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Opinion

Notice and choice paradigm in the US: shifting the focus

Data privacy has traditionally been defined as the right of individuals to control their personal information. US privacy rules reflect the view of the 'empowerment' of data subjects. The tenet of individual choice and the informational notice that goes along with it, are the cornerstones of the US privacy regime.

In the Fair Information Practice Principles as articulated by the Federal Trade Commission (FTC) in 1998, notice and choice are listed as the very first principles. Two of the most important privacy laws in the US are premised on the notice and choice regime. Under the Gramm Leach Bliley Act (GLBA), the Privacy Rule does little else other than impose a notice and choice framework. Likewise, under the Health Insurance Portability and Accountability Act (HIPAA), the ability to make decisions about the use of one's health data is a fundamental element. In reality, however, these laws contain myriad exceptions to the ability of individuals to make real choices. Entities subject to these laws can actually use data in different ways without providing any choice at all. The GLBA contains so many exceptions from the requirement to offer choice that the only real choice provided is whether data can be shared with a third party for that entity's own marketing purposes.

For unregulated organizations not subject to the GLBA or HIPAA, there are few rules requiring them to offer any choice to consumers. As a practical matter, most companies have developed privacy notices that purport to enumerate the companies' data uses, and provide choices regarding those uses. The enforcement mechanism with respect to these notices is Section 5 of the FTC Act, which prohibits 'unfair and deceptive' trade practices. Companies go to great lengths to ensure that their privacy notices are accurate so they will less likely be subject to enforcement actions. This means that privacy notices are not just fully accurate, but also wholly incomprehensible to the average reader who has not attended an Ivy League law school. Furthermore, because there are no legal requirements to request consent, the notices are often drafted so broadly as to offer essentially no choice. Even if an organization does offer consumers the ability to make decisions about the use of their data, there is little enforcement and, therefore, no way to ensure that choices are honored. All of this creates the illusion of choice. We have transformed the laudable goal of 'transparency' into a tell-all notice that offers little information that a consumer really wants and few meaningful choices.

All this may leave us thinking that we should welcome the demise of the once-cherished notice and choice paradigm. I would argue otherwise. While the 'consent' model is not a panacea, I would suggest that there continues to be a role

for consent in today's interconnected world. However, the focus needs to shift back to true transparency and informed decision-making rather than pro-forma notices and meaningless choice. There are some circumstances in which it is absolutely necessary to provide clear notice and to obtain informed consent. For example, I should be able to choose whether information I provide to my bank to obtain a loan could later be provided to a potential employer in the hiring process. This is a use of the data that I would not anticipate and real harm could ensue as a result. There is no question that there are circumstances in which consent is useful and necessary. However, these instances are limited to those about which consumers really care. Innocuous uses of data should not trigger a consent opportunity. While it is critical to protect and empower consumers, we should do so in a way that is relevant to them and addresses their real concerns.

Much of the criticism around the 'notice and consent' paradigm has focused on its lack of value to the individual. We need to perhaps shift the focus to the organization rather than the individual. There is significant value for companies which craft privacy notices to reflect their information practices. Developing an accurate notice requires careful scrutiny of an entity's data processes. I have drafted hundreds of these notices and there is not a company with whom I have worked that has not benefited from the self-examination. The privacy practices that are revealed inevitably lead to a more privacy-sensitive and secure corporate culture. Ultimately, this benefits the individuals who entrust their data to that entity.

In short, we need to reconsider the true value of the notice and choice paradigm, and reshape it to serve the goal of 'transparency' that it was once intended to promote.

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