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Position Paper for W3C Workshop on Web Tracking and User Privacy

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Summary

Individual entities have begun to offer privacy-enhancing technological measures such as "do not track" browser extensions, and organizations such as W3C and the IETF are moving to consider systematic responses to privacy concerns. These are positive developments for improving user privacy, but I think they are unlikely to recognize their full potential if they are implemented in a legal vacuum. I want to explore the types of statutory and regulatory rules most likely to promote—but not interfere with—development of code-based privacy enhancements.

Background

I am an associate professor at the University of Minnesota Law School. As a legal scholar I specialize in information law, particularly internet, privacy, and intellectual property issues. My privacy-related research focuses on the interaction between marketing practices, online technology, and legal rules.

In 2002, I wrote one of the earliest and most comprehensive examinations of P3P and its interaction with law, later published in the NEW YORK UNIVERSITY LAW REVIEW. (*See* William McGeveran, *Programmed Privacy Promises: P3P and Web Privacy Law*, 76 N.Y.U. L. REV. 1812 (2002)) I concluded that light-touch legal regulation could have encouraged broader adoption of P3P and more broadly provided the necessary "nudge" to stimulate development of privacy-enhancing technological solutions. In a more recent article, published in the UNIVERSITY OF ILLINOIS LAW REVIEW, I analyzed the emerging practice of social marketing—defined there as the disclosure of an individual's browsing and purchasing habits as a form of online word-of-mouth promotion aimed at that individual's social network. (*See* William McGeveran, *Disclosure, Endorsement, and Identity in Social Marketing*, 2009 U. ILL. L. REV. 1105) This piece reached a conclusion quite similar to my P3P analysis: a more robust legal requirement for user consent would stimulate market and technological best practices to shape the emerging field of social marketing in a manner that protects privacy. As I argued in both articles, that respect for privacy not only helps individual users, but it safeguards the economic and communicative vitality of the internet. Online advertisement or the recommendation ecology are

compromised by user suspicion and the potential "spammification" of inaccurate, exaggerated, or undesired disclosures about individual preferences.

I have begun research exploring application of a similar legal analysis to the general topics of behaviorally-based marketing. (In a related vein, I am also considering privacy implications of various identity-layer proposals.)

Position

Twelve years after the publication of Lawrence Lessig's *Code and Other Laws of Cyberspace*, his descriptive observations about the application of architecture, law, markets, and norms to online behavior have become so widely internalized that they border on cliché. Yet the prescriptive analysis that he began there, and that has been continued in work by many others academics, technologists, and activists, has not achieved the same level of acceptance.

Unfortunately, some policymakers still tend to propose rigid mandates, and in response some in the internet community tend to view all regulatory interventions with hostility. Lessig would argue that the modality of traditional law should be used to shape the development of other modalities to achieve goals such as enhanced user privacy. This has become a common mode of regulation in, for example, environmental law.

Current legal rules concerning commercial data-handling (or the lack of them) have failed. Without channeling from legal rules, the general and diffuse consumer demand for increased online privacy has not coalesced into a coherent demand for consistent treatment (beyond occasional media-fueled uproars over particular practices) or created momentum for particular privacy-protecting technology. But this does not mean that users are satisfied with the level of privacy they now enjoy, particularly when they learn more about current practices. We are all familiar with empirical evidence telling us so.

A legal regime that imposed certain minimum requirements and mandated respect for certain expressed user preferences could foster widespread adoption of uniform best practices—and the technological tools for achieving them. W3C obviously would play a crucial role in fostering such an environment. I continue to believe that, had such legal rules been in place ten years ago, the development and adoption of P3P might have turned out differently.

I hope my participation in the workshop will help inform analysis of legal rules calculated to support and promote, rather than impede, robust technological response to privacy concerns.