GLOBALIZATION OF MARKETING IN THE MSC: SOME LEGAL CHALLENGES

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ABSTRACT

It is needless to say that since the appearance of the United Nation’s Charter of 1945 the world had been divided into three worlds. The First is the free world, the Second is the communist world and the Third is the developing or non-aligned nations. This situation had dominated the world’s political landscape until the end of the cold war in the late 1980s. By that time, the former Soviet Union proclaimed its reforming policy ‘Perestroika’ to restructure its economy. At the same time senior Bush of the First world proclaimed the concept of the New World order. As a result, most of the countries have opted for a combination of democracy and market economy. This has created the concept of globalization, or becoming or making worldwide. On the other hand, in the era of the information technology and in response to the new economic system Malaysia has been creating its smart project, the Multimedia Super Corridor (MSC) taking advantage of the concept of globalization that experienced by the world. Seven flagship applications had been projected in the corridor. One of these has been the Borderless Marketing Centers whereby four areas of multimedia applications had been identified. In other words, it has globalized marketing in the MSC. The proposition of this paper is that although such a process of globalization generates opportunities to Malaysia it may also generate some legal challenges to it as well. Globalization of marketing has provided Malaysian and international companies with the opportunity to operate in an environment of close operation in the multimedia industry in a manner that defies time zone, physical borders, national interests, etc. However, this also imposes practical legal challenges such as to the rules of the conflict of laws, obscenity and pornography, copyright, privacy among others. This paper presents some of the possible legal challenges resulted from the globalization of marketing in the MSC and tries to propose some counter solutions to such challenges. With the hope that opportunities of globalization of marketing in the MSC and other political, economic and social challenges will be tackled by other papers.

KEYWORDS: Cyberlaws, e-commerce, Globalization, legal challenge, technology.

1. INTRODUCTION

At the outset, it should be stated that the term globalization is defined as becoming or making worldwide. This distinguishes it from both universalism and globalism. The term “universalism” is used to recognize the common origins of all the people and the very
planet. Globalism is used to define something similar to a vision of the world to see how the whole is deeply interconnected that even the action of few people can influence the lives of all the others (D’Antonio, 1997).

If we want to trace back globalization as a term, yet some works can be singled out in the area since the 1960s. One of these is the Macluhan’s Global Village which was published in the mid 1960s that is considered as an early signal. At that time it was a sociological characterization by someone involved in developments at the intersection of mass media on the one hand and worldwide mass consumption and entertainment on the other hand. In retrospect, we can see now that a number of ingredients particularly the market and information technology.

Another landmark of the way to globalization is the Club of Rome’s report entitled Limits to growth by Meadows in the early 1970s which pointed out that unlimited expansion of the Western model of economic and technological growth would lead to disaster in terms of depletion and deterioration of the natural environment (Lubbers, 1996a).

The third landmark is a book entitled The Third Wave by Alvin Toffler appeared in 1980. The far-reaching integration between electronics and computers and communication technology led Toffler to what he termed ‘The Third Wave’ (Toffler, 1990). This book helped raise the consciousness and the deeper understanding of the explosion of information technology. It addresses two main issues which are electronics that gave chips and bits and communication technology which gave satellite and glass fiber (Lubbers, 1996a).

2. GLOBALIZATION OF MARKETS

Since the appearance of the United Nation’s Charter of 1945 the world had been divided into three worlds. These are the First world (free world), the Second world (communist) and the Third world (developing or non-aligned nations). This situation had dominated the world’s political map until the end of the cold war in the 1980s. This period witnessed two significant declarations. On the one hand, the Second world headed by the Soviet Union proclaimed its reforming policy ‘Perestroika’ to restructure its economy. This new policy simply means a waiver of the regulated economy to the free one. As a result, the so-called Second world gradually disappeared and the concept of the non-alignment countries in turn lost its frame of reference. At the same time senior Bush of the First world proclaimed the concept of the New World order, which describes the situation and calls for all countries to opt for democracy and market. As a result, most of the countries opted for a combination of democracy and market. This situation has created the political and economic perspectives of globalization (Lubbers, 1996a).

