

Update on U.S. e-commerce :
Speed-bumps or Shortcuts on the
Information Superhighway?

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Overview - Current Hot Issues

- Domain Names -- changes and trends
- Broadband -- open access for ISP's to cable television systems
- Spam -- Judicial and Legislative Restrictions
- Encryption -- Revamping export rules
- UCITA -- Uniform Commercial Information Transactions Act

Hot Issues - continued

- Digital Music
- Meta-Searching
- Deep Linking
- Privacy Issues
- Securities Issues
- Jurisdictional Issues

Snapshot of Growth of Internet Use in the United States

- median income for online households is 57% higher than the average American household
- 27 million women now online, accounting for 46% of all U.S. net users.
- Teens average 8.5 hours online per week
- 87% of college students are currently online
- seniors account for 19% of total consumer online spending (Source: <http://www.Infobeads.com/Insider/Pages/Main/Main.asp?sid=102199>)

Increasing Trade in Domain Names

- over 5 million registered domains; principally “dot coms”
- more purchases and sales of names
- rising prices:
 - mall.com: \$250,000
 - computer.com: \$500,000
 - wallstreet.com: \$1,000,000
 - altavista.com: \$3,000,000

Domain Names and Trademark Infringement

- Increasing domain names means more opportunities for infringement
- Greater numbers of trademark suits
- Recent issues:
 - Infringement by metatags?
 - Infringement by country-level domains?

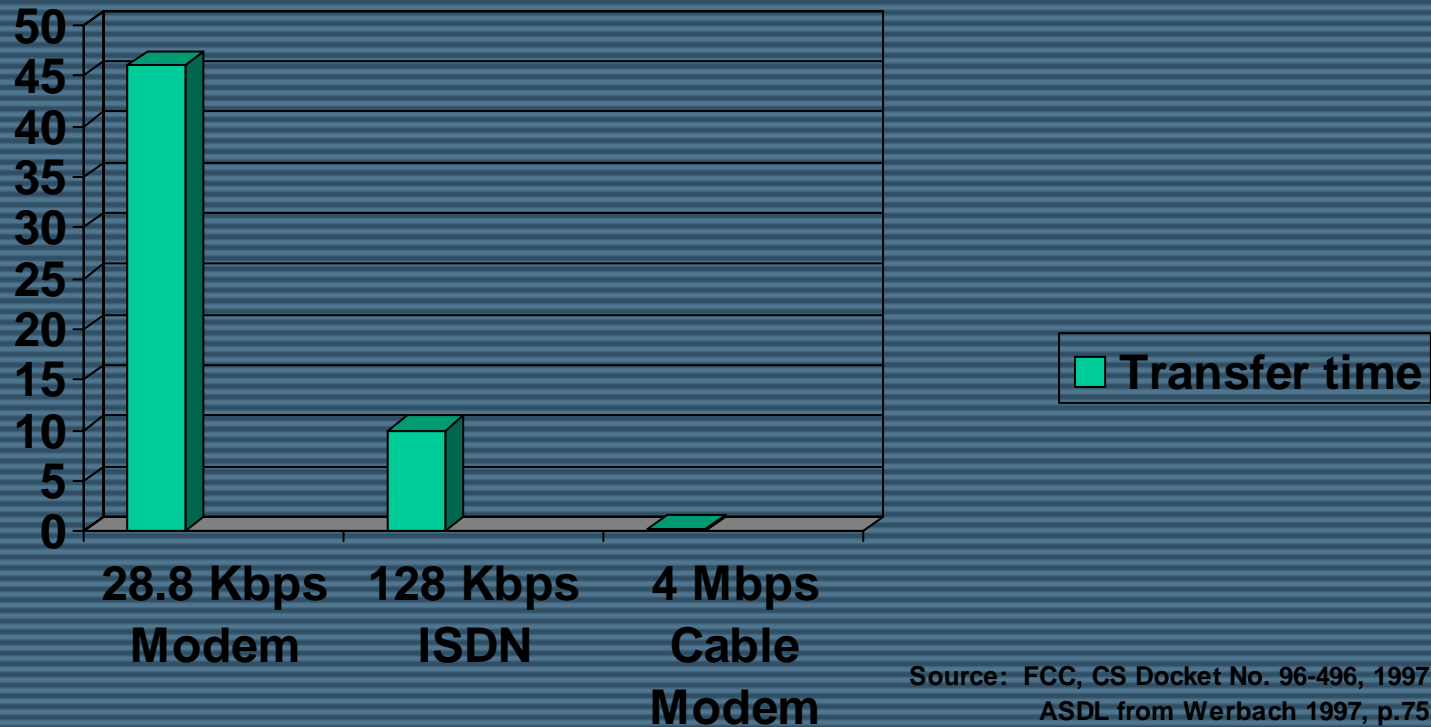
Domain Name Registration System

- Coordinated by ICANN
- NSI will recognize ICANN's authority; will enable all ICANN-accredited registrars to access NSI's master domain name registry
- Dozens of new registrars on the horizon
- New TLDs (.firm, .store, .web)?

Other Domain Name Developments

- ICANN dispute resolution policy
- Anti-cybersquatting legislation
- Typosquatting (e.g., whitehouse.com, micr0soft.com, netcsape.com, yaho.com, lyco.com)
- International residency requirements and prohibitions on transfer of domain names

Broadband: Fight over Internet Access Speeds (e.g., time to download 3.5 min. video clip)



Source: FCC, CS Docket No. 96-496, 1997;
ASDL from Werbach 1997, p.75;
The Emerging Digital Economy Report

Broadband: Open Access for ISP's?

- "open access" to an essential resource vs. demand for "forced access" to the investments made by the cable companies
- Some of the arguments for open access
 - cable offers greater coverage
 - AT&T and MediaOne are building a new monopoly
 - competing technologies do not yet exist

Broadband: Open Access for ISP's?

