

Social and Mobile and Clouds, Oh My!

Emerging Privacy Issues & The Challenge of Globalizing Technology



Presented by

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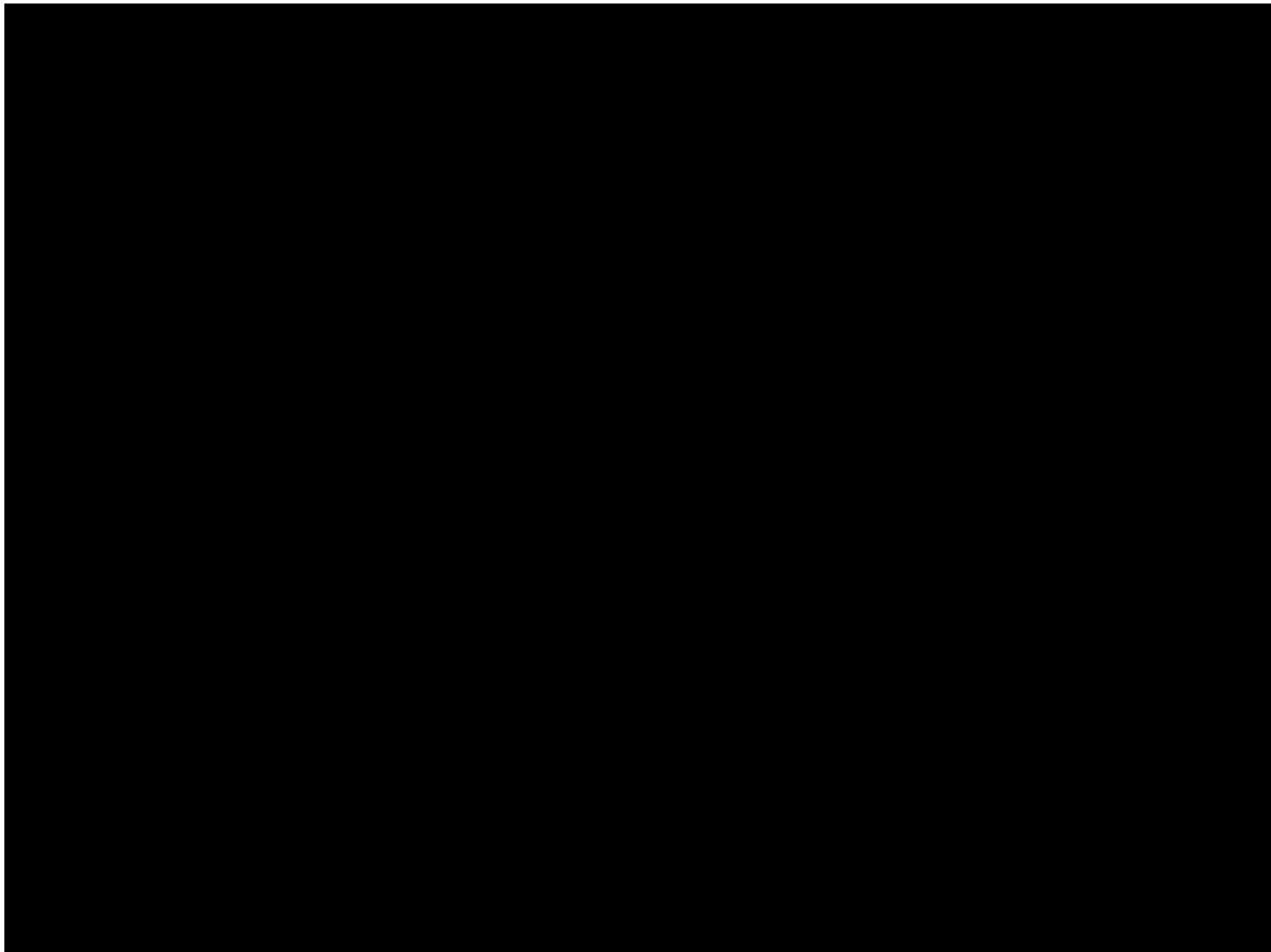
IAPP **Canada** Privacy Symposium 2012
10 May 2012; Toronto, Ontario, Canada

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The business of relationships.

Is it the Information or Control of the Information that is Game Changing?

