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RFID Policy May Not Wait

It's clear that deployment of mass-market RFID applications will generate public concerns that must sooner or later be addressed if the technology is to achieve its true potential usefulness in society. The response to those concerns will either be embodied in a set of effective standard business practices, in governmental regulation or in some combination of the two. It's not the purpose of this column to argue for

or forecast a particular outcome, but instead to examine timing issues. Should RFID users and suppliers get involved now, or sit tight?

Today, the key RFID issues are on the table, and some degree of public discussion is taking place. A coalition of privacy advocacy groups has called for a moratorium on consumer-level deployment of RFID until impact studies have been performed, and it has demanded familiar privacy safeguards such as notice, choice and data access by consumers. The Federal Trade Commission held an RFID Workshop last summer, followed by a House subcommittee hearing. Both invited input from a range of participants to try to get a handle on what the technology can do and what its policy implications may be. However, no action is imminent: Both the FTC and Congress are currently in a “listen and learn” mode and not likely to move anytime soon unless pushed by outside developments.



On the industry side, most argue there's no reason to engage seriously in the policy development process until RFID tags are widespread at the individual product level, some five or more years in the future. And because they feel that consumers will not take notice themselves until then and that lawmakers won't be eager to take on issues that haven't “matured,” they can safely shelve any real discussion of how this ubiquitous new technology interacts with important social values. (Admittedly, some helpful dialogue is taking place within EPCglobal, but the guidelines it has issued so far are without teeth and are hopefully intended just as a prologue to

meaningful usage rules.)

I believe the “wait until it rains” approach is a mistake. But apart from whether it’s wise or not to try to develop policy ahead of full deployment, I would like to identify several near-term factors that within the next two years may force business’ hand and persuade savvy industry leaders and their Washington representatives to dial up the other stakeholders.

Law Enforcement Use

Perhaps the deepest fear of U.S. privacy advocates is the abuse of RFID capabilities by government. Law enforcement is already looking at using RFID tags in ways that raise emotional constitutional issues. Criminal justice use of the technology is likely to occur well ahead of commercial product-level tagging, and it will prompt Congress to define in what ways and under what restrictions RFID tags can be used in the investigation and prosecution of crimes. And another tracking technology—GPS—is already spreading through the law enforcement community. GPS may be on a faster policy track because there already are conflicting court decisions on, for example, whether the Fourth Amendment prohibits investigators from using secretly placed transmitters to track suspects without court approval. If a trend develops that favors unfettered use, a fervent public debate will ensue over the limits of government monitoring of its citizens, even in public. The rapid uptake of either technology by government poses risks for the private-sector RFID market:

Because GPS technology is similar to RFID from an issues standpoint, a Congressional GPS law-enforcement policy debate will define in practical terms the RFID law-enforcement debate even if policymakers decide they’ll wait to act on RFID. Given the similarities, however, there is a good chance Congress would elect to deal with both technologies in the law-enforcement setting at the same time.

Even if formal legislative/regulatory action is limited to law enforcement rules, the attitudes formed and the approaches or solutions adopted will necessarily heavily impact, and constrain, private-sector solutions when they are debated at some point in the future. Once Congress gets some expertise in either technology as it examines use in the criminal justice system, it will be greatly tempted to go ahead and deal with consumer issues at the same time.

Near-term Niche Applications or Foreign Deployments

In countries such as China and Singapore, consumer activists are weaker, media is compliant, and government mandates can speed the penetration of RFID. One can imagine them embracing product-level tagging within a couple of years in the name of commercial efficiency and leapfrogging the West into technology leadership. These kinds of implementations will not likely incorporate restraints or requirements the U.S. public would desire, thus RFID opponents and skeptics are likely to find them ideal poster-children for technology abuses.

In addition, there will be areas where the benefits of product-level tagging are so compelling that adoption will proceed ahead of the general wave of RFID consumer applications. Examples: Tesco's trial of DVD shelf tagging, or the tagging of high-value products. These applications are broad enough to trigger consumer concerns, and thus a more general debate.

Threat of State or Foreign Regulation

Clearly, a patchwork of inconsistent or conflicting state or national regulations governing RFID use could be problematic for a technology whose benefits rely on the seamless collection, transmission and use of data not only across state but also national boundaries. As RFID consciousness seeps more

into the public mind, legislators are attracted to it both for substantive reasons and to advance their own careers. A few bills were introduced last year at the state level, and more are expected this year. While the states generally give the feds some time to act in areas affecting interstate commerce, they may not wait too long on RFID, given the populist nature of the policy issues, their media appeal, the continued efforts of activist groups and predictable industry blunders.

Other nations generally rely more on their bureaucracies to develop policy, which usually allows them to propose and implement rules before the diffuse U.S. process runs its course. In addition, most Europeans expect government to intervene sooner rather than later. Depending on the direction taken abroad, both U.S. government institutions as well as the U.S. business community may come to feel it is better to promptly stake out a balanced policy domestically and then market it abroad, rather than do nothing and then be forced into an attempt to carve out "safe harbors" or exceptions to foreign rules, as was our experience in the case of the European Data Protection Directive.

Pressure From Advocacy Groups

Activists feel the consumer-level issues are obvious and predictable and should not wait for debate and resolution until the technology is deployed. Basically, they know that if they wait too long, their leverage will decrease. As RFID becomes integrated at great expense into the commercial life of the nation and world, and becomes commonplace, their ability to change the way it is used will diminish. Thus, Tesco's trials in Europe have drawn a call from advocacy group Consumers Against Supermarket Privacy Invasion and Numbering (CASPIAN) for a worldwide boycott (not the group's first).

While CASPIAN may be deemed a fringe organization by some business interests, it has achieved remarkable media presence,

and a number of well-known privacy groups, from the Electronic Frontier Foundation (EFF) and the Electronic Privacy Information Center (EPIC) to the Center for Democracy and Technology (CDT) and the American Civil Liberties Union (ACLU), have joined it in the call for a moratorium on consumer-level deployment until the public policy issues are resolved. Serious missteps by RFID companies as they test and deploy RFID systems may give these groups the fuel they need to energize the media and policymakers.

In conclusion, there is a reasonable chance that some combination of these factors will bring business to the negotiating table well before item-level RFID tagging is widespread. Rather than expending their efforts on delay strategies or inadequate fig-leaf commitments, industry should be guided by the goal of building consumer trust in the technology to maximize its potential uses, while agreeing to forgo practices that cannot be reconciled with significant social values. It should seek to better understand the actual concerns of informed consumers, and then begin informing the rest by planning and launching broad consumer education. At the same time it should start meaningful outreach to other interests and begin the process of looking beyond its own short-term benefit. We all have a stake in making sure RFID is done right, and the days are past when the public would trust corporate leaders and scientists to act in their behalf when it comes to values. It's time to talk.

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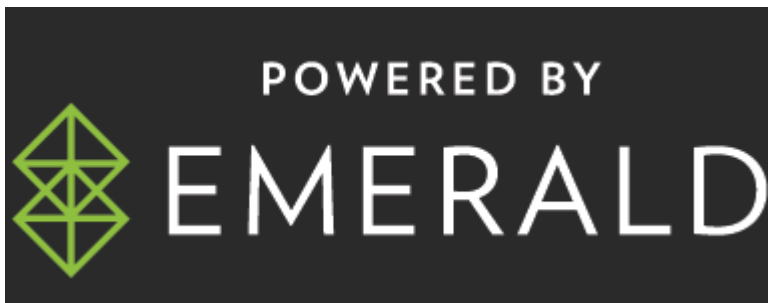


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