, not at the end of your Web site, to agree to that, let's just take a look at what that means when a customer faces that Web site.

I'm looking at that and it says the appropriate country here is going to be Zimbabwe.

And I say okay, that's very interesting. What I'm required to do as a consumer is to try and track down the consumer protection law in that

country, come to terms with it, understand it, and make myself in an informed way, able to take the decision that I should be willing to accept that that is my consumer protection jurisdiction.

Now, it is actually relative easy to find out what the consumer protection laws in Zimbabwe are. There aren't any. So, that's really a simple decision for me to make. But let's put it in a much more realistic term. Let's say that, in fact, it says that the law is going to be in the United States. Now, the United States has some pretty complex laws. Again, the economic transaction costs to me as a consumer and be willing to accept that as the country's law is quite substantive if I want to do that in a reasonable way. Worse than that, if you take the U.S. As the example, I might be willing to make a little transaction in the U.S. If it's, in fact, a reasonably big transaction, I probably wouldn't want that to be my jurisdiction because this is a highly litigious jurisdiction. I would probably not want to be here by choice. So, that's something to consider.

And I think country of origin fails as well to deal with other issues that we're not

thinking about. If I choose to buy a book here in the United States and I use my credit card and you say the law applicable is the United States and I want to use your chargeback provision, my credit card company, which my company is in Australia, is going to say no way, we don't have chargeback and you can't apply the U.S. Law. Your contract is with me. Country of origin doesn't solve those problems

Now, for all of those reasons, I think reasons of just basic fairness, that's what we're talking about. I don't see too much alternative to two things. One, it has to be what the consumer can actually reasonably take action, or two, and this has been proposed by a lot of people. I think we should think about it seriously, that we do look at how similar our laws are and try and see what we can harmonize in terms of consumer protections. That way, businesses have certainty of facing more or less the same set of laws and we also look at the technology giving us some possibilities for an Internet ombudsman to which all countries can belong that would really resolve some disputes. Small disputes. Not really big money disputes.

The small disputes that consumers have with traders.

COMMISSIONER THOMPSON: Marina? I just heard a new position created here.

MS. MANFREDI: I would like to build on that and also to caption what Debra said about this idea of harmonizing further, harmonizing at a higher level, common respective levels of consumer protection because I think that this is one of the possible answers looking to the future. And I think that we do have possibilities already on the table. I think that the work that is being done in the OECD sets the path, I would say towards further cooperation. But corporations should not only concentrate on principles and on legislation.

The most important I think the discussion of these two days have shown is cooperation without limitation and enforcement and I think we should really seriously look into that. Also to examine whether we need new institutions, if needed. Do the present institutes, existing institutions leading with corporation enforcement, do they work? Should they work better? For instance, we are revamping at

European Union level the experience of cooperating member states enforcement authorities within the IMSN, which is the International Marketing Supervision Network. This is an existing body which can be used for international cooperation on enforcement.

So, we should look forward to see whether we can make use of the existing bodies or perhaps think more, I don't know, forwardly and imagine and reflect together whether we need new institutions at international level. Because I think there is also a new role for consumers or consumer's representatives in this global discussion because now with the future and new round of the WTO and the role that the consumers will have, I think it's very important that in all nations and all our states and also at regional level and at international level, consumer's voice are heard and are coordinated and we are very pleased with the results of the present dialogue, transatlantic dialogue which is started since one year, and I think this is one of the answers.

We would like to broaden this dialogue at more national level because issues become more

and more global. I think Internet and e-commerce is not only the only global issue challenging facing consumers. I think we deal in Brussels in our directive journal for consumer protection not only with the protection of the economic interest of consumers, we also deal with health and safety. And in the health and safety, in the food safety area, in the new issues like ethical trades, social trades, GMOs, I think there is scope for international corporation also with the active presence of consumers.

COMMISSIONER THOMPSON: Martin?

MR. BOND: Thanks. I'd just like to pick up on a couple of points because we've been talking just now about redress in private law cases and a bit about public law regulation. In the light of what Louise said about jurisdiction and applicable law and the problem of going to court in a foreign state, I do think that jurisdiction is the key. Certainly, if we want consumers to be buying valuable over the Internet, then they're going to want better assurance on the question of jurisdiction.

Having said that, though, just before this section, downstairs we had a rather

depressing prognosis, I think, for the Hague Conference but certainly we would encourage people to maintain an interest in that because --

COMMISSIONER THOMPSON: The heart is still beating.

MR. BOND: -- It's worth another go. Yes. Marina mentioned harmonization and another point I wanted to make in the public role area is I think regardless of what we do, electronic commerce will shine a much harsher light on disparities between national laws. Whether we have a directive in Europe on e-commerce or whatever happens, that will take place and say I think we need to think very much harder about codes of conducts and certainly, we're doing that in UK. And as you know, we are taking a full part in the discussions in the OECD guidelines, but what we would like to see is whether there is scope for more international cooperation on codes of practice because, I mean, it's been said a number of times over the past couple of days that it's really too ambitious to expect harmonization of national laws at the international level.

Now, the word "go" on things like the guidelines is a start, but we do think we should

make some quicker progress if we look at codes generally as a solution to that problem.

COMMISSIONER THOMPSON: Does that also include in your eyes an increased opportunity for bilateral discussions?

MR. BOND: It doesn't rule it out. We are already having those talks, yes. It doesn't rule it out at all. But I think from the consumer's perspective, if you have the potential to buy from any number of countries, certainly any number of developed countries, then you're going to be looking for something that is broader in scope.

COMMISSIONER THOMPSON: All right, Hanns. You've had your flag up. Have you started us down a road that --

MR. GLATZ: I only wanted to highlight that Louise's attempt to challenge my principles really confirms it. I provide to you a possibility for getting out of the U.S. Jurisdiction and if you combine that with good and critical attitude of consumer organizations, pointing out warning their members, never sign a contract under the jurisdiction of (inaudible), if you can get under German, Belgium, I don't

know what jurisdiction, grasp the opportunity. And the whole thing, again combined with a good private redress system, may give consumers much more and better policies, better chance than this mandatory system that they are locked into the system where they reside.

MS. SYLVAN: May I just respond? Thank you. I absolutely take in at this point about the difficulty for businesses in understanding all of the jurisdictions they might face in relation to consumers, but, though, I would say that, you know, big companies like Amex and Visa and IBM and I could list a whole host of others, they kind of exist all around the world where I go. They already know the consumer protection laws in those countries. They also know the company laws. So, I don't think there's much of an issue in terms of those global companies.

I do think that there's a very real issue to small and medium enterprises knowing all of those jurisdictions, but from our perspective, to turn it around, how then to you expect us as consumer organizations to try and teach the consumers of the world about all of the world's jurisprudence? It is much more difficult for an

individual consumer to do that task than it is for a business to do that task.

COMMISSIONER THOMPSON: Well, I think both your points are very interesting. I'd like to raise one other issue, though. Can we talk a little bit about time? That in the sense that you both have valid viewpoints, but I think when we talk about law and jurisdiction and choice of law, it's really a surrogate for other things that we really want to get at. It's one of the basic principles we want to see how consumers are treated with regard to, by sellers and vice-versa. What is fairness to a seller as well? And when you look at it in that vein, that there can be some concerns that maybe there are some internal steps that all of us should be looking at in terms of providing at least some degree of comfort to consumers and to businesses, whether it's really considering whether there should be some period or some circumstances where there can be mutual agreement as to what law applies for, for example, other avenues for alternative dispute resolution that will take it out of this box where, in fact, a lot of governments feel somewhat restricted because we

are a creature of legislation.

MR. GLATZ: Well, leaving aside fraud. Let's stay in the field where there is honest intention on both sides. I'm afraid that there will be a period where if you want to be absolutely sure as a consumer of not running any unreasonable risk, you will buy online from the company you know perhaps in your country or in a country which you know and not go beyond this. And yesterday, the example if I really want a product which is offered only on a very exotic Web site somewhere at the end of the world and I really want it and it doesn't cost an amount which is terribly high, I probably will run the risk of getting into all this trouble. But if I want to get another sweater, I will probably go to Marks and Spence on Web site if I'm living in Belgium if I living in Belgium to be sure that everything is there.

