American Bar Association

Section of Public Utility, Communications
and Transportation Law

Report of the
INTERNET INDUSTRY COMMITTEE

2005 Fall Council Meeting

Chair:
Jonathan B. Wilson

Contributors:
C. Celeste Creswell
Cavan E. Fabris
Allison M. Gluvna
Joseph W. Ozmer, II
Jonathan B. Wilson

Table of Contents

[1] Part I prepared by C. Celeste Creswell and Joseph W. Ozmer, II, Wargo & French LLP
[2] Part II prepared by Jonathan B. Wilson, Interland, Inc., and C. Celeste Creswell, Wargo & French LLP.
[3] Part III prepared by Allison M. Gluvna, Wargo & French LLP.
[4] Part IV prepared by Cavan E. Fabris, Womble Carlyle Sandridge & Rice, PLLC.

PART I THE COMMUNICATIONS DECENCY ACT APPLIES TO GOOD SAMARITAN TOOLS DESIGNED TO PREVENT PHISHING

A. Summary of the Case

On September 13, 2005, a Wisconsin federal trial court issued the most recent decision addressing the Communications Decency Act (the "CDA") and a case of first impression within the Seventh Circuit: *Associated Bank-Corp. v. Earthlink, Inc*.[5] This case is particularly interesting because it presents the first application of CDA immunity to a tool designed to protect Internet users from phishers (*i.e.*, individuals posing as legitimate web sites as part of identity theft schemes), namely EarthLink's ScamBlocker tool.

The plaintiff, a Wisconsin-headquartered multibank holding company ("Associated Bank"), accused EarthLink of falsely identifying the bank's web site as "potentially fraudulent" in a warning published by EarthLink's ScamBlocker tool. The court granted summary judgment to EarthLink and dismissed all of the plaintiff's claims, reasoning the CDA immunized EarthLink from liability for the plaintiff's Lanham Act, tortious interference with business relations, negligence, and state statutory fraudulent representation claims.

B. The Paths Available

EarthLink claimed it was entitled to summary judgment based on two independent prongs of the CDA,[6] which provide:

> (c) ***PROTECTION FOR "GOOD SAMARITAN" BLOCKING AND SCREENING OF OFFENSIVE MATERIAL***.
>
> (1) Treatment of publisher or speaker. ***No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider***.
>
> (2) Civil liability. ***No provider or user of an interactive computer service shall be held liable on account of--(A) any action voluntarily taken in good faith to***

[5] No. 05-C-0233-S, 2005 WL 2240952 (W.D. Wis. Sept. 13, 2005).
[6] 47 U.S.C. § 230(c) (emphasis added).

> ***restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or <u>otherwise objectionable</u>***, whether or not such material is constitutionally protected; or (B) ***any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1)***.

The court found EarthLink immune based on the first prong, holding EarthLink could not be found liable for publishing content provided by a third party, even if EarthLink edited that content.[7] Interestingly, the court chose not to address the second prong, which, as discussed below, also could have entitled EarthLink to immunity and would have provided guidance concerning the seldom interpreted second prong, Section 230(c)(2).

C. The Path Taken

The first prong of the statute, Section 230(c)(1), "provides broad immunity [to Internet service providers] for publishing content provided **<u>primarily</u>** by third parties."[8] If a third party "provides the **<u>essential published content</u>**, the interactive service provider receives **<u>full immunity regardless of the specific editing or selection process</u>**."[9]

Associated Bank claimed EarthLink lost this immunity by allegedly requesting the information, posting the information on its own web site, and/or benefiting from the posting of the information. Following substantial authority, the court rejected these arguments,[10] and

---

[7] *Associated Bank*, 2005 WL 2240952 at *3.
[8] *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (emphasis added).
[9] *Id.* at 1124 (emphasis added) (finding Matchmaker.com immune even though it provided questionnaire that facilitated creation of allegedly offensive content posted on Matchmaker.com site).
[10] In *Blumenthal v. Drudge*, 992 F. Supp. 44, 47, 51-52 (D.D.C. 1998), the court held Defendant America Online, Inc. ("AOL") was entitled to immunity even though it posted content on its own service that it requested and obtained from co-defendant Drudge, "a person whom AOL paid $3,000 a month—$36,000 a year, Drudge's sole, consistent source of income—and whom AOL promoted to its subscribers and potential subscribers as a reason to subscribe to AOL." *See also Carafano*, 339 F.3d at 1121, 1122-25 (immunizing commercial Internet dating service that charged users fee to post profiles on its website that were shaped by defendant's questionnaire); *Ben Ezra, Weinstein & Co. v. America Online, Inc.*, 206 F.3d 980, 983, 984-86 (10th Cir. 2000) (granting immunity to defendant that obtained stock price information from third party and posted it in defendant's "Quotes and Portfolios service area"); *Optinrealbig.com, LLC v. Ironport Sys., Inc.*, 323 F. Supp. 2d 1037, 1040-41, 1047 (N.D. Cal. 2004) (granting immunity to "SpamCop" service that was in business of gathering reports of spam (mass unsolicited

accepted EarthLink's contention that a third party provided the "essential published content" at issue, *i.e.*, that the plaintiff's web site was "potentially fraudulent."[11] Significantly, in reaching this conclusion, the court recognized that, at most, EarthLink merely formatted or edited the essential published content,[12] and such actions did not make EarthLink the information content provider.[13]

D. The Path Not Taken

Although the court's decision under Section 230(c)(1) made it unnecessary for the court to analyze the case under Section 230(c)(2)'s "Good Samaritan" provision, it appears EarthLink also was entitled to summary judgment under this second prong of the Act. While Section (c)(1) immunizes an interactive computer service provider ("ISP") for doing nothing, Section 230(c)(2) encourages proactive conduct—*i.e.*, it provides immunity to an ISP for taking voluntary good faith actions intended to restrict access to offensive content and for providing others with the technical means to do so.

---

email) from third parties, posting such reports on its web site, forwarding such reports to Internet service providers, and encouraging Internet service providers to cut off alleged spammers' Internet access).

[11] *Associated Bank*, 2005 WL 2240952, at *3-4.

[12] Similarly, the defendant in *Opinrealbig.com*, "SpamCop," was entitled to immunity despite editing activity. 323 F. Supp. 2d at 1037. SpamCop gathered reports of spam from third parties and posted such reports on its web site. *Id.* at 1040-41. SpamCop also removed the third party's email address from the report, forwarded the report to Internet service providers ("ISPs") with its own heading, and encouraged the ISPs to cut off the alleged spammers' Internet access. In the forwarded report, SpamCop stated: "This message is brief for your comfort. Please follow links for details." *Id.* at 1041. When the ISP administrator clicked on the link, he or she was redirected to a page on SpamCop's web site that "explain[ed] to ISPs that [SpamCop] ha[d] traced the source of the purported spam to the ISP" and "encourage[d] the ISP to take action against the spammer" while noting, "'Please be careful when taking action. It is possible (though unlikely) that the account is what we call 'an innocent bystander.'" *Id; see also Ben Ezra*, 206 F.3d at 985-86 (finding defendant did not create or develop stock price information that defendant had edited by deleting information and published within its "Quotes and Portfolios service area," even though plaintiff alleged defendant worked closely with third party that originated information); *Carafano*, 339 F.3d at 1124 (holding defendant Internet dating service was not responsible for content of user's profile, even though defendant's questionnaire facilitated formulation of profile content); *Batzel v. Smith*, 333 F.3d 1018, 1020-22 (9th Cir. 2003) (immunizing defendant who edited email he received from third party, which accused attorney of possessing stolen art; published email on his web site without checking veracity of the email; and added "'moderator's message' stating that 'the FBI has been informed of the contents of [the third party's] original message.'").

[13] *Associated Bank,* 2005 WL 2240952, at *3 ("Further, had Defendant edited the list of phisher sites it received from the third-party vendor Congress enacted § 230 'to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.'")