<http://www.youtube.com/watch?v=okKrcdE1kew>



**Pay no attention to
that man behind the curtain!**

**The emergence and convergence of
innovative digital technology**

**Social Networks
Mobile Platforms
Cloud Based Computing**

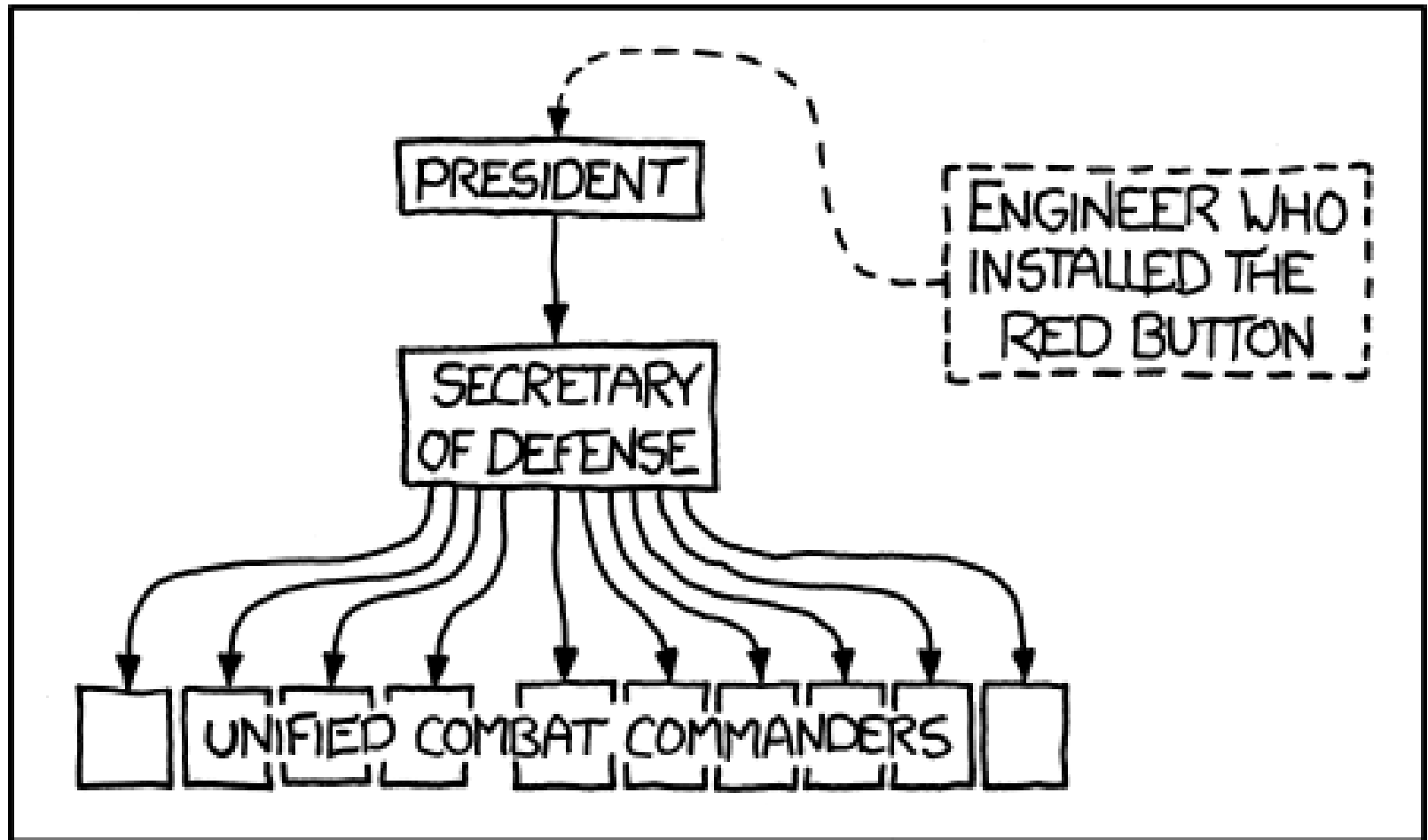
continues to challenge our legal & regulatory systems,
creating confusion amongst and between
search, surveillance, privacy & data protection



“What chance has the ignorant, uncultivated liar against the educated expert? What chance have I against a lawyer?” Mark Twain, “On the Decay of the Art of Lying,” 1882

Technology Changes the Rules

Technologists Can Change the Game



US NUCLEAR CHAIN OF COMMAND

Changing the Tires

on a Moving Car?

Governmental intervention may be necessary to protect consumers from abuse, but can a concretized, codified piece of legislation remain relevant as innovation and technology remains unpredictable?

Consumer privacy, data protection and surveillance have always been context specific and continues to evolve. How can they be harmonized across nations, cultural and local boundaries?

Distinctions between desktop computing and home entertainment become irrelevant; Mobile devices will increase the ability to capture consumer information; Cloud computing makes content, application programming and processing accessible anywhere, anytime, effectively outsourcing the evolution of technology making distinctions among devices irrelevant;

Business models and legal frameworks continue to change; metrics and quantification methodologies continue to be debated; roles of advertisers, agencies, media buyers, broadcast and publishing networks, as well as ISPs, search engine, browser and web hosting companies – the technology players – continues to change.

Convergent Digital Technology is Transforming



**Trademark and Service Mark Protection
into**

Brand and Reputation Management

**Copyright Protection
into**

Artistic Expression and Innovation

**Search, Context & Location Behavior
into**

Surveillance, Privacy and Data Protection

If I Only Had Courage

The Rise of Cloud Computing

**Cloud Computing is:
“Dynamically scalable
virtualized information
services delivered on
demand over the Internet.**



AND
With IPv6 there is
a
unique, static IP
address for every
device

Yankee Group: “Clouds in 2010: Vendor Optimism Meets Enterprise Realities,
Yankee Group Research, Inc.

