Techscope

(An Occasional Survey of Comment & Events)

Denmark, update on Echelon

8 Dec 2000, From: Bo Elkjaer <boo@datashopper. dk>

Just a short notice on the Echelon-discussion in Denmark. The danish parliament Folketinget has declined to aid the EU committee that is investigating Echelon. The EU committee formally contacted the head of the parliaments permanent select committee for controlling the intelligence-services—in danish: kontroludvalget for efterretningstjenesterne—asking for information regarding parliamentary control with the danish intelligence services. No confidential information was asked for. Just the basic info on how the select committee works.

The head of the committee, Thor Pedersen, from the liberal partyVenstre, declined to aid the EU committee. He did this without informing the select committee or the parliament. This caused some uproar when we disclosed his doings in Ekstra Bladet, but later the decision had been upheld at a meeting in the select committee. Complaints have now been filed against Thor Pedersen.

This means that Denmark is one of only two EU-countries whose parliament has declined to help the EU committee: The other declining parliament is the British. No other EU countries have stepped aside. Indeed they have been rather helpful with the EU committee. Thor Pedersen's decision has infuriated the members of EU-parliament Lone Dybkjaer, (party: Det Radikale Venstre, married to our prime minister) and Torben Lund, (party: Socialdemokratiet, which is the governing party in Denmark). Both are members of the EU committee, and both have declared they have no doubt Echelon exists.

Meanwhile, the danish signals intelligence-service Forsvarets Efterretningstjeneste is continuing to upgrade their equipment. The SIGINT-site at Skibsbylejren has been equipped with three satellite dishes, all 18 meters across. There are further plans to erect three additional dishes of the same size. The dishes are solely planned for interceptions. Accord-

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ing to building plans, a radius around the area must be cleared of all electronic emissions, including cell phone towers and welding equipment. Also tall buildings will be prohibited in the area around the 30 meters tall radomes containing the dishes.

In the Future of Storytelling, Why Do We Need Words? Why Do We Need Authors?

By Linton Weeks, 26 April 2000. © Washington Post, *excerpted and reprinted with permission.*

Squirreled away in a homely house office in Watertown, MA, Mark Bernstein and Diane Greco—and their company Eastgate Systems—champion the avant-garde cause of experimental storytelling that sneers at beginning-middle-end narrative.

They incite folks to follow wispy electronic links hither, thither, and yon. Readers ricochet from thread to thread, shuttle back and forth from linear tale to deep background to irrelevant digression.

In fact, as technologies—such as on-demand printing and electronic reading devices—hustle more and more information into digital, rather than printed, form, the very notion of reading, writing and the book is mutating. The question is not when, or if. The question is: What will storytelling look like in the future?

"This is either the dawn of a new age of writing, "says Bernstein, "or the end of Western civilization. "Whatever. "The future of literature, "Bernstein says, "lies on the screen. ""Books, " says the soft-spoken Greco, "will become objects of nostalgia."

As more and more authors stop writing for the physical book—paper leaves bound with cardboard covers—and begin writing for electronic reading screens, the kinds of histories and biographies and novels and poems and scripts and plays they produce are changing forever.

And as more and more readers stop reading books that are presented in static, from-on-high, "Moby-Dick" fashion, more and more stories are becoming collective enterprises. Collaborations among writers and photographers and designers and code writers flourish, much like Hollywood. With an added, heretofore impossible element: you.

Your life will be the "book. "Your poem will be the poem. Your recipes will be the cookbook. Your tips will be the travel guide. Your story will be the story. The readers will become the writers, in collaboration with the author (or authors). But first, we've got a few more stages that we are going through.

Age of Spiritual Machines

Click on the name of Robert Coover, English professor at Brown University, and you'll discover that he's 68, he's been teaching on and off for more than 35 years and he is the godfather of hypertext fiction. The best

example of contemporary, word-intoxicated hypertext, Coover says modestly, is "Patchwork Girl" by Shelley Jackson, which was published in 1995 by Eastgate on a floppy disk. It twists the story of the Frankenstein monster—Mary Shelley creates it, it falls in love with her and follows her to America.

Or you can click on other stellar samples of hypertext on the Internet. You'll find a reading room on the home page of Eastgate Systems (www. eastgate. com) with several examples of "straightforward" hypertext.

Even before the great computer deluge, before the Internet, Coover was tinkering with nonlinear storytelling, in the tradition of Laurence Sterne, James Joyce, and Salman Rushdie. Coover's stories challenge the age-old axiom that a good tale moves from Point A to Point B to Point C. He plays with time and point of view and the structure of sentences and paragraphs.

The notion of nonlinear storytelling dates all the way back to medieval manuscripts with marginalia, Coover explains. "They were like hypertextual documents. "The Bible, he says, is the perfect example of a "not-very-adhered-to story line, in a hypertextual way, one thing linking to another. "There are many forward-looking references and echoes of the past in the Bible.

If you think about it, footnotes, bibliographies and indexes are all forms of hyperlinked materials, which is why people begin reading some books from the back. Modern examples of pre-computer hypertext fiction include "Hopscotch" by Julio Cortazar and Milorad Pavic's "Dictionary of the Khazars: A Lexicon Novel in 100, 000 Words," which was published in male and female editions.

In 1963, Marc Saporta published "Composition No. 1" as a set of loose pages in a box. Readers were encouraged to shuffle the leaves like a deck of cards and read them in the order they assumed. In England, B. S. Johnson published "The Unfortunates" in 1969, an unbound novel of 27 sections, with only the first and last marked. The middle 25 were to be read in random fashion.

For centuries, Coover says, "people have struggled against the imposition of the line. "They have fiddled with backtracking and interrupting. "Cervantes breaks off the story of 'Don Quixote' and takes you in different ways. "There is, Coover admits, a certain A-to-B-to-C structure "suggested by the page-turning mechanism" of the book. But before books, oral storytellers wandered here and there, told sub-stories, took the tale in unexpected directions. "A good joke-teller digresses, "Coover says. "In fact, think of your own life, " he adds. "You are living in a particular instant. Whenever you reflect ahead or behind, this is a hypertextual experience."

Using dandy new electronic devices and the speedy delivery of words, images, and sounds, storytellers are able to mimic real-as-life mayhem in ways that have never been available. With the computer, "we are presented with a multidimensional potential that is something kind of new, " Coover says. "What we are doing is new."

To Coover, parts of the new are unsettling. Click again and you'll be transported to the December 1999 issue of *Yahoo! Internet Life* magazine. You'll read Coover pining and opining that there is a new generation of readers being suckled on the Internet, "trained from primary school on to read and write—and above all to think—in this new way, and they will be the audience that literary artists will seek to reach."

He writes, "New forms will be created, are being created as I write. Hypertextuality, multimedia, text animation, computer games, virtual reality, streaming sound and video, etc. , have already had a massive impact on electronic literature, and this will continue at an undoubtedly accelerated pace. "There is a voracious appetite among the present generation of readers for lots of bells and whistles, and the numbing variety of new tools required to produce these hypermedia artifacts encourages more collaboration, as writers join together to create works with designers, composers, graphic artists, filmmakers, and other writers. "

Of course it's changing the nature of writing. But as the day arrives when the ideas in a book are no longer inextricably intertwined with the experience of turning pages, what is this doing to the experience of reading? Is it saving us time or slaying our attention span? Is it turning Gutenberg's revolution into a quaint blip on the time line? Is it leading us down the primrose. com path? Is it enriching our lives immeasurably? Or is it making us impatient with the deep, quiet, resonating buzz-on we get from immersing our imaginations in an author's carefully laid-out tale?

