

Online / Offline Imbalance

While the EU rules and US-EU Safe Harbor Principles apply online and offline, the FTC has focused on regulation of privacy on the internet, rather than offline. Some of this focus doubtless reflects the sexiness of electronic commerce and the understandable desire to be involved in an expanding industry. But other than the issue of online profiling (whereby clickstream data is received by websites, and which the FTC has separately addressed in a different set of reports), the FTC has never articulated a basis for treating offline privacy differently from on-line privacy. Yet traditional commerce raises all of the same issues, and the online community has actually done a far better job of communicating privacy notices and other elements of privacy policies to users than has the local department store or gas station. After all, when was the last time that either told you what they do with your credit card information?

The FTC's online-centric approach risks heightening unjustified public concerns, many rooted in widespread technophobia. We casually give our credit cards to waiters who disappear for 15 minutes and return with a bill. We of course have no assurances that the waiter hasn't surreptitiously copied down the number or made an extra imprint of the card. But familiarity, the sense that the waiter risks something by doing this, and laws against credit card fraud combine to give us a sense of security sufficient to let the transaction proceed. Similarly, we entrust our most precious documents – our bank statements, our mortgage records, our love letters – to the security of paper and spit, and leave them to the care of a dozen underpaid strangers to carry across the country. It shouldn't work – but it usually does. And, more importantly, we trust it to. We talk on the phone, oblivious to the ability of an administrator in a central office to eavesdrop. And we wander through stores, unconcerned that a nefarious stranger could be following us around, noting our purchases and planning to use that information to blackmail us. Yet in the world of technology, we worry a great deal about these same transactions.

Treating "technology" differently not only risks setting different and more demanding rules for the New Economy (which arguably needs them less), but could lead to the adoption of rules that we would never accept in the off-line world because we would better understand their implications in daily life. As P. Bernt Hugenholtz of the University of Amsterdam has said in the context of regulation of technologies like Napster that affect existing intellectual property arrangements: "People are always scoffing that the technology moves so much faster than the law, but that's ridiculous. In fact the law is moving faster than the technology, which is both ironic and a very bad sign.... All academics I've ever met – no matter what their political stance – agree on one thing: all this Internet-related legislation is very, very premature. You'd think they'd at least see what the car looked like before trying to drive it."ⁱ

The above legislative and regulatory difficulties are thus compounded when legislators seek to pass preventative legislation in the technology environment. Such legislation can result in the wrong bill at the wrong time in the wrong forum, with local legislators responding to media discussion of ill-defined "privacy" concerns before specific problems have emerged. Given the international reach of the Internet, a mish-mash of inconsistently detailed local, state, national, and international regulations can kill or cripple what would have been beneficial new initiatives.

On several occasions, FTC Commissioner Leary has written persuasively on the perils of differential regulation of online activity:

“If the Internet is subjected to requirements that do not apply pro tanto to offline commerce, the regulatory imbalance could itself inhibit the growth of the Internet and undercut our common objective [of promoting the growth of Internet usage].... Of course, some privacy issues are particular to the Internet.... Any legislative or regulatory scheme can and should ensure that consumers are adequately informed about these Internet capabilities.... [But more generally, the] distinction between online and offline privacy is illogical, impractical and potentially harmful.... The Report’s recommendation would require Amazon.com to comply with the fair information practice principles but not the local bookstore which can compile and disseminate the same information about the reading habits of its customers.... Enforcement actions would depend on the source of and method used to collect a particular piece of consumer data rather than on whether there was a clear-cut violation of a company’s announced privacy policy or mandated standards.”ⁱⁱⁱ

After warning that such regulation would put internet companies at a competitive disadvantage, Leary also tellingly traced the political history of the FTC’s interest in the in-the-news topic of online commerce: “The Report’s recommendation limits itself to online privacy for reasons that seem primarily historical. The Commission first looked at the online world at a public workshop in 1995, followed by subsequent workshops in 1996 and 1997. Then, starting in 1998, Commission staff conducted annual surveys of Internet sites and their privacy policies to measure in a rough way the state of industry self-regulation. Each survey has been reported to Congress. The Report’s legislative recommendation flows from that series of surveys. The surveys have provided a lot of useful information, and undoubtedly spurred industry attention to online privacy issues, but the scope of these particularly surveys should not dictate the parameters of a legislative proposal.”ⁱⁱⁱ

ⁱ **Privacy in the Information Age** at 131.

ⁱⁱ FTC, “**Privacy Online: Fair Information Practices In the Electronic Marketplace: A Report to Congress – Statement of Commissioner Thomas B. Leary Concurring in Part and Dissenting in Part**” (May, 2000) (hereafter “**Privacy Online Report – Leary Concurrence and Dissent**”) at 1, 8, 9, and 9-10 (citations omitted)

ⁱⁱⁱ **Privacy Online Report – Leary Concurrence and Dissent** at 10-11.