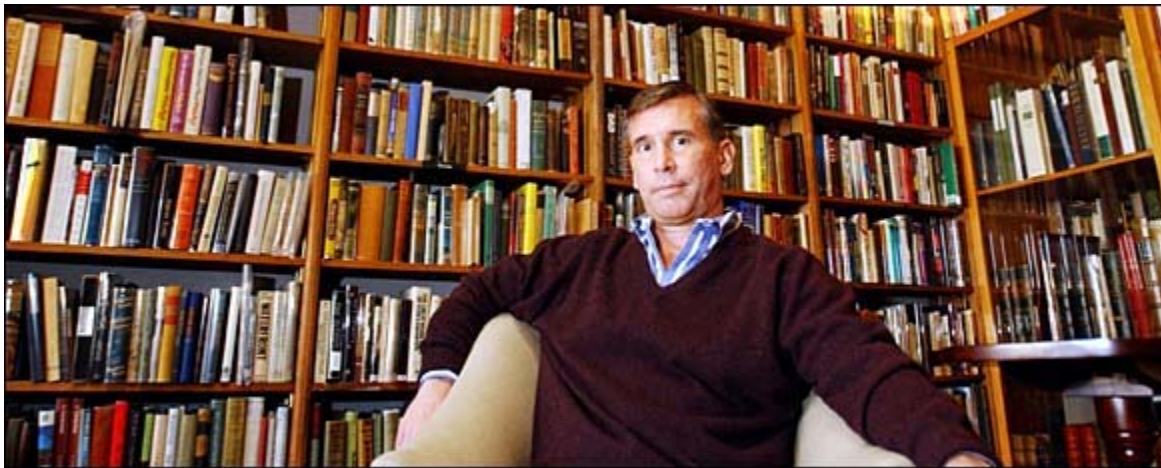


E-COMMERCE REPORT

Patriot Act Curbing Data Retention



Ann Johansson for The New York Times

Phillip Bevis, the founder of Arundel Books, which sells online and off line, says he has cut the amount of customer data he retains.

By **BOB TEDESCHI**

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COULD the Patriot Act threaten the growth of e-commerce?

That is the question being raised by some online booksellers and e-tailing analysts, who suggest that the Patriot Act, passed in October 2001 to give the government new counterterrorism capabilities, has already changed the way some companies and consumers do business online. For some consumers, it has meant fewer online purchases of politically incorrect books. For the Web sites, it has meant changes to privacy policies and marketing strategies, among other things.

Some moderate voices among online businesspeople see no true threat, and the Justice Department dismisses the risks of the Patriot Act altogether. But Phillip Bevis sees it otherwise.

Mr. Bevis, the founder and chief executive of Arundel Books, which sells used and rare books online and off line, says that his customers' concerns about the Patriot Act have forced him to severely curb the amount of customer data he retains, and to alter his marketing as a result. Because he no longer keeps information about customer purchases - so as

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to avoid the possibility of having to disclose it to the government - he can no longer discern the buying habits of his patrons and then offer them advertisements for books they may like.



"This has certainly had a chilling effect on us, and our customers," Mr. Bevis said.

At the core of his concerns is Section 215 of the Patriot Act. Under that section, businesses, organizations or citizens can be compelled by the Federal Bureau of Investigation, if it has a federal judge's order, to hand over any records the F.B.I. deems relevant to an investigation of terrorism or espionage, as long as the investigation is not based solely on actions already protected by the Constitution's free speech provisions.

If an investigation, for example, is based solely on a suspect's radical religious statements, which receive broad First Amendment protections, the investigator would very likely be denied access to records of related books the suspect bought. But if the investigation is based on suspected terrorist bombings, and a federal judge deemed the records of a suspect's book purchases on bomb making a necessary part of the inquiry, a bookstore might be required to produce the records.

Compared with companies that sell their wares only in stores, online businesses - particularly those engaged in selling so-called expressive materials like books, music and videos - are good candidates for law enforcement requests under the Patriot Act. While off-line customers can avoid creating an audit trail by paying cash for their purchases, consumer anonymity is hard to achieve online, where transactions typically involve credit cards and shipping addresses.

In support of librarians and booksellers, online and off, various advocacy groups have been engaged in a bitter argument with Attorney General John Ashcroft. The privacy advocates contend that, by invoking the Patriot Act, the F.B.I. could monitor the reading habits of everyone in America. Mr. Ashcroft characterized such charges as "baseless hysteria" in a speech in September. And last week, a Justice Department spokesman, Mark Corallo, pointed out in an interview that no library or bookstore had been ordered to produce customer records under the Patriot Act.

"And unless they're the subject of a national security investigation into international terrorism or spying, and unless a federal judge is convinced of that fact," Mr. Corallo said, "we can't get their records."