Is it changing the way we reason and, indeed, the very way in which our brains and the brains of our children's children are being wired? What is happening to us as a literate species?

Actively multi-absorbing this very article on the Web—with accompanying images and sounds and theoretically endless hyperlinks—is a profoundly different experience from reading it meditatively in ink on dead trees. The result is a brave new world that even Aldous Huxley couldn't envision in his paper product of the same name.

In the out-front genre of hypertext creation, Coover says, two schools have emerged—those whose writers quaintly continue to tell stories with words and those that are turning away from them in favor of images, sounds, and sensory surprises.

There is, among young writers, "a great fascination with all the new hypermedia possibilities, " Coover says. "Stories are image-driven, less traditional—if you can call something ten years old a tradition—than the kind of stories I write. "It's entirely possible that images could replace words altogether in the electronic world. "There is a risk of that, " Coover says. But he doesn't like to entertain the notion. "Language is more precise than image, easier to reflect upon itself. I wouldn't like to lose that self-critical mode. Nevertheless, writing itself was a technology, invented by Sumerians for a purpose. "

Coover believes that something is lost when words take a back seat to images. He appreciates the way that one reads a word, thinks about it, applies his own life experience to it, then reacts to it in the context of the

storyteller's tale. "For me, there are more checks against mere seduction when words are used, and an opportunity to engage my imagination."...

The Dying Paragraph

You don't need words, says Keith Devlin, a dapperly dressed Brit who pronounces the word "words" as "weirds." Devlin is the dean of science at St. Mary's College of California and a senior researcher at Stanford. He has written a passel of books on numbers and language. "You can tell a good story with images and music." And gestures, "the face conveys everything."

Devlin, 53, is in Washington for a scientific convention. I'm interested in talking to him because he believes that the human brain is changing and that words may be becoming less important to us.

He thinks the paragraph.

Is dying.

He posted this observation on a Web site: "We may be moving toward a generation that is cognitively unable to acquire information efficiently by reading a paragraph. They can read words and sentences—such as bits of text you find on a graphical display on a Web page—but they are not equipped to assimilate structured information that requires a paragraph to get across.

"Half a century after the dawn of the television age, and a decade into the Internet, it's perhaps not surprising that the medium for acquiring information that [a large number of 10,000 college students surveyed] find most natural is visual nonverbal: pictures, video, illustrations, and diagrams." We could be entering an era, Devlin says, when words are used less and less to tell stories. Logos and graphs and glyphs and images and sounds are used more and more.

In the August 1999 issue of *Conservation Biology*, David Orr, a professor at Oberlin College, wrote that the human vocabulary is shrinking. By one reckoning, he observed, the working vocabulary of 14-year-olds in America has plummeted from 25,000 words in 1950 to 10,000 words today. "There has been a precipitous decline in language facility," says Orr. "This is nothing less than a cultural disaster. Language is what makes us human."

He added in his article that in the second half of the 20th century "the average person has come to recognize over 1,000 corporate logos but can now recognize fewer than 10 plants and animals native to his or her locality. That fact says a great deal about why the decline in working vocabulary has gone unnoticed: Few are paying attention."

"Man was around for three million years before developing language," says Keith Devlin. "We've had language for only the past 100,000 years. And writing for about 6,000 years. Language may be an aberration" in the human time line. Convinced of the power of interactive storytelling, Devlin helped develop an electronic companion to calculus. He used interactivity as a teaching tool to pull the student along. "We were really designing interactive theater."

The classic textbook probably will die, Devlin says. "There will be a suite of materials available to the student. "Students will choose, and interact with, course material. "I was used to teaching math serially, "Devlin says. But the electronic companion was designed to teach students who grew up on [Game Boy]. "We engaged them in interactivity. It's very powerful. The user is in the driver's seat. It's the opposite of the normal way of teaching."

Devlin, like Coover, is troubled by the trends. He has a sense that the old "text world" is disappearing. As we talk and I tell him of my research, we envision a less wordy world. Perhaps harking back to ancient times where images, symbols and gestures ruled, and where words were few and far between, a knowledge-filled illiterate age. The [Nike swoosh] speaks volumes. "I don't think we can assume there will be a diminution of learning and communication" if physical books die, Devlin says. "Voice-over, sound-over, interaction, you could talk to the text, the text could respond. I can well imagine doing such a course, with graphics and text. "

"What we're getting is not a dumbing-down of the way communication is taking place, "he says, but a metamorphosis. Maybe there's a Post-Book Literacy in which reading plays a smaller part. The new multimedia literacy will require the quick and sure assimilation of—and response to—fast-flowing images and sounds and sensory assaults. People will be valued for multiprocessing, not focusing on one page of text after another after another.

"Some really good novels could come out of this, " says Devlin. "The capability to convey enormous ideas through images is powerful. This is Gutenberg all over again. It's going to happen. "

Images and Music

The one and only predictable feature about the future is its unpredictability. There will probably always be books as we know them. Few new media have ever completely replaced the old. But the new often sucks away the power of the old. Radio coexists with TV. But we do not crowd around the Philco, as we once did, to hear the president of the United States declare war.

We don't write on clay tablets anymore. We write on keyboards that create twinkling dots. A *Declaration of Independence* drafted by Thomas Jefferson on a word processor would be fundamentally different from the one meticulously crafted—first in his head, then with quill pen on what was then very expensive paper—more than 200 years ago.

It's a new world, all right. We'll see how brave it is. Or cowardly. I strolled into this story believing that traditional storytelling—beginning, middle, end—would endure and that the word is sacrosanct. Now, months and thousands of words later, I'm not so sure. Some of the most intriguing post-book storytelling being committed on the Web is crafted with moving images and music and an occasional sentence or two here or there.

Much of it, such as the work of Alan Dorow, co-publisher of *Journal E* in Vienna, is unwitting. Dorow has posted an online rendition of "Without

Sanctuary, "a petrifying new collection of photographs and postcards about lynching. The physical book is published by Twin Palms. Oddly enough, Dorow's Web production, using the author's voice and slides from the paper product, is more captivating and the effect more everlasting than the hardback (www. journale. com/withoutsanctuary/main. html).

Other multimedia experiments abound on the Internet. You can find those at the *E Compass* logo on the home page of *Journal E*. On the *Journal E* web site, Dorow offers visitors the chance to post their own stories or family photos. And while experiencing the"Without Sanctuary"story, readers are able to react to the horrific images. "The presentation has left me without words that can adequately express my deep innermost feelings," writes one reader/viewer.

Dorow hopes to expand the Forum aspect of other stories on the web site. He is redesigning pages to integrate the intimate and intense responses to the presentation right into the screen so that viewers all over the world will be able to respond to the text and the images and to the responses of other viewers, thereby becoming part of the story—changing and shaping and expanding and making more rich the story.

The reader becomes the storyteller. And vice versa. It's a book, I say to Dorow. "I hadn't thought about it, " he admits. But he doesn't have to think long. He gets excited at the prospects. At the peculiar and precarious spot where we are. The history of storytelling. Could be its future.

Yahoo Asks U. S. Court to Rule Against French Court

by Keith Perine, © 2000 The Industry Standard, reprinted with permission.