I don't think that there's any other way of doing it. It's a learning process. But with electronic commerce getting explosively larger, you will see, and you have seen all of these examples, from the business side, the seal. Business or reputation of companies will provide

consumers with some guidance and from the consumer organization side and the government side, observe it and if there's anything going wrong, raise the flag, make it clear, use legal instruments insofar as they are there, but at least use the instrument of publicity by pointing out the black sheep. I think that's the only way how it will really happen. On a global scale, that's a new element because all the rest is not new. We have had in all our countries since the war.

COMMISSIONER THOMPSON: But it's also important to recognize, though, and I think this is what presents a challenge to all of us, where the real growth is going to occur, if it's going to occur with regard to e-commerce, because large companies like yours and other large companies who are in many jurisdictions are very sophisticated and that they have really taken on the burden of understanding of what it takes to compete and including some very important consumer issues.

Where real growth may indeed occur is in the smaller and middle level companies where there's not as much information, not only on the

part of business, but also on the part of the consumer. So, that's really a challenge for all of us. Hugh?

MR. STEVENSON: I have a question. Just following up on the discussion about the EU approach and the notion that the, and I hope I have this right. Under the Rome Convention, the choice of the law would not deprive the consumer of mandatory rights or rights under the mandatory rules of law.

I know at least a couple of people from the industry perspective have said to me at some point, well, we don't know exactly what that means and we don't know what that covers and that might cover different things depending on what the other countries say it might cover. Is there any approach that might provide some certainty to business and some degree of predictability for consumers to attempt to define to some extent what that term "mandatory rules" might mean? So, that would give them a more predictable environment for both business and consumer.

MS. MANFREDI: Well, I would say in broad terms the contractual laws are kind to consumer contracts in the different member states who are

part of the convention. But it is true that I think that the use of these conventions, even in the European legislation, do lack some user friendliness and we are trying to build up ways of informing both consumer and the industry what exactly the scope of the different legislation is. So, we are working at present. We have set up a dialogue with EAISP, which is the European Association of Industries and Service Providers, to try and clarify the scope of the consumer legislation so that, I mean, this kind of disclosures can be clear to the industry. So, I think this is a working process and we hope to be able to point out clear and user friendly indications in a few months because you are, I mean, it is true that, according to the different member states, the scope of the management rules can be different. Can I have the opportunity since I have the floor to --

COMMISSIONER THOMPSON: Certainly.

MS. MANFREDI: -- Take advantage of it and say a word building up on what Martin Bond said. I want to clarify that as far as the European Commission is concerned and as far as the Director General for Consumer Protection, by

all means, we are looking also at the issue of self-regulation for the matter of the Internet.

We are definitely not looking only to have legislation but only to self-law. But on self-regulation, we are trying to establish at European level, at least, some principles about establishing codes of practices because what we are trying to do and we are experimenting at the European level, we have already managed to conclude one code on the Euro, on the implementation of the Euro.

What we would like codes to become is an exercise where the consumer side is active. There is a negotiation between the, I would say the industry side and the consumer and the negotiation leads to the creation of a code and then the code itself should have provisions for its monitoring and sanctions and so that its implementation can be monitored and enforced.

And this is the way we are looking at self-regulation which is, I would say, there is more regulation than only the voluntary part, but I think it would be important to give certainties on the European and international scene.

COMMISSIONER THOMPSON: What is it,

Jackie?

MS. PEARCE: Just on the point of the mandatory laws in another country. In Australia, at least, the Trade Practices Act can't be contracted out. You can say that's a mandatory consumer protection law. And it was suggested this morning, I think, by Peter Harter that a consumer would very readily give up those mandatory consumer protection laws if it meant that, otherwise, they wouldn't have access to this service, and I agree with you, but I think that's because consumers, at least in Australia, having the Trade Practices Act around for 25 years, are so used to having that basic protection, that they don't know when they miss it unless, of course, they buy something, not off a reputable company like yours, but off a disreputable company where they are sent perhaps the wrong thing. That's a simple thing. They send it back. No refund. But there's nothing they can do about it because that's the basic protection that they are offered under things like the Trade Practices Act which is there is a good reason why think can't contract out of.

Just a couple of other things quickly.

Just like to touch on Louise's point about the ombudsman type scheme. I think it's an important issue to talk about choice of law and jurisdiction but you'll always come across enforcement difficulties and that's why marketplace consumers like the idea of an industry ombudsman, is something that really needs to be explored, perhaps not on an industrywide level but as was suggested in an earlier session, I think sectoral levels. For instance, financial services. Those sort of sectoral levels might be more easily adopted by an industry ombudsman scheme.

One last thing. On the point of choice of law, I think everybody is of the agreement that either the destination or the origin should apply. But perhaps if the consumer is given the choice and Louise was concerned about having the choice of a, the legislation of Zimbabwe, perhaps. If just a suggestion, perhaps if the Web site said this is the law that will apply and then it linked to basic information about that legislation, for instance, rights of refund, implied conditions and warranty, or anything like that, perhaps that's a suggestion whereby

information could be found more readily.

COMMISSIONER THOMPSON: We have about five minutes and I'm going to be wrapping up, but it's brought us to a point where there's some questions that I have and I was just wondering if people want to talk about it just briefly. Let's leave aside choice of law. Let's leave aside jurisdiction. Let's talk about what we have right now and what can we do to better enforce judgments? Because let's talk about what happens with our own country and I view this like information-sharing and how do we do a better job with that?

MR. GLATZ: Speaking as a lawyer, if you want to improve the situation with enforcement of judgments, the only way is negotiating bilateral or multilateral agreements. This is a huge task.

You're not starting from nowhere. We have a lot of these agreements but as we see, they are not always welcome to full satisfaction. Therefore, I think, particularly with electronic commerce, we should at least give a chance to these business-led, third-party sector, whatever it is, arrangements which are not law enforcement but which lead to the same result- consumer

satisfaction in most of cases. It is not a replacement for it but I think it's certainly something that could fill a gap until we are there where we have the global legal society.

COMMISSIONER THOMPSON: Louise?

MS. SYLVAN: Yes. I'd absolutely agree with that. Enforcement of bilaterals are an obvious way to go and there's an increasing number of them being negotiated and that's much easier to do than to try to negotiate a multi-lateral arrangement in relation to that.

I also think we get moved along the path by doing things by getting the OECD guidelines up and working. And when we all sit around and say gee, harmonization is impossible, let's not try to do that, I actually think that, Hank Perritt, in an earlier session, suggested that we not make that assumption, that we actually look at the commonality of our laws, particularly across the OECD because there's quite a lot of commonality there, and that's a very good basis to start looking at a much regime for consumers than what's offered at the moment and we should move towards that.

The reason I speak with some urgency

about that is because of the consumer's international study. We were absolutely flabbergasted with the results of that, the extent of which this was not working for consumers and all of the message had been that this was wonderful and this was great, and we didn't need to worry about the problems. In fact, we had enormous problems all through that study and if those percentages reflect what's actually happening to people as they try to shop outside of their jurisdictions, which is the whole point, then I think there is some urgency in getting some of these matters solved fairly quickly.

COMMISSIONER THOMPSON: Debra?

MS. VALENTINE: I'm beginning to agree with what I'm hearing now. When I first listened to Hanns when you talked about who was passive and who was active, I mean, the way our law works, if you put the Web site up in a jurisdiction and that Web site is allowing you to click and you make sales in that jurisdiction, you're the active one and it's not the consumer who is hitting the little click who is the active one. They're the passive one and they can hail

you into their court.

But I think we're all getting to the point where we're recognizing that a lot of these jurisdictional and choice of law ideas grew up in either a federal system like the U.S. Or a federal system like the EC, and you can have a rule of origin law when you all share the same laws and rules. We can have a, you know, protect consumers where the consumer sits where we all share essentially the same laws and rules. And I think what we do need to think about is how can we really do it in the world where we don't have absolutely shared laws and yet, I'm getting incredibly, I'm going to sound like Pollyanna, but incredibly upbeat on the possibility that this may be the one area, every country has consumers and every country has entrepreneurs who can get on the Net and conduct business.

This may be the one area, you know, unlike intellectual property, unlike areas where countries have comparative advantages or things they want to protect, this may be the one place where we can mostly agree. In fact, it is pretty easy to enter into bilateral agreements with relatively like-minded countries. We've done it

with Canada on the term of it dying in the consumer protection area to deal with telemarketing and fraud.

COMMISSIONER THOMPSON: Yeah. We did it with Canada.