Section 230(c)(2) provides, in pertinent part:

> No provider or user of an interactive computer service shall be held liable on account of--(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

Based on the plain language of this provision, courts have noted: "A web host that *does* filter out offensive material is not liable to the censored customer."[14]

EarthLink claimed it was entitled to the "Good Samaritan" immunity of Section (c)(2) because it was engaged in a voluntary effort to "restrict access" to material EarthLink believed to be "objectionable," namely fraudulent phisher sites, with the intent of protecting Internet users from identify theft scams. Because the actions of which Associated Bank complained arose directly from EarthLink's voluntary, good faith efforts to restrict access to material EarthLink believed to be objectionable, EarthLink's activities were protected by 47 U.S.C. § 230(c)(2)(A).

Moreover, EarthLink's activities also qualified for the protection of Section 230(c)(2)(B). Under prong (B), ISPs are immune from liability based on "any action taken to enable or make available to information content providers or others the technical means to restrict access to" material the ISP considers objectionable. EarthLink's provision of ScamBlocker clearly is an "action taken to enable or make available . . . the technical means to restrict access" to fraudulent web sites. Accordingly, Section 230(c)(2)(B) appears to immunize EarthLink from liability related to its provision of ScamBlocker, at least under the circumstances of Associated Bank's Complaint.

---

[14] *Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003) (emphasis in original); *see also*, *e.g., Zeran v. America Online, Inc.*, 958 F. Supp. 1124, 1135 n.22 (E.D. Va. 1997) (noting Section "230(c)(2) appears to immunize such providers and users from causes of action brought by persons whose material is screened or blocked from the Internet.").

Further, the conclusion that EarthLink's activities were shielded by Section 230(c)(2) is supported by the congressional policy underlying the statute.

> Congress' clear objective in passing § 230 of the CDA was to ***encourage the development of technologies, procedures and techniques by which objectionable material could be blocked or deleted*** either by the interactive computer service provider itself or by the families and schools receiving information via the Internet.[15]

To expose EarthLink to liability for a mistake made in the course of protecting Internet users from fraudulent web sites would fly directly in the face of this policy. Indeed, the prospect of such liability would create a substantial *disincentive* to providing tools such as ScamBlocker for restricting or screening access to objectionable material.

E. The Road Ahead

Although, in stating a holding based on Section 230(c)(1), the *Associated Bank* opinion joined the majority of cases interpreting the CDA, this dispute may signal a change in focus. Given the alignment between EarthLink's conduct and the policy of the CDA, along with the increasing popularity of tools such as ScamBlocker, future cases may turn on the heretofore ignored "Good Samaritan" prong of the CDA in Section 230(c)(2) and bolster the incentive Congress intended.

PART II THE UNITED STATES AND THE UNITED NATIONS ARE BATTLING FOR CONTROL OF THE INTERNET

The second phase of the World Summit on Information Society ("WSIS"), which will take place in Tunis on November 16-18, 2005, undoubtedly will include heated debate concerning a proposal to take control of the Internet away from the United States government. In June 2005, the Working Group on Internet Governance ("WGIG"), which was created by the Secretary-General of the United Nations (UN), issued its final report leading up to the second

[15] *Zeran*, 958 F. Supp. at 1134 (*citing* 47 U.S.C. § 230(b)(4)'s policy statement that intent of CDA is "to remove disincentives for the development and utilization of blocking and filtering technologies") (emphasis added).

phase of the WSIS. The final report recommends transferring control over the Internet from the United States government to an entity affiliated with the UN.[16]

Historically, the Internet has been governed by the Internet Corporation for Assigned Names and Numbers ("ICANN"), pursuant to a "Memorandum of Understanding" [17] with the United States government. ICANN, a non-profit corporation with an international board of directors, controls the Internet by managing the technical elements of the domain name system, which includes delegation of top-level domains such as .com and .info.

Reacting to the WGIG final report, the U.S. Department of State released "Comments of the United States of America on Internet Governance" on August 15, 2005, which tactfully expressed a "willingness to engage in dialogue related to Internet governance in relevant multiple fora" but concluded: "In these fora, the United States will continue to support market-based approaches and private sector leadership in Internet development broadly."[18]

The European Union recently announced that it supports the WGIG report's recommendation, which appears to have prompted resolutions by the United States Senate and House of Representatives. "Expressing the sense of the Senate that the United Nations and other international organizations shall not be allowed to exercise control over the Internet," the Senate Resolution[19] concluded:

---

[16] Available on-line at www.wgig.org.
[17] Available on-line at www.icann.org/general/icann-mou-25nov98.htm.
[18] Available on-line at www.state.gov/e/eb/rls/othr/2005/51063.htm.
[19] In reaching this conclusion, the Senate Resolution recited the following background:

> Whereas the Internet was created in the United States and has flourished under United States supervision and oversight, and the Federal Government has followed a path of transferring Internet control from the defense sector to the civilian sector, including the Internet Corporation for Assigned Names and Numbers (ICANN) with the goal of full privatization;
>
> * * *
>
> Whereas the explosive and hugely beneficial growth of the Internet did not result from increased government involvement but from the opening of the Internet to commerce and private sector innovation;

Resolved, That the Senate—

(1) calls on the President to continue to oppose any effort to transfer control of the Internet to the United Nations or any other international entity;

(2) applauds the President for—

(A) clearly and forcefully asserting that the United States has no present intention of relinquishing the historic leadership role the United States has played in Internet governance; and

(B) articulating a vision of the future of the Internet that places privatization over politicization with respect to the Internet; and

(3) calls on the President to—

Whereas, on June 30, 2005, President George W. Bush announced that the United States intends to maintain its historic role over the master `root zone' file of the Internet, which lists all authorized top-level Internet domains;

* * *

Whereas the European Union has also proposed transferring control of the Internet to the United Nations, and such a transfer of control of the Internet would confer significant leverage to the governments of Iran, Cuba, and China, and would impose an undesirable layer of politicized bureaucracy on the operations of the Internet that would result in an inadequate response to the rapid pace of technological change;

Whereas some nations that advocate radical change in the structure of Internet governance censor the information available to their citizens through the Internet and use the Internet as a tool of surveillance to curtail legitimate political discussion and dissent, and other nations operate telecommunications systems as state-controlled monopolies or highly-regulated and highly-taxed entities;

Whereas some nations in support of transferring Internet governance to an entity affiliated with the United Nations, or another international entity, might seek to have such an entity endorse national policies that block access to information, stifle political dissent, and maintain outmoded communications structures;

Whereas the structure and control of Internet governance has profound implications for homeland security, competition and trade, democratization, free expression, access to information, privacy, and the protection of intellectual property, and the threat of some nations to take unilateral actions that would fracture the root zone file would result in a less functional Internet with diminished benefits for all people; and

Whereas the World Summit on the Information Society will meet in November 2005 in Tunisia to discuss the possibility of transferring control of the Internet to the United Nations or another international entity, and that summit will likely be the beginning of a prolonged international debate regarding the future of Internet governance . . . .

S. Res. 273, 109th Congress, 1st Sess. (2005).

(A) recognize the need for, and pursue a continuing and constructive dialogue with the international community on, the future of Internet governance; and

(B) advance the values of an open Internet in the broader trade and diplomatic conversations of the United States.

