

The Coming Internet Privacy Scrum

By Naomi Schaefer

Judging from the press offices of various congressmen on both sides of the aisle, 2001 is going to be the year for Internet privacy. It seems everyone in Washington is floating some proposal to protect Internet users from the federal government, from big corporations, or just from their own ignorance about this new medium. More than 50 bills were introduced in Congress in 2000 alone.

Most recently, Senators John McCain (R-Ariz.), John Kerry (D-Mass.), Spencer Abraham (R-Mich.), and Barbara Boxer (D-Calif.) have unveiled the Consumer Internet Privacy Enhancement Act. "Our bill," explains Abraham, "does not regulate the Internet. It empowers consumers." Who could be against that?

Over the next year or so, congressmen will face enough Internet regulation proposals to wallpaper the Capitol. Rob Taylor, counsel for the Senate Commerce Committee, notes there is bipartisan support for "some type of legislation." Indeed a recent poll that asked Americans about their "greatest concerns about the next century" found "a loss of personal privacy" ranks number one, above both terrorism and global warming.

There are bases for such fear. Late in 1999, 20-year-old college student Amy Boyer was murdered in New Hampshire by a stalker who tracked her down after buying her Social Security number from an Internet information broker for \$45. Earlier, actress Rebecca Schaeffer was killed by a crazed fan who traced her through driver's license records sold by the state of California. These sorts of basic safety issues are now on their way to being solved by congressional bans on Internet traffic in such data.

But numerous prickly and more subtle privacy issues remain unresolved.

There are, for instance, many questions about the security of financial, health, and other information consumers entrust to the Internet. In 2000, hackers managed to enter a number of prominent, supposedly secure, Web sites containing sensitive private information. The attacks left many consumers wondering how deep cybercriminals have been able to burrow, and how much personal data about various companies' customers they could access.

And people aren't worried only about hackers. Recently, the FBI set off a firestorm when it unleashed an Internet surveillance program called Carnivore, which can be set up on any Internet service provider (ISP) and be used to search every message that passes through the system for a given bit of information. The details of the program are still quite vague, and a federal court has ordered that Carnivore be examined by a group of independent experts, most likely at a university.

While the FBI must first have an official warrant to read a suspect's e-mail with Carnivore, once the program is installed it can read every other user's mail—somewhat like the police obtaining a search warrant for one residence, but having the option to turn every house in the neighborhood upside down. And it's not just ordinary users who are scared. "Every ISP worries about how Carnivore may cause them to violate their legal obligations" to protect their users' privacy, explains Andrew Shen, a policy analyst at the Electronic Privacy Information Center.

"Government has been the traditional invader of privacy," warns Deborah Pierce, staff attorney for the Electronic Frontier Foundation, a non-profit pri-

vacy advocate group. "Before computers, government was the only entity with huge files about citizens."

Others insist the problem goes far beyond government invasion. "Privacy isn't what it used to be under the Fourth Amendment," laments Mike O'Neil, counsel for Americans for Computer Privacy. Once, "your personal property was at home, and the government needed a warrant to search it based on probable cause." Today, people "entrust their most private information to third parties." And they do so believing the information will be as safe as if it were in a locked box in their attic, but often it isn't.

Jason Catlett, president of a firm called Junkbusters, argues that corporate infringements on privacy are today's biggest threat. "While the government has great power, it has been traditionally restrained by law, whereas corporate profilers have very little legal restraint placed upon them," says Catlett. Many companies involved in e-commerce, however, are downplaying consumer privacy worries, even in the case of Carnivore. Jay Whitehead, CEO of EmployeeService.com, argues "We would be outraged if SWAT teams didn't show up at a hostage takeover even though innocent people are involved; so why are we so horrified when they show up on the Internet even though some innocent people might be inadvertently monitored?"

For the last several decades, however, private corporations have been able to collect information as efficiently as the government. "Junk mail," which results when companies sell information about their customers' buying habits to other firms, has existed for decades. But the Net now makes personal information

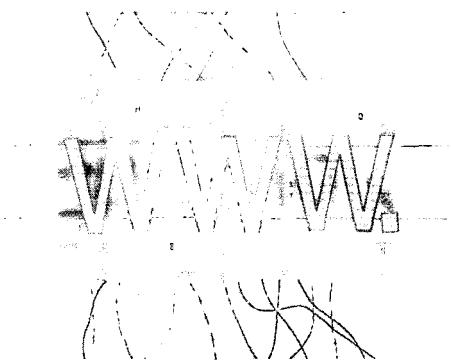
much easier to acquire. "If you think about technology in any of its forms," Andrew Shen says, "what you see is an amazing development of speed, computing power, computing storage."