21 December 00–Yahoo filed a complaint Thursday in U.S. District Court in San Jose, California, aimed at sparing itself the burden of preventing one nation's Web surfers from accessing goods on its U. S. site.

The complaint seeks to derail a French judge's November 20th order that the Santa Clara, California, media company must block French surfers from auctions for Nazi material on Yahoo's American Web site. The company is asking the American court for a declaratory judgment against the French court's verdict.

"This whole attempt at jurisdiction really goes beyond reasonable limits, "says Yahoo attorney Greg Wrenn. "We're asking the U. S. court to ... give us a ruling that says it's unenforceable in the United States. "

The International League Against Racism and the Union of French Jewish Students filed suit in French court this year, arguing successfully that the auctions violate a French law barring the sale of racist materials. Judge Jean-Jacques Gomez ruled in favor of the plaintiffs, gave Yahoo three months to comply after being served with the order, and imposed a daily fine of 100, 000 French francs ($13, 948) for every day of noncompliance thereafter. Wrenn said the company hasn't yet been served with Gomez's order, but that it wanted to act before the three-month period expires and the fines start piling up.

The closely watched case is a key test of the international legal system. The plaintiffs argued successfully that the auctions violate a French law that bars the sale of racist materials. Yahoo has countered that the definition of what is racist or Nazi-oriented is subjective and could include items such as the *Diary of Anne Frank*, a young Jewish girl's memoir of hiding in Nazi-occupied Holland during World War II. More importantly, Yahoo argues that it's technically impossible to completely block French Web surfers from its U. S. site. A number of experts who testified in the French case, including WorldCom executive Vinton Cerf, share Yahoo's view.

Yahoo says Gomez's order violates the American constitutional guarantee of free expression and the Communications Decency Act's immunization of ISPs from liability for third-party content. The plaintiffs in the French case, who couldn't be reached for comment, have 20 days to respond to Thursday's U.S. court filing.

The Top 10 Privacy Stories of 2000

Following is a list of the top 10 privacy stories for the year 2000, as well as forecasts, and a partial list of source material. The analysis was done by Privacy Foundation personnel, including Executive Director Stephen Keating; Richard Smith, Chief Technology Officer; and researcher Justin Rickard. For questions, please contact Keating by email at <sk@privacyfoundation. org> or Smith by email <rms@privacyfoundation. org>. Based at the University of Denver, the Privacy Foundation is a non-profit, non-partisan organization dedicated to research on privacy issues and efforts to educate the public.

1) Workplace Surveillance Heats Up: "Employees are Toast. " Millions of employees in the U.S. and worldwide are now subject to electronic monitoring by employers—a stealthy trend fueled by relatively cheap technology (like mini-surveillance cameras and keystroke monitoring software) and employer paranoia about unauthorized use of email and the Internet by employees. Two-thirds of major American firms now do some type of in-house electronic surveillance, and 27 percent of all firms surveyed monitor email, according to the American Management Association. Dozens of companies including Xerox, Dow Chemical, and The New York Times (and government agencies including the Central Intelligence Agency) fired and disciplined employees in 2000 because of alleged bad behavior in using the companies' communications networks. "Employees are toast, "one chief privacy officer told the Privacy Foundation, noting that employers have substantial economic, legal—and now, technical—clout over employees in this area.

LOOK FOR: "Workplace privacy rights" to become a negotiated fringe benefit, with New Economy companies leading the way.

SOURCES: More U. S. Firms Checking Email, American Management Association, 4/14/00; Dow Chemical Fires 24 [and disciplines 235] in Email Controversy, CNET, 9/15/00; Big Boss is Watching, *Yahoo Internet Life*, 10/00; Narcware, *Forbes*, 5/1/00

2) Patient Privacy Rules: Widespread public concerns about disclosing personal medical information to doctors and hospitals—for fear the records will end up in the hands of databanks, insurance companies, and prospective employers—led to new federal rules proposed in late December. Six years in the making, the revisions to the Health Insurance Portability and Accountability Act (HIPAA) will oblige doctors to seek patient consent to use medical records in routine matters, and give patients greater access to their own records. The 1, 553 pages of new patient privacy rules, proposed by the U.S. Department of Health and Human Services, will take two years and billions of dollars in private sector costs to implement. In February, President Clinton signed an executive order prohibiting the use of genetic information in federal employment practices. The genetic screening issue is still unsettled in the private sector.

LOOK FOR: Changes and delays in the proposed patient privacy rules, as health care lobbyists target Congress and the Bush Administration.

SOURCES: Clinton's Health Privacy Rules Await Congress' Perusal, *Associated Press,* 12/21/00; $17. 6 Billion over 10Years to Protect Medical Files, *Boston Globe,* 12/21/00; President to Bar Genetic Discrimination, CNN, 2/8/00.

3) Carnivore Attacked: Acknowledgment by the FBI of an email surveillance technology named Carnivore set off alarm bells among privacy advocates, who called for more public disclosures about Carnivore's capabilities, and restraint in its use. The FBI's claim that Carnivore had only been used 25 times, primarily in national security cases, did little to allay concerns. Carnivore operates under existing wiretap laws—laws that have been broadened through court orders to allow an estimated two million phone conversations to be monitored annually by law enforcement. A technical review of Carnivore, done by an Illinois institute that was handpicked by the U.S. Justice Department, was seen by critics as a whitewash. The broad fear is that the FBI could use Carnivore to tap the data pipes of Internet Service Providers and cast a wide net for emails, not just those sent and received by the targets of specific investigations.

LOOK FOR: Increased scrutiny of law enforcement surveillance technologies by civil libertarian groups and activists.

SOURCES: Carnivore Eats Your Privacy, *Wired News,* 7/11/00; Critics Blast FBI's First Release of Carnivore, CNET, 10/2/00; EPIC's Carnivore Archive, Electronic Privacy Information Center.

4) DoubleClick Unplugged: The merger of database marketer Abacus Direct with online ad company DoubleClick hit front pages and sparked a federal investigation in January 2000 when it was revealed that the company had compiled profiles of 100, 000 online users—without their knowledge—and intended to sell them. The resulting outcry stymied the plan, which was shelved later in the year as DoubleClick and combative chairman Kevin O'Connor endured the steep decline among Internet ad stocks. In the press and in the public square, the name "DoubleClick" became synonymous with Internet privacy breaches. Nonetheless, the matching of consumers' web-surfing habits with traditional "offline" personal data

(name, address, income) remains a lucrative lure for marketers. Avenue A and MatchLogic were two online marketers hit with proposed class-action lawsuits alleging that they track customers without permission.

LOOK FOR: The biggest online/offline direct marketing experiment in history: the operational merger of AOL and Time Warner.

SOURCES: DoubleClick Sued for Privacy Violations, CNN, 1/28/00; DoubleClick Postpones Data-Merging Plan, CNET, 3/2/00; Kevin O'Connor Gives People the Willies, eCompany, 10/00; Online Ad Companies Hit With Privacy Suits, CNET, 9/22/00.

5) Rise of the CPO: Microsoft, IBM, American Express, and dozens of other firms, ranging from the Fortune 500 to start-up e-commerce firms, created and filled a new executive position called Chief Privacy Officer. With no clear career path to the job, the first CPOs have backgrounds ranging from law to marketing. Job duties are best described as Chief Flak Catcher, heavy on public relations, with fledgling attempts to coordinate their company's strategic, legal, and technical teams to protect consumers—or at least enforce the company's own posted privacy policies. At the federal level, law professor Peter Swire wrapped up his two-year tenure as the nation's first chief privacy counselor to the president.

