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RECENT LEGISLATIVE ACTIVITY

by Nancy Lazar

Consumers Online: Your Right to Privacy in Cyberspace

“According to some predictions, nearly one billion people will be online in the next 10 years. If people are uncomfortable sending personal information over the Internet, the largest potential consumer market will be closed to nearly every company in the world,” according to Joseph L. Dionne, chairman and CEO of The McGraw-Hill Companies, a leading information services provider.

A *Business Week*/Louis Harris & Associates survey released on March 4, 1998 noted that consumers' concerns about the protection of their privacy in cyberspace will significantly impede the growth of online electronic commerce in the U.S. The survey found that many American consumers believe entering personal information into cyberspace poses a potential threat to their privacy. Seventy-eight percent of Americans who use online services stated they would use the Internet *more* if they were confident that the Internet system safeguarded the privacy of their individual information and communications. Similarly, in a recent Georgia Institute of Technology survey of 10,000 online users, privacy in cyberspace was considered the greatest challenge to the development of online electronic commerce.

Since consumer participation in online commercial transactions is a relatively recent phenomenon, the law governing the use of the Internet is obscure. While some courts have

applied federal laws safeguarding consumer privacy to commercial transactions in cyberspace, the protection of consumer privacy online is limited. For instance, although Congress amended the Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510 - 2710 (1982 Supp. IV 1986) (“Act”), to prevent Internet service providers from releasing personal information of their members to a *government agency* absent a legal request, the Act does not explicitly prohibit Internet service providers from distributing the members' private information to any individual or entity outside of government. Furthermore, the Act fails to provide adequate remedies for those whose privacy was violated in cyberspace. For instance, the Act does not include any immediate punishments or deterrents for violators of consumer privacy online. In addition, the law fails to establish a mechanism by which private information illegally obtained over the Internet can be excluded from civil or criminal court proceedings. As a result, consumers who use the Internet are not guaranteed true and complete protection of their right to privacy in cyberspace. The absence of a strict, clear policy on consumer privacy on the Internet and consumer reluctance to participate in online electronic commerce absent privacy protection has caused the President, Congress, state government, and the information industry itself to create guidelines on privacy safeguards for consumers using the Internet.

President Clinton Urges Private Industry to Create Internet Privacy Safeguards

On July 1, 1997, President Clinton began the surge towards developing online privacy guidelines when he approved and issued "A Framework for Global Electronic Commerce," an extensive report describing the role the federal government will assume in the evolving electronic marketplace. Clinton believes that "[g]overnment officials should respect the unique nature of the medium and recognize that widespread competition and increased consumer choice should be the defining features of the new digital marketplace. They should adopt a market-oriented approach to electronic commerce that facilitates the emergence of a global, *transparent, and predictable legal environment* to support business and commerce. The report's author, Ira Magaziner, the President's senior adviser on Internet policy development, emphasizes throughout the report that the federal government will take a passive role in the regulation of electronic commerce. Rather than enacting laws to protect the privacy of consumers online, the federal government wants to ensure the implementation of a clear, strict industry-created system that allows consumers to protect themselves. The federal government urges the information industry to set its own policies and procedures if it does not want the government to play a significant role in regulating online commerce.

Industry Requests Limited Aid from Government in Regulating the Internet

In response to President Clinton's recommendations for the regulation of the Internet, 11 leading American high-technology companies formed a coalition, the Computer Systems Policy Project, and issued an 18-page position paper on the development of the electronic marketplace on November 18, 1997. Members of the Policy Project are chief executive officers of companies including Apple Computer Inc., Compaq Computer Corp., Data General Corp., Digital Equipment Corp., Hewlett-Packard Co., International Business Machines Corp., NCR Corp., Silicon Graphics Inc., Sun Microsystems Inc., Stratus Computer Inc., and Unisys Corp. To quicken the development of online electronic commerce and to gain consumer faith in the electronic marketplace, the coalition urges both Congress and the White House to participate in the creation of electronic commerce policy. However, the coalition requests only limited government involvement.

