Consumer Protection

Harm-Based Privacy Protection?

BY JIM HARPER

Nearly a decade ago, the FTC asked Congress for prescriptive authority to mandate notice, choice, access rights, and security from online businesses. "[T]echnology has enhanced the capacity of online companies to collect, store, transfer, and analyze vast amounts of data from and about . . . consumers," the agency's May 2000 report intoned. Thank goodness Congress didn't act on it.

It seems obvious in hindsight that Google would have been a success, but it's not. If a complex access, correction, and deletion regulation had existed then, the engineering efforts the founders poured into search would have been diverted to complying with FTC dictates. More importantly, investors unsure of the business model and wary of the regulatory environment might never have funded the project.

Because we didn't get regulation, we got the Google we have today. And Facebook. And Twitter. And foursquare. And whatever else the kids are using to remake the way we do communication and commerce.

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A decade later the concerns are pretty much the same. Technology has further enhanced the capacity of online companies to collect, store, transfer, and analyze vast amounts of data from and about consumers. These concerns are legitimate. But we also know what we get in return: new innovations and benefits for consumers. Consumers benefit a great deal when they trade on small items of personal information, in ways we have yet to fully discover. We are also continuing to learn how consumers pursue their interests in the marketplace. Through experience in other sectors, most privacy analysts now recognize that formal "notice" and mandated "choice" are not a pair of swim fins consumers use to keep their heads above the commercial waters. Consumer decision-making is far more complex and—at the same time—less intellectual than reading over privacy policies.

As a participant in two of the three recent "Exploring Privacy" panels put on by the FTC, and many other FTC events over the last decade, I can also report progress of a different type. The FTC staff responsible for examining these issues recognize the economic trade-offs, human complexity, and subjectivity of privacy interests better today than they have in the past. One gets the sense that they know what they don't know.

Careful analysis is slowly drawing the FTC (and many thinkers) toward harm-based privacy protection. In an environment as diverse and changing as the Internet and online business, there are not categories of persons or blocs of personal information that can be categorically adjudged "sensitive." There are not business models that can be categorically placed on the wrong side of a privacy line.

There are definable human interests that deserve legal backing. The next step will be to examine what harms are legally cognizable. The privacy torts would be a good place to start. A caution: the creation of a risk (of identity fraud, for example) is not a "harm"—that would explode the concept.

Another question is whether a federal agency should have a role in preventing privacy harms. Online privacy protection is an "Internet-y" problem that should be solved in an "Internet-y" way. A central governmental authority will have a hard time solving interleaved economic and social problems on a changing international network. More likely, the marketplace and common law courts—where privacy protection got its legal start—should continue the work.

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