MS. VALENTINE: So that I think on the enforcement against the nasty fraud, the egregious stuff, coordination, bilaterals, actually getting, referring stuff back and forth so it can get enforced in the jurisdiction where it matters is going to work, but I do think that most of the people here with a legitimate businesses that we've been talking with and about the last two days, this private ordering, the codes of conduct, the letting people know what your business practices are and then choosing, knowing that to engage in the transactions is the way its going to go and then if we then have online dispute resolution or whatever, that's where we're cobbling things together right now in the near term. I think that's going to be near where we'll see lots of development.

COMMISSIONER THOMPSON: Martin?

MR. BOND: Thanks. Very briefly. In this regulatory area, I mean, I just agree that

there is a great deal of scope of increased cooperation between authorities.

As far as private areas and individual disputes are concerned, we've heard a lot about ADR. There's the scope from across-border ADR and online ADR, which we're extremely interested in at home.

The other thing is that without interfering too much with the legislation on jurisdiction and applicable law, we can get a lot of information, better information to consumers about how to enter the legal system if they have to and certainly within Europe or where our countries are close together, we can help consumers plug into the legal system in another country. So, you don't necessarily have to alter the rules, you just have to make it a bit easier for them to understand in those cases where it's worthwhile taking an action, how to do it.

COMMISSIONER THOMPSON: If you want us to click here. Michael, since I took the shot, I'll give you the last word.

MR. JENKIN: All right. Well, just very briefly. One thing I would like to emphasize is the importance of these underlying principles

that were being negotiated at the OECD and which are being done in some national jurisdictions. I think, frankly, that is incredibly important from the point of view of giving people a clear understanding on the main points of what they have to be concerned with when they do business on the Internet or generally about what is appropriate levels of information to provide? How do you go about signing a contractor or doing a contract? What's reasonable to expect in terms of enforcement? Those kind of principles, I think, are critical.

And, in fact, well, I think in the longer term, if we can make sure that they are then implemented involuntarily and regimes nationally have a bigger impact on the practical protection that consumers could expect a fairly short time. Not to say that the jurisdiction issue isn't important. I think it is. It's critical in the longer run. But in the short term, I think this is an area where we can usually get some results but we need to do it. I stress this. We need to do it in a context where there's a standard set for things like redress mechanisms and ones which are broadly understood internationally. If we

don't have that, then simply having the principle isn't going to be enough.

MR. STEVENSON: We would like especially thank our foreign guests on this panel who traveled a very long way, not just in cyberspace, but in real space. According to some of our panelists, it's the same difference.

We'd like just before taking the break, giving you very brief summaries of what happened in the two breakout sessions and David Medine will start with the alternative frameworks.

MR. MEDINE: Thanks. We focused on alternative frameworks in the context of private sector initiatives. The good news is we barely had time to touch on the variety of existing private sector alternatives having to address the challenging issues of jurisdiction and choice of law.

We first focused on mechanisms to inform consumer decisionmaking which could help consumers avoid disputes in the first place. These include seal programs, which could be either private sector or, as one panel proposed, government-sponsored seal programs. And the key question there is, are these seal programs, do

they have strong standards that will adequately protect consumers?

And in other areas we learned that the Internet itself may provide solutions and we heard about an online firm that surveys every customer who visits and does business with a Web site and then posts those results so customers essentially have realtime feedback on how other consumers are experiencing that company.

We then moved on to discuss a variety of dispute resolutions, including online mediation, arbitration, credit card chargebacks and industry systems such as the European Advertising Standards Alliance. We didn't even have time to consider new mechanisms that were under development to resolve disputes.

So, it's clear that there are encouraging developments of alternative mechanisms that are responding to the costs, inefficiencies and uncertainties of the existing legal systems.

MR. STEVENSON: And then in the breakout session on international bodies and agreements, we touched on a number of things that I think also came up in the session we just listened to in looking at what areas there might be where we

might move forward with such international agreements.

One that a number of people mentioned was aiming to develop some more consensus on certain core consumer protections. A couple of people mentioned, as a model, the OECD privacy guidelines and as a process where having guidelines, that is, at a certain level of generality, have stood up, was a helpful mechanism to have and the point was made by several people that there's a value to that even if it's not turned into the form of a binding agreement.

There was less interest on the subject of any agreements about jurisdiction and choice of law, which reflected a couple of different things, including just the practicalities of how one will get there.

On the judgment recognition, which came up here also briefly both for consumers and governments, we talked a little bit about the outlook, the speed on which the Hague Convention operates the comments and that seems to be fairly consistent. It would be slow.

On the government recognition of

judgments, I didn't necessarily hear any objection on principle, but again, there is the preserved practical problems and whether that, how quickly one can put something in place on that.

On information sharing and cooperation among governments, there seemed to be interest and information sharing subject to, for privacy concerns. And the mention was made there as I think it was here of the possibility of bilaterals or small groups of countries getting together to develop such agreements.

And there was also reference to the New York Convention on arbitration enforcement which is an interesting sort of development in light of what we've heard quite a bit about; namely, looking at mechanisms of alternative dispute resolution.

So, with that, we'll take a break and why don't we reconvene at five after five.

(Whereupon, session five concluded.)

FEDERAL TRADE COMMISSION PUBLIC WORKSHOP
WASHINGTON, D.C.

**U.S. PERSPECTIVES ON CONSUMER PROTECTION
IN THE GLOBAL ELECTRONIC MARKETPLACE**

WEDNESDAY, JUNE 9, 1999

5:00 p.m.

NEXT STEPS: WHAT SHOULD GOVERNMENT,
INDUSTRY AND CONSUMERS DO NOW?

REPORTED BY: LINDA BAHUR

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JAMES LOVE

P R O C E E D I N G S

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MS. BERNSTEIN: It's been a wonderful two days. We want to get started now, if we may, for the final wrap-up session of this symposium that we have all benefited by.

Before we start, I'm Jodie Bernstein. I have the great pleasure of serving the Commission as a Director of Bureau of Consumer Protection here and I want to thank all of you who took your time to attend and be with us for this very valuable opportunity to discuss these topics.

I'm confident that there will be other opportunities because we want to follow on, as Roger said earlier and I felt the same way, this is such a rich debate and such a rich agenda that I know it will take most of us some time to begin to really digest the amount of information that was presented and also the difference of views.

But given that, let's see what we can do with our wrap-up session. I will say that I tried and failed to have for you this afternoon my own Web site and because I heard earlier in the discussion that someone said that if governments could not enforce judgments, a whole

questions of the enforceability of judgments, maybe a government could put up a cautionary site that would warn people in other countries. And I was going to have, you know, the Bureau of Consumer Protection can tell you right now that you should not go to Joe Schmoe's site in Foreignland and I thought that would be something that we could discuss. However, I couldn't get anybody to design the Web site this afternoon, so that will have to wait.

I'd like to begin, however, with what I believe, and my group here, Lisa, Hugh, et cetera, David, have suggested were a series of consensus views that emerged today and let me just read them to you and then I'm going to ask for comments from our panelists as to whether there is agreement that these were consensus views, whether there are others that we've missed and whether there are, subsequently, then, we will then also discuss whether we could, we have ideas of how to pursue other views in the future and where we should go from here, but first let me describe consensus views.

First, that online businesses shouldn't be treated differently from other businesses.

Number two, that online consumers should not get less protection online than they get offline. Number three, that everyone benefits from disclosures, business practices and initiatives that facilitate informed decisionmaking and build consumer confidence. Number four, it would be helpful to develop an international consensus on a set of core protections for consumers. And finally, it is a good idea to work towards facilitation of government cooperation and information-sharing among consumer protection agencies internationally.

I think that's quite an interesting list and one that really is quite impressive for two days of work with the number of people who have been participating on these subjects.

So, let me begin by first asking any of our three commissioners who have been good enough to be with us if they would like to make any comments on that subject or others before we ask the panelists for their views on what seems to have emerged so far in what we've accomplished to date. Commissioner Thompson?

COMMISSIONER THOMPSON: Sure. I just have one short comment and because I might not be

able to get a word in edgewise later and it's this. I wanted to do two things. One is to thank everybody who is not only in attendance, but also in these panels. They've been remarkably enlightening and people have been very candid and open about some of their ideas even if it's not necessarily an idea that most people would say is fully baked, because I think that it's interesting to trade values at this stage, to test them to see what might work and what might not work. But this is an area where things are moving so fast that the value of the idea itself is very important.

The second thing is on a personal level. I would like thank very much you and your staff, Hugh and Lisa in particular, for arranging these past two days because I thought that it was masterful. I thought that we heard some very interesting things from a wide range of people from a lot of different places and I think that it's going to go a long way, at least on a personal level, on shaping my view on how this issue progresses.

