



US Internet Service Provider Association

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October 8, 2003

The Honorable John McCain
Chairman
Committee on Commerce, Science and Transportation
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The United States Internet Service Provider Association (US ISPA) is a national trade association representing the common legal and policy interests of the major ISPs. US ISPA, on behalf of our members, America Online, Cable & Wireless, EarthLink, eBay, MCI, SBC, Verizon, writes in regard to S.1234, the Federal Trade Commission Reauthorization Act of 2003. While US ISPA members share popular alarm over the increase of fraudulent and deceptive schemes which cross national borders, we have several concerns and questions about the proposed legislation, both as to its general approach and relating to specific provisions. We hope these matters can be addressed, and we ask that Congress give them consideration before acting on this bill.

At the outset, we are concerned that S.1234 could create two competing methods for foreign criminal authorities to obtain evidence – one using the Department of Justice and its Mutual Legal Assistance Treaties, and the other the Federal Trade Commission (FTC) and this proposed legislation. Permitting two methods for obtaining the same evidence will lead to “forum shopping” by foreign authorities. For example, if Justice has doubts about the policy basis or evidence supporting a foreign criminal case, a foreign agency might approach the FTC for assistance. US ISPA favors the continued practice of establishing one central authority with the responsibility to facilitate information sharing in criminal matters, as is the case with Mutual Legal Assistance Treaties (MLATs).

Another possible area of forum shopping concerns cost reimbursement. When the Justice Department seeks evidence, it generally pays the costs to ISPs and charges the foreign government for those costs. The FTC’s record of reimbursing for discovery costs is different, and S. 1234 does not provide for reimbursement of ISPs for costs associated with assisting foreign law enforcement agencies through the Commission. We urge that payment for costs incurred by third parties like ISPs be required.

A second general issue is presented by comparison of the proposed legislation with the MLAT process and existing law regarding the FTC. MLATs, which are implemented by the Department of Justice, are negotiated by the Departments of State and Justice on a bilateral basis with one country at a time. Each MLAT carefully describes the type of assistance available, the offenses covered, the procedures to be followed, the allocation of costs, and the bases for denial of assistance; all after negotiations in which each country describes its substantive and procedural laws in great detail. Throughout this process the executive branch, in the exercise of its constitutional power to conduct foreign relations, selects those nations with which our government will cooperate, rather than obligating us to assist states cooperation with which may not serve our national interests.

Indeed, this narrower and country specific approach has been required by Congress in the International Antitrust Enforcement Assistance Act, codified as Chapter 88 of Title 15 of the U.S. Code. In contrast to the open ended and over broad scope of the proposed legislation, which would allow assistance to a wide array of criminal, civil, and administrative enforcement entities from any foreign country, subdivision, or multilateral organization, Congress has taken a much narrower and more judicious approach with regard to antitrust enforcement. Current law allows the FTC to cooperate extensively with foreign antitrust enforcement authorities, but only when a Mutual Legal Assistance Agreement (MLAA) is in force with the particular country. (See 15 USC Sections 6201-6211). We note with interest that the bill repeatedly excludes matters which would fall under existing antitrust assistance laws.

As to specific provisions, we would highlight the following three as the most serious, though not the only, items needing further review. First we suggest that the definition in Section 202 of a 'foreign law enforcement agency' is too broad as written, and if enacted, could subject ISPs to enforcement actions and obligations from a number of multinational organizations. For example the European Union (EU)(with which the FTC and Department of Justice already have a detailed MLAA) has many organs in the Commission, Council and elsewhere with putative jurisdiction over "fraudulent and deceptive" practices. These matters would include consumer protection, personal data protection, product liability etc. We fear that this legislation would open the door to the FTC using its authority within the United States to further enforcement actions based on the EU's very different standards against US companies doing business abroad. Similarly in the intellectual property area, groups like the World Intellectual Property Organization would have the authority to issue requests to obtain customer information from ISPs.

Our second concern relates to the conduct being investigated, as opposed to the nature of the investigator. Section 204(j)(1) of the bill would allow FTC assistance in cases of "...possible violations of laws prohibiting fraudulent or deceptive commercial practices, or other practices similar to practices prohibited by any provision of the laws administered by the Commission..." Other countries often have very different views of what constitutes an unfair trade practice. In some countries, a 2-for-the-price-of-1 sale or offering 24-hour service may be an unfair trade practice. US ISPA recommends that at a minimum this language be strengthened to reflect that the FTC may not assist a foreign law enforcement agency unless the conduct they are investigating is also considered illegal in the United States.

The Honorable John McCain

June 22, 2006

Page 3

Finally, the suggested bases for the FTC to use when deciding to assist foreign authorities set out in Section 204(j)(3), while not meant to be exclusive, do not address certain crucial considerations. The proposed language has the FTC considering "whether compliance with the request would prejudice the public interest of the United States." Since U.S. resources are being used for this aid, we suggest that the emphasis is reversed. The legislation should require the FTC to provide assistance only when granting it is clearly in the best interests of the United States. This should in turn involve considering and balancing the hardship imposed on U.S. industry by providing the foreign assistance, as well as the benefit to be afforded to U.S. citizens as a result of providing assistance. The criteria might also allow such assistance only in cases in which there is a showing of significant negative impact within the United States or on U.S. consumers, similar to the nexus required in the expansion of the FTC's own enforcement jurisdiction in Section 210 of the Bill.

US ISPA understands that the Department of Justice has raised a number of concerns with S.1234, and we share many of those concerns, particularly those regarding Section 205 on non-disclosure of information supplied by or about foreign sources, Section 206 regarding delayed notice of proceedings, Section 207 on voluntary provision of information, Section 208 on the Right to Financial Privacy Act, and Section 212 on staff exchanges.

We look forward to speaking with you further about these issues, and discussing possible more narrowly focused alternatives which would address the problem of trans-border fraud in a manner more consistent with existing law.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Baker", written in a cursive style.

Stewart Baker
General Counsel
United States Internet Service Provider Association

cc: The Honorable Ernest F. Hollings
Ranking Minority Member