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Future of Privacy Forum Founder

Does Not Expect Online Privacy Bills to Pass This Year

Christopher Wolf is a privacy law attorney at Hogan Lovells in Washington, D.C. His career in privacy was launched in the 1990s when he helped keep a sailor from being dismissed from the Navy under “Don’t Ask, Don’t Tell.” The Navy violated federal law — the Electronic Communications and Privacy Act (ECPA) — in contacting AOL to find out whether the sailor was a user by the name of “bysrch” who had listed his marital status as “gay.”



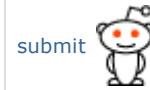
Christopher Wolf, Future of Privacy Forum founder

Two years ago, Wolf co-founded the think tank [Future of Privacy Forum](#) — backed by corporate supporters — to advocate for responsible data practices. Today, the Forum released a journal of six academic papers about privacy that it hopes will influence policy makers — among them is a paper on “What is Privacy Worth?”

Those in D.C. are kicking around a bunch of ideas about how to deal with online privacy. Congressmen Rick Boucher and Bobby Rush have both proposed online privacy bills in the House. Senator John Kerry has mentioned that he [wants to get in on the action too](#). The Federal Trade Commission (FTC) is discussing providing Web surfers with a “Do Not Track” option. And the Senate Judiciary Committee has plans [to update ECPA](#). Privacy — it’s so hot right now.

And people have wildly different opinions about what should be done. [The Economist](#) recently hosted a debate about whether government should get involved in regulating online privacy, with Marc Rotenberg of EPIC arguing that it should and Jim Harper of the Cato Institute arguing that it should not. And Wolf reports that tempers flared at a [privacy conference](#) in Seattle last month. “It was like the blog brain barrier had

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been breached,” said Wolf. “People were acting in person the way they sometimes do [anonymously] on blogs — shouting out and interrupting... It got quite animated.”

I talked to Wolf about what he expects all that privacy heat to cook up in Washington, D.C., this fall. He suspects that the online privacy bills will not pick up much traction, but he says that business has noted that lawmakers are paying close attention to the issue, and are reforming their practices accordingly.

“Privacy isn’t just a legal compliance obligation. It’s good business,” said Wolf. “It’s becoming less defensive than it is a feature that consumers will find attractive if they’re dealing with a company that highlights their privacy practices.” (True.)

The interview has been edited and condensed for clarity’s sake...

Kash: As Congress gets back to work, they’re going to be talking about online privacy and debating the drafts of these online privacy bills from Boucher and Rush. I’ve read through them, and they’re complicated. (Surprise, surprise.) Is anything productive going to come of this?

I doubt they’re going to be passed this year, certainly in an election year, given other priorities... But I think it’s always a good thing when attention is paid to how better to improve privacy.

I founded the Forum two years ago to explore new ways to improve privacy. We didn’t rule out legislation and we’re not allergic to it, but obviously great care has to be taken. Because there can be seriously adverse unintended consequences of regulation that can affect what is really one of the few shining lights in our economy right now, which is the Internet economy and online commerce.

Kash: What are some of your concerns with the bills as drafted now?

I think it may be too early to give up on innovation and self-regulation given the advances that have happened since the FTC’s 2009 report

which admonished the online advertising industry, especially, to come up with self-regulation.

The Rush bill has very broad definitions – there’s not the traditional distinction between data owner, and controller, and service provider, and a processor... And each data element stands on its own, so it may not even be tied to an individual person, so a random email address like “crazylawyer@hotmail.com” would appear to satisfy the definition of covered information even if there’s no name associated with it. Notice would be required whenever information is merged or combined with other data [like that email address], and that happens all the time in the online ecosystem these days.

There’s a lot of work that needs to be done in understanding what these provisions mean. Congressmen Boucher and Rush circulated their bills in drafts precisely because this is such an uncertain area in terms of how to regulate it and they wanted feedback and they got a lot of it, apparently. And, notably, they haven’t re-introduced – or introduced – their bill. There was word that they were going to come up with a combined effort after the Rush bill came out, and they haven’t done that.

