

LECTURE: Netscape and the Law in the Information Age⁺

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I. INTRODUCTION

Being the general counsel at Netscape was fascinating because Netscape has been involved in many of the most pressing issues concerning the Internet—contracts, copyright, encryption, and privacy, to name a few. The experiences of Netscape show how technology is once again forcing our leaders to deal with many complex issues that make us turn yet again to examine the first principles that have been debated since the founding of our country.

II. NETSCAPE'S BEGINNINGS: HAVING THE RIGHT VISION

Netscape is premised on the idea that tremendous power comes from a global, easy-to-use, multimedia network.

One way to illustrate the force of this vision is the speed with which it has been accepted. It is hard to remember that only five years have passed since Netscape was formed in April of 1994. The first beta-version of the Navigator did not get released until the end of 1994. So all of the expansion of the internet that we have seen, with websites everywhere, has come about in a very short time. We joke that in "Netscape time," one year equals seven, and I guess from that perspective, it has been some thirty years since Netscape first came into being. This expansion is happening so rapidly because the idea behind Netscape is right.

III. THE CHALLENGES OF THE INTERNET: RETURNING TO FIRST PRINCIPLES

Despite the fact that society was ready for something like Netscape, we faced many challenges as we pushed into new territory to set up our Navigator. To address the new legal questions that we found ourselves confronting, we had to return to first principles and adapt basic legal concepts to what Netscape was doing.

A. Contract Law

The first challenge was writing contracts for the new software needed to operate a web browser. No one before us had to deal with issues such as protecting copyright on mass-market software that is globally distributed in open electronic format. Furthermore, customers were coming to us asking for the browser for their businesses. They knew they wanted this hot, new browser to set up websites for their businesses, but they did not have a clue what their new businesses were going to be. The result was that we had to negotiate with customers who wanted our product for their businesses, but frequently, the customers on the other side of the table were making their business plans as they negotiated with us. This made every negotiation unique.

We had no guidance on how to deal with these new contexts and needs. Four years ago, there were no form books out there for protecting Internet software. I am proud to say that our lawyers were

⁺ Edited transcript of remarks delivered to the Yale Law and Technology Society on February 23, 1999.

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the creators of most of the forms for Internet software licenses. We had to deal with some tricky issues on warranties, indemnity, and licensing itself.

For example, licensing is very different when there are multiple levels of distribution and where distribution is very easy, as opposed to when you are selling something on a disk or through a retail outlet. We had to think about the basic goals and requirements of contracts to work through these issues.

This notion of creating new licenses is still going on for us. When we decided to make our source code available through the Net, we formed an entity called Mozilla.org. It was the first time a commercial software company had made its software so freely available to the public. As a commercial software company, our lawyers had to protect that which needed protecting in order to preserve our commercial interests while getting the product to the public. We wrote something called the Mozilla Public License, which was the product of a lot of creative, out-of-the-box, legal thinking.

The Mozilla Public License¹ now is being used as a model by companies such as IBM, which just gave some of its source code to the general public. Other online entities are also starting to use that model.

B. Policy Implications and Legislation

On the policy side, the issues have been fast and furious as well. When I first got to Netscape, one of the first things that happened was the Communications Decency Act (CDA).² I went to Washington to see what was going on and I realized, to my dismay, that the Internet Service Providers (ISPs) had been there already and had protected themselves in the draft legislation. The online services had also been there and protected themselves, but there had been no one to speak on behalf of producers of Internet software. So at the eleventh hour, I was very forceful and got myself in the middle of these negotiations, and we got some acknowledgment in the CDA legislation of the role of Internet software. CDA, as you know, fell by the wayside,³ but it was a real eye-opener for Netscape. We realized that it is necessary to follow what is going on in Washington.

Things developed rapidly, as CDA did, when the Internet suddenly sprang forth. At that time, all of the legislators were calling up wondering what it was, and some of them were already taking action. CDA was the first example of that type of quick action. It made me realize that we needed to stay continually on top of activity in Washington.

One of my first hires as general counsel was someone who could monitor legislative activities. It was very unusual in Silicon Valley to have a policy person, but CDA was a wakeup call for me. Things were going to happen that were going to affect our business if we did not keep our eyes open.

¹ See The Mozilla and Netscape Public Licenses (visited Nov. 14, 1999) <<http://www.mozilla.org/NPL>>.

² Communications Decency Act of 1996, Pub. L. No. 104-104 (codified as amended in scattered sections of 47 U.S.C.).

³ See *Reno v. ACLU*, 117 S. Ct. 2329 (1997) (declaring CDA unconstitutional).