MS. BERNSTEIN: Thank you, Commissioner. I was going to ask for a standing ovation for the

staff but we will accept your gracious thanks and again, as I said, initially our thanks for the level of participation and assistance we've had from everybody in this group.

Commissioner Swindle, Mr. Anthony, anything at this time?

COMMISSIONER SWINDLE: Certainly. Thank you, everybody, for attending and I think the ultimate thanks would be in our attendees, panel and staff. I would think we can take a few minutes and solicit the opinion of the audience, both who participated in the presentation as well as those who sat there who may have had the more difficult task of listening to all of us and ask you what you think of the five points of consensus.

MS. BERNSTEIN: Thank you. Mr. Anthony?

COMMISSIONER ANTHONY: Thank you. I would just like to say how much I enjoyed sitting in and listening to the panelists and the questions that have been posed and I would look to welcome the foreign visitors who have come to our Commission and ask you to come back and stay in touch with us.

MS. BERNSTEIN: Thank you very much. And

indeed, I will certainly follow your suggestion, Commissioner, and after we've given the panelists up here an opportunity to comment, then I certainly would hope that we'd have time for the general audience to comment on this or any other subject as well.

So, can we stop, can we start, please. Yes, stop, that was a Freudian slip if I ever heard it. Down at the end of the table and I think that's Jack down at the end of the table. No, it isn't.

MR. LOVE: James.

MS. BERNSTEIN: James. Excuse me. I didn't intend this as a pop quiz or anything. It just seemed that we tried to kind of bring things together by way of articulating what seemed to have emerged from the couple of days.

MR. LOVE: I am most interested in a point that you mentioned about the need to develop core sets of principles or the other related issues of harmonization type issues that would come out. I think that one thing that I've heard from the conference is that you cannot solve all these problems in consumer protection by identifying whether it's a seller or whether

it's the seller or the buyer. They're a significant set of issues that just don't get solved by that and, to me, that raises the question of where does this sort of harmonization or attempt to develop these international standards take place?

I work for a consumer group and frankly, we think that it makes a big difference what institution does things. I go to, like I say, the World Health Assembly and I go to the WTO meetings. It's the same countries basically in both institutions, but the climate is totally different at the World Health Organization than it is at the World Trade Organization. And, so, you got all these international organizations. You got your World Intellectual Property, World Labor Organization, health organizations, blah, blah, blah, blah.

Well, we're quite keen on the idea that consumer protection -- I'm glad that you all have done this big meeting. It's elevated to the status of these other things in that you sort of think about an international institution that was really devoted to the thorny and difficult problems of coming up with these harmonizations

in international standards that wasn't the stepchild of trade missions like, you know, the OECD meeting or sort of buried in some committee, either the WTO or something like that, but the kind that can flourish on its own is everyone else that has serious concerns has pushed for in their own particular areas of concern.

So, one thing I would sort of put on the table is if we can do this harmonization, where is it going to happen? Who's going to be in charge? And basically, anyone who is working in government knows jurisdiction, jurisdiction, jurisdiction is pretty key and kind of who is going to head the missions at the countries that's going to decide? Is it going to be like USTR type things, Department of Commerce, FTC? We offer FTC, actually, of course.

MS. BERNSTEIN: How many votes for FTC? No, I'm not going to take a vote. Roger -- thank you very much, James. Those are interesting ones to pursue.

MR. COCHETTI: Thank you, Jodie. If I can also begin by expressing my thanks and I think the thanks of everyone who has been here for you and your staff and the work which I think

everyone recognizes a tremendous amount of work that went into would making these workshops possible.

I would also like to thank the commissioners who have spent time in these workshops. I think not all of us expected the commissioners to express the amount of interest they did in the subjects, so I think we're grateful that they were willing to spend the time learning more about what is binding measure of a fairly complicated subject and a very important one.

By coincidence, I had taken down three items of my own of what I thought constituted essential elements of a viable and workable solution, more viable and workable framework as we move forward, and they kind of overlap with the points that you raised, and I'll mention them and comment on the ones that are different.

One is that I think it's pretty clear to me after listening to the discussion in the last couple of days, that there will be no universal or single solution to the questions of consumer protection on the Internet. That, in fact, instead of looking at a single answer, we're

going to be looking at a mosaic of answers and that that mosaic includes not only probably special conditions for regulated services which we didn't really talk about but which also fit into this such as medical services or legal services or whatnot, but it also includes the two broad areas that we have spent a lot of time talking about, one of which is greater coherence to the conflict of laws and the question of which laws genuinely and effectively govern consumer sales activity on the Internet I emphasize effectively because I think that what we will need to work our way towards in the long run is something that's not just in the abstract but in real world of the consumer, effective recourse to laws where they are applicable and relevant.

The second brought theme that we talked about that will simultaneously have to be addressed and that is an identification of best practices. And whether that's done purely in the private sector or eventually sort of working its way up to the government level, I think it's not clear. It is clear to me that any discussion about best practices on the Internet really has

got to begin with the private sector and then be looked at by people in government.

So, the first conclusion I reached is that there's no silver bullet. There's no single solution. We're looking at a mosaic of solutions that fit a conflict of laws, identification of best practices, stripping out special areas of services, et cetera.

The second is that it's clear that in any of these, whether it's a greater coherence in conflict of laws or in the development of the best practices, we have to look at new mechanisms and techniques for consumer dispute resolution and it's simply because the medium is multi-national and people are not multi-national. They are where they are and so, consumers are faced with the, and merchants are faced with the unpleasant prospect of having to fly all over the world or find some way to address disputes. And this isn't the only forum, the only area where this issues is being discussed that's coming up in a variety, but this is probably the most compelling, so I think a lot of work needs to be done on that.

And the third area that struck me as one

that's essential for sort of a viable solution or a viable work in the future is some greater flow of information about both good practices and conflict of laws and there are really two sides to that. One we talked about a lot, which is disclosure. The other we talked about almost not at all which is consumer education. But I truly believe that as we move forward, both of those pieces need to fit together because what you want is sort of informed consumers making informed choices.

So, those are my conclusions from the three days and they kind of overlap the five -- the first two that you mentioned, online business should not be treated differently than offline and consumers shouldn't be denied any benefits they had. I think those are obvious goals. I think every single person in this room shares a caveat that everyone familiar with the Internet would have to say is to the extent that it is viable or feasible to do it in the Internet environment. These are the goals you strive for and how precisely you achieve them really is a function of the medium itself.

So, those are my thoughts on the session.

Again, our thanks to you and your staff and everyone else for the work they've done on this.

MS. BERNSTEIN: Thank you, Roger. I think your point about alternative dispute resolution mechanisms was close to being a consensus view. That is, the need for developing perhaps different kinds of alternatives for dispute resolution that is emerging as an important domestic issue and certainly would be more important in the global environment.

Let me skip down to the other end of the, no, let me start with Jack. I'm going to get the name. Hank. I'm sorry. Would you comment?

MR. PERRITT: Sure. I expect that you're going to hear a lot of support for your consensus principle number four, the development of an international consensus on core values and I certainly support that and I'd like to stay a couple things about why I think it's so important.

We are not going to be able to harmonize even across state lines in the United States, let alone across national lines around the world some sort of massive code for the Internet. What we can do, however, is to pick particular subject

areas that have a high potential for consensus and we need to do some more work to inventory what the laws are in the major countries to understand what the potential for consensus is. But I think especially in the consumer area, we ought to be able to bring consumer protection in the international arena to the same point that privacy was after the OECD principles were adopted and that means that we use the OECD principles on privacy as a kind of model in the sense that such principles have to be relatively general to gain agreement.

It probably will be necessary to trim the edges of the consumer protection subject and if we need to trim them a lot, I would suggest that consumer fraud might be a particular core value that might be the focus of some discussions. And then if we could, and furthermore, the OECD might be an attractive framework to do. Probably more attractive than the WTO because you don't have so many countries involved, but you do have most countries that are most involved now in electronic commerce.

Now, the reason that seems like a good idea is that if you could get some agreement on

some of the, a subset of the universe, then you do two things. You make it easier for some of these ideas for private self-regulation to take root, because if you have some agreed-upon values and then those values get instantiated in private codes of conduct, then the self-regulatory mechanism that has that code of conduct to its core is instantly more legitimate to the public regulators and you also make it less difficult to deal with choice of law and personal jurisdictional issues because if the laws's the same, if everybody agrees that consumer fraud means that and that that's an important value, who cares whether you apply the law of Germany or the law of the United States? And for that matter, who cares whether you're in court in Germany or in the United States? So, you unload some of the choice of law and jurisdictional questions to the extent that you begin to get some harmonization.