If we concentrate on the economic concept, yet it was introduced to mean the world’s economy that is characterized by increased free trade, mutual dependency, a great deal of global sourcing, a worldwide capital market, free movement of capital and the promotion of direct foreign investment by other countries, to mention a few (Lubbers, 1996b).
However, the globalization process does not work in the absence of the technology that makes it possible. Thus, technology, especially communication and information technologies were resorted to.

3. THE ROLE OF TECHNOLOGY

According to Kirby (1996), the first signal to globalization made by media can be traced back to the 1850s. Nathaniel Hawthorne in his book The House of Seven Globes concluded that by means of electricity the world of matter has become a great nerve vibrating thousands in a breathless point of time.

In 1925 Adlous Huxley also painted the picture of the vast power of this media interconnection as well as of the dangers brought by to cultural consolidation and ultimately homogenization. He stated that the modern civilization is doing its best to re-establish the tribal regime but on an enormous, national and even international scales. Cheap print, wireless telephones, trains, motorcars, gramophones and all the rest are making it possible to consolidate tribes, not of a few thousands but of millions. In a few generations, it may be that the whole will be covered by one vast American speaking tribe composed of innumerable individuals, all thinking and acting in exactly the same way (Kirby, 1996).

Moreover, McLuhan’s Global Village is worth noting also. In this book, the term was coined to describe the way in which the global media were linking humanity in all parts of the world.

The improvement of communication from traditional means such as sailing the oceans, to modern communication technologies such as radiotelephony, satellites, glass fiber has made a direct contribution to globalization in the sense that by these modern technologies cultures, values, ideas, attitudes, opinions and information among nations are transferred and shared worldwide in a real time process.

Before the birth of these modern technologies, news and information could only be conveyed by messengers traveling on foot. Messengers from distant locations can take weeks, months or even years sometimes to arrive. They were used only to communicate affairs of state, nobility, church and commerce. They are neither interactive nor available to common people. The transmission of messages is very slow as well as expensive. Imagine that the Voyage of Macro Polo conveying letters from Church of Rome to the Emperor of China took decades.

Nowadays, people everywhere are confronted with the effects of the emergence of modern communication technologies. By these technologies, nations in different parts of the planet share almost the same updates in terms of information, news and ideas. Indeed, these have made reduction or death of distance meant a greater intensity of contact, causing an ever-faster integration of democracy and market economy. Thus, technology is at the heart of the process of globalization. It is the driving force that spurs the wheel of economy, politics and culture progress. This can be observed clearly through the utilization of satellite and
the integration between computer development and communication technology, the internet, which has given a worldwide impetus to growth.

For instance, the satellite as a communication technology has managed to disseminate international news and world entertainment among nations in a manner that makes the world looks like a small village. This is what meant by McLuhan when he wanted to describe the way in which the global media were linking humanity in all parts of the world. What happens in the north, south, or the east can be shared at a real time to the west and vice versa. Remember, people worldwide had watched the live satellite televised of the ceremony and events of the XVI Commonwealth Games of 1998 as if they were at the National Sports Complex of Bukit Jalil here in Malaysia. This is indeed a globalization made by technology.

Likewise, if we give a close look at the Internet, yet it provides a real picture to globalization. It has made it possible for any content (news, information, entertainment, etc.) travelling on the World Wide Web to be available to anyone who has access to the Net. Before the birth of the Internet, it was impossible for traditional mass media such as radio, television and newspaper, to convey what exists in the world. In this Web, people are equal in information, entertainment, etc. If we exclude those who lack the economic ability or those in remote or rural areas, people on different parts of the planet share the same materials moving on the Web. Their lives are becoming similar in terms of news, entertainment, education, communication and information, etc. through this Net. Thanks to technology that has made all these possible.

4. THE MALAYSIAN EXPERIENCE

Malaysia is said to be a nation whose growth has been considerably shaped and guided by strategic five years development master plans. Providing the ultimate backdrop to these plans is a national agenda that sets out specific goals and objectives for long-term development known as the Vision 2020. It is an optimistic aspiration that draws upon the past achievements and embodies the collective future hopes of the Malaysians. This Vision is distinguished with Malaysia’s long-term goal of being a service-based economy – that is the economy which depends mainly on the service sector for its revenue. To live such a dream, Malaysia has thought of investing in new niches in the belief that, investing in services already offered by others means investing in an unprofitable business coupled with lagging behind master players (Nantha, 1997).

