

Online Privacy: Personalization and User Empowerment

Submission to Congressional Internet Caucus

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By the

Software & Information Industry Association

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SIIA is the leading association of code and content companies with over 1100 members worldwide. SIIA members include AOL Time Warner, Sun Microsystems, The McGraw-Hill Companies, Real Networks, Privada, Reed-Elsevier, Novell, Oracle, Dow Jones, and Travelocity.

SIIA views privacy as a fundamental concern for businesses operating in the online space. Since 1997, SIIA has advised members and non-members alike to develop and strictly adhere to a company-wide privacy policy. Many of our members are leaders in privacy protection, believing that good privacy practices provide them with a competitive edge over their competition. In addition, several SIIA members are also producers of privacy-enhancing technologies and services that provide users with the ability to set their own privacy preferences.

Privacy is a deeply personal value and SIIA believes that comprehensive government regulation is an inappropriate tool to address the privacy concerns of online users. It has been suggested that legislation based on an opt-in model would be an appropriate solution for the privacy concerns of users; however, such an effort would ignore the diversity of business models now operating on the Internet.

Information both personally identifiable and non-personally identifiable is used for a variety of purposes including personalization of an Internet user's online experience, facilitation of e-commerce, and the provision of consumer protection - - such as fraud detection. Moreover, the ability of a company to understand the needs and desires of its users affects not only the design and presentation of the company's offerings but also the degree to which companies are able to identify revenue sources and growth opportunities. An opt-out approach is widely used today in both the online and offline marketplace, and opt-out creates the proper balance between protecting privacy and allowing consumers to enjoy the benefits of personalization and customization. Under an opt-out approach, the default always favors "free information flow," a goal that maximizes the inherent strengths of the Internet and its potential to improve consumers lives.

Government mandates regarding choice could hamper the ability of users to benefit from personalization and the ability of companies to provide services and applications, such as free e-mail and search services, without passing all of the costs onto the user. Absent an application of fees for service or an increase in existing subscription rates, the result could be a decrease in the diversity and richness of content available on the Internet. A more sensible model is to allow companies the flexibility to provide privacy options in the manner that works best for each particular business model, while ensuring that consumers are always fully informed of all their privacy choices.

A mandatory opt-in system sets the default rule to “no information flow,” undermining the innovation and growth of the Internet while making it more inconvenient for the average consumer to engage in e-commerce transactions. More importantly, a mandatory opt-in requirement would not account for technological developments that will allow consumers to access the Internet or exercise choice in completely new ways. For example, the shift from PC-based Internet access to wireless Web access via a small handheld device is likely to make opt-in prior to information collection extraordinarily difficult, if not impossible, in certain circumstances. As Internet usage expands to a new array of handheld and portable devices, the idea of forcing consumers to click through screen upon screen of marketing preference questions becomes much less feasible and could easily turn many consumers away from these new platforms by making the online registration process extremely complex and difficult to navigate.

By setting the default rule against the collection of information in all situations, an opt-in rule would make it much more difficult for some companies to personalize their services and reach the consumers most likely to be interested in them. Under an opt-in regime, it will be far more difficult for consumers to set up personalized features and receive the many benefits of a tailored Internet experience. As a result, companies will not have the incentives to provide these features and take full advantage of new technologies available in the online environment to provide consumers with customized services.

Moreover, universally mandated opt-in is not a desirable option, as it requires user assent every time information is requested. When one considers that a user typically travels to many different websites during a session, it would require that the user jump through an authorization protocol at each stop and each instance where the website was attempting to personalize content. Such a result would degrade the user’s experience and could lead many to avoid the Internet. In fact, it is entirely possible that a more complicated process could actually confuse or overwhelm users.

An opt-in law could also require companies to retrofit their systems to code data previously collected for the specific uses for which consumers consent, to categorize and store the consents obtained, and to match any future uses of the data with these categories. In short, onerous opt-in regulation could make it harder for small businesses and new entrants to compete in the Internet marketplace.

Disclosure of the company's information practices, expressed through written privacy policies and through the use of such machine-readable formats as P3P, should be considered adequate means of providing notice. If the value of the information and services provided by the website fail to meet the expectations of the users, the market will force such companies to raise the value of the services they provide and the privacy protections they adhere to in order to meet the expectations of the users. Government should not restrict the ability of users to assess for themselves whether the value proposition a company is making is worth the exchange of information about them. This is the most

powerful opt-out and would allow many beneficial services, such as free e-mail and discounted ISP access to continue based on exchanges of information between users and companies.

With respect to privacy, government should involve itself in the enforcement of section five of the FTC Act's unfair and deceptive practice provisions and pre-empt regulation by the fifty states in the interest of avoiding inconsistent standards that would make it impossible for large and small companies alike to operate.

Congress should not get caught up in a debate over the terminology of "opt-in" and "opt-out," but should focus rather on the ultimate goal, which is to empower users (and not government) to control their personal data while maximizing the value of the Internet to these users. As long as users have a clear understanding of what information is being collected about them, how it may be used, and how they may limit its use and disclosure, users will be able to exercise control over their privacy while still enjoying the full benefits of customization and personalization that the Internet can provide.