Second point relates to your consensus principle number five, the development of cooperative and information-sharing arrangements and I would encourage you to do that in a fairly explicit way. Perhaps using the multi-, the

Mutual Legal Assistance Treaty as a fairly loose kind of model, but I think if you start with information-sharing arrangement between consumer protection agencies, then you can get pretty close to mutual enforcement of your decisions, which I think would be helpful.

Now, just a couple of points about the machinery. There's been a lot of support expressed for private self-regulatory arrangements and I share the enthusiasm for those things, although I must say that I think that to be realistic, we must expect some degree of public law framework for that. There is too much political commitment to consumer protection through public law and too much mistrust of foxes guarding chicken coops for us to expect completely to be turned loose and left alone all together. But what we can seek, and I think there's a reasonable possibility of achieving, what we can seek are new hybrid regimes where the public institutions say here are the outer limits, here are the minimal protections, and within this very general framework, let private creativity and market forces blossom.

Now, there are two things that is I think

deserve particular attention. We do not need to reinvent the wheel for private dispute resolution. We have a private dispute system that's been around for a long time it's. It's called arbitration. And as to that, we don't have to worry about the difficulty of negotiating a multi-lateral international treaty. We've got one close and to a hundred country are signatories to it. And in the area, the pre-cyberspace area for which it was designed, it works very well.

The interesting thing is as those of us who are enthusiasts for private dispute resolution in cyberspace, we almost never make use of that international convention or of arbitration which would meet the fairly permissive tests of domestic U.S. Law and I think we ought to understand why that is. I'm not arguing that we should use arbitration, traditional arbitration as opposed to these other things but we need to understand why traditional arbitration, with its very well developed and highly predictable systems of procedures and private autonomy and judicial enforcement, why it apparently is not resonating very well with the

people who are designing these new private systems for the Internet.

Related point, still on the machinery. If we're going to have private self-regulation for aspects of electronic commerce that involve considerable asymmetry and bargaining power and information as between large sellers and fragmented small consumers, I think we're going to have to do a lot more work than we've done on understanding what our feasible representation arrangements for fragmented side of that.

We've had some experience wrestling with that in the Internet domain name administration area but the nastiness and instability of that discussion I think is enough to caution us about the difficulty of that when we really don't have a very good set of ideas about how you can ensure, as I think Jamie Love had encouraged several times today, how you can ensure that the little people have a place at the bargaining table when your model is bargaining private regulation model.

Further, I would suggest that we should be attentive to how technology could help us improve the functioning of systems. In the

preceding panel, someone said that if you want to sue, click here. Well, there is a lot of work going on about how electronic filing might facilitate the operation of our court and I think it's appropriate for us to give more focused attention to how technology can help make more useful and accessible the institutions that we already know and which already have legitimacy, like courts, for example, like arbitration, like mediation that Ethan Katsh has worked so effectively one.

Finally, I would encourage everybody here and all of your friends to take active part in helping to figure out answers to the questions that you've heard posed today and to move along the affirmative suggestions that you've heard today. I hope the Federal Trade Commission will continue its excellent job of creating opportunities for us to learn from each other. I also would encourage you to participate in the American Bar Association's Internet jurisdiction project which is open to anyone who wants to volunteer. There are lots of drafting opportunities. I'm particularly interested in that because it's housed at my law school and you

have a particular opportunity in the consumer protection area because the guy who is coordinating that, Stu Engis, is sitting right there. So, you can volunteer with him before you leave the room to actually do some of your own work on this.

MR. BERNSTEIN: Thank you, Hank. I think a number of our folks are participating in the ABA project and will continue to go through very good suggestions. Sally Gustafson, will you give us your views next?

MS. GUSTAFSON: Thank you, Commissioner Bernstein. And again, thanks for inviting me and the other states who have participated in this and I think everyone has a good perspective on this and I also appreciate listening to the professor's views. They're extremely well articulated and stated, but I like to go for a minute from the professor to the prosecutor and in my sort of common look at this, I'm trying to see why we are here, why we just spent two days of our valuable time listening to all of these big thoughts and these good ideas. And that is, I think, of course, I have an answer since I asked the question, but I think we are here

because there is a problem and the problem is that consumers are not getting effective remedies in their Internet commerce in their dealings.

We're not here because business isn't flourishing on the Internet, because business and commerce isn't taking off and looking for new horizons and exploring new areas, which is wonderful. I think that's terrific. I appreciate that and enjoy that as much as anyone in room, but the problem and the reason that we're here is that somebody is being left behind and all too often, that's a consumer. That's somebody who is the buyer, who is there and I know all of you from the business communities are saying well, these are our customers, we love them, we care about them. They're the ones who give us their money, but they are in an unequal bargaining position when they're dealing with businesses and on the Internet. And more often than not, they are not finding effective remedies and that's why I think this conference is very useful and some of the core principles that the commissioner has stated are really good starting point to try to address that issue.

I'd also like to make one other comment.

I've heard over the last two days several people say well, putting fraud aside, we won't talk about fraud because those are really the bad guys. That's not anyone in this room, I'm sure, but everyone says let's just not talk about that for right now because everyone agrees that those people, and those bad guys, should be subject to all kinds of restrictions. Let's talk about the other things. Well, to a consumer, I think sometimes that's a very nebulous distinction. Certainly, a consumer who purchases a Mark Maguire baseball card that's signed by Mark Maguire and it isn't Mark Maguire's signature, has been the subject of fraud and everyone can say yeah, that's true.

It's not always clear when you're looking at this on the Internet and there's, you know, nobody knows. We're not dealing with smart consumers and consumers who aren't so smart. We're dealing with people who take the information that they see there as to the truth. Mark Maguire signed this card, it's worth a lot, and I'm going to spend my money and do it. Well, if it isn't a signed card, that person has been the victim of fraud.

On the other hand, people will say well, that's not quite the same as not putting disclosures up on your Web site, but if you're selling tickets on an airline, you're selling, you've got tickets for sale to go to, say, from Seattle to go to Reno for the weekend or, excuse me, if you get these tickets to go to Reno, and you think wow. I'd love to do that. They're only \$50 bucks. That's great. Round trip. Well, you don't notice that three clicks away that it tells that you can only use these tickets on Tuesday, the first Tuesday of the month and only if it isn't raining and, of course, everyone knows that you'll never been able to use the tickets because it's going from Seattle. It's an in-joke.

So, anyway, these are the kind of things that -- people who purchase over the Internet, whether it's a very clear fraud or a fraud that's perpetrated sort of in a more subtle way, they don't care. They just want their money back. And how are you going to do that?

I think that's what we get down to when we look at the core principles and what we have found and I have mentioned earlier is that the

one way to do this in the real world, in the practical world, is to be working with other countries, and I'm talking about sellers that are in other countries, trying to be working with the other countries, who try to harmonize what we're doing.

I mean, one of our biggest problems in initially dealing with the Canadians, who we love, was that they, in the beginning, had a hard time seeing that selling foreign lottery tickets to U.S. Residents and having them lose their money was actually a crime in Canada. So, when we recognize that fraud is a crime no matter where it occurs and that we can get agreements among nations, then we're well on the road to effectively finding remedies for consumers.

Also, another thing I think that we have to look at is where are these effective remedies? Instead of saying well, where are is the seller or where is the buyer? As a criminal prosecutor, we were always told to follow the money. Maybe that's one thing, is look for the money. Where is the money? That's what the person wants is their money back. So, perhaps there is that possibility of looking for the remedies and then

trying to find a way as to how to get the remedy effectively to the person who has lost their money.

I also am very intrigued by the online arbitration and alternative dispute resolution. I think that there is a whole new possibility of creating in this new environment a new kind of jurisdiction where people can go and resolve issues and problems and perhaps then with some kind of hybrid where as a professor says, some sort of structure around that.

We do have a lot of alternative dispute resolution companies, not only the Better Business Bureau. There are private arbitration services and we may see the development of this in the entrepreneurial spirit that we're all looking at the Internet. We may start getting companies that are competing for consumers who are looking for effective remedies and trying to get that to occur online.

So, I think that the core principles that we have agreed on or at least that are proposed as agreement are very good starts and as far as effective remedies, I think that's what we have to focus on and continue to try to achieve.