The subsequent House Resolution[20] states in pertinent part:

Resolved by the House of Representatives (the Senate concurring), That it is the sense of Congress that—

(1) it is incumbent upon the United States and other responsible governments to send clear signals to the marketplace that the current structure of oversight and management of the Internet's domain name and addressing service works, and will continue to deliver tangible benefits to Internet users worldwide in the future; and

---

[20] The House Resolution provides the following background to its ultimate conclusion:

Whereas the continued success and dynamism of the Internet is dependent upon continued private sector leadership and the ability for all users to participate in its continued evolution;

* * *

Whereas the Internet Corporation for Assigned Names and Numbers popularly known as ICANN, is the proper organization to coordinate the technical day-to-day operation of the Internet's domain name and addressing system;

* * *

Whereas ICANN makes significant efforts to ensure that the views of governments and all Internet stakeholders are reflected in its activities;

Whereas governments have legitimate concerns with respect to the management of their country code top level domains;

Whereas the United States Government is committed to working successfully with the international community to address those concerns, bearing in mind the need for stability and security of the Internet's domain name and addressing system;

Whereas the topic of Internet governance, as currently being discussed in the United Nations World Summit on the Information Society is a broad and complex topic;

Whereas it is appropriate for governments and other stakeholders to discuss Internet governance, given that the Internet will likely be an increasingly important part of the world economy and society in the 21st Century;

Whereas Internet governance discussions in the World Summit should focus on the real threats to the Internet's growth and stability, and not recommend changes to the current regime of domain name and addressing system management and coordination on political grounds unrelated to any technical need; and

Whereas market-based policies and private sector leadership have allowed this medium the flexibility to innovate and evolve . . . .

H. Con. Res. 268, 109th Cong., 1st Sess. (2005).

> (2) therefore the authoritative root zone server should remain physically located in the United States and the Secretary of Commerce should maintain oversight of ICANN so that ICANN can continue to manage the day-to-day operation of the Internet's domain name and addressing system well, remain responsive to all Internet stakeholders worldwide, and otherwise fulfill its core technical mission.

Just as these resolutions were issued, President Bush and European Commission President José Barroso met at the White House on October 18, 2005 and discussed Internet governance. Although few details emerged from this meeting, it appears both sides are standing firm, so the stage is set for a November showdown in Tunis, which will launch a long and complex international debate concerning the future of Internet governance.

PART III PROTECTING JOHN DOE: RECENT CASES ADDRESSING FIRST AMENDMENT RIGHTS OF ANONYMOUS INTERNET USERS WHOSE INFORMATION IS SUBPOENAED

A. Introduction

Blogs and online discussion forums afford individuals the opportunity to express their opinions anonymously to a widespread audience. Consequently, when libelous statements are posted anonymously on the Internet, obtaining information about the poster's identity to enable a lawsuit is difficult and often requires a subpoena to the poster's Internet Service Provider ("ISP").

Typically, a plaintiff bringing a libel action based upon an anonymous Internet posting will file a lawsuit against "John Doe." Once the lawsuit is filed, the plaintiff will then issue a subpoena to the ISP to disclose the identity of the anonymous poster. Under the Cable Communications Policy Act of 1984, ISPs may not disclose a subscriber's personal information without the subscriber's prior written or electronic consent.[21] If an ISP notifies a subscriber of a

[21] 47 U.S.C. § 551(c)(1).

court order, the ISP may then disclose such information pursuant to the order.[22] Frequently, if a subscriber does not respond to the notice given by the ISP within a certain time frame, the ISP will then disclose the identity of the anonymous poster. However, in some instances, upon receipt of notice of a subpoena or court order from their ISPs, the anonymous posters will file a motion to quash or motion for a protective order to prevent the disclosure of their identities.

In two recent cases – *Fitch v. Doe*[23] and *Doe v. Cahill*[24]– the Maine and Delaware Supreme Courts addressed the enforcement of subpoenas issued to ISPs because the anonymous posters at issue objected to disclosure of their identities. The *Fitch* court sets forth typical arguments raised by a John Doe defendant when an ISP is subpoenaed to disclose the identity of an anonymous poster. On its own, the *Fitch* court raised, but declined to address, First Amendment concerns. The *Cahill* court, however, did address these concerns and made an attempt to balance the anonymous poster's First Amendment rights with the plaintiff's interest in identifying the anonymous poster in order to effectively pursue litigation against the poster. Although each state may set its own standards regarding the enforcement of subpoenas to ISPs designed to identify online posters ("Anonymous Poster Subpoenas"), the recent *Fitch* and *Cahill* opinions suggest a trend towards ensuring safeguards are in place to provide First Amendment protection for anonymous Internet users. As the law regarding this issue is still developing, it is important that anonymous posters and their attorneys become aware of arguments they may make under the First Amendment. Likewise, it is important that plaintiffs issuing Anonymous Poster Subpoenas recognize they may face more difficult hurdles to acquire this information than they have in the past.

---

[22] *Id*. § 551(c)(2)(B).
[23] 869 A.2d 722 (Me. 2005).
[24] No. 266, 2005, 2005 WL 2455266 (Del. Oct. 5, 2005).

B. *Fitch v. Doe*

In *Fitch v. Doe*, the Maine Supreme Court addressed several typical challenges to enforcing an Anonymous Poster Subpoena. These issues include (1) lack of consent of an Internet subscriber to the disclosure of his identity in response to a subpoena; (2) the proper interpretation of the Cable Communications Policy Act of 1984; and (3) the First Amendment protection afforded to anonymous posters.

The plaintiff in *Fitch* sued an anonymous "John Doe" who had sent an email purporting to be from the plaintiff's email address.[25] Upon filing suit, the plaintiff sought disclosure of Doe's identity from Doe's ISP.[26] Noting the ISP's privacy notice stated that subscribers "consented to the release of information 'to comply with criminal or civil legal process,'" the Court determined Doe had consented to disclosure of his identity in response to a subpoena.[27] Accordingly, the trial court ordered the ISP to comply with the subpoena and disclose information regarding the email account.[28]

1. Consent

On appeal of this decision, the Maine Supreme Court considered the subscriber's consent as a potentially valid argument; however, it declined to follow the trial court's holding on this issue. The Maine Supreme Court held that the privacy notice had never been authenticated, and the plaintiff had never established that the privacy notice applied to Doe.[29] Furthermore, the court noted that even if the privacy notice had been established as authentic, it would not be sufficient proof that Doe had consent to disclosure of his identity.[30] The terms of the privacy

[25] 869 A.2d at 723.
[26] *Id*. at 724.
[27] *Id*.
[28] *Id*.
[29] *Id*. at 727.
[30] *Id*.

notice stated that consent was only authorized to the extent that it was authorized in the original subscriber agreement, which the plaintiff had not introduced into evidence.[31] Obviously, given Doe's anonymity, it would have been difficult for the plaintiff to introduce Doe's original subscriber agreement into evidence; however, the court observed that this could have nevertheless been accomplished by (1) providing evidence of the ISP's routine business practice of requiring consent; or (2) seeking a redacted copy of the subscriber's agreement from the ISP.[32]

2. Cable Communications Policy Act

The Cable Communications Policy Act provides that disclosure of personal identity information is authorized if it is "subject to subsection (h) of this section, made pursuant to a court order authorizing such disclosure, if the subscriber is notified of such order by the person to whom the order is directed."[33]

Doe raised the argument that the terms of subsection (h) therefore applied to his situation.[34] Subsection (h) provides a heightened standard – clear and convincing evidence that the subject of the information is reasonably suspected of engaging in criminal activity – to obtain disclosure when information is sought by a government entity.[35] The court held that this argument was an improper construction of that provision, specifically that "[t]he use of the 'subject to' language ensures that governmental entities will not be able to bypass § 551(h); it

---

[31] *Id*.
[32] *Id*. at 728.
[33] 47 U.S.C. § 551(c)(2)(B).
[34] *Fitch*, 869 A.2d at 728.
[35] The Cable Communications Policy Act of 1984, 47 U.S.C. § 551(h), provides in pertinent part:

> (h) Disclosure of information to governmental entity pursuant to court order
> Except as provided in subsection (c)(2)(D) of this section, a governmental entity may obtain personally identifiable information concerning a cable subscriber pursuant to a court order only if, in the court proceeding relevant to such court order –
> (1) such entity offers clear and convincing evidence that the subject of the information is reasonably suspected of engaging in criminal activity and that the information sought would be material evidence in the case; and
> (2) the subject of the information is afforded the opportunity to appear and contest such entity's claim.

does not impose the requirements of § 551(h) on parties who are not governmental entities."[36] Therefore, the court held that as long as the ISP provided notice to the anonymous subscriber, it could release the information in response to a court order.