As such, Malaysia opted for leapfrogging into the 'Information Age' taking advantage of the concept of globalization and opted for investing in an environment that encourages innovation, helps companies to reach new technology frontiers, partnering global information technology (IT) players and providing opportunities for mutual enrichment and success [12]. This resulted into working since 1995 on the creation of a 15 Kilometers wide by 50 Kilometers long cyberspace known as the Multimedia Super Corridor (MSC) project. It was officially announced by the Malaysian Prime Minister on 29 August 1995 to present a unique opportunity for the country to participate in the world stage of high technology multimedia (Hassan, 1998). It runs from the Kuala Lumpur City Center
(KLCC), the intelligent precinct, which houses the world's tallest buildings, down south to the Kuala Lumpur International Airport (KLIA), which is commissioned in 1998. This project is said to be a world-first, a world-class act and a most huge cyberspace in the world. The main objective of the corridor is to help companies of the world test the limits of technology and prepare themselves for this new millennium. It will bring for the first time an integrated environment with all the unique elements and attributes necessary to create the perfect global multimedia climate.

What is important here is that Malaysia is attempting to ‘create a Knowledge Economy in a controlled environment, to allow observation of development patterns and creation of paradigm shift mechanisms’. These aspirations have been translated into applicable multimedia areas, known as the seven major MSC flagship applications, which are the e-government, the smart schools, the smart card, the telemedicine, the boarderless marketing centers, the worldwide manufacturing web and the R & D clusters as projected in the official manifesto.

If we select for the purposes of this paper the Borderless Marketing Centers, yet four multimedia application areas have been identified. These are telemarketing, online information service, e-commerce and digital broadcasting. Let us concentrate on the e-commerce as one of the four areas identified in this application. Yet, e-commerce is considered to be the new business platform in the cyberspace era. The objectives of e-commerce are to support the buying, selling and distribution of services and products, to enable companies to exploit IT to enhance efficiency and create new business opportunities and to build electronic bridge between the external and internal processes of an organization, to mention a few (Abdul Karim, 1998; Ali, 1998).

In other words, the e-commerce application is projected by the Malaysian government to provide both Malaysian and international companies with the opportunity to operate in an environment of close operation with leaders in the multimedia industry in a manner that defies time zone, physical borders, national interests, etc. This in turn will generate opportunities for Malaysia. Without globalization the adoption of the free trade, mutual dependency, a great deal of global sourcing, a worldwide capital market… can not be achieved.

5. LEGAL CHALLENGES

Despite the aforesaid advantages of globalization, yet challenges also exist. These are social, economical, political, and legal among others. Legal challenges can be found in areas such as the private international law (conflict of laws), obscenity and pornography, the copyright infringement and the privacy invasion.

As we know, traditionally every legal jurisdiction in the world has a set of rules that provide solutions to issues regarding the conflict of laws or cases involving foreign element known as the private international law. These rules determine which jurisdiction should
hear the case, which jurisdiction’s laws should be applied when the laws of two counties or more clash and how judgments be enforced. The private international law is not a body of substantive rules. It is a technique that courts use to choose the appropriate forum and the relevant applicable substantive law. Its rules and principles don’t provide a direct solution to a dispute, they merely indicate where to look for the solution. Solutions for the three questions of private international law are as follows.

For the jurisdiction that should hear the case, traditionally the court should ask is there a close connection between the events that have occurred and its jurisdiction? Is it fair to hear the case? And will hearing the case affirms the goals of fairness and judicial administration?

If the court is to hear the case according to the concluded criteria, the second question that should be addressed is which law or laws should it apply to the case? Here the court should analyze the event and classify it under a certain category. In other words, it should say that whether the event is a tort, a contract breach, a privacy invasion, a copyright infringement, etc. After classifying the event, the court should then look to single out the rules or principles regarding the category in question.

For instance, if the matter in question is a breach of contract here unless the parties have mutually agreed to the applicable law in advance, the choice of law is determined by what is known as the ‘closet connection’ test. This includes the place of contracting, negotiation or performance, creation of the subject matter of the contract and the domicile, residence, nationality or place of incorporation or business of the parties.