Cloud Computing

What Me Worry?

Privacy & Data Security

Regulatory Compliance

Intellectual Property

Performance Metrics

Jurisdiction

Litigation & Government

Termination

Tax

Business Continuity

Insurance

Antitrust – Competition

Pricing

Shared Applications

Shared Infrastructure

Shared Data Resources

Competitive Issues

Enforcement Issues

&

The 800 Pound Gorilla in the Room:

Interoperability

Availability & Access

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Cloud Trends to Watch

**Government regulation, perhaps akin
To FCC or PTT type interexchange, availability and data
regulation, as well as tax considerations are likely to emerge.**

**Telecom providers will close
the gap between public and
private cloud environments**

**Cloud providers and
infrastructure builders will
invest in security and
compliance management**

**Clouds are inherently multi-jurisdictional, interoperable
and subject to varied governmental legislation,
regulation and judicial oversight.**



If I Only Had A Heart

The Rise of Social Media

“The web is more a social creation than a technical one. I designed it for a social effect – to help people work together – and not as a technical toy.”

Tim Berners-Lee, “Weaving the Web: The Original Design and Ultimate Destiny of the World Wide Web”



In the 1970s, *Deep Throat*, a pornographic movie, migrated sexually explicit sex from home into movie theater – hardly private or hidden from public view. Yet also in the 1970s, “**Deep Throat**” became the code-name used by Carl Bernstein and Bob Woodward of *The Washington Post* for a confidential source in their investigation of the Watergate scandal in the Nixon administration.

Traditional Media is Passive

Social Media is Different . . .

- Attract
- Monitor
- Engage
- Respond
- Interact
- Transact
- React
- Retain
- Improve



"Didn't you get my e-mail?"

Has Changed the Balance of Power

Content Context Control

Enable Conversations

Influence Conversations

Monitor Conversations

React to Conversations

Monetize Conversations


It's All About the Conversation



The Comfort of Strangers

Most social networks have no way to qualify friendships and if they do, they are generally ineffective, ignored or rarely used.

Individuals are much more relaxed about interacting and sharing information with strangers in an online environment than in person.

Social networks provide a game-like atmosphere. Collecting friends, building large followings, game participants, networks, circles, common interest and activity groups – even people  'ing is considered desirable.

Alexander Korth, http://www.readwriteweb.com/archives/on_privacy_in_social_networks_what_drives_users.php

Social Media Can Target Demographics & Individuals

- Age
- Preferences
- Gender
- Relationship Status
- Activities
- Location
- And more



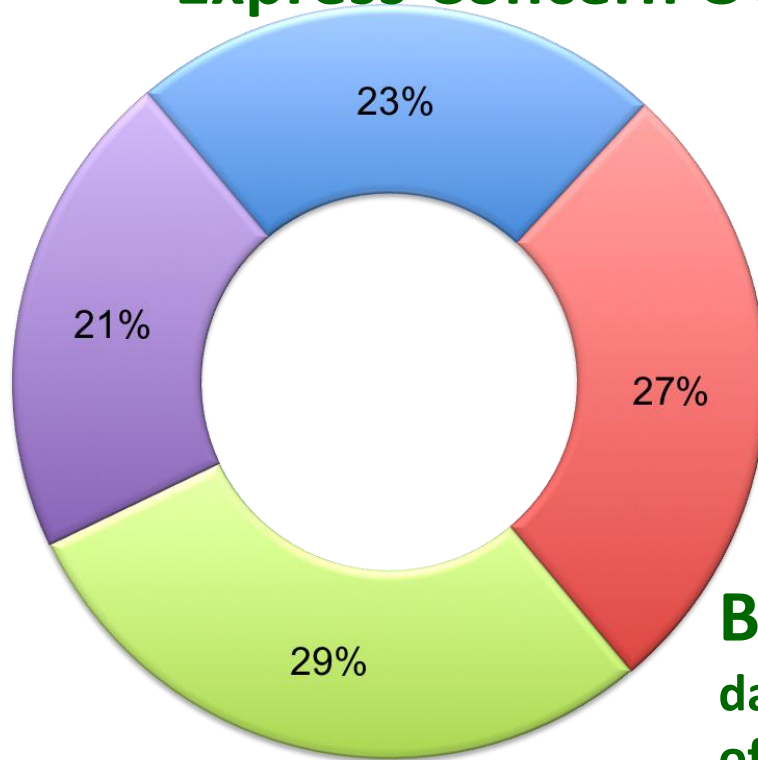
Peer to Peer Social Climbing?



Given that studies consistently show consumers trust other consumers – their peers – more than advertisers (and government) when it comes to product and service recommendations, does it come as any surprise that ‘influence’ peddling has now been extended to consumers?

Social Media Participants

Express Concern Over Privacy



Source: Marist Institute, July 2010

- Very concerned
- Concerned
- Not very concerned
- Not concerned at all

BUT . . . *The Wall Street Journal*, just a few days ago, reported that in the Proceedings of the National Academy of Sciences,

“Talking about ourselves--whether in a personal conversation or through social media sites like Facebook and Twitter--triggers the same sensation of pleasure in the brain as food or money.” Scientists have found that bragging and boasting feels so rewarding, at the level of brain cells and synapses, we can't help sharing our thoughts.

