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# Consumer Protection in the Age of the Information Economy

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# Overview

- In light of historical roots, what are hallmarks of modern consumer protection?
- What tools do consumer advocates have to meet new challenges?
- Three examples of new challenges to existing framework
- What elements of a reform agenda can be extrapolated from those examples?

# Origin of “Consumer”

- Trade practice regulations are as old as commerce itself
- 1745 Oxford English Dictionary “One who uses up an article produced, thereby exhausting its exchangeable value: opposed to *producer*”
- Henry Maine, Ancient Law 1861: Progress of society is from status to contract
  - Unless status is “consumer”?

# Expansion of Consumer Protection

- Late 19<sup>th</sup>-Early 20<sup>th</sup> Century
  - Prohibit most obvious health & safety risks; punish most egregious fraud
- Mid-Late 20<sup>th</sup> Century
  - Channel power of modern regulatory state to serve consumers
    - Government enters market as player
- Turn of 21<sup>st</sup> Century: 3<sup>rd</sup> wave

# Competing Views of State & Market

- Liberal Market Economy
  - Narrow sense of public; broad sense of private
  - Competition, innovation, individualism
    - Is strong protection a tax on the clever for the benefit of the foolish?
  - Regulate through property and contract
- Coordinated Market Economy
  - Broad sense of public; narrow sense of private
  - Solidarity, continuity, redistribution
  - State as player in market

# Competing Views of Consumerism

- Consumerism as market populism
  - Maximize individual choice and individual risk
  - Guarantee transparency
  - Possessive individualism
- Consumerism as social justice
  - Restrict both individual choice and risk
  - Guarantee outcomes
  - Holistic view of civil society

# Example 1: ICT Standards

- Industrial Standards & Products
  - Safety & health
  - Lower price, improved quality, increased choice
- Network Effects & ICT Networks
  - Single provider to reap benefits of single solution?
    - US versus EU on Microsoft's duty to support interoperability
- Irrelevance of Industrial Standards Bodies
  - Global markets, rapid innovation

# Consumer Protection & ICT Standards

- “New Approach” to law reform & standards
  - Coordinate legislation & standardization
  - Failure of EU Electronic Signature Directive
- US Section 508 Standards for Disabled Access
  - Federal procurement standard & federal purchasing power subsidizes creation of private market
- Internet standards
  - Minimum standardization, accommodate affluent priorities, achieve first mover advantage
  - No privacy, no security
  - De facto exclusion of poorest nations

# Example 2: E-Contracting

- Remove barriers to innovation in marketing channels
  - Standard form contracts as private governance of industrial revolution
  - Horwitz effect: subsidize growth by deflecting responsibility for harm
- Results-oriented contract jurisprudence
  - Shrinkwrap
  - Clickwrap
  - Browsewrap

# Unfair or unconscionable?

- Regulation of unfair contract terms
  - 2<sup>nd</sup> Wave Policy Instrument
    - Uniform protections level playing field between new and old
    - Stifle innovation and consumption?
  - New Approach
    - Standards for machine readable disclosures?
    - DRM as unfair implied contract term
- Uncertainty of unconscionability litigation
  - Market for lemons problem: how to get consumers to pay for quality?
  - But what about private shop bots?

# Example 3: Security & Privacy

- Health & Safety for Information Economy
  - Privacy as dignity or commercial transaction?
- Identity theft is a symptom of the larger problem
- Managing regulation/innovation interface
  - Risks of technology forcing legislation
  - Failure of “light touch” regulation
  - General principles without effective enforcement
  - Privacy enhancing standards and market failure

# Internet as Afghanistan?

- First Anglo-Afghan War 1841-42
  - 17,000 left Kabul, Afghanistan
  - 1 entered Jalalabad, Pakistan 1 week later
- What if the Internet cannot be secured?
  - Nominal price of connectivity versus true cost
  - Magnitude of unsolved problems
- No alternative but better regulation
  - ISO 27000/17799 Adaptive management

# What is to be done?

- Protect consumer, stakeholder, mass producer or citizen?
  - Draft charter of consumer rights in digital age
  - Open source, collaborative production
- Promote production of global public goods
  - Multilateral pursuit of solidarity
    - Systematic restrictions on freedom of contract & property
  - Privacy, fair use enhancing technologies
- Democratize regulation by standard developing
  - Better regulation necessary but not sufficient
  - Ex post support not ex ante participation

# Conclusions

- Where you stand depends on where you sit
  - From global laissez-faire to global solidarity
  - Decision making under uncertainty and precaution
- Consumer advocates as norm entrepreneurs in global arenas
  - From enhanced consumption to sustainable development?
- Accountability notwithstanding governance diversity
  - Private property versus standardization
  - Standardization as legitimate self-regulation