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FEC Must Close 'Mighty Big Loopholes' to Impose Internet Rules

The FEC was sloppy in crafting campaign finance regulations that were overly broad in excluding Internet activity, FEC Chmn. Scott Thomas said at the 12th Online Politics Conference on Fri. He added that and the FEC's highly anticipated March 24 draft rulemaking will tighten up the language to address online communications' influence on the campaign process.

Thomas, a Democrat, told the crowd he was there to "serve as a pooper scooper" for his Republican colleague Comr. Bradley Smith "who dropped quite a pile the other day" in an interview with CNet suggesting that bloggers would be subject to the Commission's disclosure and spending rules. "I assure you that we have not made up our minds on anything yet and there is no reason to assume gloom and doom," he said.

The initial rule -- a result of the McCain-Feingold law -- left some "mighty big loopholes" that allowed parties to spend unlimited amounts of soft money on production of and consultation for online videos, websites and other forms of Internet communication. Those actions could be done in complete coordination with candidates, and corporations and unions could pick up the tab no matter how high the cost, he said.

Reports that campaigns had paid bloggers to run ads or favorable postings raise important questions about whether the writers are actually commercial vendors working in concert with campaigns to influence the election, Thomas indicated. He added that the court decision that prompted a 2nd look at the rules didn't instruct the commission to clamp down on bloggers nor did it say to take away bloggers' personal computers -- it just told the govt. that the guiding principles were "way too broad" and had to be amended. Those who blog at home independently will remain free and the commission may explore whether a financial formula could apply to online communications that would allow bloggers to avoid disclaimer obligations, he said.

The commission has shown a willingness to expand exemptions to some Internet based services, which raises several questions: (1) What is a periodical publication? (2) What is a legitimate press function? (3)

What defines news, commentary or editorial content? The new rules will help define the content and allow for press freedom, he said: “This is not going to be fun for us. But we can’t just dodge the statute and just close our eyes and say ‘that’s a stupid provision.’”

U. of Tenn. law professor Glenn Reynolds, who runs the popular blog “Instapundit,” bashed the Commission, calling Thomas’s speech “the most cogent argument for the abolition of the Federal Election Commission” he has heard. He said the Commission should learn from the example of the FTC, which “has had its head handed to it” by citizens who complained to Congress when it tried to regulate used-car dealers and funeral homes. An effort to regulate blogs is unlikely to succeed given “the size of the universe of things that have to be regulated [and] the powerful desire not to be regulated,” Reynolds said. Technorati recently put the number of blogs at 7.7 million.

Meanwhile on Fri., a letter sent to Thomas by Rep. Conyers (D-Mich.) and 14 co-signers pushed for the commission to explicitly exclude blogs from disclosure requirements and campaign finance limitations. A blog shouldn’t be held accountable under the statute simply because the site contains political commentary or includes links to a candidate or political party’s website, provided that the politician or party didn’t compensate the blog for such linking, the letter said. Thomas said he was looking forward to reading Conyers’ letter and reviewing the legal analysis behind it.

A bipartisan group of bloggers and activists known as the Online Coalition delivered a similar letter to Thomas explaining their concerns about the pending rulemaking. The group wants the Commission to grant blogs and online publications the same consideration and protection as broadcast media, newspapers or periodicals; promulgate a rule exempting unpaid political activity on the Web from regulation; and clarify the rules and definitions related to “coordinated activity” to protect bloggers from breaking rules governing republication of campaign materials. The coalition’s website went live Fri., and by mid-afternoon nearly 1,000 supporters had signed on to the letter. -- *Andrew Noyes*

‘Black and White TV’

Online Politicking Small Now, but Wait Till ‘08, Speakers Say

The Internet’s influence on the political process is still in its infancy, but the promise the medium holds for the future of American govt. is substantial, Web and political experts said Fri. at the Politics Online conference at George Washington U.

Online politicking is “still in that black and white TV stage,” but its force is growing, former Howard Dean campaign manager Joe Trippi said. In 2004, both parties succeeded in different arenas of harnessing the power of the Internet. The GOP’s communications infrastructure was more established to publicize “the next big stories” on a grassroots level, which eventually led to snippets on DrudgeReport.com and the cable news channels, Trippi said: “They understand that movement better than Democrats do.” Liberals mastered online moneymaking and using the Web to mobilize outside standard party channels. Still, he said, “whether we master the medium or not, this medium couldn’t have made this election.”