After the choice and application of a certain law to the case, the last question in private international law is the enforcement of the legal judgment. That there is little point in seeking a favorable judgment if there is little possibility of enforcing it. This usually takes the frame of a claim for monetary damages. But it might involve a revocation of a license to do business, for instance, or of some other privileged granted by the state. It might also result in an order for specific performance of a contract or an injunction forbidding certain conduct in the future. Solutions for the enforcement of the judgment depend on the treaties signed between or among the states involved.

In cyberspace, as stated earlier, if a Malaysian citizen created a contract with a US citizen in the Web, whereby one of them obliged himself to make the payment in the UK, and one of the parties breached the terms of the contract, questions regarding private international law will arise. In this instance, which courts should hear the case? Are they the Malaysian, the US or the UK courts? Which law should be applied and how can the judgments be enforced? Thus, can we apply the same traditional solutions to cyberspace? Is there any legislative basis for that? The matter is still open.

Another possibility is that we can assume that cyber-contract for instance may differ from traditional contracts in the procedures but not in the content (Johnston & Morgan, 1998).
The only one difference between the two is that cyber-contract is made electronically while the traditional one is made in ink and paper. The same contents can be found in both. What supports this point of view is that courts, as in the US, have accepted the validity of the electronically signed contracts based on the reliability of standardized, repeated forms of procedures (Rose, 1995).

Thus, if a court in Malaysia is to hear the case, it should ask before hearing the case the same traditional questions of the close connection between events that have occurred and its jurisdiction, the fairness of hearing the case and meeting the goals of fairness and judicial administration by hearing it. If these criteria are met, the Malaysian court should accept the jurisdiction for a suit. Immediately after accepting the jurisdiction for the suit, the court should analyze the event and classify it under the suitable category to assign the applicable law.

As for the law that should be applied, being an e-contract and based on the concluded point of view, the court should apply the law agreed to by the parties, if any. In case where this law is not found, it should refer to the ‘closest connection test’. That is to say, it should consider the place of contracting, negotiation or performance, creation of the subjected matter of the contract and domicile, residence, nationality or place of incorporation or business of the parties to choose the suitable solution for the case (Johnston & Morgan, 1998).

Lastly, it remains to say that for the effective enforcement of the judgments, treaties between the countries in the age of the cyber-space world should be signed. However, these depend on the applicability of the conventional rules in cyberspace.

With regard to indecent issues, pornography is one of the main harmful impact of cyberspace. It has become a major carrier of sexually explicit materials which are easily accessible to anyone on the net. Now cyberspace is vastly used for distribution and sells of all sorts of pornographic materials from images of soft-core nudity to hard-core sexual acts. These materials contain the most obscene and inhumane sexual activities including actual torture and mutilation, sexual abuse of children, defecating and urinating, and many more, for sexual pleasure. All these objectionable materials are publicly available through Internet with simplified links and access. They are accessible to anyone connected to the Internet although members of a particular site are given exclusive access to whole range of materials, which are not available to the public (Johnston & Morgan, 1998).

The availability of the various uncensored sexual acts on the Internet, which are accessible to anyone around the world, has raised tangible concern among the society. Parents are worried about the impact of their children’s exposure to these sexual materials on the net. The public in general is concerned about a possible moral and ethical decay that results from the exposure to these materials.
In fact, Internet pornography has tremendous influence on society particularly the children. Perhaps, it leads the children to involve illicit sexual activities in early age. As a result, teenage pregnancy will be on the rise. Finally, pornography is associated to many criminal acts, molestation, forcible rape and sexual violence.

Such materials can find their way to the MSC. Companies may take advantage of freedom of marketing in e-commerce to make such materials available in the MSC. As such, an early decision should be made regarding censorship of materials made available in e-commerce. As software released so far are inadequate unless be installed in every single terminal as well as they can be bypassed by those of knowledge of computer commands.