Again, I have not been able to do this job in a conventional way, because nothing Netscape did was conventional, and everything was moving very fast.

In addition to the rapid pace of events, it was very heady to participate in policy development because we got unusually good access for such a little company. Literally every day, I was getting calls from state legislators. They were worried about taxation and jurisdiction questions, or they just wanted to understand generally what was happening. I got calls from members of Congress and even legislators in foreign countries. They knew that something was going on but no one knew exactly what it was. We were one of the only entities out there that could tell them what was happening.

Today, we are still dealing with the kinds of issues that legislators inquired about early on, including privacy, encryption, advertising, pornography, obscenity, copyrights and taxes. It is interesting that the questions that I was asked about four and a half years ago by and large have not been resolved. There has been a lot of activity, but we have not resolved the questions, though we learned the importance of keeping an eye on the policy side of what we were doing.

C. Privacy Issues

1. The Problem of Privacy on the Internet

Privacy is another fundamental issue we had to address, but this one took a little while to bubble up. Vast amounts of public information can be obtained easily through Internet databases. It took the industry a couple of years to recognize that this was going to be the case, and I think it was just a natural evolution as normal folks, not just the techies, started using the Internet. People started raising questions about privacy, and their worries are appropriate.

Strangers can get my home address and my phone number now. That does not make me feel good. Even though they could get the information before, access is now easy and universal. We are in an era where no one likes regulations, so the Federal Trade Commission keeps crawling to the water's edge to warn the industry to get itself in order or else face new regulations. The industry responds to these threats by stating that it is getting itself in order. For example, there is now something called the Online Privacy Alliance, through which industry has created a code of conduct for privacy practices as applied to online customers.⁴

Privacy, however, is still a very open, unsettled area. Once again, this goes back to the notion of first principles. We have a new technology that is going to create new social issues for us. We understood privacy before. We had it more or less under control in the Industrial Age. Now, all of a sudden, privacy is totally out of control again. We value privacy, but we need to balance that value against the efficiencies of mass databases. Although we love the fact that we can find our friends on the Internet, we do not like the fact that there might be a criminal out there who can find us just as easily. We need to find a balance.

⁴ See <<http://www.privacyalliance.org>>.

2. The Encryption Debates

The encryption debates began in 1995, when Netscape was the lone voice stressing the need for really strong encryption in the era of Internet software. I testified before Congress about encryption a few times. I was frustrated because I could not understand why no one, not even Microsoft, could see that we needed to change substantially the laws governing encryption. Internet software was now global. It did not make sense to me that American manufacturers were handcuffed in their ability to distribute their software to the world simply because they could not utilize encryption.

Encryption is necessary because information can be read by others as it goes from computer to computer if it is not encrypted. Encryption puts an envelope around the communication that protects the privacy of the message. The Netscape browser uses encryption, as it is one of the ways you can keep your information private.

In the encryption debate, we argued in support of the maximum level of encryption available for export. On the other side, law enforcement and national security interests in the federal government were worried that encrypted communications would help hide terrorist activities. The White House and Congress were in a dilemma. They wanted to help the providers of commercial software, the browsers, and other software companies. They wanted to help American industry. On the other hand, the national security people were saying to Congress that if encryption controls are relaxed, the blood will be on Congress' hands if there is a terrorist act caused by encrypted data. Although Congress was really torn, the debate made no sense, because there were already foreign producers of strong encryption that could be imported into the U.S. These producers could have a global market for their software, and strong encryption was going to be produced outside of the country even if it was not produced domestically. However, the national security interests did not see this point; they really thought that they could shut down encryption just by stopping the American producers from exporting encrypted materials.

Encryption highlights that we are going through a period similar to the one at the beginning of our country when there were very fundamental issues that had to be balanced. There are rights of the individual, as reflected in the need for privacy through encryption, and there are the community's rights or desires to have law enforcement and national security. Somehow we have to strike the right balance between the two as we set up guidelines for the Internet.

Again, this is going back to first principles, similar to the way the authors of the Federalist Papers had to return to first principles to solve governance problems in a newly-formed society. In part from the encryption debate, I began to understand that this technology was going to change almost everything and that the social ramifications of these changes are not clearly understood.

D. Copyright Issues

Another issue that came up for us was copyright. In the context of one of the meetings the World Intellectual Property Organization (WIPO) had in Geneva to discuss copyright issues, I saw that there were two camps involved in the copyright debate. In one camp were the vested copyright

holders-the motion picture industry and the software industry. The other camp consisted of online service providers, ISPs, and those like traditional librarians who want freedom of copyright. Netscape was in the middle because we make our money from copyright, yet, at the same time, we did not want the Internet to be harmed through poorly reasoned copyright laws.