(WSJ; D1; Science Reveals Why We Brag So Much, May 8, 2012, Robert Lee Hotz)

Digital Technology Combined

With Social Networking Shifts Social Expectations

We traditionally (“normally”) assume that our conversations are private and made public only when one or more of the participants takes some affirmative action.



In the online environment conversations are public by default and and you have to work to make them private



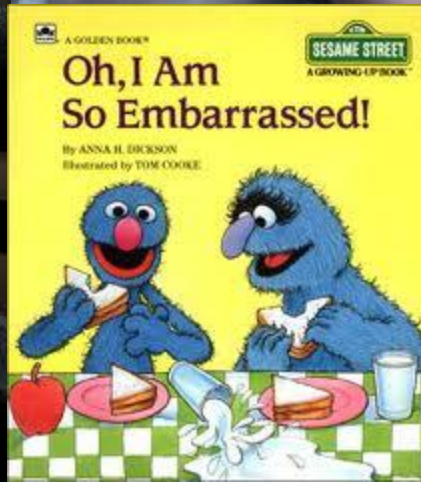
BUT

in the mobile world . . .

we are still confused!



You are being exposed in new ways



and . . . **iapp**

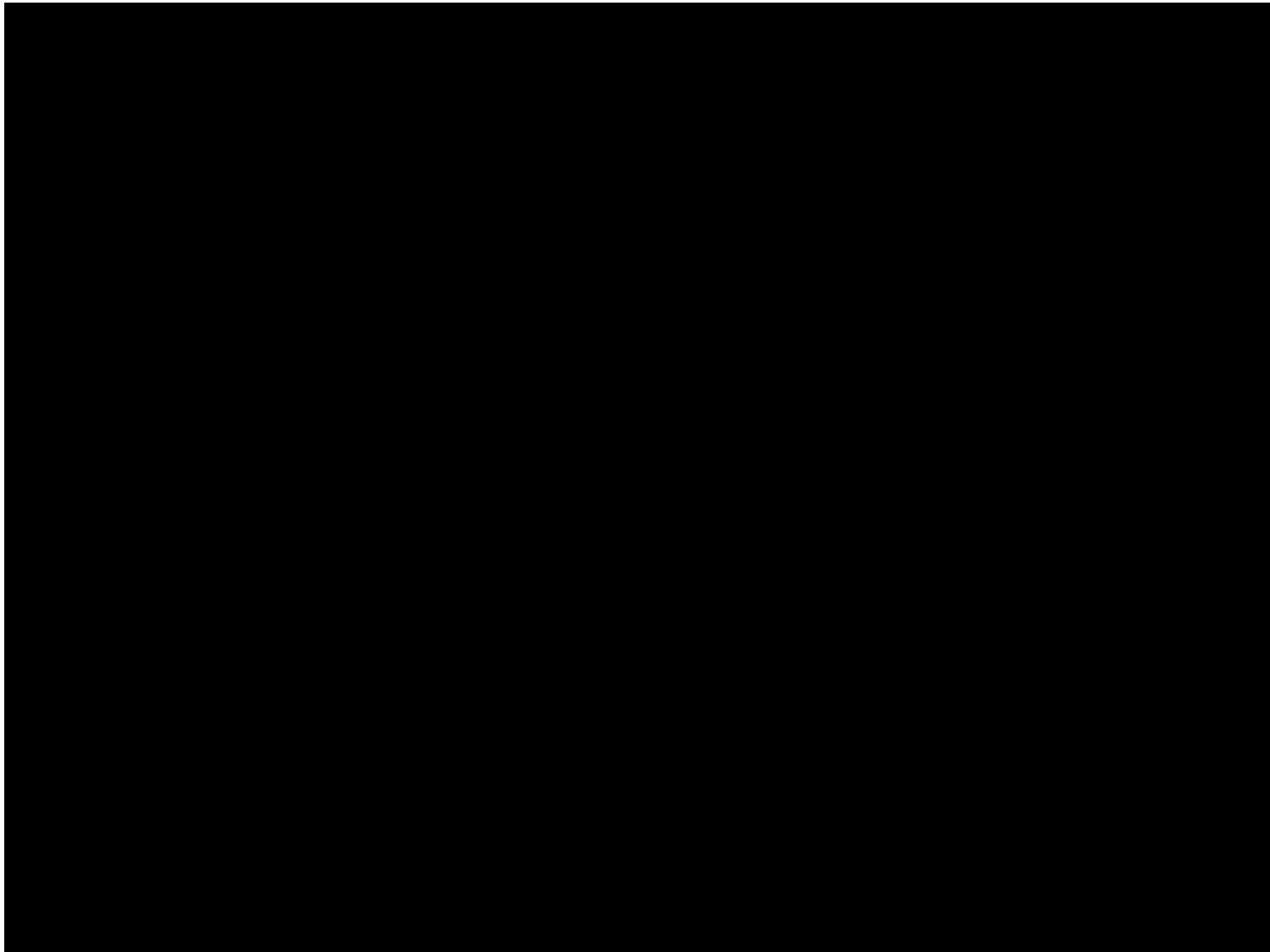
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Managing Social Reputations

Is Now an Integral Part of Privacy Expectations



Is anyone electable anymore?