One problem with the 2004 election cycle was that the Internet’s power to mobilize and connect voters outpaced organizers’ ability to manage it, Trippi said, adding that it wouldn’t be a problem in 2008. Trippi offered to get the ball rolling by donating \$100 to the first Democratic Presidential candidate who launches a website and promises to take only \$100 donations. PoliticsOnline Pres. Phil Noble called that idea “precisely the kind of brilliant thinking that is going to radically change -- and is in the process of radically changing -- our politics.” He said, however, that in the future, “money is going to quit being the thing that you’ve got to have.” Noble said he believes raising funds is going to be the campaign equivalent to getting press coverage.

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Emily's List Pres. Ellen Malcolm said engagement is about more than money and the key in the future will be to organize around market needs. In the short term, politicians will need to recapture the Web-related energy from last year's campaign and move it into the core of campaigns' institutional missions for 2008. On a lighter note, Greg Spiridellis, creator of one of the most memorable Web offerings from the election cycle -- the JibJab cartoons that poked fun at both camps -- said he hoped his company taught the campaigns not to take themselves so seriously. He "created something that everyone was feeling but nobody that was in the business of politics was saying."

Online Fundraising Should Complement Traditional Methods

Political fundraisers said the quality of the message, timing and degree of 2-way communication will determine how effectively campaigns can raise money through online operations. "The biggest variable is the moment you're in," and campaigns that quickly reach supporters as news events unfold will maximize their fund-raising, MoveOn.org Dir.-Washington, D.C., Tom Mattzie said. In his work for the Kerry-Edwards campaign, Mattzie would test-send different messages to select group early in the morning, analyze the click-through and open rates a few hours later, and send a revised message to the rest of the list by noon based on feedback. He found a 3-20% response difference based on stylistic changes such as subject line and graphic format. Bush-Cheney 2004 e-campaign manager Chuck DeFeo said he got supporters "vested" in the campaign by sending them an ad preview via e-mail and asking for their comments before launching the final ad on TV. After Mattzie said he built the Kerry campaign's e-mail list to 2.8 million subscribers from nothing a year ago, Anne Lewis, Democratic Senatorial Campaign Committee (DSCC) deputy exec. dir., said her group raised more money through their much smaller list. The largest response to a single Bush-Cheney e-mail happened a year before the election when Cheney himself made the pitch, DeFeo said.

How campaigns and allied organizations should create e-mail lists was a source of disagreement among panelists. After other panelists said paid lists can be used effectively, Mattzie said: "We shouldn't diminish the viability of organic" list-building through word-of-mouth, which usually results in more active and committed supporters. DeFeo implicitly agreed when he said paid lists have a 70% drop-off -- and no value -- after 2 weeks if campaigns and groups don't effectively pitch the recipients for money and activism. Plus Three Pres. and Kerry activist Juan Proano said MoveOn's organic success was "rarified" and not indicative of other groups.

Panelists said online fundraising should complement, not replace, traditional methods such as direct mail. Some supporters will hesitate to give their credit card for online donations, so they need print forms, Lewis said. DeFeo responded heatedly to a question about the Bush campaign's alleged slowness in creating an online presence, saying they succeeded in getting online users to become activists in their own neighborhoods. He added that Democrats "neglected" to cultivate their activists offline, a point Mattzie echoed.

Online fund-raising for the 2006 midterm elections "feels a little disconnected" because fund-raisers have not explained well to worn-out supporters why they need money so early, Mattzie said: "What you ask people to do is the most important thing." Organizers need to limit themselves to one or two major requests from supporters to not dilute the effect, DeFeo said. Mattzie predicted \$1 billion would be raised online for the 2008 campaign.

Politicians Skeptical of Online Ads

Online political advertising is actually falling behind other ad formats and must be targeted narrowly, campaign and industry experts on advertising said in their panel. Less than 1/2 of 1% of 2004 campaign ad expenditures went to online political ads, Connections Media founder Jonah Seiger said: Online ads are the "bastard step-child" of TV and other established media. Skeptical politicians "still need some handholding" to get comfortable with incorporating online ads into their budgets, even when staff and consultants give them proof of results, Seiger said. Television and direct-mail advertising are so entrenched that no campaign wants to risk diverting resources at key points in the race, Seiger said: "I'm not sure [efficacy is] quite the problem anymore."

