

January 12, 2000



TEN ISSUES TO TRACK

Congress returns this month, and lobbyists and agencies are gearing up for a busy year in e-commerce policy. Here is an overview of key areas to watch. Developments in many of these areas will have a direct effect on the bottom line of U.S. corporations.

1. Privacy. Privacy remains the primary e-commerce policy issue for legislators, and is emerging as a key topic for Presidential candidates. Look for broad legislation on privacy to be introduced early this year. Additionally, the new financial services privacy law (E-commerce News, December 1999) may have significant implications for any entity that handles consumer financial transactions (including, for example, travel agencies, realty appraisers, or car rental agencies). The Federal Trade Commission will be leading the effort to draft regulations under the new law (to be completed by May 12). The Supreme Court's recent 9-0 ruling upholding a federal law restricting state departments of motor vehicles from distributing their data to corporations and direct marketers will likely be cited in discussions about other federal privacy legislation. (Reno v. Condon, No. 98-1464, Jan.12, 2000, supct.law.cornell.edu/supct/html/98-1464.ZO.html). As the tools made available by the biometrics industry become more widely available, there will be ongoing debates over the privacy implications of these techniques. Meanwhile, the safe harbor negotiators for the EU and the U.S. have set yet another deadline for completion of their discussions: March.

2. Consumer protection. Last fall, the OECD (Organization for Economic Cooperation and Development) issued online consumer protection guidelines that are intended to be adopted (as "best practices" or model law) by the twenty-nine developed countries that are members of that organization. (See www.oecd.org/dsti/sti/it/consumer/prod/guidelines.htm). The guidelines stress the importance of transparency and information disclosure, among other things. Early this year, private sector groups in the U.S. (including bbbOnline) will be working on creating consumer protection guidelines for online businesses to follow (as part of "seal" programs or otherwise). Encouragingly, Jupiter Communications has reported results from a survey showing that 90 percent of online shoppers were "largely satisfied" with their shopping experiences during the holiday season (up from 74 percent last year).

3. Taxes. The three-year moratorium on state Internet taxation under the Internet Tax Freedom Act runs out in October 2001. No real progress has been made so far on creating an equitable solution to the problem of domestic Internet taxation, let alone to the problem of warring international tax regimes. The federal commission on Internet taxation (see www.e-commerce.commission.org) has so far postponed all decisions, and will hold its final meeting in March. Look for a great deal of attention to the commission's findings, due to be provided to Congress by April 2000.

4. Alternative dispute resolution. Given the global nature of e-commerce, efficient consumer redress for small-value disputes may have to occur outside the court systems of the world. Both the Department of Commerce and the Federal Trade Commission are very interested in alternative dispute resolution efforts, and plan to hold a workshop in the late spring of 2000 to discuss the status of ADR in the online world. Similarly, the European Parliament will be discussing online dispute resolution at a conference in March. The first large-scale, inexpensive online ADR system will probably emerge this year. The rules for such a system — how much process is needed? what law will apply? — will need to be worked out.

5. Cybercrime. Last week, Attorney General Janet Reno announced the formation of a network of local, state, and federal agencies to work together to stop cybercrime. The group, to be called LawNet, will include teams of computer crime prosecutors and investigators and will facilitate technology sharing. On January 7, 2000, the Clinton Administration issued a national plan for critical infrastructure protection that calls for creation of a centralized intrusion detection monitoring system. The announcement earlier this month that a hacker had threatened to post more than 300,000 stolen credit card numbers taken from CD Universe has raised the profile of security issues on the Web. Look for increased attention to cybercrime issues and concomitant concerns about erosion of personal civil liberties.

6. Jurisdiction. The issue of jurisdiction over Internet transactions will be discussed intensely this coming year. The European Parliament is considering extending the Brussels Convention (which requires all consumer disputes to be governed by the law of the consumer's home country) to apply to e-commerce. Consumer groups in the U.S. take the same approach, and would like to mandate that a consumer's own local law apply to any disputes that consumer has with an e-commerce company. Online businesses, meanwhile, would prefer not being exposed to the vagaries of the laws of all countries of the world. There could be a middle ground between these two approaches — one that would combine required merchant "best practices" with the notion of permitting the merchant to choose the law to apply to interpretation of its contract with a consumer — but the fight over jurisdiction has a long way to go.

7. Campaign finance. Last week, the Federal Election Commission (www.fec.gov) received more than 1200 comments in response to its Notice of Inquiry concerning the application of federal campaign finance laws to the Internet. Although some commentators would prefer that the FEC keep away from the Internet altogether, others noted that the potential for corruption exists on the Internet just as it does in the offline world (and that the FEC needs to enforce its regulations online). This election year will probably see some attention paid to Internet campaign finance matters — although the FEC is not likely to act until after election day, Congress may suggest legislation to confront this issue.

8. Domain name disputes. The first decision under ICANN's new Uniform Dispute Resolution Policy (E-commerce News, September 1999) was issued on January 14. (World Wrestling Federation Entertainment, Inc. v. Michael Bosman, Case No. D99-0001.) The arbitrator that heard the case proceeded despite the effort of the parties to settle their dispute, and issued a brief decision in favor of the complainant (and citing U.S. principles and caselaw). Additionally, the first cases under the recently-enacted cybersquatting bill are now being decided (e.g., Teen Magazine v. Blue Gravity Communications, D.N.J., temporary restraining order granted, January 7, 2000). There will likely be a stream of cybersquatting arbitrations (under the UDRP) and litigation (under the cybersquatting law) this year. Concerns will be raised about the powers granted trademark owners under both of these regimes.

