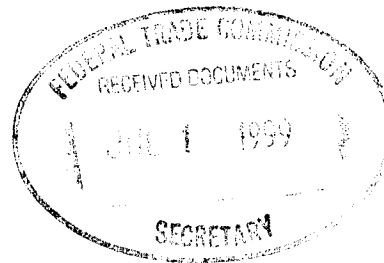


① 415.436.9333
① 415.436.9993



Electronic Frontier Foundation

1550 Bryant Street / Suite 725 San Francisco, CA 94103

June 30, 1999

www.eff.org

Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: U.S. Perspectives on Consumer Protection in the Global Electronic Marketplace—
Comment P994312

Dear Secretary,

The Electronic Frontier Foundation (EFF) is a nonprofit, public-interest organization working to protect rights and promote responsibility in the electronic world. We thank you for giving us the opportunity to submit our comments on consumer protection issues related to e-commerce.

From the scope of the questions you ask in the Federal Register notice, it appears that you have taken on a task of Herculean magnitude. EFF believes that government's role with regard to regulating the Internet should be precisely the opposite of that. In the developing world of electronic commerce, the government should refrain from stifling the growth of the medium with over-regulation, unless addressing specific egregious violations. Perhaps there will be a role for governmental oversight in the future to assure that technological tools are utilized to their maximum capacity. But it is premature to make any assessments in that area, and the government will best foster the health and growth of the Internet by refusing to burden it with regulation.

Jurisdiction Questions

You pose several questions related to the protections and fora provided to consumers doing business with international companies. This is an unsettled area of Internet law, and it affects much more than Internet commerce. Regulation of adult materials, gambling, taxation, and libel are but a few of the areas of law directly affected by questions of jurisdictional authority. Jurisdictional issues are well outside the scope of what the FTC should be focused on.

It is not clear where electronic transactions take place, and it is therefore unclear as to which jurisdiction's law is appropriately applied. However, parties to a transaction

should always be able to contract among themselves which law they would like to apply to their specific transaction.

Electronic Signature Questions

The area of electronic signatures is not one where government regulation should impose requirements on businesses and consumers. What constitutes a valid signature for purposes of engaging in electronic commercial transactions should be established by the market. If parties agree that a particular signature format is valid, then transactions utilizing that format should be recognized under contract law.

Under no circumstances should the government take on the role of assigning or certifying digital signatures. Certainly this is beyond the authority granted to the Federal Trade Commission. But it is also not an appropriate role for any body of the federal government to play. The online community is sorting through this, and market forces will determine which signature formats and the like are best.

The burden of proof that an electronic signature is not valid should rest with the party making that allegation. Once the proof is offered, the burden shifts to other party to prove validity. The allocation of loss when electronic signatures are used fraudulently must be determined on a case-by-case basis. Much will depend on actual or implied knowledge of the nature of the abuse, the resultant damages, and the ability of the parties to bear the brunt of the loss.

Consumer Empowerment

Businesses should be required to provide disclosures to consumers regarding how personal information and transaction information about them will be used. In fact, consumers should be given the opportunity to opt-in or opt-out of any uses of their information beyond the original transaction. Consumers must be given access to their information in order to make additions or corrections. Consumers are entitled to be compensated for the use of their information beyond the original transaction. Furthermore, consumers should be able to remove their information from databases and insist that their data be destroyed. The FTC can create regulations that require businesses to comply with these standards.

Enforcement

Contract law offers consumers considerable strength in enforcing agreements they enter into online. Since each purchase is, in effect, a contract, it would be a simple matter to insert language setting up an enforcement procedure, be it through courts or some sort of mediation mechanism. While consumers have less muscle in selecting appropriate fora, there is an entire body of law in this area for offline transactions that can be used to protect consumers online.

EFF believes it is inappropriate for the United States government to create or require international dispute resolution procedures or tribunals. The government is perhaps in the worst position to make determinations as to how electronic disputes should be resolved. The parties to transactions must be free to make their own decisions regarding dispute resolution.

Criminal prosecution of electronic transactions should be used in egregious cases such as large-scale fraud. The many laws currently on the books to protect consumers already give law enforcement officers the power to bring such prosecutions.

Consumer and Business Education

The FTC and other government agencies should play a major role in educating consumers about their rights in electronic transactions. In addition, the government should provide advisory materials that inform businesses and consumers what kinds of information they should not reveal, how they can tell if a particular online merchant's system is secure, which businesses have been subjected to multiple complaints and/or lawsuits for abusive business practices, and what countries are inherently insecure for doing business. The FTC's web site can contain this information, and the FTC can provide periodic alerts that web sites around the world can post or link to.

Industry Self-Regulation

Many online merchants have made great strides towards regulating themselves in this area. This is generally a good idea, especially when the technology is still so new and over-regulation could severely hinder its development. However, the FTC and the government should provide the enforcement teeth that are missing in self-regulatory schemes. Companies should be encouraged to adopt privacy and consumer protection policies that, at the very least, reflect their requirements under state and federal law. Then companies should be held accountable for living up to their stated policies. Furthermore, there should be strict notice and opt-out provisions in the law that companies must go through before they can change existing policies.

In addition, there should be legislation that protects consumer information in the event of a company's acquisition or bankruptcy. If a company has a stated privacy policy, for example, and then that company gets acquired by a company with a less favorable privacy policy, consumers who signed up with that company before it was acquired should be able to "take back" their information, or at least expect that the terms under which it is held will not be changed.

Global Electronic Marketplace

The global electronic marketplace is going to grow exponentially over the next few years. Probably the biggest thing that will add to its growth would be the relaxation of the export control laws on encryption. Once companies and individuals can use strong encryption to keep their data private and secure, more consumers will feel comfortable

with doing business online. Once consumers feel safe online, all sorts of things will be available for electronic sale.

EFF believes that ultimately technology is the best way to empower consumers to protect themselves. As business practices become more uniform, technological responses will become more available to consumers.

Thank you again for giving us the opportunity to comment as you work to formulate United States government policy in this important area. We would be happy to meet with you and work to create a system that is in the public interest. Please contact me at 301/283-6629 if I can be of any further assistance.

Sincerely,

A handwritten signature in cursive script that reads "Shari Steele". The signature is written in black ink and is positioned above the typed name and title.

Shari Steele
Director of Legal Services