

Privacy Newsletter

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PRIVACY NEWS

- ◆ **E-Commerce: Law and Jurisdiction**, a major international conference sponsored by the Center for International Legal Studies (CILS), is scheduled for October 11-14, 2001 in Salzburg, Austria. One of the chief topics to be covered at the event is a global look at privacy issues. Mintz Levin attorneys Cynthia Larose and Amy Bushyeager will participate in this discourse. Further information on the conference will be available soon on the CILS website, www.cils.org.
- ◆ The European Commission has adopted a Decision that allows non-European Union (EU) companies to enter into contracts with model language that satisfies the adequacy requirement of the EU's data privacy directive. These "model" contracts are an alternative to registering with the Department of Commerce under the Safe Harbor agreement. Before adoption of the model contract decision, the EU had recognized only Switzerland, Hungary and the U.S. Safe Harbor arrangement as ensuring "adequate protection" for personal data transferred to countries outside the EU. The EU is soliciting comments on the draft contractual clauses until August 20, 2001. One troubling feature of the model contract is joint and several liability whereby the data importer and the data exporter are liable for damages to the data subject.
- ◆ The financial privacy regulations under the Gramm-Leach-Bliley Act went into effect on July 1, 2001.
- ◆ On July 6, 2001, the Department of Health and Human Services issued guidance on the implementation of the Health Insurance Portability and Accountability Act (HIPAA) medical privacy regulations.

Individual Privacy on the Internet

By Senator Ernest F. Hollings

Numerous polls indicate that Americans fear their privacy is not sufficiently protected on the Internet. Last year, *Business Week* reported that 57 percent of Americans believe Congress should pass laws to govern how personal information is collected and used on the Internet. While industry claims that self-regulation is working, only 15 percent of those polled by *Business Week* believed the government should defer to voluntary, industry-developed privacy standards.

The Federal Trade Commission (FTC) issued its most recent report on the current state of Internet privacy in May of 2000, which recommended federal legislation to safeguard consumer privacy on the Internet. This recommendation carries with it particular credibility in light of the FTC's record of extensive analysis on this issue and its prior recommendations to allow self-regulation a chance to work. Congress is now charged with devising the most prudent and efficient response. The debate is focused primarily on the issue of whether "opt-in" or "opt-out" consent mechanisms should be used.

Privacy experts argue that opt-out is not a real choice. I agree. If individuals have to opt out, they will have difficulty making informed choices to protect their privacy as they attempt to determine what each company is doing and whether to opt out of those practices. The single incentive for preventing consumers from opting out is financial gain. E-commerce leaders will tell you that individual data is an extremely valuable commodity in their industry. Many companies operating on the Internet employ privacy policies that allow for the sale of customer data they collect unless an individual specifically requests otherwise. That data can include sensitive personal information such as financial or medical information about an individual.

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Mintz Levin is honored to publish this piece by Senator Ernest F. Hollings (D-SC). As Chairman of the Commerce Committee, the Senator is a leader in the privacy debate on the Hill.

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Individual Privacy on the Internet

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In my opinion, an opt-in regime is the only intelligent choice. That means companies must obtain prior consent from users before collecting and using or distributing personal information. It grants individual Internet users, not companies, control over their personal information on the Internet and squarely places the burden on the companies, where it belongs. A recent survey by the Pew Research Foundation revealed that 86% of Internet users want opt-in on the Internet.


Industry claims that we are confusing the issue, that information gathering helps companies “enhance, personalize, and customize” people’s experience on the Internet and we should welcome such practices. But when individuals visit sites on financial or health issues, most of them are interested in anonymity, not personalization.

A consumer’s access to his or her personal information should also be a priority. After all, how can you protect the privacy of your personal information if you don’t know what others are looking at? While companies profile individuals to build their data bank and supposedly “customize” services, those individuals often do not have access to review, correct or supplement their profiles. As with opt-in, industry claims that granting access is too burdensome, yet facts suggest otherwise.

Some successful companies are already offering opt-in in some form: the search engine AltaVista, shopping tools Dash and AllAdvantage.com and the household reminders e-mail service, LifeMinders. Secondly, reasonable access requirements already work in the credit card industry pursuant to the Fair

Credit Reporting Act. Given that some major Internet companies, like AOL and Microsoft already provide some form of access, the industry will not be burdened by having to meet reasonable access requirements. If the FTC felt an access requirement were too burdensome for some smaller companies, or for start-ups, they could of course lessen, or waive the requirement.

Finally, contrary to claims by industry, legislation cannot possibly shackle the Internet. The experts know this. John Chambers of Cisco Systems predicts that by 2010 a quarter of the world’s global commerce will be conducted on the Internet. No legislation could ever stop, stifle, or thwart this inevitable progress. Arguments to the contrary are simply attempts to thwart our progress in protecting individuals’ privacy.

It would be irresponsible for Congress to turn a deaf ear to the overwhelming public demand for privacy controls on the Internet, regardless of the objections voiced by some Internet companies. By building a basic privacy framework and giving consumers greater control over their personal information, we will help to boost user confidence—and, by all indications, that’s good business for everyone. 



OUR PRIVACY EXPERTISE

Mintz Levin attorneys have been influential in the development of portions of federal privacy statutes, as well as numerous corporate policies for clients in a range of industries. Many of our attorneys counsel clients on a day-to-day basis regarding their privacy policies and have drafted policies for those same clients to help ensure they avoid litigation and negative publicity while operating in accordance with the growing body of federal and state privacy statutes. Among our attorneys are several with extensive legislative and policy expertise, including an individual who served the Clinton Administration as Senior Advisor to the Chief Counselor of Privacy at the White House and most recently as Special Counsel to the General Counsel of the United States Department of Commerce. In these capacities, she was responsible for managing all issues regarding privacy and cyber security, including the Executive Branch's compliance with the Children's Online Privacy Protection Act (COPPA). Among the senior professionals of our consulting affiliate ML Strategies, LLC with close ties to lawmakers on Capitol Hill, is an individual who served for six years as Chief of Staff to Senator John Kerry, a sponsor of the McCain-Kerry proposal on privacy. His experience in helping to shape Senator Kerry's legislative policy led to close relationships with many of the individuals on Capitol Hill who continue to shape privacy policy. We are continually monitoring the progress of regulations working their way through the federal and state legislative processes so that we may assist clients in developing proactive policies which respond appropriately to the regulations' proposed requirements.

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STRATEGIES

Mintz Levin and ML Strategies provide legal, legislative and consulting expertise on privacy as it relates to many issues. If you would like further information, please contact the Mintz Levin attorney who regularly handles your legal affairs, or one of the attorneys or senior professionals listed below.

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