Our overall concern is that we just need to be very careful in setting new rules legislatively to make sure they don’t stifle innovation and growth of commerce. At the same time, privacy needs better protection.

Kash: What do you see as an effective way to improve privacy practices if these bills don’t move forward this fall?

We have a pretty strong enforcement framework in place. The FTC under its current enforcement authority actually has been quite vigilant and vigorous in going after companies that engage in unfair or deceptive practices and hasn’t been reluctant to expand the definition of what is unfair with respect to the protection of personal data (e.g., the FTC admonishing [Sears for not providing](#) proper notice of data collection and [Dave and Buster’s restaurants for not protecting](#) customers’ credit card and debit numbers). That kind of flexible regulatory focus may be the best way to proceed in a changing economic environment.

I’m not convinced otherwise yet. I certainly wouldn’t be prepared to

support either of these pieces of legislation in their current form... because of ambiguity and the potential to chill economic advances.

I haven't given up on self-regulation. Industry has gotten the word that they need to do better... These bills are serving a good incentivizing purpose.

Kash: I see privacy groups file complaints with the FTC — such as the complaint about Facebook making a major change to its privacy policy for users in December. And it seems like nothing ever came of that. If the FTC continues to be the primary agency responsible for consumer privacy, does it need more resources to deal with these complaints?

Well, when the FTC investigates a company, it's non-public which is a good thing, as a lot of times they dismiss the investigation, if the respondent is able to demonstrate that there is no basis for concern. A lot of times, the investigations, as I understand it, arise from the headlines in the paper, whether it's a data security breach or an episode involving one of the social networking sites.

There is no mechanism for filing a complaint with the FTC. A "complaint" is basically a request to investigate. I've heard [the FTC] say it takes the requests very seriously, and there are investigations ongoing into various subjects. But they're non-public. The fact that we haven't heard anything following the filing of these complaints is not necessarily a sign that the FTC is not looking at these things or that there might be a consent decree that arises from it. I wouldn't read anything into silence on these subjects.. They're not oblivious to serious privacy concerns at the FTC.

Kash: The FTC is talking about creating some kind of "Do Not Track" option for consumers. People loved the "Do Not Call" list to prevent being contacted by telemarketers, and it seems like it could pick up momentum based on the similar title alone. But Harlan Yu wrote at Princeton's Freedom to Tinker blog that it's not as simple as it sounds.

"Do Not Call" operates in two dimensions. You register a phone number

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and telemarketers are forbidden from calling. “Do Not Track” is being advanced to work the same way. You register your name and marketers won’t be able to access your online data. But I wonder how you do that from a technical perspective with the multiple IP addresses and multiple devices. The underlying difficulty of developing something that’s simple for “Do Not Track” is the very subjective nature of privacy.

Not being interrupted at dinner on the phone is one thing, but there are variations of concern with tracking — who’s doing the tracking, how much information are they collecting, what are they going to be doing with it, and what do you get as a consumer in return? Those aren’t issues that come up with “Do Not Call” but they are issues that are relevant to tracking. I’m perfectly happy to have Amazon give me suggestions on what to buy based on my previous purchases. The same thing when I was shopping for a car. I was perfectly happy to have ads for cars after I went to Motortrend and Edmund and other sites, and there was the conclusion that I was looking for a car. Those are variables that just do not exist with “Do Not Call.”

Kash: The Electronic Communications Privacy Act is very dated [as detailed by Kevin Bankston at the Electronic Frontier Foundation in [this NPR interview](#) where he made the point that your email is no longer private after six months.] Can we count on ECPA being updated this fall?

That’s more likely to happen than the online privacy bills... It doesn’t matter where your data is. It ought to be protected. ECPA is a dense and opaque law that needs revision.

It’s funny, though — Passed in 1986, it’s actually one of the more modern privacy laws.

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