The best way to think of online ads are as "gap fillers," said Morra Aarons, former Democratic National Committee dir.-Internet mktg. She said the Kerry-Edwards campaign raised \$1 million from keyword searches and its early campaign ads on the *N.Y. Times* website led to a 14% favorability increase among Republicans and independents: Online ads have the ability to "micro-target... in a way you can't do on TV." *Times* sales manager Mike Connors said an ad campaign that NYTimes.com did with Unicef on tsunami relief exceeded its donation targets,

adding that advocacy groups are more open to using online ads. Seiger credited an anti-AARP group for the effectiveness of its highly visible online ad in the presidential campaign that cost only \$2,000: "Sometimes to be effective and smart, you don't have to spend much money." -- *Andrew Noyes and Greg Piper*

E-Commerce Off Front-Burner

Intellectual Property Issues Continue to Roil Treaty Talks

Intellectual property (IP) issues continue to irk, as delegates begin pushing to complete a draft Hague Conference treaty aimed at harmonizing jurisdiction over and enforcement of judgments in cross-border civil cases. With a diplomatic conference set for June 14-30 in the Hague, the U.S. Secy. of State's Advisory Committee on Private International Law has set a March 29 meeting to seek feedback from industry, trade associations, bar associations and nongovernmental organizations on the draft's IP provisions. European Union member states are consulting one another on IP and other aspects of the treaty.

Though the draft treaty has been narrowed to cover only business-to-business choice-of-law contracts, IP issues remain "pretty complex," a source close to the negotiations said last week. The latest version covers copyright and related rights as well as infringement proceedings. A controversial passage addresses otherwise-excluded IP rights if raised incidentally. An example would be when, in litigation over royalty payments under a license, a defendant claims the licensed IP right was invalid, the source said. "Getting everyone to agree in principle and to accept the drafting is hard in the extreme," the source said.

A key issue still unresolved for consumer groups is the draft's treatment of the "first sale doctrine," said Manon Ress of the Consumer Project on Technology (CPT). The first sale doctrine is essential for library lending rights, rental rights in video stores and 2nd-hand sale of books, she said. Large corporations often try to use contracts to curb resale of goods; over time, national policies vary on such provisions' enforceability. The Hague proposal generally would make exclusive choice-of-court provisions mandatory; consumers want to ensure that it doesn't change global policy on the first sale doctrine, Ress said.

The treaty would be "a big help for forum shopping," Ress said. By separating some aspects of IP disputes, the treaty would make sure litigation over the validity of all noncopyright-registered rights -- such as patents -- would always take place in the country in which those rights are registered, unless they were "incidental" to the main litigation. But lawsuits over infringements, the scope of a particular claim or the fairness of a contract would be in foreign courts, with stiff enforcement measures for foreign judgments.

E-commerce issues "are not on the front burner anymore" since negotiators limited the treaty's scope, but there remains some sensitivity about take-it-or-leave it contracts -- such as shrinkwrap agreements for software, an issue that heightens interest in the grounds under which a choice of court clause can be enforced or not -- said a source close to the negotiations.

In Europe, there's enthusiasm for keeping online click-through and shrink-wrap contracts in the treaty, a European Commission (EC) official responsible for the treaty file told us. A larger question is how to guarantee that such contracts treat both parties fairly, an outcome negotiators have tried to assure via provisions dealing with whether an agreement is legally valid, the official said.

European consumer groups smart at including shrinkwrap and other agreements in the treaty but can live with it, since the revamped treaty specifically excludes business-to-consumer contracts, the official said. However, he said, problems remain with the convention's definition of "consumer." Consumer groups want the same definition as European instruments use, to ensure that a definitional gap doesn't set up agreements made by consumers to come under the treaty, the official said.

Following a Jan. 31 public hearing on the proposed convention, the EC began "coordination meetings" with member states. One took place March 3; another set for the 17th will be the final formal powwow before the diplomatic conference. The EC is "gauging the views of member states" as it crafts a position on the treaty, the official

said, but has its own mandate on how to proceed as well. Another U.S. public meeting, not restricted to IP issues, is slated for May 9. -- *Dugie Standeford*

Streaming Media

Orb Networks Seeks to Spread Service to STBs, CE

Streaming Media provider Orb Networks is forming alliances for cable set-top boxes and CE products, after the launch Fri. of a Windows XP version of its Orb Media Service. Orb's service, available for Windows XP Media Center Edition-based PCs since Jan., allows anyone with a broadband Internet connection to tap into the media from a home PC.