- Some of the arguments against open access
 - forced access will decrease investment in broadband
 - competing technologies do exist
 - regulation of cable access will be burdensome
- as of Sept. 17, 1999, Federal Trade Commission adopts “wait and see” policy

Broadband: Local or National Issue?

- Several municipalities have demanded that AT&T provide ISPs equal access to MediaOne's service before cable franchises are transferred to AT&T
 - Cambridge, Massachusetts; Portland, Oregon; Broward County, Florida
- Statewide open access has been proposed as November 2000 ballot question in Massachusetts
- Open access policy adopted in Canada

Legal Status of Open Access in the United States

- AT&T v. City of Portland:
 - under Federal Communications Act, cable systems may not be subject to regulation as a common carrier or utility
 - under Telecommunications Act of 1996, definition of cable service expanded to include “interactive services”
 - First Amendment argument that cable operator should have “editorial discretion”

Regulatory Status of Open Access in the United States

- City of Somerville, Mass. seeking an FCC advisory opinion on whether local franchising authority can require a cable operator to agree to open access in exchange for a franchise transfer
- Internet Ventures, Inc. has petitioned FCC to apply the “leased access” provisions (allowing third-party video programmer access to cable systems) to ISP’s as well

Spam -- Judicial and Legislative Restrictions

- Spam is unsolicited commercial mass E-Mail messages
- April 1999: California Superior Court ruled that spam sent to Intel Corporation's employees constituted an illegal trespass of Intel's proprietary computer system
- Proposed legislative limitations
 - allow ISPs to sue unauthorized senders of unsolicited bulk e-mail

Spam -- Judicial and Legislative Efforts

- impose criminal penalties on senders who hide behind false domain names
- allow recipients to "opt-out" of future mailings
- California has imposed a controversial labeling requirement
- expand the existing federal law which already bans unsolicited commercial faxes
- proposed state laws prohibiting spam

Encryption -- Revamping export

- Bernstein case: May 1999 ^{rules} U.S. federal court rules that encryption source code is “speech” that cannot be subjected to pre-export review by the Government
- Sept. 16, 1999: Proposed Clinton Administration policies would allow U.S. companies to widely export encryption commodities and software
 - regardless of the strength of the encryption features
 - without requiring the manufacturers to provide "key recovery" mechanisms.

Encryption -- Revamping export rules

- post-shipment reporting will be enhanced
 - exporters will be required to notify the Government of all exports of encryption items with key lengths of 64 bits or more.
 - in contrast, the current rules require such reporting only for specified classes of end-users.
- technological changes continues to outpace export regulatory liberalization
 - Mac G4 -- processing speed requires validated export license to certain countries

Uniform Computer Information Transactions Act (“UCITA”)

- New name for proposed Article 2B of the Uniform Commercial Code, for ALI would not approve
 - no comparable issue under UNCISG, which does not define “goods”
- Scope of UCITA
 - “computer information” means digital information, regardless of form
 - applies to transactions involving creation, modification, transfer or licensing of computer information
- Current status: enactment likely only in Washington and a few other “pro-licensor” states

UCITA -- Issues

- Shrinkwrap terms
- Disclaimers of warranties
- Contract modification
- Electronic self-help
- Reverse engineering
- Transfer of ownership
- Choice of law and forum

Digital Music

- MP3 compression standard (MPEG-1 Audio Layer 3) has led to an explosion in digital music transmission and downloading
- Clips now available from major artists -- Bowie, Red Hot Chili Peppers, Public Enemy
- Dozens of MP3 players from Diamond (Rio), Sony, Philips, Samsung

MP3 Issues

- Record company pressure to eliminate free downloads (Public Enemy, Beastie Boys) are subsiding
- *RIAA v. Diamond Multimedia*: validates MP3 use for consumers
- Secure Digital Music Initiative (“SDMI”) effort to develop a secure, watermarked compression and transmission standard

Meta-Searching

- Meta-sites focus on particular industries and allow users to enter search terms once to obtain results from multiple web sites
- eBay has prohibited auction meta-sites from accessing and displaying eBay data
- Meta-sites respond that they simply act like search engines

Deep Linking

- "Deep linking" occurs when a web site links to another company's web page that is many layers down from the home page
- Ticketmaster-Microsoft Sidewalk Café settlement
- Universal Pictures stops Movie-List use of movie trailers

Privacy Issues

- US-EU negotiations on development of voluntary safe harbor principles in order to allow continued US-EU data exchanges
- June 1998 Federal Trade Commission report
 - effective self-regulation had not yet taken hold
 - recommended that Congress enact legislation setting forth standards for the online collection of personal information from children

Privacy Issues

- FTC administrative enforcement actions alleging "unfair or deceptive" online information practices
 - GeoCities prohibited from misrepresenting the purposes for which it collects personal identifying information from or about consumers, including children
 - Liberty Financial required to post a privacy policy on its children's sites and to obtain verifiable consent before collecting personal identifying information from children

Securities Issues

- Electronic prospectus delivery/ road shows
- Cross-border offerings
- “e-offerings” and Wit Capital
- Internet Stock Giveaways
- Grass roots offerings over auction sites

Jurisdictional Issues

- General issues in Internet jurisdiction
- Developments in U.S. jurisdictional law
- European Commission approach
- International Chamber of Commerce Task Force on Jurisdiction

Speed-bumps or Shortcuts on the Information Superhighway?

- broadband
- domain name registration reform
- loosening of encryption controls
- efforts to develop uniform laws
- MP3
- overbroad regulation of spam
- privacy protections
- resistance to extending e-commerce to sales of securities
- legal concerns over meta-searching and deep linking