3. First Amendment

Because Doe did not raise the argument in the trial court that the court should implement heightened standards for enforcement of an Anonymous Poster Subpoena, the court declined to address it. Nevertheless, in dicta, the court recognized that several other courts had adopted such safeguards to ensure that court orders "do not infringe upon the First Amendment and the recognized right to anonymous speech," therefore acknowledging that First Amendment concerns may drive future decisions regarding the enforceability of Anonymous Poster Subpoenas.[37]

C. *Doe v. Cahill*

On October 5, 2005, the Delaware Supreme Court focused on the First Amendment concerns briefly referenced but not fully addressed by the *Fitch* court. In *Doe v. Cahill*, the Delaware Supreme Court noted that it was the first state supreme court to address the First Amendment argument in the context of criticism of a public figure.[38] For this reason, the court's decision is significant, as it will likely impact other state courts' decisions regarding this issue.

In *Cahill*, the plaintiffs -- a city councilman and his wife -- filed a John Doe defamation complaint against an individual who made two anonymous postings regarding city councilman Cahill on an Internet website called the "Smyrna/Clayton Issues Blog."[39] The plaintiffs obtained

---

[36] *Fitch,* 869 A.2d at 729.
[37] *Id*.
[38] *Cahill*, 2005 WL 2455266 at *4.
[39] The two postings at issue stated, in pertinent part: "Cahill has devoted all of his energy to being a devisive impediment to any kind of cooperative movement. Anyone who has spent any amount of time with Cahill would be keenly aware of such character flaws, not to mention an obvious mental deterioration . . ."; and "Gahill [sic] is as paranoid as everyone in the town thinks he is . . ." *Id.* at *1.

a court order requiring Comcast, Doe's ISP, to disclose Doe's identity.[40] Pursuant to 47 U.S.C. § 551(c)(2), Comcast notified Doe of the subpoena.[41] In order to protect his identity, Doe filed an Emergency Motion for a Protective Order in the Superior Court of Delaware.[42]

1. Good Faith Standard

The Superior Court of Delaware employed a "good faith" standard to determine whether Doe's identity could be disclosed.[43] Under the "good faith" standard, the plaintiffs needed to demonstrate "(1) that they had a legitimate, good faith basis upon which to bring the underlying claim; (2) that the identifying information sought was directly and materially related to their claim; and (3) that the information could not be obtained from any other source."[44] The trial court held that the plaintiffs had met this low standard and ordered the ISP to disclose Doe's identifying information.[45] Doe appealed the court's judgment to the Delaware Supreme Court.[46]

2. Summary Judgment Standard

On appeal, the Delaware Supreme Court held that "a defamation plaintiff must satisfy a 'summary judgment' standard before obtaining the identity of an anonymous defendant."[47] Additionally, the court held that plaintiffs in this situation must (1) make reasonable efforts to provide the anonymous poster with notice that he or she is the subject of a subpoena and (2) withhold action to provide the anonymous poster with reasonable time to oppose the subpoena.[48] The court also held that "when a case arises in an internet context, the plaintiff must post a message notifying the anonymous defendant of the plaintiff's discovery request on the same

---

[40] *Id*. at *2.
[41] Under 47 U.S.C. § 551(c)(2), a court order to the ISP and notice to the ISP subscriber must be made prior to an ISP's disclosure of the subscriber's identity to a third party in response to a court order.
[42] *Cahill,* 2005 WL 2455266 at *2.
[43] *Id*.
[44] *Id*.
[45] *Id.*
[46] *Id*.
[47] *Id*. at *3.
[48] *Id*. at *7.

message board where the allegedly defamatory statement was originally posted."[49] This holding resulted from the court's recognition that the standard adopted should balance "one person's right to speak anonymously against another person's right to protect his reputation."[50]

In reading this conclusion, the court observed the recent rise in John Doe suits filed with the main goal not of monetary compensation, but of silencing criticism and online debate.[51] After briefly addressing a middle-of-the-road motion to dismiss standard, the court determined that the motion to dismiss standard only required a minimal threshold showing to be made by a plaintiff in a notice pleading jurisdiction such as Delaware, and therefore also failed to adequately protect an anonymous poster's rights under the First Amendment.[52]

The court found that the summary judgment standard adequately addressed this balance.[53] The Delaware summary judgment standard provides that a plaintiff "'must submit sufficient evidence to establish a *prima facie* case for each essential element of the claim in question.'"[54] The elements of a public figure defamation claim in Delaware are: (1) defendant made a defamatory statement; (2) concerning the plaintiff; (3) publication of the statement; (4) the nature of the communication would be understood as defamatory by a third party; (5) falsity of the statement; and (6) actual malice.[55] The court noted that sufficient evidence for only the first five elements need be produced, as proving actual malice is nearly impossible without knowledge of the identity of the individual making the statements.[56]

The court considered whether sufficient evidence existed to establish a prima facie case for each of these elements, and determined that the plaintiff failed to establish the first prong –

---

[49] *Id*.
[50] *Id*. at *3.
[51] *Id*. at *4.
[52] *Id*.
[53] *Id*. at *6.
[54] *Id*. at *9 (quoting *Colgain v. Oy-Partek Ab (In re Asbestos Litig.)*, 799 A.2d 1151, 1152 (Del. 2002)).
[55] *Id*.
[56] *Id*. at *10.

that the statement was indeed defamatory. In considering the first prong, the court noted that there is a two-step test: (1) whether the statements are expressions of fact or of opinion; and (2) whether the statements are capable of defamatory meaning.[57] Significantly, the court noted that in light of the context of an Internet blog, "no reasonable person could have interpreted these statements as being anything other than opinion. The guidelines at the top of the blog specifically state that the forum is dedicated to *opinions* about issues in Smyrna."[58] Additionally, the court noted that a user negatively responded to the anonymous poster's statement in another posting, further supporting the conclusion that it was an opinion.[59] The court went even further in its characterization of communications in online forums by noting: "A reasonable reader would not view the blanket, unexplained statements at issue as 'facts' when placed on such an open and uncontrolled forum."[60]

Therefore, the court held that plaintiff failed to satisfy the summary judgment standard because the plaintiff failed to present sufficient evidence supporting the first element of the defamation claim – namely, that the statements were defamatory.[61] Accordingly, the court remanded the case with instructions to dismiss with prejudice.[62] The court cautioned in a footnote, however, that statements made in a blog or other online forum are not automatically considered to be opinions and may meet the required defamatory element if the plaintiff can prove that the statement is factually based.[63] Based on the court's ruling, however, it is apparent that, at least in Delaware, a plaintiff subpoenaing an ISP to acquire information about an anonymous user's identity needs to be prepared to demonstrate sufficient evidence that the

---

[57] *Id*. at *12.
[58] *Id*. at *13.
[59] *Id*.
[60] *Id*. at *12 (citing *SPX Corp. v. Doe,* 253 F. Supp. 2d 974 (N.D. Ohio 2003)).
[61] *Id.* at *13.
[62] *Id.*
[63] *Id*. at n.78.

anonymous statements are not merely opinions of the user.

D. The Trend Evidenced by *Fitch* and *Cahill*

Based on these recent cases regarding subpoenas to identify anonymous online posters, it is evident that courts are endeavoring to balance the First Amendment right to anonymous speech online with legitimate concerns of individuals defamed by online postings. Although the court in *Fitch* could not address that question in deciding to order the ISP to disclose the anonymous poster's identity, it noted several earlier cases in which courts required First Amendment safeguards to be in place.