The coalition makes proposals on controversial Internet issues, such as Internet taxes and consumer privacy on the Internet. The CEOs propose a "tax neutral" system in Internet commerce that would not discriminate based upon a consumer's method of purchasing a product. To prevent discriminatory and multiple taxation upon Internet users, the coalition requests that Congress enact legislation that would place a moratorium on new Internet taxes until the information industry and federal and state governments collaboratively create a national standard for imposing Internet taxes. Moreover, the coalition urges the revision of the Uniform

Commercial Code so that it would apply specifically to Internet transactions.

Mr. Magaziner applauded the CEOs of the major high-technology companies for their immediate response and initiative in developing Internet policy. He views the coalition's work as "a very interesting, useful and helpful initiative. The principles are consistent with what we're hoping for. And, what's important is they are stepping up and leading."

Government Asks Industry to Resolve Internet Privacy Issues at Policy Forum

On January 8, 1998, leaders of the information industry and government officials met to discuss the rapid evolution of Internet commerce at the Internet Policy & Law Forum's 1998 conference in Seattle, Washington. Mr. Magaziner again urged industry leaders to take immediate initiative in creating various Internet guidelines if they did not want the government to play a significant role in the regulation of Internet commerce. He warned that there are currently more than 80 bills before Congress concerning the regulation of Internet privacy and suggested that if industry leaders failed to take quick initiative, the federal government will create more costly and less effective Internet policy. Mr. Magaziner explained to the nearly 150 chief executive officers of leading electronic commerce companies that the "slow-moving and bureaucratic" nature of government prohibits government from keeping up with the rapidly evolving technology of the Internet.

Although the Clinton administration generally supports a hands-off policy of Internet regulation, Mr. Magaziner stressed at the conference that the government must not be

entirely absent from participating in Internet regulation. Even though he recommended that the industry itself create its own rules and regulations for safeguarding consumers' privacy on the Internet, regulating content, creating technical standards, and developing electronic payment systems, he believes that the federal government must actively participate in the regulation of specific Internet policies, including taxation, copyright protection, and encryption. Mr. Magaziner explained to industry leaders that "[i]n the Industrial Age, governments passed laws to protect people. In the Digital Age, the role of government will help ensure that regimes come in place in the private sector so people can protect themselves."

President Sets Firm Deadline for Industry to Create Internet Privacy Policy

To prompt information industry leaders into creating their own rules on Internet privacy, President Clinton has set a July 1, 1998 deadline for U.S. Secretary of Commerce William Daley to submit to the President an industry-led solution to protect the privacy of consumers who go online. Even if the top executives fail to develop an Internet privacy policy by the deadline date, Secretary Daley stated that the administration insists upon industry leaders to at a minimum establish an independent body of private-sector representatives by the set date. Such a group of industry representatives would create and implement guidelines for releasing private information into cyberspace. If industry leaders fail to satisfy Clinton's demand, the federal government may be required to revise its hands-off Internet policy and actively

participate in the creation of Internet privacy policy.

In an effort to provoke industry leaders into meeting the deadline, the federal government scheduled three consumer privacy roundtable discussions with industry executives during the first two months of 1998. Federal government officials attending such roundtables included Secretary Daley, Assistant Secretary of Commerce Larry Irving, and Mr. Magaziner. Claiming to be “educators,” rather than regulators on the issue of consumer privacy on the Internet, federal government officials proposed at the roundtables that industry representatives create a Web site certification program, which would encourage consumers to participate only on Web sites marked by a seal of approval. This seal would signal to consumers that the site complies with specific privacy protection requirements developed by the industry group. To assure Internet consumers that the seal does, in fact, represent strict adherence to privacy guidelines, government officials also recommended that the industry group regularly oversee the activity of member Web sites.

Such an immediate response by the federal government in scheduling discussions with industry leaders throughout the nation reflects the government’s willingness to “educate” the private industry into creating Internet privacy policy by the government deadline. Secretary Daley stated that “[t]ime is of the essence . . . [a]nd the longer we wait for action, the more difficult it

will be to maintain this [hands-off] position.”