Another area where we can find legal issues at stake in cyberspace is the copyright. It is an intellectual property right. It is defined as a property right which arises automatically upon the creation of any original literary, dramatic, musical or artistic work (Wall, 1993). Literary works generally include books, plays, songs and other forms of written expression. Artistic works include drawings, paintings and photographs. Dramatic and musical works are self-explanatory (Wall, 1996).

For a better understanding of the regulations of the copyright in cyberspace, we need to learn about the conventional rules of the copyright and whether or not they can be applied to cyberspace, as well as the situation in Malaysia in the era of the MSC.

However, before the proceeding to that it should be pointed out that on December 1996, at a diplomatic conference in Geneva, convened by the World Intellectual Property Organization (WIPO), a new treaty which is known as the WIPO Copyright Treaty (WCT) 1996 was adopted. According to its Preamble, WCT was a response to the recognition of the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments and also a response to the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works (Sangal, 1997).

From the legal standpoint, copyright gives a certain exclusive legal rights to the owner of a work. Accordingly, he/she totally has the right to a certain use of the work. Only the owner and those that he/she authorizes, usually known as licensees, are legally permitted to use the work. Such controls include the right to copy the work, the right to make modified versions of it, the right to distribute it, the right to transmit it, and the right to perform it publicly.

In principle, the moment someone creates a book, a piece of music, a computer program or any other copyrightable work, it is already copyrighted under the law, without any notice or registration. However, notice and registration of the copyright are helpful when making a work publicly available for claiming he/she is an innocent in lawsuits. Placing a copyright notice on a work can increase the amount of money available to those whose copyright is
infringed. The registration of the copyright is also important in terms of attorney’s fees. If the work is registered before an infringement occurs, the copyright owner has a good chance, among other benefits, of being awarded his/her attorney’s fees in the successful case. Vice versa, if the work is registered only after the act of infringement, the copyright owner will definitely has to pay his/her own attorney fees, even if he/she wins the case, bearing in mind that such a fee may weigh the money awarded to the copyright owner by the court for that infringement. Thus, the copyright owner’s decision to sue for infringement depends on whether attorney’s fees are available, which in turn is based on whether or not the copyright was registered prior to infringement (Gurnesy, 1995).

Infringement of the copyright either be a primary or secondary. Primary infringement is defined as the infringement by virtue of the creation of an infringing copy of the copyright work. Secondary infringement is the exploitation of the results of the primary infringement. Different penalties applicable to each (Halstead, 1996).

Now the question is that: can these traditional legal rules be applied to cyberspace?. In other words, does the access to materials impose any legal questions related to the copyright in the e-commerce application of MSC?

With the reference to the nature of cyberspace, yet all of the exclusive legal rights of the owner of the copyright can be observed. Every time a file is moved within or between computer systems it results in copying that file and distributing it to other systems. Likewise, every message or file maintained on cyberspace for on-line system users be considered massively distributed to all those users. And, when a system operator deletes a language contained in a user posting via e-mail, he/she is modifying it (Rose, 1995). This can also take place in MSC.

Most of these everyday activities may be performed legally, if a permission of the copyright owner was obtained. However, obtaining such a permission sometimes is not so easy. Thus, some activities in cyberspace may result in copyright infringement (Samoriski, Huffman & Taruth, 1996).

For instance, using substantial parts of a picture within another online picture is a creation of a derivative work, which is one of the copyright owner’s exclusive rights. The text of the e-mail is considered a literacy work. Thus making such a derivative work or publishing a series of e-mail letters from a single user outside the system, without permission will be an infringement. Various other illegal practices of using material without the owner’s permission include taking images from on-line services and printing them by thousands in large-scale corporate newsletters or news-stand magazines, to mention a few.

In the Malaysian experience, to face the challenges imposed by the creation of the MSC, the country has amended its copyright law, the Copyright Act 1987, through the Copyright (Amendment) Act 1997. The aim of this amendment is to protect information technology. The Explanatory Note of this Act stated that:
technological development, especially information technology, has challenged traditional concepts of copyright protection. The proposed establishment of the Multimedia Super Corridor (MSC) will generate both challenges and opportunities for Malaysia. The success of the MSC will, to a certain extent, be determined by the contents that move through it. These include educational works, entertainment products and information that are protected under the copyright law. For the MSC to realize its full potential, it is essential that adequate legal protection be made available to these works.