LOOK FOR: Certification programs for CPOs, as exemplified by Alan Westin's Privacy and American Business initiative, evolving into graduate classes and degree programs at Universities.

SOURCES: CPOs Make Boardroom Debut, *Infoworld* 12/15/00; IBM Appoints Chief Privacy Officer, *Computerworld*, 11/29/00; *Privacy and American Business*.

6) Amazon. com Surveys the Data Mine: Amazon. com, a bellwether of the Internet economy with 20 million customers, changed its privacy policy in September to warn that customer data will be considered a marketable asset if the company is ever acquired, or sells off operations. The move, made as Amazon faced scrutiny from Wall Street about its financial prospects, underscored criticisms about the way dot-com companies revise privacy policies to capitalize on customer data. Several other high-profile cases made the news in 2000. A company called Toysmart. com went bankrupt and its customer database went up for auction—until the Federal Trade Commission blocked the deal.

LOOK FOR: More civil lawsuits against Internet retailers for alleged violations of privacy policies—and Congressional action in 2001.

SOURCES: Privacy Watchdogs Blast Amazon, *Ecommerce Times*, 9/14/00; Privacy Groups Call Amazon Policy "Deceptive, " CNET, 12/4/00; Toysmart. com: Back in the Middle Again, *The Standard*, 8/18/00.

7) The Urge to Merge Financial Information: The Gramm-Leach-Bliley Act went into effect in November, permitting banks, brokerages, and insurance companies under the same roof to share customer information—and potentially share it with third parties—provided that that they notify customers how confidential information will be used and allow them to opt-out. An extension passed earlier in the year gives financial institutions until July 2001 to comply with the new rules. Privacy advocates complain

that the act has loopholes and does little to protect online transfer of information.

LOOK FOR: Consumer complaints about misuse of personal data by financial institutions.

SOURCES: Extension Granted on Financial-Data Privacy Law, *The Standard*, 5/9/00; Sharing Secrets, *The Standard*, 5/8/00; Gramm-Leach-Bliley Key Provisions, Securities Industry Association.

8) Wireless Privacy Battles Loom: New mandates for cell phone Emergency 911 service raised a host of questions about wireless privacy in 2000—and appear poised to create a new wireless advertising industry. With tens of millions of cell phones in use, the U.S. government is mandating the deployment of location-sensing E911 service for cell phones in 2001. Just as telemarketers exploited the ubiquity of wireline phone service, there are a wide range of data-service providers and marketers eager to piggyback on the new wireless technology to send text ads and discount offers to cell phone subscribers.

LOOK FOR: Technology companies and federal regulators warding off wireless spam by proposing an industry-wide "opt-in" solution for consumers to receive text messages.

SOURCES: Talking About Wireless Privacy, *The Standard*, 12/18/00; Richard Smith's Tipsheet on E911, Privacy Foundation; FCC Press Releases on E911, Federal Communications Commision.

9) Microsoft Crumbles on Cookie-Blocking: In the summer, Microsoft released a software patch for Internet Explorer that would allow a computer user to automatically block third-party cookies, which are small software files set on computer hard drives by Internet advertisers. Facing grumbles from the online advertising community, Microsoft backed off the patch, and instead will support the P3P (Platform for Privacy Preferences) standard in the upcoming Internet Explorer 6. 0. P3P is a privacy dial that will allow users to set privacy preferences for sites while web surfing. Earlier in the year revelations that the National Drug Control Policy Office's Anti Drug website placed "cookies" on user's computers led to an executive order banning cookies on federal websites.

SOURCES: Microsoft Offers Tracking Alert for IE 5. 5, CNET, 7/20/00; Cookie Patch Released for I. E. 5. 5, CNET, 8/31/00; Microsoft Looks for Consensus on Security, *ZDnet*, 12/7/00; Memo on Federal Website Privacy Practices, 6/22/00.

10) A New Kind of Public Record: The emails subpoenaed from Microsoft during its federal antitrust trial, and the email traffic to and from Florida Governor Jeb Bush sought by the media during the 2000 presidential election controversy, are just the beginning. In a variety of cases, computer server logs of government agencies and schools were sought by the media, and by individuals, as public records. Among the incidents: a county prosecutor's secretary, fired in Washington state, had her email traffic disclosed to the media; in suburban Indianapolis, a school superintendent who resigned had his alleged web-surfing activities published in the local newspaper.

LOOK FOR: Fishing expeditions by the media, political opponents, and activist citizens, seeking email and computer server logs through public open record law requests.

SOURCES: Superintendent Who Resigned Had Viewed Sexually Explicit Material on School Laptop Computer, Topics. com, 10/27/00; Media Examining Jeb Bush's E-Mails, *About*, 11/30/00.

Verizon to Face Tumor Suits?

LONDON, 28 December 2000—Mobile phone companies are facing fresh legal action from brain tumor victims in the United States, a newspaper reported on Thursday.

Britain's *The Times* said Peter Angelos, a U. S. lawyer who recently helped win $4. 2 billion in damages from the tobacco industry, was planning to launch 10 claims against handset manufacturers, mobile network operators, and fixed-line phone companies. Verizon Wireless, the largest U. S. mobile operator, will be named in nearly all of the actions, the newspaper said.

The news comes amid continued concern among some mobile phone users that radiation from handsets could cause brain tumors, despite research that has failed to find any link. Britain's Vodafone Group Plc, which owns 45 percent of Verizon, said UK government-sponsored research published this year gave mobile phones a clean bill of health.

Company spokesman Mike Caldwell said he did not know of any legal cases that named Vodafone directly, but it would defend itself very vigorously if necessary. "The mobile phone industry is not the tobacco industry, " he told BBC Radio.

A Maryland neurologist filed an $800 million lawsuit against handset maker Motorola Inc. in August as well as eight other telecommunications companies and organizations, claiming that his use of cell phones caused a malignant brain tumor.

But there is no irrefutable medical evidence that mobile phones cause brain tumors or other medical problems. John Trotter, a partner specializing in product liability at London law firm Lovells, said such cases needed an expert willing to say there was a possibility of a link. The U.S. lawyers would also be hoping that a court would grant them access to mobile companies' documents. "They may be hoping that discovery of documents would turn up something showing there was some sort of knowledge (of possible harm) among the product manufacturers, "Trotter said.

A U.S. study published this month concluded there did not appear to be any link, though it said more research was needed into the impact of long-term use of mobiles. The study by the American Health Foundation was funded in part by a research group established by the cellular telephone industry, which put more than $28 million into a blind escrow account for the group to finance research.

Angelos, who fought the tobacco industry in Maryland, plans to launch two claims against the mobile companies before March, and the remaining seven or eight within a year, *The Times* said. They will be launched initially in California, Kentucky, and Maryland.

"If these companies knew about the dangers of cell phone radiation they should be punished and they should be punished dearly—not only for what they did to the public, but for the billions of pounds of profits they made, "John Pica, an attorney at Angelos's law firm, told the Times.

The report hit Vodafone shares, which were 1. 8 percent weaker at 233. 25 pence at 1200 GMT.