MS. BERNSTEIN: Thank you, Sally.

Yesterday we had the pleasure of a kick-off speech from the Secretary of Commerce. Today, we have the pleasure of having with us Andy Pincus who is the General Counsel of Commerce and who was able to get here at least for the closing session. Welcome, Andy.

MR. PINCUS: Thank you. It's always a pleasure to be here. Only the power of Congress kept me away from this morning's session.

Let me say at the outset, what a pleasure it is for all of us at the Commerce Department to work with our colleagues at the FTC on consumer protection, privacy and a whole host of other Internet and other related issues, that I think we've really forged a good working relationship that has enabled us to spread our resources more broadly and address a wider range of issues and besides, it's a lot of fun to work with these folks.

I think your principles, Jodie, lay out a number of things that we took away also and I guess maybe I can just make a few comments about some of them. It seems to me there are two maybe partially segregable issues. There's this

question of core protections, which best practices. I think there are a lot of ways in looking at it, which is sort of what is the kind of conduct that we expect of good merchants? And then there's the question of what happens when they fall short? And as Sally said, what are the real remedies and what are the real remedies that enable consumers to get their money back and also you law enforcement people to prosecute the bad guys and get them?

I wonder if looking at it that way might not be useful because it seems to me on the core protection side, there's a lot, everyone would agree that basic fraud is bad. Then you move into questions about disclosure and affirmative disclosure obligations and kinds of disclosures where it seems to me technology may have a real role to play in increasing the amount of information that can be given to consumers because of the layered aspects of Web sites and the ability to have the ability to post their own information such as eBay and others have done. Then that seems to me to be in an area where the private sector, both NGOs and companies as well as government has a role to play in talking those

through.

The enforcement side, especially when you move beyond ADR, seems to me to be much more of a government function. How do you all at the state level forge relationships with your colleagues and other Attorney General's Offices? How do we forge relationships with other countries which clearly are going to be necessary because even if everyone agrees these practices are bad, people will do bad things, as you said. We have to find a way to get them.

I guess my reaction is looking at things that way is much more profitable than trying to take, although it's another job that he has to be done, sort of existing legal principles of jurisdiction and conflict of laws and trying to parse through how they're going to operate in this environment which is sort of a very complicated task, that it's going to take a long time and I think as the secretary said yesterday morning, governments are going to be very reluctant to say that their rules and their enforcement authority doesn't apply if they don't know what that means. If it's rule of origin and that means everybody moves to the Cayman Islands

and that's what the regime is, no one is going to sign on to a rule of origin.

As Hank said, if there's some floor, then maybe people, that's been agreed on before that analysis takes place or before those conclusions reached, maybe people would be more comfortable with rule of origin with the floor, if you will.

So, it seems to me, you've got core best practices, enforcement regimes and the legal analysis, all probably have to proceed on separate tracks if we're going to come up with a system that really works at the end.

MS. BERNSTEIN: Thank you very much, Andy. Frank?

MR. TORRES: Sure. Frank Torres with Consumers Union. I do want to make some initial comments on the some of the principles articulated and then talk just very briefly about some of my observations about what's been going on over the past two days.

First of all, in regards to the first two principles, online businesses shouldn't be treated differently and consumers shouldn't receive less protection, I think as a minimum, that's a good place to start. The comment was

made earlier in this session about as long as it's feasible, as long as it's workable. My only thought there is who determines what is feasible and what's workable? And who drives that debate?

Also, we need to recognize that online world is not the offline world and so that there might be other things that need to be considered there.

There's been lots of talk not just in terms of Internet and electronic commerce that all consumers need are disclosures and disclosures, disclosures, disclosures. Well, disclosures are not protections and are not adequate in many cases to protect consumers. And to just count on disclosures to do that, to me is a failure of the system because it doesn't work in every case. It's helpful; it's nice. Doesn't work in every case.

I was talking to my nephews recently and last year it was all Game Boys. They wanted everything associated with Game Boys. This year, it's these Pokeyman cards. Talk about going global. It's these Japanese, I equate them to, like, baseball cards, but it's this complicated game. I can't figure it out. But my point is

that they got tired of the Game Boys. They got tired of technology. It wasn't new anymore. It wasn't exciting anymore. The novelty completely wore off. There was no value in that. Is the same thing going to happen to the Internet? It's kind of neat. You get on it, you can surf.

I saw, and I don't have the exact numbers, there's a lot of people doing window shopping online but they're not purchasing products online. So, what does that tell us? I talk to people who are very smart, very intelligent, surf the Net all the time, will not make a purchase with their credit card over the Web because they're afraid of security. I'm like, there's one thing that we at least have protection on Reg. Z; it's that. I mean, you can't convince them that that works.

So, what's it going take and at what point do we really start talking seriously about doing things? I heard a lot today about how well, that is all still new. Let's figure things out. That's true in a sense, it's still new. We're still trying to figure things out, but there's billions of dollars being spent. We heard from an attorney, somebody from an Attorney

General's Office today saying that they're getting thousands of complaints. It's my understanding that the FTC has gotten a tripling of it complaints the first six months of 1998. And so, at what point do we sit down and say, okay, it's not new anymore? Now, it's time to take a look at what we should be doing and maybe this is kind of the start of that discussion.

Also, that there was talk about is protection provided in terms of the payment mechanism? Right now, you have credit cards. Your liability is limited. It's my understanding it doesn't apply in the international sense, so somebody from abroad making the purchase may not have that same core protection that we have here but remember, you're talking about using other forms of payment. Use these check cards or debit cards. Right now, if there's voluntary limited liability, and it's a little bit different than somebody picking up your credit card and using it. If somebody picks up your debit card and is able to use it, going to a merchant where all's that's required is a signature, if that even, then your whole account gets wiped out. You may get it replenished maybe in three days, maybe a

week. Maybe if the bank doesn't follow all the procedures correctly, you don't see that money again. So, it's different than a credit card. So, we need to be careful if we say oh, the payment system will take care of protecting you in making online purchases. It's not always the case.

We also hear that jurisdiction doesn't matter, that is it's hard, it's expensive. When you get down to brass tacks, even in the offline world, it's tough if you order something from abroad to do that. And so, maybe we need to think of other ways to protect consumers. That's why government cooperation and information-sharing and international consensus on core protections I think is very vital because it gets us past that, but it seems a little disingenuous, and this moves on to my next point quickly, that self-regulation is not enough. It's got to be proven, it deserves a lot of scrutiny, third party review, but it won't stop the bad actors.

I was glad to hear Hank bring up the that it needs this public law framework overlay to it.

And it seems to me to be very disingenuous to

hear the business community often talk, when we talk about trying to get some consumer protections in place, that regulations, and I said this at the other panel, stifle innovation, it will stifle e-commerce and that let's not do it now.

Industries up on Capitol Hill every day pushing for laws which will create regulations regarding the Internet. They were driving this UCC(2)(B) process which, last time I checked, I think that's kind of a set of regulations. So, to me it's a little bit disingenuous for the business community to say, oh, we don't like regulation. That seems to me that the business community loves regulation when it benefits them, when it helps create an edge over other people in the marketplace, but when it comes to providing core consumer protections, we often hear oh, we can't do it right now and it's again, it's not just in commerce but in other issues.

One last point. On a very positive note, I think the Internet is wonderful and great and there's a lot of good actors out there. There's a lot of benefit to it. A comment was used earlier that should use that technology to give

consumers the tools they need to make truly informed choices about their decisions.

And lastly, let me pull out, one company submitted comments I thought was very good, and if all companies operated within this framework, we truly wouldn't be here today, and that is this, and not all companies, I think, adhere to it. It says, companies with nationally and internationally known brands are universally vigilant in their desire to fairly and expeditiously resolve any consumer complaint for them. As for Mars, the company who filed these comments, the quality of their products and satisfaction of their customers are key to their business success. These companies are committed to resolving any problem or question the consumer may have should their products, for whatever reason, fail to meet their expectations.

I don't mean to endorse Mars or any other company but to me, it's clear. If companies adhere to that and if consumers are truly in control, then we're not here today having this discussion because companies are acting in the right way, the marketplace is competitive, complaints are resolved, so we don't get into

what jurisdiction applies. We don't even get into alternative dispute resolution. Companies are operating efficiently and be take care of that before wasting their money on their --

MS. BERNSTEIN: In other words, there is no problem?