If I Only Had A Brain

The Rise of Mobile



Everything ~~Goes~~ Has Gone

Mobile

Web Technology, GPS, RFID, Bluetooth, QR Codes, Augmented Reality and Virtual Reality

Further Blur Distinctions Between Privacy, Data Protection, Search and Surveillance

- ❖ User Search & Input
- ❖ Social Networking with Location Sharing
- ❖ Geo Targeting – Location, Location, Location
- ❖ Coupling Location with Context
- ❖ Coupling Location with Behavior
- ❖ Coupling Location with Content
- ❖ Location Sharing Capabilities

Rise of Mobile: A Historical View

Effective Regulation



Mobile Is

- Personal – always attributable to an individual
- Pervasive – one screen unites everything
- Instant – here and now
- Local – it goes where you go

**First thing you check when you wake,
last thing you check before going to bed!**

Within reach over 80% of every day ! !

**92% of owners cannot get through a typical day
without using their mobile phone**

Source: The Mobile Life, YouGov Survey 2006

Why do you think they call it a
'sell' phone ?

GeoLocation Apps Collect Even More Information

Gaming	Deals	Search & Community
		

‘Checking in’ is motivated by value exchange: Deals, information, interaction, bragging rights, notariety

Privacy or Surveillance

Wiretapping refers to the contemporaneous simultaneous or recorded eavesdropping of actual conversations as they occur.

“Location technology” or mobile surveillance refers to the use of a “pen register” or “trap-and-trace device” to identify the physical location of a specific device at an exact moment in time.

Past: Historical data

Present: Ping data

Future: Tracking movement and usage patterns, mapping both individual and group traffic, it may be possible to predict statistically where people, and perhaps a particular person, is going to be!

Sur, Sous, Co & Counter!

The “Veillance” Quartet

Surveillance – the strong monitoring the weak; the powerful watching ordinary folks, the rich and government officials, tracking and tracing each other.

Sousveillance – a term coined by Steve Mann, a professor at the University of Toronto, that refers to **inverse surveillance** - ordinary citizens monitoring, watching and recording the strong and the powerful.

Coveillance – peers stalk and monitor and watch their peers.

Counter surveillance – the practice of avoiding surveillance or making surveillance difficult.



Yeah, There's an App for That . . .



Content = Intellectual Property

Context = Search, Surveillance

Control = Privacy & Data Protection

Control = \$\$\$\$\$\$

Classic Privacy Rights

“Privacy is the right to be alone--the most comprehensive of rights, and the right most valued by civilized man.” Louis D. Brandeis

Intrusion on solitude or private affairs

Public disclosure of embarrassing private facts

Publicity placing one in a false light

Appropriation of name or likeness for commercial advantage

A personal ‘privacy’ right, which has morphed into a property right

Factors v. Pro Arts, 597 F.2d 215 (2d Cir. 1978) Confirmed property right as surviving death of celebrity (Elvis Presley)

Legal Overview

UK and 47 European States:

Article 8 of the European Convention on Human Rights

Australia:

Privacy Act of 1988

Canada:

Personal Information Protection and Electronic Documents Act 1995-2004

An Act Respecting the Protection of Personal Information in the Private Sector (Quebec)

The Personal Information Protection Act (British Columbia)

The Personal Information Protection Act (Alberta)

The Personal Health Information Protection Act (Ontario)

US:

Multiple Federal Laws in 14 categories

Multiple State Laws (Hint: California has over 80)

US Legal Landscape:

Representative Privacy Laws

U.S. Constitution, 4th Amendment

Privacy Protection Act of 1980 (42 U.S.C. 2000aa);

Electronic Communications Privacy Act of 1986 (18 U.S.C. 2510 note);

Computer Security Act of 1987 (15 U.S.C. 271 et seq.; 40 U.S.C. 759);

Federal Information Security Management Act of 2002 (44 U.S.C. 3531 et seq.);

E-Government Act of 2002 (44 U.S.C. 9501 et seq.);

Defense Production Act of 1950 (50 U.S.C. App. 2061 et seq.)

Federal Trade Commission Act

Communications Act Federal Communications Commission

State Consumer Protections, Unfair and Deceptive Acts or Practices Statutes, Privacy & Identity Theft Statutes

Controlling the Assault of Non-Solicited Pornography and Marketing Act (“CAN-SPAM Act”) and corresponding FTC rules

The Telephone Consumer Protection Act of 1991 (“TCPA”) and the corresponding FCC rules

Do-Not-Call Rules

Customer Proprietary Network Information (“CPNI”) rules

And of course there are Industry Self-Regulatory Guidelines – *e.g.*, ANA, IAB, MMA, DMA, AAAA, CARU, CTIA.