Two companies that have recently raised concerns among consumer advocacy groups are Toysmart and DoubleClick. The former went bankrupt this year and tried to auction off all of its online customer information, in violation of its own privacy policy, which stated that information given by consumers would only be used by Toysmart itself. DoubleClick, a consumer profiling company, has tried to match anonymous online profiles of people's Internet browsing habits with their actual identities. This is accomplished by using a "cookie"—a mechanism that allows a Web site to record a consumer's comings and goings.

The manipulation of Internet cookies is less like someone looking at your credit card statement than like someone following you around for a day, except rather than just noting that you shopped at the Gap, they would know exactly which pieces of clothing you looked at. A company could learn that you looked up information on prostate cancer, or AIDS, or performed an Internet search for bankruptcy lawyers. A company might use that information for its own purposes, or sell it to insurance companies, employers, or others.

Of course, some people understand the privacy risks they run and decide to go ahead anyway. ISPs that require users to let their browsing be monitored in return for free Internet service have proven popular. Many e-commerce businesses argue strongly that there should be no Internet regulation, that firms must be given room to regulate themselves. But advocates like Deborah Pierce of the Electronic Frontier Foundation believes the country could use "some overarching privacy regulation." Jason Catlett of Junkbusters argues that the nation is "tormented by the fact that we have no comprehensive data protection."

While some corporations collect data, others sell tools to make it easier for Internet users to keep it to themselves. You can buy software that, for example,



manages cookies and generally reduces the amount of "data exhaust" from your Web browsing. Although such software is useful, advocates like Deborah Pierce say it is "not going to be sufficient if people have no legal rights to privacy." Companies, she argues, "have an economic incentive to exploit personal information for greater revenues and lower costs" that must be counterbalanced.

Like many companies, Predictive Networks sends personalized advertisements to consumers based on their purchasing profiles. But it is also hiring outside consultants to advise the company on its privacy policies. The company uses technology which automatically deletes all of the composite information once the consumer profile is completed. This protects consumers in the event that the company's data is, say, subpoenaed by the federal government.

Citing the history of this company among others, lawyer Harvey Silvergate argues that "the Internet is developing, and it's very difficult at this early point to know how it will evolve, what problems will arise, and what solutions will be necessary." The legislation now pending is certainly a jumble. Mike O'Neil of Americans for Computer Privacy sums up the situation: "There are so many ideas out there; many are combined into one bill; they just take a range of issues that deal with government privacy issues, corporate privacy issues, cybercrime, and throw them all in together."

O'Neil suggests more "deliberation and attention be given to all of these issues" before any legislation is passed. Is there an urgent need for new regulations? How many of these problems can be addressed by existing laws? The Federal Trade Commission, for in-

stance, is suing Toysmart. Individuals can file civil suits over any breach of contract by an Internet company. Government invasions of privacy like those that could occur with Carnivore are being tested in the courts using existing wiretapping guidelines.

Many of the organizations and legislators involved with these questions insist that one addition to current law is needed immediately: a requirement that Internet companies use "fair information practices." In general, this would ensure that (1) no information could be collected without some sort of affirmative consent from the user (clicking on a "yes, I understand your policy" kind of button), (2) information collected for one purpose would not be used for another, and (3) users would have a way of finding out what sort of information about them exists. These seem like reasonable principles, and ones that will not need much amendment, regardless of changes in technology over the coming years.

Even Silvergate, who hopes most of these questions will be settled legally only after the market has failed to address them, says he would favor a simple rule like this. "Any ISP or e-commerce outfit or anybody else has an obligation to disclose in plain English what their privacy policy is, and, having disclosed, they would have a legal obligation to adhere to it. Non-adherence would constitute fraud."

Such simple legislation will not satisfy many of the legislators and consumer groups with a stake in this issue, however. Some want legislation to affirm privacy "as a fundamental human right," while others demand an "information-privacy czar" whose job would be to regulate Internet companies. Some want government to regulate Internet content; others don't think the government can even regulate itself effectively and should keep out of the private sector entirely. Debate promises to rage in the months ahead.

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John McCain, Culture Warrior

Later this spring, at about the time the film industry lines up to collect the Oscar statuettes they award themselves in March, studio executives are scheduled to be swearing to tell the whole truth and nothing but the truth back in Washington in U.S. Senate hearing rooms. Leading the Hollywood witnesses through their oaths, and the questioning that will follow, will be John McCain, chairman of the Senate Committee on Commerce, ex-fighter pilot turned culture warrior.