Such sentiments do little to calm Mr. Bevis, of Arundel Books, whose stores in Seattle and Los Angeles, and his Web site specialize, among other topics, in alternative titles that receive little attention from chains, like Webster's New World American Words of Freedom and the works of Charles Bukowski, a writer in the Beat tradition.

Even before the Patriot Act raised Mr. Bevis's anxieties, he was served with an F.B.I. subpoena in August 2001, seeking more than six years worth of customer data in connection with an investigation of campaign contributions to Robert G. Torricelli, the former Democratic senator from New Jersey, who in January 2002 was cleared of accepting illegal gifts and cash from a wealthy contributor. Mr. Bevis said he fought the subpoena until the matter was dropped - as it happened, a few days before the Sept. 11, 2001, terrorist attacks. But that legal battle, and the subsequent passage of the Patriot Act, led him to conclude that he should keep little customer data.

"Unfortunately, that restricts our ability to serve our customers," Mr. Bevis said. "We've had to stop customer follow-on contact, we've disabled the software that tracks customer

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purchases - all the things that turn a transaction into a continuing customer relationship."

The posted privacy policy of the ArundelBooks.com Web site reflects Mr. Bevis's efforts, in that it pledges to "NEVER sell, trade, or otherwise disclose ANY information regarding our customers to any person, organization, or government entity, unless fraud is involved."

Because he frequently sells books through other online retailers, like [Amazon](#), Barnes & Noble.com and AbeBooks.com, Mr. Bevis says he cannot sustain the same promise to customers he serves through those channels.

The privacy policy of AbeBooks.com, an online seller of used and rare books that is based in Vancouver, British Columbia, for example, states that the site may disclose personal information to "a government institution that has asserted its lawful authority to obtain the information." Marci Crossan, manager of marketing and communications for AbeBooks, said last week that the site was reviewing its privacy policy to take into account the concerns of suppliers like Mr. Bevis.

"We've come so far in the customers' comfort level with buying online that we just hope this issue doesn't take us back a few steps," Ms. Crossan said.

According to Christopher Kelley, an analyst with the technology consulting firm [Forrester Research](#), such fears are warranted, and not just for booksellers.

"Depending on how far the government goes, this issue will be so much broader than books and movies," Mr. Kelley said. "Think about hardware stores and other places where terrorists might buy things. This has the potential to explode into an issue that would impact a lot of retailers and consumers."

Executives at Amazon.com, which sells a range of goods through its Web site, say they do not share Mr. Kelley's concerns. "The government doesn't need the Patriot Act to ask for this sort of information," said David Zapolsky, Amazon's vice president and associate general counsel. "They routinely ask for it simply by filling out a form that says 'subpoena' and sending it." At that point, the recipients have the option of challenging the subpoena in court.

"It's a lot easier than jumping through the various hoops to get a Patriot Act subpoena," Mr. Zapolsky added, because conventional subpoenas typically do not require a judge's approval. "That's why, I suspect, the F.B.I. hasn't tried it."

Mr. Zapolsky said Amazon receives subpoenas "roughly once a quarter" asking for a customer's book purchase information. In those cases, he said, he typically calls the person who made the request "to walk them through the legal reasoning why these requests are problematic, and why we don't give out this information without a darn good reason or a judge telling us to."

In those discussions with law enforcement officials, Mr. Zapolsky said he relies on legal standards set by the Colorado Supreme Court in the 2002 case *Tattered Cover Incorporated v. City of Thornton*. In that case, an independent bookseller, Tattered Cover, was served with a subpoena in 2000 by federal Drug Enforcement Administration officers working with local police detectives investigating a suspected methamphetamine lab. The investigators, who sought records of book purchases by the suspects, were turned away, and a court challenge ensued.

The Colorado Court, relying on federal and state constitutional principles, said law enforcement officials seeking such materials must first show that the records are

compelling enough "to outweigh the harm likely caused" to free speech interests by the search.

The court's opinion further stated, "Our basic rationale for this holding is that, before law enforcement officials are permitted to take actions that are likely to chill people's willingness to read a full panoply of books and be exposed to diverse ideas, law enforcement officials must make a heightened showing of their need for the innocent bookstore's customer purchase records."

On only two occasions have government investigators see

king such information from Amazon continued pursuing their requests after weighing the standards of the Tattered Cover decision, Mr. Zapolsky said. And in neither of those cases has Amazon had to produce the customer data, he said.

As for possible Patriot Act investigations of an Amazon customer's purchases of non-expressive materials, like hardware items, Mr. Zapolsky said, "If the government shows up at the door with a subpoena and there's no Constitutional protection overlaying that, it's a tough argument to win."

Meanwhile, Mr. Bevis, of Arundel books, said his online book buyers continue to gravitate to less controversial titles - no matter his promises of privacy. But shoppers at his Seattle store - many of whom work at a nearby federal office building - continue to buy books that in some cases might be construed as inflammatory. "But nowadays," he said, "everybody I know who's a federal employee is paying cash."

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