1996-Health Insurance Portability and Accountability Act (HIPAA)

1974 The National Research Act

1970 Bank Secrecy Act

1998 Federal Trade Commission

1999 Gramm-Leach-Bliley Act-GLB

2002 Sarbanes-Oxley Act-SOX

2003 Fair and Accurate Credit Transactions Act

1986 Electronic Communications Privacy Act-ECPA-pen registers

1986 Stored Communications Act-SCA

1978 Foreign Intelligence Surveillance Act (FISA)

1984 Cable Communications Policy Act

1986 Electronic Communications Privacy Act (ECPA)

1994 Digital Telephony Act - Communications Assistance for Law Enforcement Act-“CALEA” 18 USC 2510-2522

2005-6 CALEA expansions

1974 Family Educational Rights and Privacy Act-FERPA

2001-US Patriot Act – expanded pen registers

2005 Privacy Act - Sale of online PII data for marketing

1974 Privacy Act



Privacy in an Analog World



On the Internet, nobody knows you're a dog.

Peter Steiner, published by *The New Yorker* on July 5, 1993

How Quickly Our Expectations of Privacy Change

1988: In the battle to block Robert Bork from the Supreme Court, someone leaked his video rentals. In response, Congress banned video stores from disclosing titles of films people rent.

**"You have zero privacy anyway. Get over it."
Scott McNealy, Chairman, Sun Microsystems, 1999**

**"The privacy you're concerned about is largely an illusion. All you have to give up is your illusions, not any of your privacy."
Larry Ellison, CEO, Oracle, 2001**

2008: A federal judge hearing a \$1 billion copyright complaint by Viacom ordered YouTube to turn over online records (computer addresses) used to watch videos. The judge dismissed privacy concerns as "speculative"

[P.S. The judge graduated law school before the photocopier was invented!]

Privacy in a Digital World



**For Those of You Zealously
Guarding Your Privacy**

If I search for you on Google and don't find you



Google

. . . do you exist?

Cookies

Cookies can only be set and read by the same domain

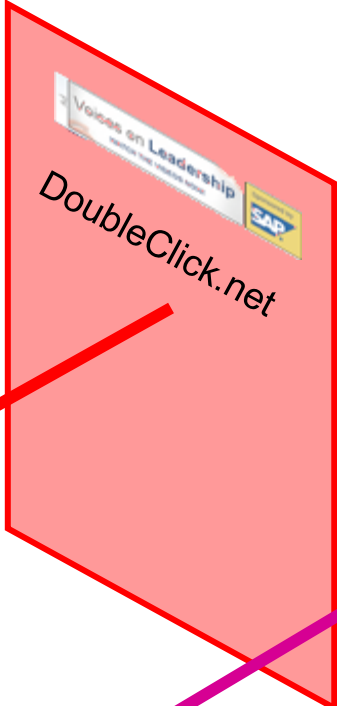
- A cookie set on mail.yahoo.com can be read by my.yahoo.com
- A cookie set on yahoo.com cannot be read by washingtonpost.com

Web coding language (HTML) allows for multiple domains to be shown in a browser on a single webpage

- An ad is usually served on a primary site by a hosted third-party provider, such as Atlas or DoubleClick
- This ad gets shown on a site like nytimes.com through a seamless “window” that is actually a view into an Atlas/DoubleClick “webpage”
- Other than ads, content from third parties, including news wires, widgets, stock information, etc, can be displayed in the same way
- When the third-party ad/content shows up in the browser, the third-party domain can read its own cookies, even though the browser location bar says the webpage being visited is another domain (<http://www.washingtonpost.com> vs. <http://www.doubleclick.net>)

Cookies

“Holes” in the washingtonpost.com are filled with ads. These ads are actually on other “sites” and that is how cookies from other sites can be set/read on the washingtonpost.com



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BUT – Most Secure Sites Use Server-Based Login Software

Sites that require logins, including web mail, news content, banking, etc, can track almost all user activity and link it directly to any user-entered profile data.

This software cannot be stopped from tracking user activity by having the browser block cookies.

Data collected by logged-in environments cannot be shared with other domains through a browser.



On the Internet, everybody knows you're a male beagle who prefers dry dog food, sneaks into the master's bedroom, lying on the bed watching cable and who wears a specially designed, hypo-allergenic flea collar.