As *Cahill* indicates, however, once First Amendment arguments are raised, courts are faced with balancing the interests of both parties. If state courts continue to follow the state authorities referenced in the *Fitch* case and the *Cahill* court's analysis of First Amendment concerns in the ISP subpoena context, plaintiffs may face more difficult hurdles in acquiring identifying information. These hurdles are not only due to the higher standard they have to meet, but also because of the strong presumptions set forth in *Cahill* that no reasonable person would believe information in certain types of Internet forums to be fact-based. Furthermore, empowered by the *Cahill* holding, anonymous Internet users may very well begin to raise objections with more frequency when they receive notice that their ISP has been subpoenaed to provide identifying information about them. As a result, courts may eventually see a decrease in the number of trivial or frivolous complaints alleging defamation on the basis of Internet postings brought for the sole purpose of identifying anonymous individuals.

PART IV REGULATORY INTERCONNECTION CHALLENGES AND TELECOMMUNICATIONS COMPETITION IN THE CARIBBEAN

A. Introduction

Interconnection refers to the contractual processes and physical procedures by which independent telecommunications networks are joined in such a way that they can function as a coherent whole.[64] At its most basic level, interconnection is the establishment of physical electronic linkages between service providers so that they can conduct business transactions electronically.[65] It has been universally understood that instrumental to the successful introduction of competition in telecommunications services is the ability of networks to interconnect thus allowing communications to occur across networks.[66] When applied in the context of telecommunications markets transitioning from monopoly to competition, interconnection becomes more than just the linking of networks, interconnection between competing networks is *the* critical mechanism for introducing market forces into any monopolistic telecommunications environment.[67]

Historically, interconnection regulation has typically taken one of two forms: "ex-post" or "ex-ante."[68] In recent years it has been generally accepted that reactive or "ex-post" regulation, which permits market forces to drive negotiation efforts with recourse to dispute

---

[64] Julian K. Wright et al, *Telecommunications Interconnection: A Literature Survey*, Asia Pacific Economic Cooperation (APEC) Organization (1997).
[65] The International Engineering Consortium, *The Globalization of Interconnection Tutorial* (2003) *at* http://www.iec.org/online/tutorials/global_interconnect/index.html.
[66] ASIA PACIFIC ECONOMIC COOPERATION (APEC) TELECOMMUNICATIONS WORKING GROUP, APEC FRAMEWORK FOR INTERCONNECTION (1999).
[67] *See* The International Engineering Consortium, *The Globalization of Interconnection Tutorial* (2003) *at* http://www.iec.org/online/tutorials/global_interconnect/index.html; ASIA PACIFIC ECONOMIC COOPERATION (APEC) TELECOMMUNICATIONS WORKING GROUP, APEC FRAMEWORK FOR INTERCONNECTION (1999); Julian K. Wright, Eric K. Ralph, D. Mark Kennet, *Telecommunications Interconnection: A Literature Survey*, Asia Pacific Economic Cooperation (APEC) Organization (1997).
[68] H. Intven, *Telecommunications Regulation Handbook, Module 3 Interconnection*, The World Bank (2000) *at* http://www.infodev.org/projects/314regulationhandbook/.

resolution efforts when negotiations stall, has failed.[69] There is now a universal belief that proactive or "ex-ante" regulation via interconnection guidelines and frameworks is required in order to achieve a competitive telecommunications marketplace.[70] This belief was instituted by the European Commission (EC) in a proposed directive on interconnection, which stated "there is a consensus that ex-ante sector specific rules will continue to be needed alongside competition rules to regulate access and interconnection, until such time as there is full and effective competition in all segments of the market."[71] Europe successfully instituted ex-ante regulatory telecommunications principles in the late 1990s ad early 2000s. The need to institute similar principles is desperately required in the Caribbean to achieve a competitive, harmonized regulatory environment.

This paper will: (1) describe the importance of interconnection, (2) provide an overview of the changing Caribbean telecommunications landscape, (3) evaluate five major events that radically changed the Caribbean telecommunication's landscape making it ripe for regulatory interconnection reform, (4) establish recognized global interconnection principles, (5) identify the regional and national regulator's role in defining, promoting and enforcing these principles and current regulatory efforts in the Caribbean, (6) describe the shortcomings of current efforts, and (7) conclude with the suggested next steps that should be taken towards the creation of a unified Caribbean-wide competitive telecommunications marketplace.

B. The Importance of Interconnection

Providing and regulating telecommunications services and interconnection have traditionally been a role for government. Until quite recently, "telecommunications operators and government administrators negotiated with each other to set the terms of interconnection

[69] *Id.*
[70] *Id.*
[71] *Id.*

without regulatory intervention."[72] These agreements were largely between monopoly telecommunications operators (carriers) and thus were a reflection of direct government involvement rather than the product of market driven negotiation efforts.[73] However, as networks began to interconnect, the sheer number of these relationships developed networks, which became global in nature. This evolution offered consumers the ability to communicate seamlessly world-wide. As this evolution grew, a move towards pro-competitive and deregulatory telecommunications policies was prevalent resulting in the privatization of many state-owned telecommunications operators.[74] During the 1990's as market-based approaches were adopted the number of national telecommunications regulatory authorities (established to promote and create competitive telecommunications marketplaces) increased from 12 to over 90 worldwide.[75] In the Caribbean alone nearly every national government has established some form of regulatory body. In addition several regional regulatory and advisory bodies have been established.[76]

Many regulatory and free-market experts have stated that regulatory intervention when injecting a competitive environment into a market devoid of competition is counterintuitive.[77] This may be true in the long run, when a competitive environment has already been established. But the realization has been that "commercial negotiations fail in the absence of pro-competitive regulations that articulate the specific terms and conditions of a major supplier's obligation to its

[72] H. Intven, Telecommunications Regulation Handbook, Module 3 Interconnection, The World Bank (2000) at http://www.infodev.org/projects/314regulationhandbook/.
[73] *See* Julian K. Wright et al Telecommunications Interconnection: A Literature Survey, Asia Pacific Economic Cooperation (APEC) Organization (1997).
[74] H. Intven, *Telecommunications Regulation Handbook, Module 3 Interconnection*, The World Bank (2000) *at* http://www.infodev.org/projects/314regulationhandbook/.
[75] *Id.*
[76] These include: ECTEL (Eastern Caribbean Telecommunications Authority, CTU (Caribbean Telecommunications Union), CITEL (Organization of American States, Inter-American Telecommunications Commission, CANTO (Caribbean Association of National Telecommunications Organizations), CTC (Caribbean Telecommunications Council), CARICOM (Caribbean Community), and (OOCUR (Organization of Caribbean Utility Regulators).
[77] H. Intven, *Telecommunications Regulation Handbook, Module 1, Overview of Telecommunications Regulation*, The World Bank (2000) *at* http://www.infodev.org/projects/314regulationhandbook/.

competitors to allow them to enter the market."[78] Therefore, "the successful transformation of monopolistic telecommunications markets into competitive ones requires regulatory intervention."[79] Since network interconnection is the key building block towards a competitive telecommunications market, interconnection issues must be at the forefront of regulatory policy.