Christian Maher, telecoms analyst at Investec Henderson Crosthwaite Securities, doubted the story would hurt the sector much. "Drawing parallels with the tobacco industry is a bit far fetched, "he said.

Beginners as a Scarce Resource

Special to KT&P *by Philip Agre, Department of Information Studies, UCLA; <http://dlis. gseis. ucla. edu/pagre/>; pagre@ucla. edu. > 31 December 00.*

The endangered species that most concerns me is people who have never used computers. We need them. Those of us who know how to use computers have been corrupted; we have accommodated ourselves to bad interface design, conceptual confusion, primitive operating systems, and ludicrous security and trust models. Why have we put up with it? Well, first we assumed that it was our own fault, and then we forgot about it. In doing so, we have stunted our imaginations. We are in trouble, and our only hope lies in the few remaining members of our species who are still unaffected.

It is true: people who have never used computers are the last flickering flame of humanity. We must sit at their feet and learn what they have to teach us. Whenever we release a new version of our gadgets, we should respectfully ask a few of these wise people to sacrifice their minds by learning how to use them. And as they"learn, "we should minutely document each step. Their every "confusion, " their every "mistake, " is a precious datum.

As my own small contribution to rebuilding our civilization, I want to sketch a few of the phenomena that I have observed when, forgive me, I have taught people how to use computers. I will start with something that happens on the Macintosh. The Macintosh, like every computer, is a language machine. But new users face a chicken-and-egg problem: they do not know how to use the computer, so they need to ask questions; but they cannot ask questions without knowing what the words mean; and the only way to learn what the words mean is by using the computer. Language is about distinctions, and the Macintosh interface is governed by several distinctions that sound the same to beginners but are importantly different. They are: (1) an application being open or closed, (2) a window being open or closed, (3) a window being selected or unselected, and (4)

a window being visible or hidden. Granted, nobody with any sense tells beginners about (4). But that leaves three importantly different distinctions.

The difference between (1) and (2) is built on another, more basic distinction—an application versus a window. One of the hardest things for new Macintosh users to understand is that an application can be open, even though it does not have any open windows. Almost as hard is the idea, built on the difference among all three of the distinctions, that you can select a different window without closing the one that is currently selected (and maybe losing all of your work). What makes this hard is that the first thing they were shown is how to start an application—an action that is only relevant when they are starting work, but which they take as the normal way of doing everything.

So beginners often get into the following loop: they start one application, do some work in the window that gets opened, close that window, start a different application, do some more work in that new window, close that window, try to start the first application again, and get befuddled when no window opens. When they ask for help, their desktop is blank: it has no open windows. They do not have the language to explain how it got that way, and the helper starts talking technical language that they do not understand.

To make matters worse, the Macintosh is actually inconsistent: some applications allow zero windows to be open, while others automatically close themselves when you close their open window, thus conflating (1) and (2). The beginner in this case has been following a perfectly rational beginner-logic, which is based not on concepts and distinctions but on things they can see and do. They reason, "to get it to do this, I do that." The distinction between an application and a window is a hard thing to see. That distinction is only visible if you have multiple windows open in the same application, which beginners rarely do, or if you actively pull down the menu in the upper right hand corner of the screen, whose meaning is far too abstract for beginners to comprehend.

Here is another thing that beginners do. They are sitting there at the keyboard, one hand on the mouse, and you are standing next to them, "helping" them. Either they have gotten themselves into trouble, or they are just learning a new feature of the machine. In either case, society has defined the situation, quite perversely, in terms of your great authority and their shameful cluelessness. You point at the screen. You say "see that box?" And before you can say another word, they click on something in the general vicinity of the box. You say "no." And before you can say another word, they click on something else in the general vicinity of the box. This cycle repeats three or four times, with both of you becoming increasingly agitated as they destroy everything in sight. They are hearing your "no, no, no, no" as a God-like rebuke, and you are watching complete irrationality that you cannot seem to stop.

The problem, evidently, is that the feeling of not-knowing-what-to-do is intolerable. They think they ought to know what to do, so they guess.

And I am not just talking about weak-minded people who lack confidence in other areas of their lives; something about the social construction of computers incapacitates even powerful human beings. What is worse, in many people this great fear of not-knowing-what-to-do is combined with an equally great fear of breaking something. (Although I have not seen this myself, several people have told me stories about friends or family members who encountered an error message such as "illegal operation" and thought they were going to jail.) The resulting mental state must really be something.

The distressing sense of having broken something is something that I can vaguely recall myself. The first program that I ever wrote, circa 1974, was a BASIC routine to print out the prime numbers. It printed "2, " then set a variable to 3 and looped, adding 2 each time until it became equal to 100, which of course did not happen. I was pleased as the 110 baud teletype with its all-caps print ball and scroll of yellow paper printed out the prime numbers up to 97, and then I was horrified when it printed 101 and kept going. The machine clattered away there in the terminal room, printing prime numbers on beyond 200 and 300. I did not know how to stop it. I went to the guy at the help desk, who for some reason lacked my sense of urgency about the problem. He came over, showed me the obscure Univac code to stop the machine (break @@X CIO return), and walked away. I was certain that I had used up all $100 in my computer account, and I started plotting how I was going to pass the course, given that I was not going to be able to use the computer any more. So we can remember these things to some degree. But I am sure I cannot recover back the full horror of the situation, much less adjust my methods of teaching to take account of similar horrors in the experience of others.

Here is another pattern, one that starts to put beginnerdom in context. Oftentimes a beginner—someone who swears that machines spontaneously break when she walks into the room—will be married to a gadget freak—someone who actually likes it when machines do not quite work. This happens a lot. Now, beginners need stability. Because of the nature of beginner logic—"if I do this, it does that"—the beginner does not know what the behavior of the machine depends on. So if the computing environment changes—configurations, versions, switches, wires, phone lines, whatever—then the beginner's empirical regularities fall apart. The gadget freak identifies with the inside of the machine and cannot see the surface of it; the beginner knows only the surface of the machine and regards the inside as terra incognita. That is because the gadget freak knows all of the distinctions that the machine depends on while the beginner does not. The two of them, freak and phobe, can live in this equilibrium situation forever, with the freak constantly undermining the stable conditions that the beginner would need in order to learn. The situation of the beginner is explicable, finally, in terms of the largest of technical contexts: the endless clashing of gears among standards. I tell students that computers "almost work, "because they are guaranteed to run up against some stupid incompatibility that the rest of us have long since learned to work around. The

most common of these stupid incompatibilities concern character sets. Think of what happens when you copy and paste a Word document into any of a number of other applications with different ideas about what a double-quote is, prepare an HTML Web page in Word, or copy a block of text from a Web page that happens to include an apostrophe, for example from msnbc. com, and then paste it into an Emacs buffer. Granted, these situations provide professors with opportunities to explain concepts like the competitive pressures for and against compatibility. But I have never met a student who could care less about this topic when they are trying to get their first Web page working. Those are a few of the phenomena that provide us with faint clues about the blessed world of timeless wisdom in which beginners live. Other clues can be found in beginners' attempts to read computer manuals, although that is an area where most of us can recover some of the primal helplessness that is the beginner's lot. I believe that much more research is required in this area. It is not just a matter of incremental fixes in the basic windows-and-mouse interface. We need to be open to the possibility that computers as we know them today embody ideas about people's lives that are shallow, muddled, and immoral. We will learn this, if at all, from the"confusions"and"mistakes"of beginners.