MR. TORRES: Right. So, with that --

MS. BERNSTEIN: Thank you very much. We have two more market reps, but before I do that, let me just remind everyone that the comment period will be open until the first of July and of you or any colleagues you have who would like to file additional comments are more than welcome to do. We would urge you to do so. Jill Lesser from AOL, please.

MS. LESSER: Thank you, Jodie. First, let them join the chorus of folks who congratulated you and the staff and the Commissioners of the FTC for undertaking this dialogue. I recall -- I don't even know if this mike's on -- recall having been here both two years ago and three years ago to begin the dialogue on privacy and I think we would all agree that we've come a long way, both in having the business community really committed to

protecting privacy online and a lot of initiatives under way and working very cooperatively with folks here at the Department of Commerce and in many areas of the government to help consumers online in that particular area, which I think does fall into consumer protection.

So, I think as we begin this dialogue, hopefully there is a similarly positive relationship to forge and discussions to be had. I think that you've done a very good job of distilling down what has been said over the past couple of days into a certain number of consensus views and much what I have to say has been said in one form or another, but let me try to add a new spin to it, and that is, I do think that when you think about these principles and in particular, what can be done next, because I think what we'd like to have come out of a dialogue like this are a set of concrete to-dos. What should we do next? And it seems to me that we should look first at what it is, that there is at least some consensus that the market can begin to take care of and address and what it cannot. And I think it really clearly cannot deal with

itself without government involvement. Fraud, deception, trickery.

And I think what we have learned over the past couple of days is that whether our online or off, what the on line environment brings to this debate about fraud in commercial transaction is difficulty in enforcement and difficulty in standards and when we end up in an environment where people who are committing fraud are finding jurisdictions with loose consumer protection laws, regardless of what area, whether it's banks or straight consumer transactions, that is a problem and it undermines the entire environment.

So, I think one thing to undertake immediately is to try to forge the consensus you talked about but around enforcement of fraud and deception laws and cooperation among law enforcement bodies around the world to try to make sure that you can work with the industry to help make examples of many of those companies who are, frankly, online to defraud.

As an example, one of the areas that America Online's been involved with for a long time with our problems that we've talked about historically with unsolicited mail or spam is

that we have undertaken not only cooperation with law enforcement where it rises to that level, but to really be sort of a private law enforcement body by undertaking many, several litigations to try to stop people from spamming. And while the problem is still significant, we have found that we've been able to cut down certain activities and certain behaviors of spammers quite considerably by having fairly high profile cases and I think the analogy can be made to this area, which is the more and strong enforcement there is, the more examples we will have and hopefully the less fraud we will have.

On the other side, I think as we talk about the provision of clarity, of right and responsibilities of consumers, I talked a little bit about this yesterday and this gets into the question about best practices. I think it's critical for the industry to start to work together to adopt a baseline level of best practices but I do think that we are seeing that begin to emerge in the online environment already and we know, as I said, in the dialogue about specific initiatives yesterday, that when you undertake to try to bring consumers online and to

e-commerce and get them comfortable, if you're engaging in a dialogue with those consumers, as we often are, you very quickly realize that you have to provide a certain level of core disclosures and protections and guarantees before consumers feel comfortable. So, I think it is happening to a large degree in the marketplace.

I would also say in the discussion about international consensus, I think it's critical to remember that while there may be baseline protections, there are different expectations that consumers have all over the world, but the interesting dynamic about the Internet is it often arises above those societal expectations. So, while cars are central to life in the U.S. And therefore, when we think of consumer protection, we think of lemon laws, that is not necessarily the case in France or in Germany, for example.

And so, you know, I think what we have to real size is we have to begin a dialogue with consumers online and eventually we will get to a place where those rights and responsibilities will start to emerge and consumers, for example, may not want to buy cars online because it is not

the kind of large purchase they can make where they don't have a physical presence but I think, as I said, you know, you've done an extraordinary job in bringing these issues together and I do think that there is a lot of work that we can do as industry among ourselves in dealing with, I hate the word self-regulation, but in trying to develop core protections for consumers that derive out of the market and that will indicate whether or not we will all be successful in our endeavors online.

MS. BERNSTEIN: Jill, thank you. I quite agree with you. I heard a large amount, I think a significant number of new best practices from various companies over the last couple of days, which are all very, I think, very interesting. Do you think that the sort of consensus-building mechanism that we've developed here or processed, has that assisted? Does it stimulate best practices in companies? Do you have a view of that?

MS. LESSER: Whether a dialogue like this stimulates consensus?

MS. BERNSTEIN: Uh-huh.

MS. LESSER: I think it does in part. It

is a way for particularly bringing people in from all over the world to understand when they're representing their consumers, where the expectations are. Obviously, as a business, we get the best feedback from our consumers all over the world and I think as a multi-national company, there are many others out there who can perhaps bring the views of our consumers to a table like that and begin a dialogue because I think we're learning a lot.

You know, we saw a vast change from last Christmas to this Christmas. You know, an exponential growth in the people who are willing to actually purchase online who do more than window shopping, and you have to go out and ask why and why not? Why are there still a lot of window shoppers and why are there more and more shoppers? And our certified merchant programs and the other things I think are developing online emerge out of those discussions that we have directly with consumers. That can happen with consumers, i.e., focus groups that we undertake with consumer organizations with other businesses who are listening their consumers and may be coming from the offline world on to the

online world, which is different from AOL which began on the online world and has, therefore, I think, a unique perspective.

MS. BERNSTEIN: Thanks. Our panelist at the end, Scott Charney, from the Department of Justice. Welcome, Scott.

MR. CHARNEY: Thank you. I thank you for inviting me to be here. There are, of course, two different kinds of fraud. There's civil fraud and there's criminal fraud. Unfortunately, neither one keep consumers away from the Internet and they raise somewhat different problems.

The real problem is, when you think about this, the role of putting consumers, businesses and government is sorting out who should be telling what to whom and in what ways? And when you think about it as a fraud problem, we usually think about two different things. One is prevention. How do you prevent people from being ripped off in the first instance? Second one is the reaction. What do you do when somebody has a complaint?

And in the Internet, although I generally agree with the principle, of course, that the Internet world should in most cases parallel the

physical world, there are some concrete differences that come into play here. And can't be ignored. The first is, what do you generally tell consumers about shopping on the Net? What we usually told them in the physical world is if it's too good to be true, it probably is. Well, it's a good rule and it's a rule that works on the Internet as well. But other things we told people in the physical world is know the company you're doing business with. Well, if you tell people that in the Internet world, you suggest that they should shop at Barnes&Noble.com and not Amazon.com because until a few years ago, who heard of Amazon.com?

And the other problem is in the physical world, there's a lot of cash-and-carry transactions. People walk into a store, put money down and walk out with the good. I think most people don't think about this very much but one of the things that happens when they walk into a store is they know there's a merchant who has invested in inventory, rent and employee and so, there's some element stability.

This is not required on the Net. I can set up a Web site virtually for nothing, start

taking credit card numbers and, you know, in return for a promise, to deliver a good and, of course, never shows up.

So, the difficulty is what exactly do we tell consumers about if it's safe to shop on the Net? And the things that we traditionally tell them might not be the right message. It's complicated by the fact that to the extent we talk about self-regulation where businesses have a good privacy practices and dispute resolution practices, that works fine and in most cases, it's great because they're legitimate businesses and they mean it. But once you move into the criminal side, it's of no help at all.

If I'm a criminal, I will put out the best guarantee with the greatest promises of resolving all disputes and returning your money before I disappear. So, one of the things that the market has to think about is third party certification, things where consumers trust organizations that vouch for businesses that aren't well known. And in some respect, large companies have an advantage in this regard. If they have a well-known name, if they're, you know, an AOL or an IBM and they're selling their

IBM hard drives over the Net, most consumers will probably figure IBM will stand behind their product.

Unfortunately, we've had some criminal cases where people have set up Web sites in other people's names or even diverted the traffic from legitimate places to bogus sites. It's getting all the information, taking the credit card numbers and then disappearing and, of course, the real company doesn't recognize at first that their traffic is being diverted until they notice a severe drop in the amount of transactions on their Web pages.

So, we need to think a little bit about how to explain to consumers what the risks are and how to prevent problems on the Net. For industry, of course, that raises some challenges as well, not only third party certification, but to what extent authentication technology should be employed on the Internet which, of course, leads me to my last point which is what do you do when there's actually a criminal problem? The answer to this is this is extremely difficult.