9. ICANN. The Internet Corporation for Assigned Names and Numbers now has limited funding and a limited agenda — to impose consensus-based policies that relate to the interoperability, technical reliability, and/or stable operation of the Internet or domain name system (see E-commerce News, September 1999). But ICANN has been mired in internal debates about the processes by which members will be elected to its board, and new consensus-based policies have not yet emerged. Key issues yet to be confronted will include ICANN's relationship to country-code top level domains ("ccTLDs" — like .uk), creation of ICANN's membership, and creation of new top level domains (potentially including .eu). Look for increased attention to ICANN's credibility over the coming year.

10. Digital divide. Last month, the Department of Commerce held a large workshop about the digital divide (see www.digitaldivide.gov). Today, about 30 percent of white American households are connected to the Internet, while only about 11 or 12 percent of Americans of African or Hispanic descent are. Look for increased government/private sector efforts to provide affordable Internet access to all Americans.

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MONTHLY UPDATE

Milestone. On January 10, AOL announced its merger with Time Warner. In the biggest merger in history, AOL gains access to TW's cable infrastructure and enormous collection of brands (Time, Life, Fortune, People, Sports Illustrated, CNN, HBO, Bugs Bunny, the Drew Carey Show), and TW gains access to AOL's 20 million subscribers.

Access to drivers license data. On January 12, the Supreme Court unanimously held that Congress had constitutional authority to enact the Drivers Privacy Protection Act, establishing privacy safeguards for drivers license records held by state agencies. The Court rejected the states' Tenth Amendment arguments, stating, "the DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as the owners of databases." (See Condon v. Reno, supct.law.cornell.edu/supct/html/98-1464.ZO.html).

Cyberterrorism. On January 7, the White House released a report entitled "Defending America's Cyberspace: National Plan for Information Systems Protection Version 1.0." The report sets forth a national plan to protect U.S. computer networks from unauthorized entry. (See www.pub.whitehouse.gov/urires/I2R?urn:pdi://oma.eop.gov.us/2000/1/7/7.text.1).

Cyberterrorism. On January 16, the Sunday Times of London reported that British hackers had sought payment for critical source code for the Visa card system that they had stolen. The hackers threatened to crash the entire system unless Visa paid ten million pounds.

DVD copying. At least three lawsuits have been filed (in New York, Connecticut, and California) by movie studios and consumer electronics companies asking the courts to stop individuals from distributing code that allows unscrambling of DVDs. The allegedly illicit code is compiled into the software utility DeCSS; programmers say the software was first created because of the absence of DVD playback software for Linux operating systems. The complaints allege that defendants have posted the software on their sites, together with text encouraging the duplication of DVDs. In the California case, plaintiffs' request for a temporary restraining order was denied in late December.

Encryption. On January 12, the Clinton administration released new encryption export rules. Under these rules, U.S. companies will be permitted to export any encryption product around the world to commercial firms, individuals and other non-government end-users without a license. In addition, "retail" encryption products that are widely available in the market can now be exported to any end-user (including foreign governments). The rules represent a significant change in U.S. policy. (See www.bxa.doc.gov/encryption)

FTC action. On January 6, the Federal Trade Commission reached a consent decree with ReverseAuction.com, an online auction site. ReverseAuction had registered with eBay (thus agreeing to comply with the eBay user agreement prohibiting spam to other eBay users), had harvested eBay users' email addresses, and had sent users messages saying that their eBay user IDs were about to expire and that users should register with ReverseAuction. The FTC complaint states that ReverseAuction's signing up with eBay (and agreeing to the eBay user agreement) was a deceptive trade practice. This action signals that the FTC is willing to involve itself in a violation of a site's terms of service. (See www.ftc.gov/opa/2000/01/reverse4.htm).

Personal jurisdiction. On January 11, the U.S. Court of Appeals for the District of Columbia ruled that where defendants' websites were merely accessible to D.C. residents (but no other contacts with D.C. were alleged), personal jurisdiction over defendants could not be sustained. GTE New Media Services, Inc. v. BellSouth Corp. et al., No. 97cv02314 (D.C. Cir., Jan. 11, 2000).

Privacy. On December 30, *The New York Times* reported that Amazon.com had been the subject of a complaint filed with the Federal Trade Commission alleging that Amazon's "Alexa" software program (designed to collect aggregate data) collected personal data in contravention of Amazon's privacy policy. On January 7, a class-action suit was filed against Amazon and Alexa in San Francisco, alleging that the plaintiffs had not been told their personal information would be collected when they used Alexa's software.

ANNOUNCEMENT

"Preparing for the Wireless E-Commerce Revolution"

On February 16-17, 2000, the Personal Communications Industry Association (PCIA) will present a conference (led by WCP Egroup attorneys) about the implications of e-commerce law and policy for the wireless industry. For registration and details, see www.pcia.com/trade. Location: The Wyndham Anatole Hotel, 2201 Stemmons Freeway, Dallas, TX.

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