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ePrivacy in a Time of War

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With the events of September 11, the normal flow of debate and anticipated change in the area of e-privacy was disrupted, leaving in its wake the hastily enacted USA Patriot Act (USAPA).

Where we were

There was (and still is) no general federal law governing privacy of personally identifiable information (PII). Federal privacy mandates focused on three areas: children, financial institutions and health; with only one of these directed primarily to on-line privacy concerns. The Children's Online Privacy Protection Act governs sites which cater to children and requires that such sites have a comprehensive privacy policy and receive parental consent before collecting any PII from children. The Gramm-Leach-Bliley Act mandates that financial institutions give notice of their privacy policy and consumers the ability to "opt out" of having PII disclosed. The HIPAA privacy rules regulate standards for privacy of individually identifiable health information.

With no general federal e-privacy mandates, most on-line businesses adopted the mantra "say what you do and do what you say." Lawsuits, charging deceptive trade practices, arose only when businesses did not follow their stated policy.

Where we were heading

Over the past year, hundreds of state and federal e-privacy bills were introduced and debated. But, notwithstanding the hype, the case for public concern over e-privacy had not been proven. Privacy policies went unread, opt-out provisions were largely ignored, and, with consumers freely volunteering PII without restriction in the tangible world, no one could explain why we should differentiate between on-line and off-line privacy. Still, there was no denying the slow and steady move toward national standards governing e-privacy, if for no other reason than Americans' "expectation of privacy" - a collective feeling that what we do at our computers is nobody's business.

Where we are now

In the wake of September 11, a national e-privacy debate which seemed to focus on consumer protection against websites disclosing shopping preferences and similar information in violation of voluntary privacy policies seems silly. Echoing this sentiment, the Chairman of the FTC recently stated he will oppose on-line privacy legislation.

But September 11 not only changed the debate, it dictated that there would be little debate over the near-term future of e-privacy. A mere six weeks after the event, the USAPA, spanning 342 pages, was enacted. The USAPA gives the government sweeping new powers to secretly search people's homes and business records, eavesdrop on e-mail and peer-to-peer systems, and track internet usage. But the USAPA is written so broadly as to go beyond protection against terrorism, and also specifically targets non-violent computer crime. Some safeguards are written into the USAPA, including some judicial oversight, but the "sunset" provisions (mandating expiration of certain provisions) do not apply to the powers governing internet surveillance.

As part of Americans' "social contract" with their government, we have agreed to give up some e-privacy in return for safety from terrorism. The key question for many is to what extent will the USAPA be used to prosecute non-terrorists. Do you trust your government?

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