Orb requires the download of a 17.5 MB software file at home. Then a customer can log in through a cell-phone and listen to a music collection, or if there's a TV card in the PC, watch live TV. The service is sold through Orb's website with a \$9.99 monthly or \$79.99 annual fee and packaged with a 30-day free trial. The Windows XP version started beta testing in Feb.

The service should gain further exposure this week at the CTIA convention in New Orleans, where Microsoft is expected to demonstrate it on notebook and handheld PCs. Lucent and Airvana also are expected to show it working over a wireless high-speed Evolution Data Only (EVDO) network said to operate 10 times faster than a standard modem.

Orb has signed "thousands" of subscribers since the service launched in Jan., said Mktg. Vp Joseph Harris, who wouldn't be more precise. But a key to its expansion may be bundling agreements expected to start appearing 2nd quarter, Harris said. Creative Technologies (Webcams), ADS Technologies (PTV-350 Instant TV PVI tuner) and Netgear (routers and media extenders) are expected to start packaging Orb with products. Audible and FilmClix, a Internet-based independent film service, are expected to "mutually promote" through their respective services, Harris said. Orb also is working with Intel. While service requires a minimum 1.4 GHz processor, it works best for streaming at 2.4 GHz, Harris said. The company also has partnerships with Pinnacle Systems and Wi-Fi service provider Boingo, Harris said.

Among the current products, Orb is compatible with Microsoft-based smart phones, Nokia cellphones including the 9300 Communicator and N-Gage QD, as well as Microsoft PocketPC-based handheld PCs including some Hewlett-Packard iPaq and Dell Axim models. It doesn't currently support PalmOne handheld devices which don't contain a streaming media player robust enough to support Orb, Harris said. Orb also has a digital video recorder (DVR) feature and is compatible with Hauppauge Digital's WinTV PC-based PVRs.

The company also is developing a version of the software for cable set-top boxes that would let the user remotely tap directly into a TV without a PC. Orb's software would be contained on IC inside the STB or stored in flash memory, Harris said. Orb has had discussions with cable STB manufacturers Scientific-Atlanta and Motorola, as well as the MSOs, and expects to secure a partner by 2nd quarter, Harris said. The Orb software is best suited for STB/PVRs where it could be stored on the hard drive, Harris said. As it expands to STBs, Orb also hopes to move away from charging a monthly fee and be included in an MSO's digital cable package as an incentive for consumers to buy the service, Harris said.

In addition to the Windows platform, Orb is developing versions for Linux-based products and Apple Macintosh, the latter expected to be available late this year, Harris said.

Orb's service appears certain to face competition. Grouper, a new peer-to-peer company, has developed software that lets smaller numbers of users watch each other's video and stream one another photos and music, without making song copies. Yahoo in Dec. bought Wuf, a new company creating software that enables users to watch multimedia content on cellphones inside the STB or stored in flash memory, Harris said. -- *Mark Seavy*

Capitol Hill

CEOs from ChoicePoint and Lexis-Nexis as well as FTC Chmn. Deborah Majoras will testify Tues. at a House Commerce subcommittee hearing that will explore the protection of consumer data from information

breaches. Hackers accessed sensitive client files held by both companies' databases recently. ChoicePoint CEO Derek Smith, Lexis-Nexis CEO Kurt Sanford will join Majoras, Vontu CEO Joseph Ansanelli and Marc Rotenberg, head of the Electronic Privacy Information Center at the hearing. Consumer Protection Subcommittee Chmn. Stearns (R-Fla.) said the hearing will "explore policy issues that involve security and compliance in safeguarding personal information, and explore the need for federal legislation." Currently, there's no single federal law governing all uses or disclosures of consumer information, he said.

Courts

The U.S. Dist. Court, Spokane, barred a Wash. company from making deception claims about its antispyware software. The FTC requested the action against Spyware Assassin, which it says used pop-ups and banner ads to trick computer users into thinking their computers were infected with spyware, then claiming its \$29.95 software would remove spyware and prevent future breaches. Spyware Assassin declared the presence of spyware on clean computers and didn't as promised remove "all or substantially all" spyware on infected computers, the FTC said. The commission will ask the court for consumer redress from maker MaxTheater and its principal.