By the Copyright (Amendment) Act 1997, Malaysia has changed its law in the lines suggested by the aforesaid WIPO Treaty and has tried to take care of the special problems created by the latest developments like the unprecedented expansion of the Internet.

In order to fortify these provisions, the new Act introduced three new offences under section 41. These are the circumvention or causing of it, the removal or alteration and distribution or importing for distribution copyrightable works. These offences are punishable by a fine of a maximum of RM 250,000 or to imprisonment for a term of a maximum of three years or to both, and any subsequent offence to a fine of RM 500,000 or imprisonment for a term of a maximum of five years or to both.

As the privacy in the digital commerce is concerned, it should be stated that scholars provided many benefits of securing the right to privacy in this respect. At the top of these benefits is the confidence of the consumer. When entering the e-business, consumers should feel that the information they send over the Net are transmitted, received and stored securely. In addition, enjoying the right to privacy in the digital commerce is said to improve the customer service in the sense that meeting customer’s needs and expectations is crucial for the business to be successful, and without this accurate information the business cannot focus its efforts, time and resources effectively. Another benefit of privacy protection in the digital commerce is that it leads to the satisfaction of the employees who will feel that they are capable, motivated and loyal the matter that facilitates the success of the business. Lastly, protecting the right to privacy in the digital commerce will no doubt avoids the business the problem of sanction that might be inflicted upon it (Caden & Lucas, 1996).

In countries such as the US, the information in the e-commerce enabled people to be in contact with others they know only through the personal information they provided about themselves. In addition, the collection and sale of such information have also become a commonplace. In a recent survey done in the US, it was found that credit bureaus hold more than five billion records containing consumers’ credit cards, loans, payment histories, bankruptcy lines and judgments, social security numbers, to mention a few. With regard to the stock market the issue of financial privacy is also at stake as the Net is a cheap and powerful medium for ramping shares whereas in the US a surge of Internet stock frauds
already existed. Share ramping rings artificially inflated the transaction volumes particularly stocks and tipped them as hot buys on the Web (Kennedy, 1996).

The privacy in e-commerce can also be invaded through the e-mail. It can incorporate information on typed memos, spreadsheets, photographs, video clips, among others. As an extremely cheap and a well-known technology that is used by most if not all users of cyberspace, yet the issue of privacy invasion of the information in e-commerce can be encountered through e-mails as it is so easy to access other individuals’ mails and intrude into their solitude or seclusion on commercial service (Adler, 1997; Salkind, 1996).

A further point among the several areas where new cyber technology has represented privacy invasion in the digital commerce is the smart card or the multi-purpose card. It is introduced to facilitate the efficiency of the e-commerce application. It aims at yielding cost savings and enhancing customers services, enhancing synergies and improving work process. Eight applications of the Malaysian card have been identified. These include the national identity card, driving license, immigration, health card, electronic cash, debit, ATM and credit cards. On this card, detailed information, a photo, and data linked to a biometrics identifier can be encoded. As with financial institutions using such cards, yet the value of cash authorized by ATM is stored in the person’s card. Thus, although such institutions promote these cards as privacy-friendly, anonymous and cash-like, privacy experts in Canada accuse card’s computer chip containing information about a person as being making them available to consumers, retailers and financial institutions. In addition, privacy advocates also fear the potential of the cards to facilitate uninvited intrusion into individuals’ private affairs (Johnston & Morgan, 1998; McLean, 1996).

6. CONCLUSION

These have been some of the legal challenges that may be generated from the globalization of marketing in the MSC, i.e. the conflict of laws, indecent materials, the copyright infringement and the privacy invasion. For the conflict of laws, the Malaysian parliament should take steps whether to accept the traditional rules governing the issues regarding the choice of law, the court that should hear the case and the enforcement regulations or introduce new ones. In addition, it should also intervene to regulate the flow of indecent materials on the Corridor taking advantage of the experiences of other countries. As regards the copyright, although Malaysia has reviewed its Copyright Act by introducing the Copyright Amendment Act 1997 but still some areas in need of such a regulation. Lastly, there should be a legislative move to deal with privacy of the individual users of the MSC.

REFERENCES


