

The ABA Legal Task Force

Building an Online Identity Legal Framework

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American Bar Association Federated Identity Management Legal Task Force



Background

- Co-Chairs
 - Thomas J. Smedinghoff, Wildman, Harrold, Allen & Dixon LLP
 - Jane K. Winn, University of Washington School of Law
- It's an open project:
 - Participants include lawyers, non-lawyers, IdM technology experts, businesspersons, and other interested persons
 - From businesses, associations, and government agencies
 - From U.S., Canada, EU, and Australia so far
- ABA Task Force Website (and sign up for listserv) at –
 - www.abanet.org/dch/committee.cfm?com=CL320041
 - Alt. URL: <http://tinyurl.com/yft89m8>



Goals

- Identify and analyze the **legal issues** that arise in connection with the development, implementation and use of federated identity management systems;
- Identify and evaluate models for an appropriate **legal framework**;
- Develop **sample terms and contracts** that can be used by parties



Projects Include . . .

- Comprehensive Report – draft by early 2011
- Common definitions
- Identify existing laws related to IdM
 - General law – e.g., privacy, tort, warranty, etc.
 - IdM-specific – e.g., PKI laws, identity laws, authentication laws, etc.
- Identify legal barriers
- Analyze options for developing an IdM legal framework
- Identify potential liability models
- Sample contracts



Addressing the Key Legal Issues of Identity Management

The Identity Ecosystem Requires A Legal Framework



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- In order to:
 - Develop the **trust** necessary to make an IdM system work, and
 - Understand and **assess their risk** of participating
- All participants need:
 - To know with certainty the legal and technical rules/obligations
 - A belief that those rules/obligations are effective, fair, and appropriate
 - Assurance that others will follow those rules
 - The ability to enforce those rules/obligations if needed

An IdM Legal Framework Exists Today, But . . .



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- **We just don't know what it is**
- Its impact on IdM activities may be uncertain
 - Most laws not written for IdM
- The rules it imposes may not address current needs
- It likely varies by a number of factors, such as –
 - Jurisdiction
 - Nature of the participant
 - Industry sector
- We may want to change it to better suit our needs
 - Yet we may not know how to structure/enforce desired changes
 - And in some cases we cannot change the rules
- In short – the legal status quo may be a major barrier

The Existing Publicly-Created IdM Legal Framework Consists of . . .



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- Generally applicable statutes, regulations, and common law –
 - Privacy law, warranty law, tort law (negligence), e-transaction law, defamation law, etc.
- IdM-specific statutes and regulations –
 - PKI laws, EU Directive, identity laws, authentication laws, etc.

Examples of Potentially Relevant Categories of Existing Law



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- Contract law
- Warranty law
- Tort law
 - Negligent performance
 - Negligent misrepresentation
 - Fraudulent misrepresentation
 - Defamation
- Third party beneficiary law
- E-transactions law
- Consumer protection law
- Data security law
- Privacy / data protection law
- Identity theft law
- Antitrust law
- Unfair competition law
- False endorsement
- False advertising
- IP law
 - Copyright law
 - Trade secrets law
 - Trademark law
 - Patent law
- Statutory/regulatory law
 - Governing the IdM process
 - Imposing IdM compliance obligations
- Liability for the conduct of others
- Governmental immunity law
- Other

Factors that Affect Application of the Law to IdM



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- What jurisdiction's law applies
 - And how to handle cross-jurisdictional issues
- Nature of the person involved
 - e.g., consumer, business, government entity
- Expertise of the person involved
 - e.g., unsophisticated vs. professional in the business
- Nature of the information involved
 - e.g., sensitivity of personal information (e.g., name vs. SSN)
- Nature of the use involved
 - e.g., login to a book club website vs. launch nuclear missiles
- Nature of any resulting harm
 - e.g., embarrassment, economic losses, property damage, personal injury

The Goal – Develop An Appropriate IdM Legal Framework that . . .



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- Provides enforceable rules for a workable and trustworthy identity ecosystem that are binding on all participants
- Adequately protects the rights of the parties
- Fairly allocates risk and responsibilities among the parties
- Provides legal certainty and predictability to the participants
- Complies with / works in conjunction with existing law
- Works cross-border (state or country)

The Basic Approach to an IdM Legal Framework Consists of . . .



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- Existing Publicly-Created IdM law
- Supplanted by Private Law (created via) –
 - Contractual agreements among the parties
 - Standards adopted by the parties
 - Self-asserted undertakings
- To fill in gaps
- Provide certainty
- Modify existing law where necessary

Building an IdM Legal Framework: Common Problems to Consider



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- The uncertainty problem
 - Lack of clarity re what the rule is
- The cross-border problem
 - Addressing the problem of differing legal regimes
 - Requirements in one jurisdiction may not exist in another
 - Requirements in one jurisdiction may conflict with requirements in another
- The non-waivable statute problem
 - Some laws impact IdM systems
 - Can't be changed by contract
- The contract enforceability problem
 - How can we bind all participants in an enforceable contractual trust framework?

Key Legal Issues Getting the Most attention



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- Liability
- Privacy/Security

Recognize That “Liability” Per Se Is Not the Issue



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- “Liability” is just the penalty when you, or someone else, does something wrong
- Define when something is wrong and who is responsible
 - What are you required to do?
 - What are you prohibited from doing?
 - What are you committing to (e.g., representations)?
 - What standard is applied to your conduct?
- Identify the legal issues of concern
 - We can’t address the issue unless we know the source of the duty – e.g., warranty, antitrust, tort, contract, duty to authenticate, etc.
- Consider mitigation strategies



Consider an Example . . .

- Assume an Identity Assertion is inaccurate and a Relying Party and/or Subject suffers a loss
- If negligence law applies –
 - Liability depends on fault of IdP
 - Relative to the standard that applies (by law)
 - Depends on nature of loss, the jurisdiction involved, etc.
- If warranty law applies –
 - Liability does NOT depend on fault of IdP
 - Depends on nature of warranty that applies (by contract or law)
- If an IdM-specific law applies –
 - May supersede negligence rules, warranty rules, or other



Some Potential Liability Models

- Warranty model – focus on stated or implied guarantees
- Tort model – focus on standards of conduct; negligence
- DMV model – no IdP liability; other roles bear all risk
- Credit card model – no Subject liability; others bear risk
- Contractual model – negotiated risk allocation (in theory)
- Strict liability – regardless of fault
- Liability caps model
- EV SSL model – restricts ability of IdP to limit its liability
- **But recognize that --**
 - **Liability model unlikely to be a one-size fits all approach**
 - **Liability is a zero-sum game**
 - **It's a policy choice**



Other Key Legal Issues

- Privacy/security concerns are huge
 - Yet few privacy laws in the U.S. (outside of government, financial and healthcare sectors)
 - And extensive privacy laws in other countries
 - Data security laws extensive in U.S. and internationally
- Laws affecting, regulating or restricting IdM activities are also very important
 - Laws regulating IdM systems – e.g., licensing requirements
 - Laws governing recognition of foreign credentials
 - Laws imposing duty to identify
 - Laws imposing duty to authenticate
 - Laws imposing duty to control access
 - E-transaction laws

Further Information



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