

Privacy Newsletter

MARCH 2003

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PRIVACY NEWS

Microsoft Reaches Agreement with EU over changes to .Net Passport.

After a year-long dialogue between Microsoft and European Union (EU) officials, the parties have reached an agreement on changes to Microsoft's .Net Passport online authentication service to bring the service into compliance with EU data protection laws. The changes will give Passport users worldwide added control with respect to the level of personal information they want shared with partnering sites. In addition, Microsoft will now give users information on how to create secure passwords, and a link to European Commission's Web site on data protection will be provided.

As a result of the changes, EU officials stated that it is very unlikely sanctions in any form will be issued against Microsoft. However, a group of EU data regulators said they plan on continuing to monitor both Passport and Sun Microsystems's competing authentication system, Liberty Alliance Project, for privacy protection concerns.

Verizon Fighting to Protect User Name.

On January 21, 2003, the U.S. District Court for the D.C. Circuit ordered Verizon to turn over the name of an alleged song-swapper to the Recording Industry Association of America (RIAA) and its member record companies in response to a subpoena filed by the RIAA as part of its efforts to crack down on music piracy. The RIAA issued the subpoena under the Digital Millennium Copyright Act of 1998 (DMCA), which provides limited infringement protection for Internet Services Providers (ISPs) in exchange for their cooperation in identifying online copyright infringers. Verizon argued that turning over the identity of its subscriber would violate the subscriber's privacy and free speech rights and require policing of users' Internet activity. The order could have widespread consequences for ISPs if record companies, or anyone claiming infringement of copyrighted materials, can easily obtain the name and address of a subscriber. Verizon has sought a stay while it appeals the order with the U.S. Court of Appeals.

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National "Do Not Call" List Raises Privacy Concerns for Telemarketers

The number you have called...may have been illegally dialed. Or it soon may be. The Federal Trade Commission (FTC) has amended its Telemarketing Sales Rule (TSR) to create a national "do not call" registry, which will allow consumers to elect to stop receiving professional telephone sales calls as early as this year.

The FTC announced its decision to create a national "do not call" registry on December 18, 2002. Both the House of Representatives and the Senate passed legislation to implement the registry on February 13, 2003. The measure has gone to the President, who is expected to sign the legislation soon. Apart from telemarketers' opposition, public support for a national "do not call" registry is widespread; however, the FTC's rule has raised privacy concerns, and at a recent congressional hearing, jurisdictional issues as well.

The FTC promulgated the TSR and its recent amendments under the authority granted to it by the 1994 Telemarketing and Consumer Fraud and Abuse Prevention Act (the "1994 Act"), which directed the FTC to issue a trade regulation rule defining and prohibiting deceptive or abusive telemarketing acts or practices (including prohibitions against any pattern of unsolicited telemarketing calls). The 1994 Act called for a review of the TSR after five years of its promulgation. It was after this review that the FTC proposed amendments to the TSR, including the creation of a national "do not call" registry. The FTC received over 64,000 comments during its rulemaking proceeding, the overwhelming majority in support of the "do not call" registry.

The implementation of a national "do not call" list has already begun to spur a privacy debate, however, largely fueled by commercial telemarketers' opposition to the FTC's proposal. The TSR exempts certain businesses from its prohibitions, including long-distance telephone companies, airlines, state-regulated insurance companies, non-profit organizations, politicians, and companies with which consumers have established a business relationship. Exempt businesses will still be able to call consumers even if they have registered for the national "do not call" list. The FTC has advised consumers that even though certain types of businesses are exempt from the TSR and can still make unsolicited calls to consumers, signing up for the registry is an effective way to eliminate unwanted calls, since most telemarketing calls are placed by non-exempt, professional telemarketers. Because the rules effectively single out professional commercial telemarketers, these telemarketers are challenging the legal basis for the registry, arguing that the FTC's rules "impermissibly target free speech." The Direct Marketing Association (DMA), along with several telemarketing firms, filed suit in January in the U.S. District Court in Oklahoma City seeking to have the do-not-call provisions on the TSR invalidated.

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National “Do not Call” List Raises Privacy Concerns for Telemarketers *(continued from page 1)*

Despite privacy concerns, support for the national “do not call” registry is strong and most privacy advocates support the proposal. Doubt was cast on Congressional approval of the legislation, however, when the DMA and some lawmakers saw another concern with the proposal — the FTC’s jurisdiction. At a recent House Commerce Committee hearing, several lawmakers expressed concern that the FTC was regulating calls that clearly fall within the jurisdiction of the Federal Communications Commission (FCC). The 1994 Act gives jurisdiction over telemarketing to both the FTC and the FCC, and FTC Chairman Timothy Muris has testified that the FCC is currently working on a proposal similar to the FTC’s. The key difference between the agencies’ regulations is that FCC rules would preempt state laws, whereas the FTC’s rules do not. Twenty-seven states have their own “do not call” lists, and under the FTC’s proposal, telemarketers would be required to consult both the national and state lists, a requirement that telemarketers claim is overly burdensome. State attorneys general also retain the right to sue telemarketers violating state regulations under the FTC’s proposal.

Administration of the “do not call” list comes from fees assessed against telemarketers, and the FTC has an August deadline to assess fees for the 2003 fiscal year. As soon as the President signs the bill into law, the FTC will finalize its contract to create the registry and can start the consumer enrollment process. Enrollment will occur on a region-by-region basis and will last for approximately two months, due to the predicted number of consumers who will register. It is estimated that telemarketers would be required to comply with the list by September 2003. ○

Privacy News *(continued from page 1)*

FTC Settles with Mrs. Fields and Hershey over COPPA Violations.

Mrs. Fields Cookies and Hershey Foods Corporation have each agreed to settle Federal Trade Commission charges alleging their respective web sites violated the Children’s Online Privacy Protection Act (COPPA) by collecting information from children under the age of 13 without first obtaining parental consent. Under the settlement agreements, Mrs. Fields will pay civil penalties of \$100,000 and Hershey will pay \$85,000, representing the two largest COPPA penalties to date. ○

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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