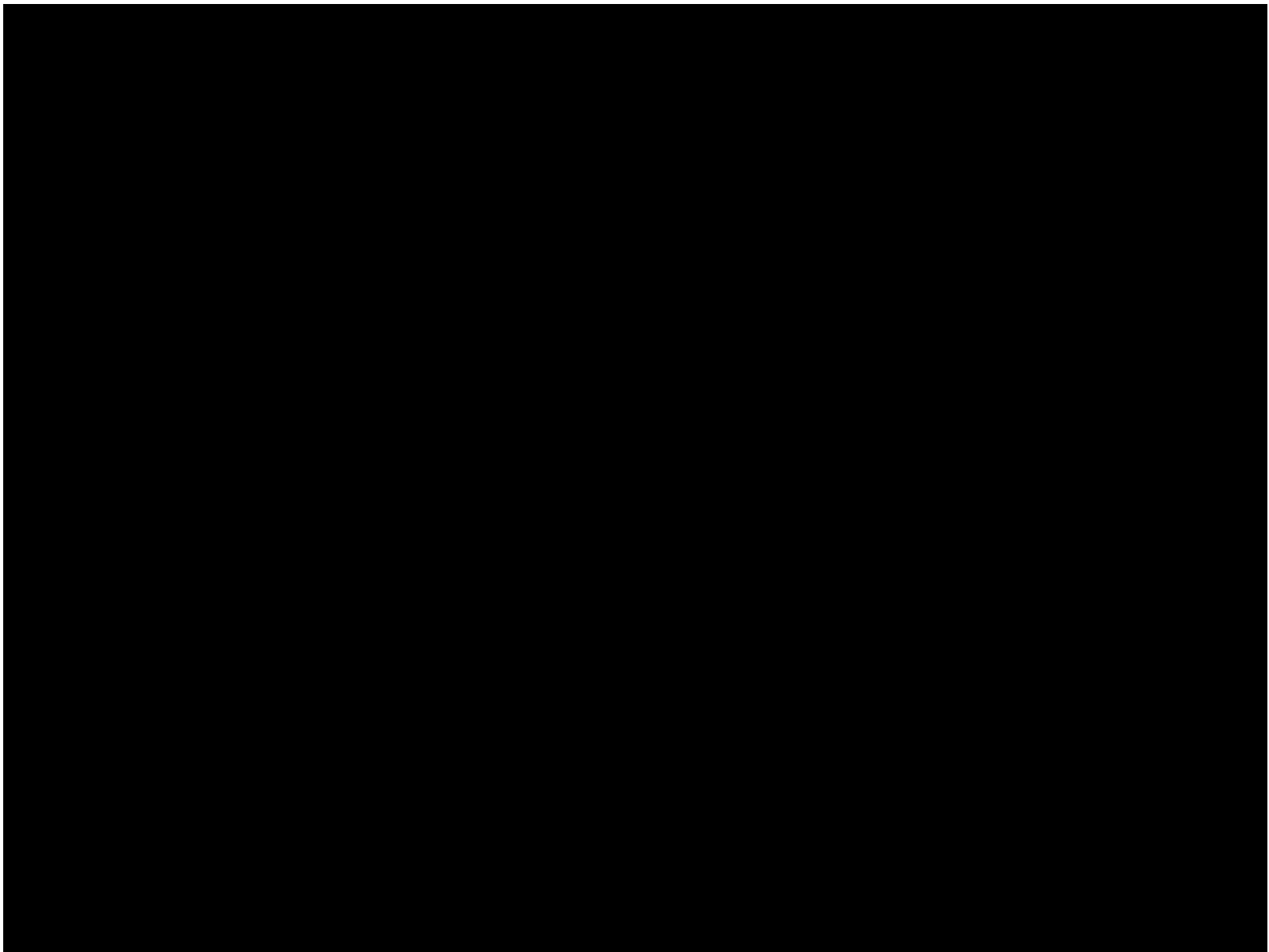
What Does Privacy Mean Today?

References to privacy are consistently and persistently used to refer to everything from true privacy, to data protection, digital search, video cameras, wireless access, open ID and browser data collection, surveillance, data matching, data mining, profiling, geo-targeting, behavioral data gathering, cookies, web beacons, invisible GIFs, web bugs, online and mobile, transactional activity, data sharing, processing, identity theft and compromised databases, to name the most obvious.

In the exchange of value, real or perceived by the consumer, privacy has become synonymous with the right to exploit the value of information about that individual, her or his relationships, activities, behaviour and preferences,

whether or not personally identifiable and whether or not sensitive or confidential.

It's All About the Information!!!



“Privacy” Appears Paradoxical

People SAY they cherish privacy as a right and principle.

BUT in their daily lives, they often act in ways that allow, even encourage, others to monitor and track them, to know their preferences, exactly where they are and what they are doing.

People express generalized anxiety about the consequences of inappropriate personal information disclosure: to businesses; to people they don't know; to computer hackers; to data mining and companies that analyzed their information in order to display ads based on the information obtained . . .

BUT in their daily lives, they often disclose information virtually indiscriminately to strangers, both individual and commercial, and most people aren't actually sure that any actual harm has occurred.

Is it a Paradox or Simply

Incorrect Attribution?

People SAY they care about the pervasive collection of information about them and ‘dossier effect’ of the web . . .

BUT most people don’t opt out, don’t turn off cookies, don’t read privacy policies and don’t know or take the time to try and understand tracking or information sharing policies of the websites with which they interact.

People SAY they would prefer to limit the amount of information that is easily obtained about them. . .

BUT most people seem disturbed if they search for themselves and don’t find much, will almost always search for information about an individual they are planning to meet or speak with, rarely change their privacy settings and almost never define their relationships and information sharing within those relationship by personal knowledge.

We Now Use the Term

'Privacy' To Mean Many Things

Anonymity/Pseudonymity: A persona, but ostensibly neither data nor behavior identifiable with the real individual behind the persona.