C. The Changing Caribbean Telecommunications Landscape

Most of the countries in the Caribbean are former British colonies that achieved their independence in the 1960's, 70's and early 80's. Upon independence, most of these countries entered into licensing agreements with the British service provider Cable and Wireless (C&W).[80] C&W was granted monopoly status over the national and international telecommunications services in these newly independent countries. "Governments granting these concessions were left with little control over operations, generally playing a minor role in determining or revising policies."[81] However, to conclude that this relationship was negative would not be entirely correct. C&W invested over $1 billion in the region from 1995-2000, with an additional $1 billion in investment planned between 2000–2005.[82] "In conjunction with AT&T and France Telecom, C&W has constructed and now operates the 1,000 mile Eastern Caribbean Fiber System (ECFS), linking 14 Caribbean island countries.[83] In addition, most countries have a complete digital network installed by C&W. However,

> "The agreements and licenses now in place with C&W have resulted in the prevalence of monopolistic pricing policies and a structure in which the dominant carrier is not subject to commercial discipline... The result is an environment not

[78] ASIA PACIFIC ECONOMIC COOPERATION (APEC) TELECOMMUNICATIONS WORKING GROUP, APEC FRAMEWORK FOR INTERCONNECTION (1999).
[79] H. Intven, *Telecommunications Regulation Handbook, Module 3 Interconnection*, The World Bank (2000) *at* http://www.infodev.org/projects/314regulationhandbook/.
[80] See CARIBBEAN TELECOMMUNICATIONS UNION, CARIFORM TECHNICAL ASSISTANCE PROJECT, ANALYSIS OF THE REGULATORY POSITION OF CARIBBEAN TELECOMMUNICATIONS UNION MEMBER STATES (2002).
[81] *Market Development: Caribbean Telecommunications Looking Toward Liberalization*, Telecommunications Industry Association (2000), at http://pulse.tiaonline.org.
[82] *Id.*
[83] *Id.*

> conducive to efficiency, private investment and growth. Under the current paradigm, the islands of the Caribbean are increasingly frustrated with their lack of control over their telecommunications sectors especially as the region strives to further its economic, political and social development."[84]

D. Redefining Caribbean Telecommunication: Four Major Events

Recent economic and technological developments have placed telecommunications at the forefront of national economies.[85] The Caribbean, in particular, is competing to provide outsourced information processing, knowledge-based services, international banking and of course tourism.[86] The Caribbean has some advantages in competing for these services. There is a high level of basic literacy in the region; the governments are relatively stable and in many of the countries the people are English speaking, trainable in computer supported skills and available for employment; labor costs are lower than those in North America and there is generally high-quality local and international phone service.[87] However, while the communications infrastructure is above average, "the rates in many Caribbean countries for international telecommunications remain too high to attract data communications-intensive businesses. It has become clear that the Eastern Caribbean region's high cost of telecommunications has forced investors to move to areas of Latin America."[88] The Caribbean now faces significant losses from sectors capable of bringing in millions of dollars in revenues and that could be providing thousands of jobs for their people. Caribbean national governments have just begun to realize in the last five years that changes to the regulatory structure need to be made to embrace the prospects of a liberalized marketplace encouraged by the increase in

---

[84] *Id.*
[85] M. Lodge & L. Stirton, *Globalization and Regulatory Autonomy in Small Developing States: The Case of Jamaican Telecommunications Reform*, Centre on Regulation and Competition, Institute for Development Policy and Management, University of Manchester (2002).
[86] *Market Development: Caribbean Telecommunications Looking Toward Liberalization*, Telecommunications Industry Association (2000), at http://pulse.tiaonline.org.
[87] *Id.*
[88] *Id.*

investment, jobs and revenue for operators, vendors and the national governments.[89] As a result, the Caribbean telecommunication market is now going through a period of massive upheaval. Four major events mark this period.

1. Substantial Technological Change: International PSTN, Mobile and VoIP Traffic

Prior to the movement towards global telecom deregulation, each country typically had one state-owned, or state authorized monopoly operator. The telecommunications industry refers to such agreements between incumbent operators as bilaterals. Deregulation has resulted in the exponential growth in the number of carriers, now estimated at about 4,000 worldwide.[90] This in turn has driven the growth of the market for competitive termination in the wholesale international long-distance market.[91] "This trend has been marked by a shift away from bilateral agreements to buying termination from the most competitive supplier in this new competitive marketplace."[92] However, the Caribbean still suffers from a lack of a competitive environment for call termination. Mobile is already making an impact on international termination and in the near future as Voice over the Internet (VoIP) is introduced into the Caribbean, a subsequent rise in voice traffic likely will accelerate the shift from bilateral purchase agreements to a competitive voice termination marketplace.[93]

Before the global deregulation movement, long-distance voice traffic providers purchased country, proper termination for calls to an entire country at one price.[94] This is still very much

---

[89] *See* Donald Connor, *Interconnection-Business Opportunity or Stumbling Block* (2004), *at* http://www.c-t-u.org/7th_Policy/7TPS_agenda.htm; Andrew Fyfe, *Liberalization Raises New Issues, Interconnection and Universal Service* (2001), at www.itu.int/ITU-D/ecdc/Seminars/StLucia/ presentations.
[90] Robert Barbiere, *Planning For Changing Dynamics In Wholesale Voice* (2003), *at* http://www.thexchange.com/news/prfiles/wp-wholesale.pdf.
[91] *Id.*
[92] *Id.*
[93] Mobile traffic is not terminated on the incumbent operator's network and VoIP traffic may or may not terminate on the incumbent's network.
[94] *See* Barbiere

the case in the Caribbean. "Under this system, the first two or three digits of a dialed number comprise the country code, and the originating carrier's voice switch only needed to read these digits to know where to send an international call."[95] With the rise of competitive carriers and mobile traffic, more options will become available to the buyer, allowing buyers and sellers of international voice termination to offer a variety of city/town specific termination rates based on call volume, time of day, and type of service (PSTN, mobile and VoIP).[96] "Savvy buyers will have to purchase termination in an increasingly complex world and switch suppliers to take advantage of off-peak and weekend cost savings."[97] This anticipated level of complexity of voice services in Caribbean will arrive soon enough, as it has in the USA, Europe and Asia. When it does the Caribbean will need a regional regulatory regime in place to provide the necessary interconnection framework for the establishment of fair, transparent and competitive access agreements.[98]

2. World Trade Organization (WTO) Agreement (1996-1998)

Under the auspices of the WTO, the Post-Uruguay round negotiators provided the legal basis for the annexation of new basic telecommunications schedules to the Uruguay Round services schedules."[99] This negotiation resulted in what is now commonly referred to as the WTO Agreement on Basic Telecommunications.[100] The Agreement establishes a set of principles regarding the regulatory framework for telecommunications services. Most

---

[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] ASIA PACIFIC ECONOMIC COOPERATION (APEC) TELECOMMUNICATIONS WORKING GROUP, APEC FRAMEWORK FOR INTERCONNECTION (1999).
[99] See World Trade Organization, Fourth Protocol to the General Agreement on Trade in Services (1996).
[100] See *Market Development: Caribbean Telecommunications Looking Toward Liberalization*, Telecommunications Industry Association (2000), at http://pulse.tiaonline.org; M. Lodge & L. Stirton, *Embedding Regulatory Autonomy in Caribbean Telecommunications, Lodge, Annals of Public and Cooperative Economics* (2002); M. Lodge & L. Stirton, *Well Connected? Building Capacity for Telecommunications Regulation in Three Caribbean States*, in Global Encounters, International Political Economy, Development and Globalization, (forthcoming, Palgrave Macmillan).

importantly, the agreement states "interconnection with a major supplier will be ensured at any technically feasible point in the network."[101] Seven Caribbean countries, Antigua and Barbuda, Barbados, Dominica, Dominican Republic, Grenada, Jamaica, and Trinidad and Tobago have signed this agreement, demonstrating their commitment to regulatory reform.[102] However, not all Caribbean nations are party to the Agreement. Most alarming is the lack of harmony within ECTEL where three of the five ECTEL members, St. Kitts and Nevis, St. Vincent and the Grenadines and St. Lucia, have not signed the Agreement.