There are two major issues involving copyright and the Internet. First of all, as communications travel from computer to computer, multiple copies are made. There is inevitable copying that goes on to keep the Internet running. Moreover, with electronic communications, computers cache copies. When you download material from the Internet, a copy stays resident on your computer for some period of time. This is necessary to avoid a worldwide wait on the worldwide web. Copyright holders want to charge for every one of these copies. Internet users argue that it is too expensive and difficult to count all the copies made and any attempt to do so will bring down the Internet.

In Geneva, another facet of the debate was going on. The third-world countries were arguing that the Internet was their future and so should not be shut down by copyright. In opposition to this were the more advanced countries where the copyright holders resided. Thus, there were some very interesting coalitions forming during WIPO. The issue of copyright on the Internet continued to the last day of the conference. Participants agreed to some language of compromise, but after the conference was over, it was not very clear what had been agreed upon because the copyright holders thought it meant one thing while the Internet interests thought it meant something else. Consequently, the debate moved to Washington as the WIPO recommendations were then supposed to be implemented in this country. The final result that passed in Washington was again a compromise.

I think that we are still trying to figure out the right way to have copyright work in the context of the Internet. The record companies and the music industry try to accommodate themselves to the Internet little by little, while the Internet interests figure out a way to protect themselves from extraordinary liability. The new legislation reflects that compromise.

Again, it was a matter of first principles. If you go back to what copyright is about, copyright is there because as a culture we have decided that we want to promote innovation. It is there to encourage artists and authors to produce. That sounds like a good thing, but is it a good thing in the era of the Internet where everyone is an author? Every time you write a little e-mail and send it out, arguably, you have something that is copyrightable. We have to learn how to balance copyright interests in this new context. We understood copyright when we had printing presses. We understood it again when we had copying machines. Now, we have to understand it all over again with the Internet. Copyright is another example of how the ramifications of technological change are not yet understood. We almost have to stumble into the problem, and then we have to re-think the principles behind the laws. We have to question why the laws exist, whether they make sense, and whether we really want those laws in the twenty-first century.

E. Jurisdiction and Governance of the Internet

Governance of the Internet has been the elephant in the living room that no one wants to acknowledge. At a conference in Aspen last summer with some top Internet thinkers, we were talking about privacy, taxation, and encryption. In every case the questions ended up being, “Who should govern the Internet, how do you govern a global media, and what is the appropriate means of governing the Internet?” No one knows the answers. I would argue that no one is even coming up with answers, because everyone is afraid to tackle the issues.

We need people who are going to start thinking about this and are going to propose models. We have models for other areas, including models for international governance, like the World Trade Organization, and models to govern banking. You can find models of governance in all kinds of places, but no one has thought through how we are going to govern a single, multimedia network that encompasses virtually all human interactions. Currently, I would say that we have relative lawlessness on the Internet. Everybody is excited by the new medium, so we are willing to let things float a little bit. The state of lawlessness, however, will not go on in perpetuity, especially as some people begin to suffer serious harm.

Furthermore, we cannot use the law to slow down this technological expansion. The efficiencies and benefits of the Internet are so great that people will violate any laws that try to hold them back. We need to think through what kinds of system of laws we really want in order to deal with this new technology and the social ramifications. Who is going to administer it? Whose law is it? What right does the United States have to declare that it is going to govern the Internet?

A few people have addressed these issues, among them David Johnson and David Post.⁵ These two authors think that self-regulation is the answer. They predict that various interest-based communities of people will set up their own rules for those who want to join. Johnson and Post have thought about online mediation programs to deal with wayward folks in such communities. It is necessary to use out-of-the-box thinking like that to come to terms with these issues.

IV. CONCLUSION

I am extremely proud of the Netscape lawyers because we have contributed a lot to the community. We started people thinking creatively about Internet software. We needed to have lawyers who were not too wedded to how things had been done before because we were creating a whole new set of legal rules for the virtual community. We needed people who had experience in intellectual property, but most importantly, people who had a combination of good judgment, the ability to think out of the box, the ability to be creative, and the ability to listen. I think this is the model lawyer for the future. Just as we had nothing from the past to rely on, future lawyers will be confronted with one new challenge after another. Lawyers, if they are going to be good participants in the process of building the twenty-first century, have to be able to use their creative sides as well as their intellectual sides to extend fundamental principles of law and society to new technologies.

⁵ David R. Johnson & David Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996).

We are building the foundation for the twenty-first century, not just technologically but socially as well. As law students, you are in a wonderful place to help build that social infrastructure, and what we build is going to be vastly different from what we have known in the past.