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Privacy in a Growing Online Consumer World

By Jordan Gimbel

Imagine surfing around the Internet free of suggestive pop-ups, advertisements trying to sell you everything from retirement insurance to a cruise in the Caribbean. Well, in the no-so-distant future, you may be able to log online to pay your credit card bill or edit your Linked-In® profile without fear of your information being sold to a third party looking to tailor a shopping profile to fit your online lifestyle.

For this privilege, consumers and privacy rights groups would thank - while Web site operators would undoubtedly fear - two draft bills that aim to radically redefine the rules of what remains private in a growing online consumer world.

On April 22, The House introduced the Cyber Privacy Act, followed by the Privacy Bill, on May 4, to regulate the collection and use of personal information over the Internet and through non-digital means as well. Without question, these bills create considerable changes for both consumers and businesses while threatening the practice of "online tracking" - a cornerstone of online business models.

Introduced by House Rep. Thaddeus McCotter, R-Mich., the Cyber Privacy Act calls for Web site operators to remove "personal information" upon request. A Web site operator must provide "a means for individuals whose personal information it contains to request the removal of such information;" and "promptly remove the personal information of any individual who requests its removal." Personal information is defined as any individual's name, together with either a telephone number of such individual or an address of such individual.

Absent from the proposed bill is any distinction between personal information that is publicly available and non-public personal information. This will be the subject of great criticism and debate.

Like many proposals pertaining to privacy issues, the Federal Trade Commission is tasked with the responsibility to enforce this Act.

Unlike the straight forward approach of the Cyber Privacy Act - requiring the removal of any personal information upon a request - the Privacy Bill is applicable to online and offline transactions. It also exempts certain types of transactions from its opt-in/opt-out requirements.

The proposed Privacy Bill would require businesses to post a privacy notice prior to the collection of any "personal information." The notice must be clear, conspicuous, accessible from the homepage through a direct link, and provide explicit information pertaining to a number of categories. It also must describe the identity of the business collecting the information, how the business will store the personal information, the categories of unaffiliated parties who may receive such information along with an explanation why the unaffiliated party may receive such information and respond to 12 other specific topics identified in the proposed Privacy Bill.

Information, described under the proposal as "covered information," ranges from the first name or initial and last name, an e-mail address, health and financial information, a consumer's precise location, any preference profile the consumer completed, an Internet Protocol address or any other unique persistent

identifier information, such as a customer number.

The heart of the Privacy Bill is the obligation by a business to obtain an individual's "affirmative consent" - a grant of permission by an individual concerning the collection and use of personal information - prior to collection. If an individual declines consent (even after the initial collection of personal information) the business may not collect covered information from the individual or use covered information previously collected. The bill, therefore, allows for the collection and use of information unless consumers opt-out, while requiring consumers to provide their consent to the use of sensitive data and for the use of data by some unaffiliated third parties.

Impacted by this proposed bill are businesses that engage in interstate commerce and collect personal information. Not included are government agencies and any business that collects personal information from fewer than 5,000 individuals in any 12-month period and does not collect sensitive information.

As many commentators point out, the Cyber Privacy Act suffers from vague language that could open the door for abuse. Imagine the scenario where individuals use the take down requirements of the Cyber Privacy Act to purge their online records. To avoid the consequences of negative reviews, a dentist, for example, can request the removal of his or her name from a Web site providing reviews of local dental professionals. Such activity would chill free speech and adversely impact the use of the Internet as a vehicle for public commentary.

One over the top example, described by the Tech Liberation Front, predicts that this Act could serve to benefit Internet trolls as a tool in their arsenal to takedown a Web site. The troll would post thousands of "personal information on a *Web site* and require it to consider hundreds or thousands of personal information take-down requests, each one backed by the threat of federal penalties." Jim Harper, available at techliberation.com/2010/04/25/mccotters-plan-to-expand-dmca-style-take-downs/.

On the other hand, the May 4 proposed bill may unintentionally undermine Internet business models that deliver free services and content. Succinctly stated by the Progress and Freedom Foundation "[B]ecause the digital economy is fueled by advertising and data collection, a 'privacy industrial policy' for the Internet would diminish consumer choice in ad-supported content and services, raise prices, quash digital innovation, and hurt online speech platforms enjoyed by Internet users worldwide."

Parties on both sides of the proposed bills may not agree whether "free" business models will disappear from the Internet, but there is no disagreement that the proposed bills will require nearly every Web site operator to adjust their privacy policies to include the specific information identified under the terms of the bills and obtain the necessary consents from visitors or members. Web site operators must also deal with individuals that opt-out and consider how to distinguish the use and storage of information from this subset of individuals. On top of all this, transparency will play a more significant role for a Web site in terms of what it does with the information it collects from visitors and members.

Consumers groups cheer the transparency the proposed bill will generate, but cite other provisions as troubling: the fact that the measure would bar consumers from suing companies for privacy breaches and pre-empt state laws. Consumer groups also point to certain exemptions as unwelcome loopholes, such as the exemption of the use of information for "operational" (defined as "a purpose reasonably necessary for the operation" of the company) purposes.

At the end of the day, the community should ask the question - is it necessary to further legislate how businesses collect personal information? Is the current patchwork of state-laws and self-policing policies instituted on the Internet sufficient? Are there less restrictive alternatives than what is included in the proposed bills?

Difficult questions to consider, but we should further examine the balance that exists between free content and services against the backdrop of regulated use of online information. If one cannot survive without the other, perhaps we can achieve our privacy goals in a meaningful manner through other

measures. For now, however, we still live in the pop up world where ads target you based on our specific online patterns. Should you reconsider that trip to the Caribbean?

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