McCain emerged as the Senate's point man against Hollywood last fall, when he presided over hearings about a Federal Trade Commission report revealing that studios aggressively market R-rated films to children. That placed him at the center of a storm that could eventually hit L.A. harder than the Santa Ana winds.

Already, *Entertainment Weekly* has tagged McCain "Judge Dread." Certainly the ex-POW will be harder to marginalize than some of the other members of congress who have sparred with Hollywood. For one, John McCain is more agile at cozying up to the press. He personally returned *TAE*'s call asking about his next move. Plus, McCain enjoys an affection from film industry players that eludes other conservative politicians.

"I've known John a long time," Warren Beatty told the *Los Angeles Times* last year, "I love the guy." Dreamworks' David Geffen, Universal's Ron Meyer, and Warner's Alan Horn have all written checks to McCain. During the presidential primaries, McCain held a \$1,000-a-person fundraiser at the Beverly Hilton and had no problem filling the room.

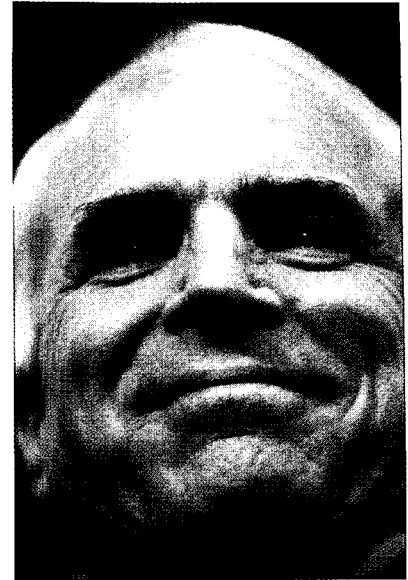
Even more unusual is the fact that McCain has his own little movie deal brewing. In late 1999, riding high in presidential politics, McCain sold the film

rights to his military memoir, *Faith of Our Fathers*, to Barry Diller's USA Films for \$100,000. One script draft has been completed, and actor Ed Norton has reportedly expressed interest in it. McCain himself has talked about the potential film with Robert Duvall. Some insiders say this deal may be more about Hollywood trying to ingratiate itself with a powerful Washingtonian than about actually making a movie. In any case, after what McCain seems to have planned for the industry in the wake of the FTC report and the hearings last fall, he may not be able to get a flight to LAX, let alone a premiere in Westwood.

John McCain was slow to tune in to the issue of Hollywood slime (he wasn't even planning to attend committee hearings on the film industry until the Columbine shootings sparked his concern, according to Capitol Hill sources). But today, he seems to be on the same page as Senator Sam Brownback (R-Kan.), who first pushed the Senate to consider cultural pollution by the film industry three years ago.

It doesn't take a government report to know that Hollywood is trying to rope in children, often using questionable means. Anyone with a remote control who turns on the WB channel or Fox will have enough evidence to sway most juries—which, according to top-level sources organizing the hearings, may well be where McCain and Brownback want their campaign against Hollywood headed.

Under pressure last fall, most studios agreed to change their marketing techniques, but McCain views those concessions as weak compared to what ought to happen. One option being considered if Hollywood doesn't clean up its act is legislation formulating a code of conduct



John McCain

similar to the rules once set by the National Association of Broadcasters, or the old Hays code followed by movie makers. And if the industry fails to live up to it? They then subject themselves to laws against false and deceptive advertising.

Then there is the threat of lawsuits like those that unraveled the tobacco industry. "Those are deep pockets," says one Republican staffer, referring to the studios. "It may actually be the trial lawyers who would help us, bizarrely enough." Already, families of the victims of the Paducah, Kentucky, school shooting have filed lawsuits against entertainment companies, complaining their products created the mindset that caused the murders. Early on, Brownback was smart enough to persuade major public health organizations such as the American Medical Association to publicly acknowledge that there's a causal connection between exposure to violent entertainment and increased personal aggression and violence. "It's starting to look more and more like Big Tobacco," says one staffer. "We've found our Joe Camel."

Whether McCain can make genuine progress in shielding children from the excesses of Hollywood remains to be seen. Nonetheless, John McCain is planning another trip on the Straight Talk Express, right down Sunset Boulevard. And what he really wants is to direct.

—John Meroney