Blocking in Libraries

FOR IMMEDIATE RELEASE: ACLU, 18 December 2000: WASHINGTON

The American Civil Liberties Union said that it will soon launch a legal challenge to legislation adopted by Congress last week that would mandate the use of blocking software on computers in public libraries. "This is the first time since the development of the local, free public library in the 19th century that the federal government has sought to require censorship in every single town and hamlet in America, "said Chris Hansen, ACLU Senior Staff Attorney. "More than 100 years of local control of libraries and the strong tradition of allowing adults to decide for themselves what they want to read is being casually set aside."

The measure, which was included in the year's final spending bill that was approved on Friday, was introduced by Senator John McCain, R-AZ. It would require libraries and public schools to adopt acceptable use policies accompanied by a"safety technology"—i. e. , blocking software—that would block access to materials deemed"harmful to minors."

Earlier this year, an 18-member commission appointed by Congress rejected the idea of mandating the use of blocking software, which is notoriously clumsy and inevitably restricts access to valuable, protected speech. A wide spectrum of organizations have opposed blocking software mandates, including the American Library Association, the Society of Professional Journalists, the conservative Free Congress Foundation, state chapters of the Eagle Forum, and the American Family Association.

"There was an Alice in Wonderland quality to this debate, "said Marvin Johnson, a Legislative Counsel with the ACLU's Washington National

Office. "With its vote, Congress rejected the advice it asked for from the panel it appointed. "

The ACLU said that because blocking programs can be so restrictive and overreaching, they significantly reduce the amount and diversity of speech and information available to individuals. For example, House Majority Leader Richard "Dick" Armey, a staunch proponent of Internet blocking, found his own web site censored, because it contains the word "dick. "And a recent report by Peacefire found that several dozen websites of candidates for Congress had been blocked by censorware.

Over the last five years, the ACLU has successfully challenged a wide range of government efforts to censor the Internet, including the landmark Supreme Court ruling in Reno v. ACLU and, more specifically, in Mainstream Loudoun vs. Board of Trustees of the Loudoun County Library, where a federal district court found mandatory use of blocking software unconstitutional in April 1998.

Top 12 Most Luddite Films of All Time

PRESS RELEASE: From THE LUDDITE READER <http://www. ludditereader. com>

But why these fifteen twelve great films? Here's why:

#1 *Alphaville* (Godard, 1965)—The only luddish film in which the protagonist actually says, "Technology, hah!—keep it!" Lemmy Caution (Eddie Constantine) establishes the archetype of the Luddite detective (spy/assassin; agent 003) in this wordy classic that critic Carlos Clarens called "Science Poetry. " In another galaxy (a Ford Galaxy, if you must know) Caution enters Alphaville, a technocracy ruled by the Alpha-60 computer, to retrieve or kill its creator, a Dr. Nosferatu (formerly Dr. von Braun). Clarens described the Alpha-60 this way: "a giant electronic computer that processes, classifies, and programs the life data of its residents. This control has brought about a cult of absolute logical behavior and those who do not conform to it (i.e. , those who show some emotion) are ruthlessly destroyed by execution during staged acquacades, or by submitting to the persuasion to commit suicide. To abet this law and order of the machine, words are kept in place by changing meaning, some being suppressed altogether while new editions of the bible/dictionary are issued daily. " Caution kills Nosferatu, causes Alpha-60 to autodestruct by feeding it poetry, and rescues Nosferatu's daughter (Mrs. Godard). It's a film both pretentious and funny, more amusing to talk about afterward than it is to watch.

#2 *Metropolis* (Fritz Lang, 1926) The film that established the beauty of robots as well as the question of who can remain (and know they are assuredly) "real" in a culture which is replacing humans with machines. It's all here: dehumanization of work; polarization of society; unionism; marianism; robotics; and art direction that has influenced science fiction films ever since.

#3 Tie: *A Nous La Liberté* (Rene Clair, 1931) and *Modern Times* (Charlie Chaplin, 1936)—Two benchmark films about working in factories. *A Nous*

is the original, depicting the boss as a thief (literally), fascist factories, and the prison-like tyranny of factory worklife. Chaplin lifted this concept for the most memorable bits in his last tramp film, *Modern Times*, which played on the haplessness of the factory worker as demonstrated by the Tramp. Chaplin comments on the Taylorism movement for worker efficiency in both the speedy assembly line scene and the automatic worker feeding machine scene. Of the two films, *Modern Times* has become more emblematic, perhaps because stills of Charlie caught in the gears of a giant machine have become one of luddism's most widely seen icons.

#4 Tie: *Frankenstein* (James Whale, 1931) and *Young Frankenstein*—The original *Frankenstein* has become a genre unto itself. "It's alive!" It is the Ur-film [after *Metropolis*] of modern mad science. It remains the prime example of the message that things you make may turn on you. It is also, with Metropolis, one of a only a few examples of the expressionist theatrical style on film. No other film has ever spawned as many derivative descendents, including such screen gems as *Jesse James Meets Frankenstein's Daughter* (1966). Mel Brook's *Young Frankenstein* used the original props and has one genuinely remarkable scene which pokes fun at the marketing of the acceptability of science and technology: Dr. Vicktor Frankenstein puts on a show with his monster and they sing and dance a duet of "Putting On The Ritz. "The townspeople are not fooled. What monsters are we creating?

#5 *Fahrenheit 451* (Francois Truffaut, 1965) In the future, most people live in fireproof houses and the job of firemen is to burn books for the state, to protect the populace from ideas that might make them unhappy. *Fahrenheit 451* is Ray Bradbury's parable of how technology destroys heritage and self-knowledge, and how television anesthetizes the populace. The underlying message of this film is that you don't have to physically burn books (the title refers to the temperature at which paper burns) to "burn" books. It is also the canonical film about censorship. The book is probably the most widely assigned luddite text in U. S. high schools. This is probably the most likely luddite film to be remade, although it will be difficult to find someone who does angst better than the late Oskar Werner.

#6 *Blade Runner* (Ridley Scott, 1982) If we can make real-looking androids, how can we be sure who is real, or even if we ourselves are real? And if we can create an android (replicants, they are called here) that looks like Daryl Hannah, why can't we make future Los Angeles look like someplace you might want to live? Most importantly: if we create a near-human consciousness, what rights do we endow it with? This film is Phillip K. Dick (from his novel *Do Androids Dream of Electronic Sheep?*) made technoir through the Hollywood blender. Important as much for its art direction as for its message.

#7 *Terminator* (James Cameron, 1984) As if you didn't have enough to worry about . . . The evil future is sending cyborgs back to crush the prenatal spark of humanity [by killing the not-yet-pregnant mother-to-be of a hero of the future (the leader of the rebel forces, no less) who hasn't been born yet—got that?]. Arnold Schwartzenegger gives the performance he

was born to play: a cyborg who says, flatly, "I'll be Baaaaack!" And keeps his promise. Message: in the future, when machines get the upper hand, we become the cockroaches.

#8 *The Gods Must Be Crazy* (Jamie Uys, 1984) Our trash is still pretty advanced technology in much of the world. This film is the apotheosis of the returnable bottle. A noble savage encounters less than noble civilized folks on his way to the edge of the earth to dispose of some disruptive technology, a soda bottle thrown out of an airplane and into the desert habitat of his tribe. The message? Don't assume that our technology is good for everybody. Currently inexcusably out of print.