I mean, one of the unique things about the Internet that's different than some other

kinds of crime is you have a large volume of low value transactions and the victim are located all over the place and if you go to your local police department in small town because one person is defrauded of \$10, and the Web site is in Bulgaria, they are not going to chase that case.

When you start going up the chain to the federal law enforcement agencies and you start trying to figure out how much is the damage here, does it meet our fraud thresholds for federal prosecution, and then you start looking at the Internet to see if you can find the source, you realize you have a whole world of problems, not the least of which is both technically and legally, it is increasingly difficult to find the source of criminal transactions on the Internet. That's because technically, of course, there's little authentication in the network. It's easy to spoof addresses. It's easy to use anonymous remailers. The Internet does not provide traceability to transaction.

Legally, the European Data Directive, as implemented by European countries, can market forces in the U.S. Where people are trying to store less and less data, means you have no

historical data available from which you can build a trail back from the victim to the source of the crime.

So, if the Internet doesn't allow realtime traceability and historical records are not preserved because the market or EU data directives don't support that kind of preservation, what you quickly find is you can't find the source of criminal activity, and that means that the risk will be that criminals will flourish in environment. To the extent that happens, of course, consumers are dissuaded from going on the Internet.

So, it seems to me that the problems are fairly widespread. It's going to require a multi-disciplinary approach, applicable legal framework, international agreements with governments, working with industry on technical standards and authentication, looking at implementations of data directive affects the market forces. All of this is going to be stirred in a pot. How it's going come out and whether it tastes good or not is an open question.

MS. BERNSTEIN: Well, on that optimistic

note, I do want to take few minutes. I know people are already exhausted but I would like to ask our audience, it has been many of whom have participated throughout, if there are any questions they'd like to address to the panel or make any comments and I would urge you, for those of you who are going to still make comments, to particularly think about what next steps would be useful from your point of view because we'll all be digesting what we've learned here and rather than try to figure that out today, which won't be possible, we would really welcome your suggestions, both in terms of whether or not a session like this or others might be useful and we would welcome your suggestions. But in the meantime, and sometimes I can't see who people are, but I know that's Jonathan Rusch from the Department of Justice. A comment, a question, John?

MR. RUSCH: A comment. I think in response to the general group of comments --

MS. BERNSTEIN: Someone give him a mike.

MR. RUSCH: A brief comment in response to the general comments that I've heard from this

panel in particular. It occurs to me that one of the things, and I think much of what you've identified at the start of this particular panel, is, in fact, a firm foundation for we should go forward, but if there's one concept that I think we need to be thinking about that really does make the response of government, the private sector and consumers different from the way we're accustomed to in the offline world is speed.

I think some of the things we need to be thinking about within government agencies that the Internet really does make things different in terms of speed with which solicitations, good, bad, and indifferent get to consumers, the speed with which consumers respond often with, frankly, even less information than they may be accustomed to getting in offline transactions. And part of what I think we need to be thinking about broadly in trying to deal with the global environment of e-commerce is doing things that allow us to respond more quickly, to evaluate more quickly what we are seeing in the online world.

We're accustomed, as you know, Jodie, from what we've been doing over the years in telemarketing fraud and other kinds of advanced

frauds, though we have a kind of an orderly process, we're coordinating through quarterly meetings and, you know, regular follow-ups and that's too slow a decision cycle. We need to be able to process information faster, share information faster and respond faster and some of that responsibility, I think, falls to the business community as well and some of it falls to us to make sure that we are sharing information with the business community.

If we're serious about wanting to make a genuine partnership between the business world and the world of government in responding to all kinds of concerns about e-commerce, it really behooves us to figure out how we can set up processes that in some ways are different from the kinds of processes we've been using up to now with traditional, old fashioned fraud.

MS. BERNSTEIN: Thank you very much, John. I quite agree with you and we certainly have tried and to some extent, have been successful in giving our people the tools to be able to work much more quickly than we have in the past and will continue to do that. I also heard, I think, and I think you were underscoring

this, this may be an area in which both private enforcement and public enforcement will have to move together in order to get to this large number of consumer issues.

Other comments or other questions? Oh, I'm sorry. Would you stand and take the microphone and tell me who you are.

MR. RALL: I Alan Rall of Sidley & Austin. There's been a lot of discussion about the lack of need or need for new legislation and the adequacy of current legislation and I think that excellent points have been made as to how the current laws are adequate to dealing with fraud and consumer protection on the Internet, but it also seems true based on the statistics that have been shared today, particularly from Mr. Serf and others, about the explosion of growth of commerce on the Internet, that this does represent a massive movement in transformation.

So, my question really is that even apart from the need for new laws, what do you see as the role for the legislatures? Congress, state legislatures. How are you coordinating the development of new regulatory policy or new

approaches at the FTC, other government agencies with Congress and state legislatures? Are they involved enough? Are they too involved? What do you see as their role?

MS. BERNSTEIN: Well, Lorraine Miller here from our agency is in the back of the room and she's our Congressional liaison. She never says anything publicly, but I'm only saying this very lightly, Alan. We do have, I think, at least some ability to work with the relevant committees of Congress. They have in the past asked us, particularly on privacy, to both study the issues that are involved in privacy and report back to them. They then held hearings and so forth. So, I'm sure it's an imperfect system that we have, but I think we have, we and other agencies, the Department of Commerce has been with us and others, to try to at least make the government's issues, the government's views as well known as we can.

As you know, there are members of Congress who have particular interests in these areas and we've tried to focus on working with them as best we can to be sure that they understand what our concerns are and can respond

in that way.

So, it's a very good question. Andy, want to add to that? I'd be happy to have your views.

MR. PINCUS: I agree with you. I think everyone's feeling their way here to some extent.

As Scott said, there are no magic solutions out there. It is a very new phenomenon and I think just as we're doing that with respect to the issues that we're trying to address, so are the people in Congress and in the states the same way.

We certainly spent a lot of time talking to members of Congress about privacy and consumer protection and domain names and electronic authentication and the other issue we're talking on and also talking to people in the states who are working on these issues. I mean, I think the best that anyone can do right now is to coordinate, share information and try and hope that some coherent policy structure develops, I don't know, which I think we've actually done a pretty good job of so far.

MS. BERNSTEIN: Well, Commissioner Thompson, I think, has a comment.

COMMISSIONER THOMPSON: But in that vein, I think one of the important roles of the Commission has been to service our resource, to act as a conduit and be able to get the best information not only to the public, but also to decisionmakers within government, whether they be in the administration or whether they be in Congress, to be able to shed some light and some real studied light on the issues that we're confronting in dealing with cyberspace.

So, in that sense, working with all of you, knowing the consumer side but also the business side, that it enables government to be very much informed.

MS. BERNSTEIN: Thank you?

MR. TORRES: Can I just make one comment?

What I found that goes up on the Hill, a lot of it is catch-as-catch-can and it's a free-for-all sometimes, but there have been attempts to close existing loopholes in existing laws that would not to make those laws apply to what goes on in the Internet.

One good example is the solicitation for credit cards as opposed dramatically, I guess, over the Internet. It's a way to get the

information out to solicit folks to buy it. There is some question or some doubt whether or not the Truth-in-Lending laws were written in such a way that applies to those types of transactions and there's currently a bill, both in the House and the Senate to make sure that the disclosures that need to be made in the offline world will be made in the online world.

So, I think perhaps we'll see a little bit more of that to fix some discrepancy. And then you do have things like privacy that are being addressed in water forms that I take it will apply to online transactions as well, particularly where your financial privacy is of some concern.

So, right now it's kind of catch-is-as-catch-can and the FTC does provide a really wonderful role in educating people up on the Hill and I guess where we're about with the issues.

MS. BERNSTEIN: Well, I'm going to educate the rest of us right now and say while I'd love to have another hour here because it's fascinating discussion, I want, once again, I thank you all for your participation and

particularly for our foreign visitors who I know went to some lengths to arrive. We will be back in touch, I'm sure, and it is now my pleasure to, I don't have a gavel. I really should have a gavel to call it to a close and thank you again for coming and have a safe journey home.

(Whereupon, session six concluded.)

(Whereupon, the June 9, 1999

presentations concluded at 6:30 p.m.)

C E R T I F I C A T I O N O F R E P O R T E RDOCKET/FILE NUMBER: P994312CASE TITLE: GLOBAL E-MARKETPLACEHEARING DATE: JUNE 9, 1999

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: June 22, 1999

LINDA BAHUR

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I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

BETH RODERICK