

Economics of Privacy Conference

On December 2, 2011, Silicon Flatirons Center held a conference at the University of Colorado Law School to discuss information privacy and the economic drivers that define it. In three panel discussions, two keynote addresses, and a one-on-one conversation with FTC Commissioner Julie Brill, conference participants listened intently to discussion and debate on the key drivers and market forces influencing the current and future trajectory of information privacy. The conference opened with a call by Professor Paul Ohm for participants and attendees to take a real-world perspective on privacy by thinking as a practitioner in the trenches.

Alessandro Acquisti's keynote officially kicked off the conference in a humorous yet thought-provoking manner. He teed up future discussion by attempting to define key questions in information privacy: Can market forces protect information privacy, and when is protection adequate? His answer to both was a resounding "it depends." Using economic theory to explain the incentive structures affecting information privacy, he explained that self-regulation is insufficient protection and that government involvement is necessary.

The first panel addressed head on the question of a market failure for information privacy. Each panelist began by presenting his or her article on the topic. The articles will be printed in the spring 2012 issue of the University of Colorado's Journal on Telecommunications and High Technology Law. The subject-matter ranged from the amount of information government knows about its citizens, to empirical studies on privacy policies, to the frustration caused by the overwhelming amount of information available. Overall the panelists seemed critical of the free market, generally agreeing that a market failure exists, if not for privacy reasons then, as Professor Scott Peppet argued, for the emotional impact of overwhelming information. Despite the dynamic nature of technology, Lorrie Cranor stated that good policy is possible as long as it is flexible. "It is hard to predict what will happen next," she said, "but it will be big and something we haven't thought of."

The panel discussion was followed by the second keynote speaker, Joe Farrell, Director of the Bureau of Economics at the FTC. Mr. Farrell skillfully taught the non-economists in the audience to understand the many economic discussions at the conference with a basic economic model. He explained that the value of privacy to consumers, not the underlying reasons or justifications for that value, is the most important consideration. By pricing privacy in light of consumer demand, regulators can minimize "noise" to yield efficient results.

The second panel addressed direct advertising and the implications of government regulation. Seth Levine favored a self-regulatory regime facilitating product creation in response to market demand. He noted that many start-up companies offer targeted advertising solutions, but none (that he is aware of) allow individuals to better control the data they pass along to companies. More importantly, individuals have the opportunity to adopt privacy measures by browsing anonymously or opting out of marketing, but many do not elect these options. At a rate of 4 to 1, for example, consumers modify their Google preferences instead of opting out.

The panelists considered European privacy regulation as a benchmark for the effectiveness of such regulation. Ultimately the group decided that privacy regulation can have an effect (influence behavior), although it might be immediately dated or ineffective. Regulation might also have a positive impact on innovation at a time when it is necessary for economic growth because regulation can fund new initiatives, creates new markets, and establish safe harbors to protect failure.

The panel ended touching upon a surprising fact that the other panels also discussed. Most Americans, they agreed, believe legislation exists protecting their privacy such that they need not take

action. The mere existence of a privacy policy apparently indicates that basic personal information is protected. Further, privacy tools generally are ineffective because individuals don't understand when or how to use them.

The third and final panel of the day began with Professor Harry Surden asking the panelists to think into the future about (1) emerging technologies, (2) prevalent or intensive use of current technologies, (3) forthcoming regulatory changes. Professor Scott Peppet then gave a presentation "speculating" on future technologies. Through creative and interesting visual examples, he proposed the future to include facial recognition goggles, retinal scanners, detailed information on everyday goods, augmented reality, and digital/physical interfaces. To conclude, he noted that his speculations were not actually speculations, but the latest products available on the market today.

In light of these new technologies, Professor Surden asked if technology empowers or enslaves, to which Berin Szoka responded readily that technology is empowering. To him, the First Amendment provides as sufficient framework for government to address information privacy issues. But it is harmful to regulate without understanding the technology or the full impact of regulation. Chris Hosfingle countered that regulation can enhance competition and allow consumers to set their preferences. Opting out of information tracking is not always available. Government can ensure that it is available to all consumers and set the fundamental policy protections that many Americans currently believe exist. Peter Swire added that cybersecurity is also a real issue that requires regulation. Companies need to protect the information they have from misuse and loss.

The conversation then turned to *IMS Health v. Sorrell*, a recent Supreme Court case on privacy and free speech. Mr. Swire presented an argument that, if privacy does equate to speech, the Court's ruling could mean all privacy law violate free speech. Mr. Beren argued that the Court's ruling is actually beneficial because it will bring an analytical rigor to legislation. Fernando Laguardo agreed that policymakers must think carefully about the consequences of regulating data and commented that the legislation at issue in the case was poorly drafted. He further noted the importance of not regulating specific technologies, but intended outcomes through overarching principles.

To wrap up the conference, FTC Commissioner Julie Brill said that many of the issues addressed by conference speakers were considered by the FTC in 2011, including social networks and behavioral advertising. The Commission's Privacy Report, she said, summed up many issues the Commission addressed over the past year. Two other issues discussed during the conference and considered by the FTC included Do Not Track and notice and choice. She explained that there is no real agreement about the implications of Do Not Track, and no way to confirm that consumer preferences will be honored. Most likely, standard-setting bodies will determine what Do Not Track means for consumers and the FTC, along with other regulatory bodies, will enforce those standards. As for notice and choice, Commissioner Brill believes it benefits consumers by educating them and giving them choices. She would like to make it simple and more digestible for consumers.