#9 *Brazil* (Terry Gilliam, 1985) In the future, the machine that will be most dangerous will continue to be the bureaucracy. In a bureaucracy no one admits to hearing you scream. Brazil presents a bleak dystopian future where a literal (smashed) bug causes the film's hero big trouble. Robert DeNiro plays the kind of handyman that we are all going to need in the future.

#10 *Robocop* (Paul Verhoeven, 1987) Luddite paranoia on film: the threat of high-tech outsourcing. You say your job is killing you? This is worse. Your job has killed you, and you come back as a cyborg owned by the evil outsourcing company that made your job hell in the first place, and you are tormented by UHF reception problems in your memories of your former family. A really well done satire of cold-blooded corporate R&D run amok, comic book heros, and action films.

#11 *They Live* (John Carpenter, 1988) Ever get that feeling, at about 10 in the morning, that maybe the world is run by a bunch of ugly aliens in some kind of Amway scheme, and that they are keeping you compliant with subliminal messages everywhere such as "consume, "" Don't question authority, " and "sleep, " that you could see if only you had these special sunglasses? Beyond luddite paranoia and into the bounds of schizophrenia, this is the primo educational film about subliminal messaging and may even be Noam Chomsky's favorite science fiction film.

#12 *Gattaca* (Andrew M. Niccol, 1997) The database as enemy. If your company has a DNA code instead of a dress code, "casual friday" can be murder. Great technoir film about the future uses of genotyping. In the future, faking your résumé to get a great job may include faking your DNA. Interesting and gross title sequence (once you understand what you are seeing). Gore Vidal as the hero's boss (!) "Jerome, "the hero, wants to fly in space, with the Gattaca Corporation. But he is naturally conceived and born, not genetically engineered to be perfect, as Gattaca requires all employees to be. So he can clean the toilets with Ernest Borgnine (Marty!) or find some way to fake his way in. A murder investigation complicates it all. Set in Frank Lloyd Wright's last design, completed posthumously, the Marin Civic Center. Medical histories and treatment databases already limit employment for many (cancer survivors particularly). This film provides an extreme example of how the uses of such knowledge might become, *ab ovo*, even more controlling in the future.

More: And now, our Missed Congeniality selection: *Jonah Who Will Be 25 In The Year 2000* (Alaine Tanner, 1976) This is the best film ever made

about people resisting development (and about the failure of resistance). Luddism is really not about machines, it is about considering humanity and community before technology and development, without measure against the standards of profit, efficiency, and markets. This film is about a group of people who gather on a farm and resist local developers. It has one scene that is unique in the history of film and that will never be equaled in Hollywood: the characters gather around a dinner table and sing a song to the unborn child Jonah, in the hope of his future. Since this film has been made their hopes seem to have been misplaced, and at least one reviewer has speculated that Jonah has become an MBA.

Broadband Broadside

From "Reason Express" (27 December 2000), written by Jeff Taylor drawing on the resources of the Reason *magazine editorial staff. Visit www. reason. com. Comments to <jtaylor@reason. com>. Reprinted with permission.*

When will it end? When every homeroom has its own communication satellite in orbit?

Schools without high-end broadband connections Internet are doomed to offer second-rate educations to kids. Or so says a bipartisan panel called the Education Commission.

"I don't think I've ever been involved in anything in 22 years of government more intense and comprehensive than this work, "said Rep. Johnny Isakson, R-Ga., the commission's vice chairman. (That should scare you right away.) Only Net connections capable of full motion video can educate young minds. That and heaps more spending on teachers so they know what to do with a full-bore TV studio in each classroom. (Surprise.)

"The legacy of the one-room schoolhouse is holding back the one-world classroom, "said Sen. Bob Kerrey, the Nebraska Democrat who was chairman of the commission and evidently speaks in strange, incomprehensible metaphors. According to the commission's report, schools spend only $200 per student on technology, compared with $5, 500 per worker for a typical corporation. Incredibly the report found that a startling 90 percent of schools and 71 percent of classrooms are now connected to the Internet. Even if it were only old Lynx text-only browsers and 14. 4 modems, that would mean nearly free access to an incredibly array of information. No TV production, though, so it must be useless.

Besides, there is no real evidence that even having stand-alone computers in classrooms is a net gain for needy kids. Certainly little can be accomplished when the core skill set one needs to operate a complex machine—reading comprehension, logical problem-solving, and basic math—is not in place. It is foolish and reckless in the extreme for the commission to extrapolate from college-level or workplace uses of computer networks to some grade school need for big pipe PCs.

But don't expect that to stop broadband ribbon cutting ceremonies at an elementary school near you.

Poland Wants SORM-2 Too

20 December 2000, from <kravietz@ceti. pl>, CETI internet services, Krakow.

Hello! In case you didn't know yet. . . Yesterday the Polish Ministry for Internal Affairs and Administration (MSWiA) sent a draft of new wiretapping laws to the Polish Chamber of Information Technology and Telecommunications. According to the draft all operators (PSTN, mobile, ISP, IAP, ICP) are required to install equipment allowing the law enforcement agencies unattended capturing of data from their networks. The draft actually specifies what the equipment is expected to do. Almost no technical details were given, but as I guess this would mean buying and installing a black box behind every border router and firewall, and providing a leased line to the spook's location.

The operator is also expected to provide an access to the plaintext, if they encrypt any data flowing through their network for their own purposes or on behalf of the customer. This would probably mean breaking all security provided by internally used IPSec and requirement to capture the data sent outside via secure VPNs before they actually get encrypted. I expect that introducing the law would simply kill many of the smaller operators, because they can not afford to buy and install the equipment, which will be then used once in several years or never. This is because there are several hundred Internet providers in Poland, but most of them are small, private businesses with several dozen customers.

There are also obvious risks associated with installing untrusted third party equipment in your core network, behind all firewalls and with access to all your data. The data would be captured at the spooks' discretion and no one would now what is actually captured and when. Polish police and special forces get much less public attention and scrutiny than in, say, the U. S. , so this would allow wide range of potential abuses like economic or political espionage.

As you can see, this is a lightweight version of British RIP and very similar to Russian SORM-2. Currently it is widely discussed here and the draft is waiting for the Chamber to express their opinion. No English version of the draft is available and I can not translate the juristic language, but all the important details have been described. Pawe Krawczyk <http:// ceti. pl/~kravietz/>.

Analysis of the Marketing Provisions of the HIPAA Privacy Rules

From Robert Gellman <rgellman@cais. com>, privacy and information policy consultant, 2 January 2001.

In debates over health privacy proposals, it was often said that video rental records had better privacy protection than medical records. Unfortunately, now that the final HIPAA privacy rules have been issued, it is still true that video rental records have better protections from marketing uses and disclosures than medical records.