3. Federal Communications Commission (FCC) Benchmarks Order (1997)

In 1997, the FCC issued a Benchmarks Order mandating a phased reduction of the settlement rates paid by U.S. carriers to foreign telephone companies for terminating calls transmitted to their respective countries.[103] The settlement rate was ideally supposed to represent the cost incurred by the companies for terminating calls.[104] However, prior to deregulation, interconnection pricing negotiations with incumbent monopoly telephone companies usually resulted in a final per minute price much higher than the actual cost incurred by the incumbent.[105] The FCC had concluded via this order that the settlement rates paid by U.S. carriers were far in excess of the real costs incurred in transmitting or receiving the calls, resulting in unreasonably high charges for U.S consumers.[106] The FCC as a result prescribed benchmark settlement rates, lowering the cost associated with each minute of each call

[101] See World Trade Organization, Fourth Protocol to the General Agreement on Trade in Services (1996).
[102] See Sherry Stephenson & Soonhwa Yi, *Dealing with Public Interest in the Changing Nature of the Provision of Infrastructure Services, with emphasis on the Telecom Sector* at Year 2000 Conference: Alternative Development: The Role of the Services Sector, Institute of Social and Economic Research, University of the West Indies (2000).
[103] *See* FCC Benchmarks Order (1997); *See also* M. Lodge & L. Stirton, *Embedding Regulatory Autonomy in Caribbean Telecommunications, Lodge, Annals of Public and Cooperative Economics* (2002).
[104] *Id.*
[105] *Id.*
[106] FCC Benchmarks Order (1997) at paragraph 268 the FCC stated "our goal in reforming the settlement rate system was to provide U.S. consumers with just and reasonable IMTS (International Message Telephone Service) service."

terminated. Prior to this order C&W entities throughout the Caribbean enjoyed significant margins from terminating voice traffic on any of their national networks. As a result of this order, C&W lost this substantial revenue stream that was used to cross-subsidize national phone services that without these subsidies would lose money.

4. *Cable and Wireless Dominica Ltd. v. Marpin Telecoms and Broadcasting Co. Ltd.* (2000)

Marpin Telecoms and Broadcasting Company (Marpin) is a cable television operator in Dominica established in 1983. Marpin received a license to install, maintain, and operate a television station and related telecommunications services.[107] In the late 1990's Marpin wished to offer mobile and internet services in direct competition with C&W Dominica, the incumbent provider.[108] To that end, Marpin brought this action against C&W Dominica claiming that C&W's exclusive license to provide national and international telecommunication services in, to and from the Commonwealth of Dominica infringed on Dominica's constitutional guarantee of freedom of communication.[109] Both the Dominican High Court of Justice and the Eastern Caribbean Court of Appeal ruled that Marpin's freedom to communicate ideas and information through telecommunications is hindered by C&W's monopoly.[110]

> "However, C&W's recognition of Marpin, … as the first competitor in the Eastern Caribbean, did not prevent the incumbent from refusing to interconnect (with) the new entrant network. This fuelled a bitter dispute between the companies, which only ended when Marpin filed a complaint against C&W with the US Federal Communications Commission. This claimed that Dominica's incumbent was in clear violation of the FCC's open entry policies for international carriers and deprived consumers wanting to call the United States of competitive price, product and service alternatives."[111]

---

[107] Cable and Wireless Dominica Ltd. v. Marpin Telecoms and Broadcasting Co. Ltd. (2000) UKPC 42 (30th October, 2000) Privy Council Appeal No. 15 of 2000.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] Jose Otero, *Mobile Opportunities in the Caribbean*, Baskerville Strategic Research (2003).

It was only under the pressure and publicity of this international lawsuit before the FCC that C&W eventually interconnected with Marpin in 2001. This case now stands as the precedent for interconnection liberalization in the Caribbean.

Instead of a liberalized interconnection environment established as a result of Marpin, negotiation delays and stalemates now characterize the negotiation efforts between C&W and new entrants throughout the Caribbean.[112] C&W aimed and continues to aim to use the prices for services agreed to with Marpin in Dominica as the benchmark for pricing of similar services in other Caribbean markets. Without a regional regulatory body responsible for injecting competition into the marketplace through a unified regulatory effort, C&W's market dominance will continue unhindered.

E. Recognized Interconnection Principles

Although it is preferred that service providers establish and monitor contractual interconnection relationships on their own, a recognized regulatory framework will set expectations, provide a timetable for negotiations, establish technical standards, provide a uniform dispute resolution process and describe enforcement procedures in case of default. Of course, commercial terms and conditions are a key aspect of an interconnection agreement. "However, commercial negotiations fail in the absence of pro-competitive regulations that articulate the specific terms and conditions of a major supplier's obligation to allow them to enter the market."[113] "Regulations … can enhance the likelihood of successful commercial

[112] *AT&T in Dominica*, The John Rose Journal, March 24, 2003 *at* www.da-academy.org/johnson22.html (stating that the C&W wants to use their 14 cents-a-minute interconnection agreement with Marpin in Dominica as a benchmark for negotiations for a similar contract with AT&T Wireless in St.Lucia and St. Vincent and the Grenadines).

[113] CITEL GUIDELINES AND PRACTICES FOR INTERCONNECTION REGULATIONS (1999).

negotiations if they provide the parties with incentives to enter into negotiations in good faith and to reach a constructive interconnection agreement in a timely manner."[114]

There are three key principles that have been shown to be necessary when setting-up regional interconnection regimes: (1) Transparency, (2) Non-discrimination, (3) Regulatory efforts focused on the incumbent operator.[115]

1. Transparency

Transparency refers to both the publication and availability of an interconnection agreement once concluded, and whether the entire process by which the agreement and surrounding regulatory decisions was open, transparent and well defined.[116] Transparency is an effective means of discouraging anti-competitive behavior by the incumbent provider.[117] By making interconnection agreements public, regulators and market participants are able to identify and remedy this anti-competitiveness.[118] In addition, the publication of interconnection agreements permit future contracting parties to refer to common terminology, definitions, rates, technical standards, commercial language and accepted dispute resolution mechanisms.

2. Non-Discrimination

Discrimination in interconnection agreements can come in many flavors. This is because interconnection agreements vary from competitor to competitor. When comparing interconnection arrangements the test is whether the differences that exist rise to the level of

---

[114] *Id.*
[115] *See* H. Intven, *Telecommunications Regulation Handbook, Module 1, Overview of Telecommunications Regulation*, The World Bank (2000) *at* http://www.infodev.org/projects/314regulationhandbook/.
[116] CITEL GUIDELINES AND PRACTICES FOR INTERCONNECTION REGULATIONS (1999).
[117] *See* H. Intven, *Telecommunications Regulation Handbook, Module 3 Interconnection*, The World Bank (2000) *at* http://www.infodev.org/projects/314regulationhandbook/; CITEL GUIDELINES AND PRACTICES FOR INTERCONNECTION REGULATIONS (1999); Donald Connor, *Interconnection-Business Opportunity or Stumbling Block* (2004), *at* http://www.c-t-u.org/7th_Policy/7TPS_agenda.htm.
[118] *See* H. Intven, *Telecommunications Regulation Handbook, Module 3 Interconnection*, The World Bank (2000) *at* http://www.infodev.org/projects/314regulationhandbook/; CITEL GUIDELINES AND PRACTICES FOR INTERCONNECTION REGULATIONS (1999).

being unjust, undue or unfair discrimination.[119] Although discrimination can arise in many situations, CITEL[120] has identified two primary areas where discrimination is likely to occur: "any-to-any connectivity, [and] fair and equal treatment of calls."[121]

"Any-to-any connectivity of a public switched telecommunications network refers to the ability of any user to communicate with any other. No carrier with market power over essential facilities and services should have the power to preclude a telecommunications user from terminating calls on its network."[122]

"A state of fair and equal treatment of calls exists when a customer experiences no difference between calls originated or terminated on an incumbent's network or its competitor's network, assuming the only variable is the interconnection arrangement."[123] Among the more serious kinds of discriminatory activity related to fair and equal treatment of calls is quality-of-service discrimination. New competitors are particularly sensitive to this because customers will perceive that calls originating on the new entrant's network are lower quality in comparison to calls originating on the major supplier's network.[124] To protect against this, as part of the negotiation process, it may be necessary to preclude discrimination in such areas as routing plans, grade of service, post dial delay, transmission media and provisioning intervals, among others and permit the centralized regulatory body to address and rectify disputes that may arise.[125]