The Federal Government Audits Industry for Creation of Internet Privacy Policy

During March 1998, the Federal Trade Commission (“FTC”) “swept” the Web sites of 1,200 companies to determine whether American businesses have created Internet consumer privacy guidelines. Specifically, the FTC looked for the posting of statements on designated Web sites which fully informed online consumers of the company’s use of their personal information.

On June 1, the federal agency will report to Congress its findings, which will provide the basis for deciding whether Congress must intervene by enacting legislation to protect consumer privacy online. Such prompt federal government policing of the information industry’s development of Internet policy reflects the

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government’s willingness to pass consumer privacy legislation if the industry itself fails to implement such guidelines. Robert Pitofsky, chairman of the FTC, stressed that “[i]f we wait a year or two for self-regulation and it doesn’t happen, I’m prepared to predict in the strongest terms right now that legislation will happen, and it will happen very promptly.”

The FTC examined the Web sites of the following companies: 100 financial institutions, 200 sites targeting children, 100 companies in the health care industry, 100 retail companies, and 100 of the most widely used Web sites on the Internet. The FTC randomly chose the remaining Web sites from names listed in an Internet directory.

Congress Proposes "Hands-Off" Policy on Internet Regulation

Despite the presence of nearly 80 pending bills before Congress concerning consumer privacy on the Internet, two main bills being considered before the U.S. House of Representatives reflect Congress' general "hands-off" policy on the regulation of Internet commerce. On July 30, 1997, not even one month after President Clinton's call upon the information industry to develop its own Internet privacy guidelines, House Telecommunications Subcommittee Chairman Billy Tauzin (R-La.) introduced a package of cellular and internet privacy bills, which demand that "[t]he Internet community itself ought to work out its problems." First, Chairman Tauzin submitted "The Internet Protection Act of 1997," H.R. 2372, 105th Cong., 1st Sess. (1997), a bill that "tells the FCC that the Internet is off limits." According to Tauzin, "[i]f regulation is eventually needed, it will be a policy decision made by Congress and the administration. This is a legislative statement of intent for the regulators to leave this unregulated side of the telecom industry alone to remain as free and unfettered from government regulation as possible." In general, The Internet Protection Act of 1997 forbids the Federal Communications Commission ("FCC") from applying the regulations outlined in the

Telecommunications Act of 1996 to Internet commerce. Specifically, the Act prohibits the FCC and the states from regulating "Internet Information Services" except for areas dealing with local exchange services, law enforcement access to the Internet, national security, and network reliability. The act primarily prohibits the FCC and the states from determining and charging the rates applied to Internet consumers. "[W]e don't want the FCC morphing into the Federal Computer Commission," argues Representative Christopher Cox (R-Calif.), who introduced the bill with Representative Tauzin to the House Committee on Commerce.

Second, Chairman Tauzin submitted to the House Committee on Commerce on July 30, 1997, the "Data Privacy Act of 1997," H.R. 2368, 105th Cong., 1st Sess. (1997), which mandates the information industry to create standards for the protection of consumer privacy on the Internet. Specifically, the Data Privacy Act would require Web sites to provide notice to consumers that the site is collecting their private information and that they may choose to "opt out." In addition, the bill would compel Web sites to notify children that they need to obtain parental permission to enter any private information about themselves or their families over the Internet. Not only would the Data Privacy Act of 1997 protect the privacy of consumer information released over the Internet, it also would significantly reduce consumer receipt of unsolicited junk e-mail. The bill provides that the information industry must require senders of advertising e-mail to place the sender's business name on the message's subject line and that the message's body include the sender's business address. Lastly, the bill would forbid the use of any government-held information, specifically

Social Security numbers, for purposes of marketing on the Internet.

Although Congress and the Clinton administration are willing to regulate Internet commerce, they will do so only if the leaders of the information industry fail to promptly regulate their own industry. The message specifically reflected in both President Clinton's

July 1997 electronic commerce report and the House's package of Internet bills represents the general "philosophical tone" of the federal government concerning Internet regulation: "[I]f they [industry leaders] do develop these guidelines voluntarily, they'll have safe harbor from the regulatory reach of government."

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