

SOCIAL COSTS OF INCOHERENT PRIVACY POLICIES

Pamela Samuelson, UC Berkeley,
IBM Almaden Privacy Institute,
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OVERVIEW

- Range of conceptions of the nature of a person's privacy interests in personal data
- Strengths and weaknesses of EU Directive on Personal Data Protection
- Strengths and weaknesses of U.S. privacy policies
- Social costs of incoherent policies
- Some thoughts about possible paths to greater coherence

CONCEPTS OF PRIVACY

- Fundamental human right
- Right of individuals as vs. governmental intrusions
- Context-dependent
- Zero privacy (get over it)
- Property-based concepts of privacy
- Modified trade secrecy approach

HUMAN RIGHT

- EU Personal Data Protection Directive endorses
- Dignity, autonomy, self-determination interests protected
- Gives rights to individual as vs. government and vs. private sector
- Comprehensive regulatory regime to control collection & processing of personal data
- Perhaps attributable in part to experience of extreme misuses of personal data during Nazi era

EU DATA PRIVACY REGIME

- Not entitled to collect personal data except in limited circumstances (e.g., necessity)
- Not entitled to process or reuse data except for limited purpose for which collected
- Subject has right of access to data collected, right to challenge misuse of data
- Firms must designate data controller
- Government agency to oversee

BENEFITS OF EU APPROACH

- Comprehensive and defined objective = coherence
- Firms on notice of what must do
- Technology developers have some guidance as to system design
- Public is reassured about respect for privacy & hence more willing to disclose because misuse will be punished (fines, damages, bad publicity)

CRITICISM OF EU PRIVACY

- Too paternalistic
- Overbroad (e.g., taking laptops to EU)
- Impedes many socially beneficial uses
- Creates unnecessary transactions costs (e.g., getting new permissions)
- Mainframe-centric in increasingly distributed computing environments
- Fundamental right in my address & phone?

PRIVACY RIGHT VS. GOV'T

- 4th A protects vs. “unreasonable” **gov't** searches & seizures (especially if trespass involved)
- 1st A protects vs. **laws** forbidding anonymous publications (*McIntyre v. Ohio*) or forced disclosure of data with chilling effect on freedom of association (*NAACP v. Alabama*)
- *Roe v. Wade*: **gov't** can't interfere with doctor/patient communications re abortion; right of privacy found in “penumbra” of U.S. Constitution (widely criticized)

PERSONAL DATA & GOV'T

- 4th A & federal wiretap laws require warrant before government has right to tap telephone conversations of US nationals (but not pen register/trap & trace)
- Privacy Act of 1974 limits public agency disclosures of personal data in government databases, & requires gov't agents to obtain a subpoena to gather information from third parties

CONTEXT-DEPENDENT

- Typical US pattern: documented abuses lead to adoption of new law
- Fair Credit Reporting Act: imposes responsibilities on credit report agencies to protect confidential personal data & ensure information is up-to-date & accurate
- “Bork” law: Video Privacy Protection Act
- Other specialized laws protect telephone/cable subscriber information, financial privacy, children online, health data

ZERO PRIVACY

- Doesn't information want to be free?
- Aren't free flows of information a good thing?
- Collection and reuses of personal data promote commerce (direct marketing, better service to customers); firms have 1st A right to use
- Most people don't care about data privacy (or are willing to give it up for a small token)
- Trust industry "self-regulation" through privacy policies, codes of conduct, &/or P3P (NO LAW)

PRIVACY AS PROPERTY?

- Compilers of personal data now regard this data as *their* property, have incentives to over-collect because they can internalize the benefits & externalize social costs; lack of transparency
- Granting property rights to individuals could force firms to internalize social costs by paying \$ for it
- If this data is so valuable, why shouldn't individuals be entitled to benefit from this value?
- Let the market set prices/terms that accommodate variations in personal preferences on privacy

WHY BE WARY OF PROPERTY AS A SOLUTION?

- Anathema to civil liberties perspective
- Normatively unappealing
- Property rights regimes are far from costless
 - significant transactions costs (rise of infomediaries?)
 - market infrastructure must be constructed
- Most property rights are transferrable, but only inalienability rules will protect privacy
- Mismatch with purpose of other IP rights
(incenting investment to create more information)

U.S. PRIVACY POLICY

- Presently a mixture of all of the above
 - Sometimes human rights
 - Sometimes right vs. government
 - Sometimes context-dependent
 - Sometimes zero
 - Sometimes self-regulatory
 - Sometimes property-like
- Result: incoherence

SOCIAL COSTS

- Little or no guidance to firms or technology developers (except in specified contexts)
- No coherence from one law to next
- Firms continue to have considerable financial interests in collecting and processing data, want systems that ignore privacy interests
- Privacy as a social value is eroding, approaching the zero privacy state McNealy says to get over
- Yet do we want to live in a society with 0 privacy?

TRADE SECRET ANALOGY

- Individuals have an interest in restricting access to & use of non-public data about themselves akin to interests of TS developers
 - Want control over reuses beyond authorized purposes
 - Want protection vs. breaches of contract, confidence
 - Want protection vs. use of improper means to obtain non-public data
 - Want others to maintain secrecy through security
- Sets minimum standards of commercial morality
- Common law norms can evolve over time

IMPLIED LICENSE TERMS

- When data is disclosed or acquired for a legitimate purpose, right to use is limited to that purpose; need permission to use for different purpose
- No right to disclose to others w/o permission
- No automatic right to transfer your interest
- Even if transfer OK, transferee bound to same terms
- Other reasonable expectations of parties will be enforced (e.g., use of appropriate security)
- Ability to terminate rights if inappropriate

CONCLUSION

- Overwhelming majority of Americans believe that privacy of personal data should be respected, worry about lack of privacy in online environment
- Comprehensive legal framework to protect privacy has benefits, including guidance to technologists about system design; modified trade secret approach may be better than EU-style law
- As citizens & technologists, you bear some responsibility for whether privacy will be respected or not, so what are you going to do?