---

[119] H. Intven, *Telecommunications Regulation Handbook, Module 3 Interconnection*, The World Bank (2000) *at* http://www.infodev.org/projects/314regulationhandbook/.
[120] Inter-American Telecommunications Commission of the Organization of American States (OAS).
[121] CITEL GUIDELINES AND PRACTICES FOR INTERCONNECTION REGULATIONS (1999).
[122] *Id.*
[123] CITEL GUIDELINES AND PRACTICES FOR INTERCONNECTION REGULATIONS (1999).
[124] *Id.*
[125] *Id.*

3. Regulation focused on the Incumbent

"The universal imposition of interconnection obligations on all operators, large and small, generally amounts to over-regulation"[126] Incumbent operators, by their very dominance, have the ability to establish the terms by which they would interconnect with a competitor. Therefore incumbents have a powerful incentive to maintain their dominant market position by limiting competitive interconnection to their network. In order to create a level playing field for all participants on the road to a competitive marketplace interconnection regulation should be directed towards the incumbent.[127]

F. Promoting Competition: Harmonizing Regional and National Regulatory Efforts

Regionally, the role of a regulator has usually been limited to promoting market liberalization and competition, harmonizing policies on a regional level, introducing advance telecom technologies and services, increasing teledensity and providing a regional source of expertise available for consultation by its associated national regulatory bodies.[128] On the other hand, national regulatory bodies are entrusted with three key hands-on duties: controlling access to markets, controlling the behavior of the operators in those markets, and dispute resolution.[129] Because two sets of priorities exist for the region there is a need to harmonize their efforts through regional regulatory reform in order to rectify the various deficiencies that result from an

---

[126] H. Intven, *Telecommunications Regulation Handbook, Module 3 Interconnection*, The World Bank (2000) *at* http://www.infodev.org/projects/314regulationhandbook/.
[127] *See* H. Intven, *Telecommunications Regulation Handbook, Module 3 Interconnection*, The World Bank (2000) *at* http://www.infodev.org/projects/314regulationhandbook/; *See also* Donald Connor*, Interconnection-Business Opportunity or Stumbling Block* (2004), *at* http://www.c-t-u.org/7th_Policy/7TPS_agenda.htm. (stating that this approach is consistent with the WTO Agreement on Basic Telecommunications which poses interconnection obligations only on the incumbent and with the European Commission's (EC) proposed Directive on access and interconnection (2002/19/EC) aimed at regulating "dominant operators" only.
[128] *See* Andrew Barendse, *The Shifting Locus of Regulation: Trends and Implications of Regional Regulation, Harmonizing Regional Regulation in the EU, SADC, and OECS*, Delft University of Technology, World Dialogue on Regulation for Network Economies, (2003).
[129] *Id.*

environment where multiple regulators exist. Regional regulators have a variety of options that when combined in the right combination for their regulatory environment can expedite negotiations and guide interconnection agreements toward completion. These options include: (1) establishing guidelines in advance of negotiations, (2) creation of a default interconnection agreement, (3) agreement on a common technical jargon and definitions template, and (4) establishment of a common dispute resolution and enforcement system.

Hypothetically, imagine you are a potential new entrant into several countries within a particular close-knit region. Should you be forced to reinvent the wheel when it comes to negotiating your interconnection agreements? Forced to succumb to multiple national regulators each with its own distinctive policies and procedures? The answers should be no. These increased costs of entry and continued costs of competition into these new markets stifle new competition and needed investment. Unfortunately, without a common regional approach to competitive market entry for interconnection, the nations of the Caribbean are essentially sending a message to potential new entrants to take their investment elsewhere where market entry is facilitated by a common regional interconnection regime. To remedy this perception the use of "ex ante"[130] interconnection guidelines are a necessary and effective means in promoting good interconnection agreements."[131]

G. Shortcomings of Current Regional Efforts in the Caribbean

"Telecommunications in nine (9) of the fifteen (15) Caribbean nations are regulated by independent regulatory agencies, where as the respective Ministries of Communication are

[130] Ex-ante or proactive regulation versus ex-post or reactive regulation.
[131] H. Intven, *Telecommunications Regulation Handbook, Module 3 Interconnection*, The World Bank (2000) *at* http://www.infodev.org/projects/314regulationhandbook/.

responsible for regulation in the other six (6) states."[132] In addition, there are several regional bodies all conducting some sort of regulatory activity in the Caribbean.[133] Seven separate independent regional regulators, with overlapping vague roles and responsibilities currently are tasked with telecommunications regulation for a region of nearly 23 million people,[134] roughly the population of Texas. This lack of consolidation within the region has dramatically slowed the establishment of a competitive telecommunications marketplace in the Caribbean. Although ECTEL is the best example of a dedicated Caribbean regulator, ECTEL does have its shortcomings.

ECTEL was established in May 2000 by five member states of the Organization of Eastern Caribbean States (OECS).[135] The structure of ECTEL provided for the establishment of national regulatory bodies in each of the member states.[136] ECTEL's regulations are only suggestions; they must be advanced via legislation in each member state in order for the regulation to have any effect.[137] The national legislatures may, and often do, make changes that have the potential to affect both the work of ECTEL and the timetable by which they become effective in a member state. This leads to inconsistent application by national legislatures and acts as a barrier to regional competition by requiring the potential new entrant to learn the regulatory requirements to market entry in each nation.

---

[132] CARIBBEAN TELECOMMUNICATIONS UNION, CARIFORM TECHNICAL ASSISTANCE PROJECT, ANALYSIS OF THE REGULATORY POSITION OF CARIBBEAN TELECOMMUNICATIONS UNION MEMBER STATES (2002). The established regulators are The Fair Trading Commission (FTC) in Barbados, the Public Utilities Commission (PUC) in the Bahamas and Belize, the Office of Utilities Regulation (OUR) in Jamaica and Eastern Caribbean Telecommunications Authority (ECTEL) and the National Telecommunications Regulatory Commissions (NTRCs) in Dominica, Grenada, St Kitts & Nevis, St Lucia and St Vincent and the Grenadines.
[133] Supra at 12.
[134] Excluding Cuba or Puerto Rico, World Bank.
[135] Commonwealth of Dominica, Grenada, St. Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines.
[136] Treaty Establishing the Eastern Caribbean Telecommunications Authority (ECTEL) (2000).
[137] *Id.*

However, ECTEL's mandate as a "node of international cooperation" falls short of the proactive, demonstrative efforts required for regional success. In other regions, the European Union (EU) and the Asia Pacific Economic Cooperation Telecommunications Working Group (APEC), have taken a more demonstrative effort to lead and direct its member states towards a common regulatory policy on interconnection. As the Caribbean looks to turn the corner towards the creation of a competitive interconnection environment it should look towards the successes in Europe and Asia through the EU and APEC as a potential model for success.

H. Conclusion

A successful competitive national telecommunications environment is directly tied to a successful regional regulatory structure where the international telecommunications community sees the region as competitive. The Caribbean, with 23 million people and 15 nations, is having serious difficulty implementing a competitive telecommunications environment in the face of C&W, the regionally entrenched monopoly. Although the region realizes that no area is more vital to the future achievement of sustainable development than telecommunications, its current regional regulatory efforts are either weak or only represent a small subsection of the nations of the Caribbean. The need is apparent for a regional entity empowered to create a single, regionally accepted default interconnection agreement that clearly defines regional standards, establishes a timetable for interconnection negotiations, creates a regional dispute resolution system authorized to mandate interconnection, and penalizes anti-competitive behavior. Only when this organization is created can the Caribbean begin to reap the economic and regulatory benefits of a competitive telecommunications marketplace as enjoyed in Europe and Asia.