Privacy & Security Law Report™

March 29, 2010

Consumer Protection

Looking Beyond Notice and Choice

by Fred Cate

If the Federal Trade Commission has learned anything from its three workshops on "Exploring Privacy," it is that notice and choice are inadequate tools for protecting information privacy.

This shouldn't really have come as news. After all, Timothy Muris, when he was chair of the FTC, doubted "whether we know enough to implement effectively broad-based legislation based on notices,"describing the experience with Gramm-Leach-Bliley privacy notices in these terms: "Acres of trees died to produce a blizzard of barely comprehensible privacy notices" (Timothy J. Muris, Protecting Consumers' Privacy: 2002 and Beyond, Privacy 2001 Conference, Oct. 4, 2001, available at http://www.ftc.gov/speeches/muris/privisp1002.shtm).

Nine years later, current FTC Chair Jon Leibowitz opened the first workshop with a somewhat more understated, but nevertheless similar, sentiment when he said that "[w]e all agree that consumers don't read privacy policies" and the notice and choice regime hasn't "worked quite as well as we would like" (FTC Chairman Jon Leibowitz, Introductory Remarks, FTC Privacy Roundtable (Dec. 7, 2009), at 3, available at *http://www.ftc.gov/speeches/leibowitz/091207privacyremarks.pdf)*.

This is an important discovery because for more than 40 years, regulators have not only treated notice and choice as key tools for protecting privacy, but have actually regarded choice as the goal of many of those laws.

So a second important lesson from the FTC workshops is that there is a mounting consensus that not only are notice and choice inadequate tools for protecting privacy, but that choice is an inappropriate goal as well.

So What Should Replace Them?

As a better goal for privacy laws, I suspect that the answer will be along the lines of preventing harmful uses of personal information, but with a broader concept of "harm" than U.S. laws have previously recognized. Certainly "harm" must be broader than just physical or economic injury, to include injuries less easy to quantify or demonstrate, but that are nonetheless very real—what some participants at the FTC roundtables described as the "ick"factor.

As better tools for protecting privacy, I expect three developments. The first is that future laws and rules will require more substantive protections for personal data, especially when those data are used without explicit consent. So just as Massachusetts has moved beyond the 40-something states that merely require notices of data breaches, to impose requirements designed to prevent breaches, I suspect that more privacy laws will take a similar tack (For one proposed approach, see Fred H. Cate, "The Failure of Fair Information Practice Principles," in Jane K. Winn, ed., Consumer Protection in the Age of the 'Information Economy' 341 (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1156972).

Second, future privacy laws are likely to focus more on use of information, rather than mere possession. Some uses of personal information may be harmful or present a greater risk of harm, and so would be prohibited entirely or require explicit notice and choice, while other uses of the same data may be so beneficial to the data subject, the data user, or society more broadly that they are permitted without consent or with more limited choice opportunities (for example, with opt-out choice).

Finally, a frank recognition of the limits of notice and choice does not mean that they play no role in protecting privacy. Their role may be reduced and refocused, so that notice is used more to support transparency and choice opportunities are reserved for those instances in which there are meaningful choices to be made, but they are not going away.

Fred H. Cate is director of the Center for Applied Cybersecurity Research and a Distinguished Professor—C. Ben Dutton Professor of Law at Indiana University, in Bloomington, Ind., and a senior policy advisor to the Centre for Information Policy Leadership at Hunton & Williams LLP.