

WHAT LAWYERS NEED TO KNOW ABOUT THE DIGITAL DIVIDE

By Peter K. Yu

Introduction

The emergence of the Internet and the dramatic explosion of e-commerce have created many new opportunities. The Internet allows people to search for and apply for jobs without travelling. It enables people to improve their education while staying at home. It also provides people with chances to meet others with similar interests and in different geographic areas.

However, not everybody can take advantage of these new opportunities. Many people—in particular Native Americans, the elderly, the poor, the disabled, those who live in rural areas and people living in the less-developed countries—do not have access to the new information technology or to Internet contents that are relevant to their lives and their communities.

This gap between those who can make effective use of information technology and those who cannot is commonly referred to as the “digital divide.” To bridge this divide, the government, intergovernmental organizations, private foundations, non-profit organizations and the private sector have developed projects that facilitate the use of new communications technologies to enable communities and their citizens to realize their socio-economic, education and cultural potential.

As legislators, policymakers, corporate executives and the general public become more conscious of the digital divide, the Internet environment—legal, business or otherwise—may change. Thus, lawyers serving Internet clients must become more aware of the digital divide and anticipate the legislative responses, public policy choices and changing customer expectation that may affect their clients.

Elements of the Digital Divide

The digital divide consists of five key elements.

- **Awareness.** It goes without saying that those who are not aware of the Internet and the new communications technologies will not be able to take advantage of the opportunities created by the information revolution. Likewise, those who are not aware of the digital divide will not be able to understand the substantial gap between the information haves and have-nots.
- **Access.** Building a telecommunications infrastructure requires substantial investment of capital. So does the expansion of business and social applications of new communications technologies. Unfortunately, those communities that are in the most desperate need of basic information technology and telecommunications infrastructure rarely provide attractive markets. Nor do they possess the technological experience needed to operate the new technologies. Even worse, many of these communities are struggling just to meet their basic needs, such as clean drinking water, food, housing, electricity and basic health care.

- **Affordability.** Not everybody can afford new information technologies and the expenses incurred in upgrading the equipment, software and training support. In most undeveloped or underdeveloped markets, the costs of the hardware and software and the connection fees are so high that Internet access remains out of reach for most people within those areas.
- **Availability.** While access to technology is important, access to information that is relevant to the individual or his or her community is equally important. Unfortunately, most Internet content is generated by companies that are driven mainly by business interests. To maximize profits, these companies tend to target customers who have more disposable income, to carry content provided by themselves, their affiliates and corporate partners, and to clout out information supplied by their competitors and unaffiliated content providers. As a result, low-income and underserved Internet users sometimes have difficulty locating information that is relevant to their lives and their communities.
- **Adaptability.** Access to new information technologies is important. However, this access is only useful if people are able to adapt to the changing technological environment and use the new technologies effectively. So far, computer illiteracy and technophobia have posed significant barriers to bridging the digital divide.

The E-Rate Program

Traditionally, universal access has been the public policy response to reduce the disparity between those who have new communications technologies and those who do not.

Through the 1996 U.S. Telecommunications Act, universal service has been expanded to cover information technology. The “E-Rate” program, which is funded by telecommunications companies (and thus their customers who bear the additional charges), provides discounted Internet hook-ups and connection fees for schools and libraries in the United States. Delivering billions of dollars in discounts over the past few years, the program has accelerated the adoption of Internet technologies in American schools and libraries and has helped connect the younger generation to the educational resources available on the Internet.

While George W. Bush favors efforts to bridge the digital divide and to provide students with computers, he has been critical of the Clinton administration’s management of the E-Rate program. To provide flexibility, Bush has proposed to consolidate the E-Rate program with other education technology funds. Nevertheless, commentators have pointed out the legal difficulties in consolidating those funds because the E-Rate program is created as a telecommunications infrastructure fund managed by the Federal Communications Commission whereas the other education technology funds are under the domain of the Department of Education.

Federal Subsidies, Tax Incentives, and Other Sources of Funding

Apart from the E-Rate Program, the government may create new federal subsidies programs that may spark a sudden growth of nonprofit organizations aiming to connect low-income groups to the Internet. The government also may create tax incentives that encourage the private sector to

donate computers, to sponsor technology centers in poor neighborhoods and to train those who are not yet connected to the Internet.

At present, computer manufacturers receive a tax deduction for computers they donate to schools. With the increasing attention to the digital divide, these incentives may be broadened to cover libraries and technology centers in low-income neighborhoods.

In addition to federal subsidies, intergovernmental organizations and private foundations will provide funding for projects that help bridge the digital divide. In the past few years, traditional foundations have devoted an increasing amount of resources to technology projects, bringing with them experience and personnel networks to foster long-term change in local communities.

The newfound e-wealth also has created a number of new and aggressive foundations. Instead of using traditional review and approval processes, these new upstarts provide more flexibility and are more comfortable in exploiting unallocated funds or venture capital to solve development problems.

Finally, in response to the global attention the digital divide has recently received, intergovernmental organizations, such as the Asian Development Bank, the European Bank for Reconstruction and Development and the World Bank Group, have funded a large number of projects that aim to prevent the less-developed countries from being shut out of the New Economy.

New Laws and Regulatory Framework

As Professor Lawrence Lessig reminded us in his seminal work, *Code and Other Laws of Cyberspace*,² codes used in computer programs are written by human beings and are thus regulable by the government if the government finds a reason to do so. Like privacy and intellectual property, the digital divide may provide a sufficient reason for the government to regulate in this area. Indeed, this issue may provide a worthwhile social cause that helps rally political support from the general public.

Consider for example the disabled, who are among those deeply affected by the digital divide. In December 2000, the U.S. government issued a new rule requiring all government web sites to be accessible to the disabled. To comply with this rule, which will take effect in June 2001, many government agencies have to redesign their web pages by installing features such as “alt” tags (that translate images into texts) for the blind and keyboard navigation options for those unable to use a mouse.

In addition, to protect the public against the lack of access to information that is relevant to their lives and their communities, the Federal Communications Commission has been particularly careful in reviewing, and imposing open access conditions on mergers in the telecommunications industry that have implications on Internet access and distribution of information. A case in point is AOL’s purchase of Time Warner, which created the world’s largest media conglomerate.

Customer Expectations and Changing Business Models

Creating a community of loyal customers has been a dream goal for almost every Internet business. However, good products and services are no longer the only criteria for customer satisfaction. Today, customers may look to other issues such as privacy policies, political correctness and assumption of social responsibility. They also may expect those companies from which they purchase their products or services to devote a reasonable amount of resources to public welfare, humanitarian, educational and philanthropic causes.

Thus, to attract customers and to acquire goodwill from the online community, an increasing number of Internet companies have donated their services and resources to help bridge the digital divide. For example, in March 2000, Microsoft, IBM and AT&T pledged more than \$101 million worth of materials, software, services, training and financial support for a United Negro College Fund program that aims to improve computer access for students and faculty at historically black colleges and universities.

Conclusion

Several years ago, a 56K modem was the state-of-the-art technology for connecting a computer to the Internet. Today, many computers are equipped with broadband technology. With the proliferation of new communications technologies, the definition of the digital divide, and the projects that seek to bridge this divide, will continue to change.

Nevertheless, as long as there is a disparity between the information haves and have-nots, the government, intergovernmental organizations, private foundations, nonprofit organizations and the general public will continue to undertake and support efforts that help eliminate this disparity. As new programs are instituted, the Internet landscape will continue to change.

If Internet lawyers are to serve their clients successfully, these changes cannot be ignored.

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