Confidentiality: Control over the use of information; protection from the collection, sharing and abuse of information about them.

Security: Protection from disclosure, impersonation and identity theft in ways that can cause harm.

Not All Data is Created Equal

People ascribe importance to some types of information and not to others. Often the degree of perceived required protection may vary by age, status, culture, societal norms, nationality, gender and a variety of factors.

BUT most people (and regulators) agree that health and financial information, information about children, personal and family secrets should be protected.

Almost everything else is open for discussion!

Context Is Important,

But Not Always in the Same Way to Different People

People are often willing to forego some degree of privacy and control and even the exploitation of information,

IF, for example, it would help to:

Combat pedophiles and child predators;

Prevent terrorism and other criminal activity;

Make public places and transportation safer;

Prevent or detect stalking.

People also voluntarily forego some degree of privacy in order to obtain some commercial or personal benefit.

Highly Individualized and Context Sensitive

Does This Make You Happy or Make You Nervous?

Pizza Palace '30 Minutes or it's Free'



I Have a Feeling We're Not In Kansas Anymore

Privacy is no longer just about our right to be let alone or to prevent facts and observations about us from being perceived, used or shared.

Our legal and regulatory systems have become schizophrenic and inconsistent in our use of terminology and in distinguishing between personal and personally identifiable information, differences in how we refer to the various capabilities and platforms spawned by innovative digital technology.

It is indeed, all about the information – the right to control, exploit and obtain value from information about us . . . even if that information is publicly available and even if it is neither confidential, nor sensitive.

Social and Mobile and Clouds, Oh My!



Sometimes I lie awake at night and ask “Where have I gone wrong?” Then a voice says to me, “This is going to take more than one night.” Charlie Brown, from Peanuts, by Charles Schulz

Global Reach, Global Resources

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Related Practice Area(s)

- Mergers & Acquisitions

Related Articles

- Vol. VI, No. 7 (July 2007) **Legal Bytes**
- Vol. VI, No. 6 (June 2007) **Legal Bytes**






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Legal Bytes

Advertisers Online and on the Frontline

New York's Attorney General has just settled actions against Priceline, Travelocity and Cingular Wireless for promoting products and services using "adware"—the first time a law enforcement agency has held an advertiser responsible for ads displayed through adware.

These settlements require the advertisers (and affiliates—presumably sales agents and promotional partners) to give consumers full disclosure of any adware (including adware bundled in other software); ensure advertising has a conspicuous, identifiable brand; obtain consent from the consumer to download and allow the adware to operate on the computer; and make it reasonably simple for a consumer

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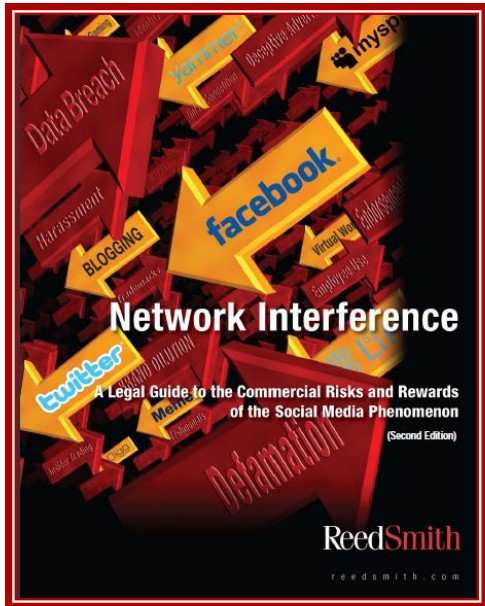
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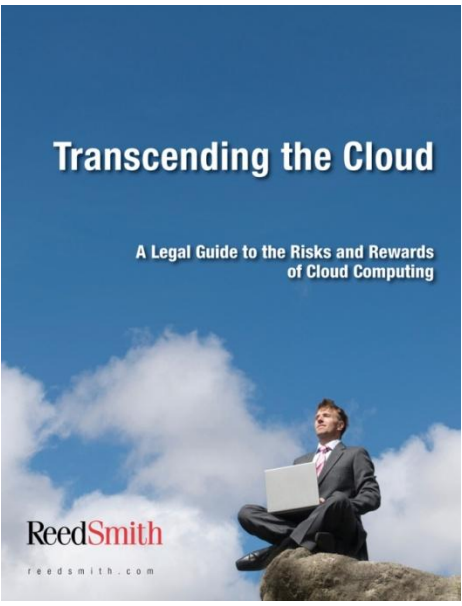
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Resources—More Information



www.reedsmith.com/networkinterference



<http://www.reedsmith.com/cloudcomputing>

Coming Soon:

Mobile Mayhem: A Legal Guide to a Wireless World

What I've Been Reading

An Army of Davids: How Markets and Technology Empower Ordinary People to Beat Big Media, Big Government, and Other Goliaths

Glenn Reynolds

Database Nation : The Death of Privacy in the 21st Century

Simson Garfinkel



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Thank You !



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Questions??

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