Symbol Technologies filed a patent infringement suit against Intermec Technologies in U.S. Dist. Court, Wilmington. Saying Intermec is infringing its 802.11 patents, Symbol Technologies seeks a permanent injunction and monetary damages. Intermec is suing Symbol for infringing its RFID patents, which Symbol says contradicts industry support for a royalty-free RFID air interface and will slow RFID adoption. Last week, in advance of the suit, Symbol ended a supplier relationship with Intermec for laser scan engines.

International

German VoIP provider Sipgate will offer emergency calling from Germany, to 110 for Germany and to 112 elsewhere in Europe, the company announced Fri. at the CeBIT. Authorities consider lack of 911-like emergency calls one of VoIP's major problems. Sipgate said tests of the system, based on a cooperation with the network of Deutsche Telekom, were nearly complete and the company would offer the function in the coming month. Sipgate would be the first network-independent VoIP provider to make the offer. For nomadic VoIP users, said CEO Thilo Salmon, the company also was working on a solution, but was relying heavily on public authorities: "We could route emergency calls of nomadic customers to a central number; that could help anybody still able to speak." But in Germany there's no central number yet. Sipgate also announced several deals with hardware providers. Sipgate VoIP accounts, for example, will be preinstalled on several Siemens devices. The company also will offer a €150 WLAN phone from Chinese hardware provider UT Starcom for nomadic VoIP use. -- *ME*

Internet Gold subsidiary GoldMind acquired 50% of Israeli academic portal Nirshamim Fri. GoldMind plans to boost Nirshamim ad revenues through cooperation with other GoldMind portals.

Industry Notes

Cable companies now split the market for new broadband customers with phone companies, according to a Standard & Poor's report on the cable industry. Although cable's core video services are "under intense competitive pressure" from DBS, the industry should continue to benefit from "healthy" subscriber growth, enhanced digital tier offerings, and IP phone services now being launched, said Standard & Poor's analyst Eric Geil. Cable faces competition from phone companies bundling voice and data with DTH-provided video, Geil said. The 3 largest regional RBOCs also can include wireless services in these packages. In a few years, cable operators could see meaningful fiber-based competition from phone companies for video services, the report said. Nevertheless, cable has a significant head start in its ability to provide a full suite of advanced services, it said.

Yeahronimo Media Ventures acquired Tensleep Technologies. The digital-content provider said Tensleep shareholders will own about 8.6% of the combined company.

Washington Internet Daily Calendar

- March 15 Heritage Foundation and Defenders of Property Rights conference on "Government's Role in Protecting Constitutional Rights in Intellectual Property," 9 a.m., 214 Massachusetts Ave. NE -- Laura Dlugacz, 202-572-6231 or ldlugacz@dcgpr.com.

- March 15 House Commerce Committee's Subcommittee on Commerce, Trade and Consumer Protection hearing on protecting consumer data after ChoicePoint, 10 a.m., Rayburn Bldg. Rm. 2123 -- Larry Neal, 202-225-5735.

- March 16 Senate Judiciary Committee's Subcommittee on the Constitution, Civil Rights and Property Rights hearing on obscenity prosecution, 3 p.m., Dirksen Bldg. Rm. 226 -- Blain Rethmeier, 202-224-5225.


- March 17 Georgetown Law colloquium on copyright liability and the Internet, 3:30 p.m., Georgetown U. Law Center, 600 New Jersey Ave. NW, 5th Flr. -- Julie Cohen, 202-662-9871 or jec@law.georgetown.edu.

- March 22 Philadelphia's Wi-Fi implementation webcast with city CIO Dianah Neff, 2 p.m. -- Eerik Kreek, ekreek@itaa.org.

- March 22-23 Federal Information Systems Security Educators Assn. conference on computer security awareness, training and education, Bethesda N. Marriott Hotel, 5701 Marinelli Rd., Rockville, Md. -- Teresa Vicente, 301-975-3883 or teresa.vicente@nist.gov.

- March 23 Information Technology Assn. of America webcast on information security and liability, 2 p.m. -- muncapher@itaa.org.

- March 23 FBCA Young Lawyers Committee Brown Bag Lunch on fiber unbundling, 12:15 p.m., Drinker Biddle & Reath, 1500 K St. NW, 11th Fl. -- Jason Friedrich, 202-354-1340 or jason.friedrich@dbr.com.

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