Highlights

- The rule contains the most sweeping authorization for the use of patient information for marketing proposed in the last twenty years. The marketing rule was not in the draft rule published for comment.
- The rule expressly authorizes disclosures for marketing without patient consent. For example, information about a woman's pregnancy can be used by health providers or plans for marketing and disclosed to others for marketing. A woman could only object after the fact.
- All medical information held by providers and payers can be used by them for marketing without affirmative patient consent or without the opportunity to opt-out in advance.
- All protected health information can be disclosed for marketing. The rule does not protect information about diagnoses, prescriptions, pregnancy, sexually transmitted diseases, mental health treatments, or confidential communications. Marketing to minors or using protected health information about minors is permitted.
- Patients have the right to opt-out of marketing only after receiving a marketing communication. If a family of four has a dozen doctors, clinics, health plans, hospitals, laboratories, pharmacies, pharmacy benefit managers, etc., the family may have to write 48 separate letters to opt-out of each organization's marketing activities.
- Patients do not have to be offered toll-free numbers to opt-out, the ability to opt-out online, or postpaid opt-out letters. A covered entity could require an individual to send a separate snail mail letter to opt out. Nothing in the rule says that a covered entity cannot charge patients who want to opt-out.
- HHS has defended the marketing rule by saying that it allows physicians to make recommendations to patients. However, the definition of marketing expressly excludes these recommendations. Therefore, a rule allowing broad uses and disclosures for marketing is not necessary to permit physicians to make treatment recommendations.

Quote From The Preamble

Any doubts about the sweeping scope of the marketing rule is put to rest by these words from the preamble to the rule (on page 82771 of the Federal Register notice):

> However, the final rule permits an alternative arrangement: the covered entity can engage in health-related marketing on behalf of a third party, presumably for a fee. Moreover, the covered entity could retain another party, through a business associate relationship, to conduct the actual health-related marketing, such as mailings or telemarketing, under the covered entity's name.

This language says expressly that marketing is permissible for a fee, that marketing is permissible on behalf of third parties, and that telemarketing is permissible.

Details Of The Hipaa Marketing Rule

A covered entity does not need patient authorization if it uses or discloses protected health information for marketing under any of these conditions:

1. . . . in a face-to-face encounter with an individual. The encounter does not have to involve a provider. For example, a marketer could knock on the door of a pregnant woman and try to sell her a product or service. Face to face marketing using medical information might also be done be for cars, vacations, magazines, or other products or services unrelated to health.
2. . . . if the marketing concerns products or services of nominal value. For example, a hospital might use or disclose a list of patients with a particular diagnosis if the purpose were to distribute a 25-cents off coupon for a product that costs a dollar. The marketing could be for products or services unrelated to health.
3. . . . if the marketing concerns the health-related products and services of the covered entity or of a third party and the communication meets the applicable conditions (see later).

Conditions For Health-related Marketing

The conditions that apply to the last category of marketing offer some limited protections. The communication must identify the covered entity as the party making the communications. If the information were given to a business associate, the business associate might have to say that it was the covered entity. This may actually hide the fact that the information had been shared with another entity. Or the information might be presented in another way ("Now that you are pregnant, your doctor asked us to tell you about our diaper service. ") Because any covered entity can use data for marketing, the source of the data might be a laboratory or other indirect provider that a patient would not even recognize. The communication must prominently disclose whether the covered entity was being paid directly or indirectly. This can be done easily. ("The XYZ diaper company is paying us to mail this offer to you, but we think the offer is so wonderful that we would have done it anyway had we thought of it first ourselves.")

The third condition is that the patient must be given an opportunity to opt-out of receiving future communications. There are several problems here. An opt-out is not required for newsletters or general communications distributed to a broad cross section of individuals. However, it is not clear what a broad cross-section means. A hospital being paid to send a promotion for a drug manufacturer could avoid offering an opt-out if the communication were to a broad enough group. For example, a promotion for a drug of interest only to diabetics would not have to offer an opt-out if the promotion went to all hospital patients.

Opt-out Shortcomings

It is not clear what is meant by opt-out. Would a patient opting out of a promotion for a diabetes drug also have to opt-out separately of promo-

tions for heart, kidney, and cancer drugs or promotions for other third parties? Would opt-outs cover institutions, business associates, indirect providers and hybrid entities or would separate opt-outs be required?

The rule does not specify an opt-out procedure. An 800-number for opt-outs is not required. No online opt-out is required. No postpaid opt-out card/letter is required. Patients could be required to write a snail mail letter for each provider, health plan, insurance company, pharmacy, pharmacy benefit manager, laboratory, x-ray facility, clinic, and other facility. ("If you want to opt-out of future promotions, write a letter containing your name, address, health plan, SSN, medical record number, the names of your doctors at our hospital, the clinics you attend, and send it to us at . . . .")

Perhaps the worst opt-out feature is that the rule does not provide for opt-in or even advance opt-out. An individual acquires the right to opt-out only after receiving a marketing communication.

Rules For Marketing Based On Health Status

Other conditions attach if a covered entity uses or discloses protected health information to target communications based on health status or condition. The entity must determine that the product is beneficial to the targeted individuals. The rule does not require a determination by a treating physician or health professional. An administrator can presumably make the determination. Any study that shows any potential benefit, no matter how small or questionable might be enough to justify a determination. For example, the rule might permit the marketing of vacation packages to patients with a variety of ailments or as a preventative measure.

A second condition is that the communication must explain why the individual has been targeted and why the product or service would be beneficial.

This Condition Actually Runs The Risk Of Further Invading The Privacy Of Marketing Subjects

Imagine marketing condoms to a teenager who was treated for syphilis. The promotion would have to say that the teenager was selected because s/he was sexually active and condoms will prevent a recurrence of the disease. What happens if the teenager's parent opens the letter first? A woman who had an abortion that her family did not know about might receive a solicitation for family planning services that referenced her abortion.

A third condition is that a covered entity must make reasonable efforts to ensure that opt-outs will be honored. This condition is useful, but the rule does not require anyone to make reasonable efforts to provide easy, free, and alternative opt-out methods. The rule does not say anywhere that a patient must be able to opt-out without paying a fee.

The rule suggests that information cannot be disclosed to a third party without consent. That is true, but it is misleading. A disclosure for marketing can be made to a business associate, and anyone can become a

business associate by signing a contract with a covered entity. Patient records can be disclosed, for example, to a telemarketing firm if the firm becomes a business associate. The telemarketer can then market any health-related product or service, including a product or service of a company that is not a business associate.

The general privacy rules attach to business associates who receive disclosures from covered entities. That is a good thing, but the fact remains that broad scale marketing using patient information is permitted. Business associates could be allowed to make disclosures to other business associates.

The information of a consumer who responds to a promotion might not be covered by the privacy rule. A consumer who responds to a marketing solicitation might be disclosing name, address, and diagnosis to a third party not covered by the rule. Further use of the information would therefore be unrestricted.

Remedies

Another consequence of the marketing rule involves remedies available to individuals whose records are misused. The final rule removed the requirement that patients be identified as third party beneficiaries under any contracts with business associates. Thus, if a marketer or business associate of a hospital misuses health information disclosed to the marketer, a patient would have no clear right to sue under the HIPAA scheme. The legal conclusion on this point would vary from state to state, and a great deal of uncertainty about third party beneficiary law and health privacy remains. Nevertheless, it is possible that no remedy would be available.

Video Privacy Act (For Comparison)

The Video Privacy Protection Act does not allow video operators to disclose the names of movies that an individual rented without affirmative consent. The HIPAA health privacy rules allow use and disclosure of any protected health information for many marketing purposes without the affirmative consent of the individual. The Video Privacy Protection Act allows video operators to disclose the categories of movies rented (not actual titles) only if an individual was given an opportunity in advance to opt-out. The HIPAA health privacy rules allow disclosure of any protected health information for many marketing purposes without mandating an advance opt-out.