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<th><strong>Title</strong></th>
<th>Privacy, jurisdiction and free expression in the digital age</th>
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<tr>
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Paper No. 25
Where Are We Headed?

"If there is a single truism of the evolution of the Internet, it is that no one knows WHERE it is going or precisely WHAT drives it or in WHAT direction."

Dr. Eddie Currie
Founding Father of Personal Computer Revolution
emerging issues in digital age

- net governance & jurisdiction
- net privacy
- net speech

dilemma in digital age

Tension b/w Business, New Technology and Old Law
- Technology and Business dynamic while Law is static and institutions adapt slowly
- Business expectations from Law are Predictability, Fairness, Enforceability & Efficiency (cheapness & speed)
- Expectations of Law may mutually conflict: Certainty (predictability / enforceability) versus Flexibility (fairness, cheapness and speed)
need for e-Law

Broad Issues Relevant to Internet Space
- Most law was made without contemplating e-Commerce
- E-Commerce is borderless and instantaneous

Need for Law in Cyberspace
- Must be a set of rules that facilitate reliable communication & trustworthy commerce
- Must be laws that define, punish, prevent wrongful acts that destroy the electronic commons or impose harm on others

net governance & jurisdiction

- Internet as “most participatory form of mass speech yet developed” (ACLU vs. Reno, 1996); transcends geographical boundaries; reaches global audience
- Issue of Jurisdiction – liability depends on evaluation of where the offense has been committed
- 2 key issues
  - whether & to what extent establishing a presence on the Internet makes one “present” in any jurisdiction from which its web site may be accessed
  - how to limit risk of liability in multiple jurisdictions

US Jurisprudence: “Minimum Contacts Analysis”
- Defendant’s purposeful availment of privilege of doing business in forum state
- Cause of action must arise from defendant’s activities with respect to forum state
- Substantial enough connection or nexus b/w defendant’s acts and forum (Reasonableness test)

US Jurisprudence; fact-specific
- Generally, if merely post information on web site and have no other contact or interaction with forum state, then court has no jurisdiction
net governance & jurisdiction

Basic Competing Models
• Existing territorial sovereigns simply extend their jurisdiction and amend their laws as necessary
• Sovereigns enter into multi-lateral international agreements to establish new and uniform rules specifically applicable to conduct on the Net
• New international organization establishes new rules, new means of enforcing those rules and holding those who make rules accountable to constituencies
• Self-regulation where de facto rules may emerge as result of complex interplay of individual decisions by dispute resolution service providers, by system operators and users

emerging issues in digital age

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the stakeholders

Consumers

Government E-Commerce Companies
fundamental values of net privacy

- Promotes psychological well-being
- Provides space for creativity & autonomy
- Avoids embarrassment or sense of violation
- Deters financial fraud, theft of reputation, theft of identity
- Encourages free expression
- Lowers cost of doing business

e-commerce & privacy

Innovative ways to easily & inexpensively collect personal info about individuals
- Clickstream data - while net browsing, trail of electronic info left at web site: email address, hardware & software used, how long one stayed at web page
- Internet Cookies - small file generated by web server & stored on user's PC; unique identifier to accurately count "hits"; sends info to 3rd parties (advertisers) to know user's personal preferences
- User-Provided Information - online forms, chat room postings, other authorized access

Online Shoppers' Concerns
- Privacy and security - 53%
- Can't inspect product - 20%
- Unfamiliar with process - 6%
- Don't want to wait for delivery - 3%
- No concerns - 13%

Source: NetZero Report, December 1999
**definition of net privacy**

Information Privacy
An individual's claim to control the terms under which personal information is used, disclosed and acquired.

**interests in privacy**

Privacy of Information
- Prevent access to information
  - Financial and medical records
- Prevent disclosure of information
  - Access permitted but control dissemination
- Ensure accuracy of information
  - Disclosure permitted but ensure correct info such as credit and health status

**interests in non-privacy**

- Law Enforcement - society's need to thwart criminal activity
- Employment - observe employee activities, protect trade secrets, protect against liability for employee acts
- Marketing - reduce product costs by avoiding wasteful advertising
- On-line Commerce - provide online transactions, ex. electronic contracting, purchase of products and services
present privacy legislation

• Difficult to enforce; ineffective to deter criminals who remain untraceable
• Global harmonization of laws difficult due to cultural differences
• Burden on individuals to protect data
• Language of legislation necessarily broad; difficult interpretation
• Technology develops faster than law; difficult to understand privacy implications

e-commerce companies

Right of Free Speech - Right to report true facts about you to others

Objective
• Enhanced customer service
• Long-term relationship = profit $$$

Purpose
• Use for own targeted marketing and advertising
• Sale to advertisers
• Sale to market research firms
• Exchange w/partners for banner ads, email marketing

government steps in

FTC surveyed 1,400 web sites:
• 14% - Gave notice of privacy collection practices
• 2% - Gave comprehensive privacy policy
• 89% - Directly collected personally identifiable information from children
• 10% - Provided for some form of parental control over collecting kids' information

Conclusion: Substantially greater incentives needed to spur self-regulation & widespread implementation of basic privacy principles
future of net privacy

As automation increasingly invades modern life, the potential for Orwellian mischief grows.

Justice Ginsberg

emerging issues in digital age

- net governance & jurisdiction
- net privacy
- net speech

net speech

Key Issues on Free Speech on the Internet:

- Definition of Obscenity - depends on "contemporary community standards"; w/c community standards apply?
- Indecency is protected speech (vs. Obscenity)
- Whether 3rd party intermediaries (ISPs) can be held contributorily liable for materials passed via their networks
e-ASEAN task force

- First Asean high-level advisory board on IT issues
- Regional "e-agreement" for presentation @ Asian Economic Minister Retreat in Myanmar last May 2000
- Will take charge in fast-tracking creation of Asean Information Infrastructure (All)
- Goal of seamless environment for electronic trade across the region

Legal & Regulatory framework
- Common legal framework in e-space
- Electronic Commerce Code of Practice
- Harmonization of policies & regulations

Physical infrastructure
- Facilitate construction of infrastructure that provides regional interconnection through All

Human Resources
- Creation of Education-Asean Online (EAO) to create online repository for regional academic research & collaboration

Conclusion

The important thing to remember is that technology is *not necessarily* the same thing as civilization.