

Invasion Of Privacy On The Internet: Information Capturing Without Consent. An Ethical Background As It Pertains To Business Marketing

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ABSTRACT

Because of unwanted contacts by marketers, privacy issues are becoming more and more important to the U.S. consumer, especially since the advent of the internet. An examination of dimensions of the nature of privacy and right to privacy both in law and moral philosophy will be conducted.

Keywords: privacy, internet, ethics, business, marketing, moral philosophy

1. INTRODUCTION

Consumer privacy is a public policy issue that has received substantial attention over the last three decades. This privacy issue affects both consumers and marketers. With the emergence of online marketing arise new privacy concerns that may require regulatory legislation (Caudill, 2000; Milne, 2000). One of those privacy concerns is information capturing without consent.

The Internet has made it possible for marketers to gather information without the immediate knowledge of consumer (information capturing without consent). By using tracking software and cookies, organizations are able to gather new types of information, such as click-and-viewing patterns, that can be used to target and profile individual consumers. The collection of this data permits marketers to sell advertising on their Web sites (Caudill, 2000; Milne, 2000; Sheehan, 2000). Well known companies have been criticized about Internet privacy issues: America Online for attempting to sell subscribers' telephone numbers, and Intel for developing the new Pentium chip that identifies users (Caudill, 2000).

Privacy research has focused mainly on whether marketers provide notice and choice through their information requests and disclosure statements (Milne, 2000). Serious questions exist with regard to the extent to which marketers should be allowed to gather and use personal information about specific customers (Culan, 1995). The USC/Berkeley privacy study, funded by the Ford Foundation, indicates that the large media sites with the most traffic appear to be doing a better job of disclosing privacy practices and adhering to standards set by groups such as the Better Business Bureau and TRUSTe (Pryor, 2001).

The Internet is a relatively new tool for the U.S. consumer. Initially we were enamored with the possibilities of the Internet; we were fascinated with all the information that was available at our fingertips. We also liked the convenience the Internet offered us in making online purchases. It was now easy to obtain items and with the advent of e-bay, we could obtain hard to find items. As with many new experiences in life, once the newness wore off, many of us took a harder look at it. Yes, it was easy to make purchases, but who had access to all of our private data. We were now getting inundated with junk e-mail and unsolicited phone calls because we got onto mailing lists.

Because of these unwanted contacts, privacy issues are becoming more and more important to the U.S. consumer.

This situation creates an important issue between consumer and marketers over right to information versus right to privacy. It may be important from the point of business ethics in general, and more specifically ethics in information systems to further explore this issue. This paper will try to identify the most beneficial public policy regarding privacy on the web.

Since the right to privacy is an important issue for consumers, it is imperative to know the foundations of this right. First a discussion of privacy concerns of on-line consumers will be presented. Then in search of a solid basis for our conclusion for this topic, we will examine dimensions of the nature of privacy and right to privacy both in law and moral philosophy.

II. WHY IS PRIVACY ON THE INTERNET RELEVANT?

Privacy on the Internet is becoming an increasing concern among people who shop online. A Business Week/Harris poll was conducted in 1998 and also in 2000. The February 1998 poll was a survey of 999 adults including 404 online users (Hammonds, 1998). The March 2000 poll was a telephone survey of 1,014 adults. The question asked in both surveys was, "If you shop online, how concerned are you that the company will use your personal information to send you unwanted information?" The response for "very concerned" increased from 31% to 41% from February 1998 to March 2000 (Green, 2000).

A second question was asked for the same two years, "If you use the Internet, to what extent would explicit guarantees of the security of personal information encourage you to buy online?" The response of "a lot" increased from 15% to 37% from February 1998 to March 2000 (Green, 2000). Obviously security of personal data is an issue with the consumer.

But if security is an issue with consumers, is it also a big issue with the companies who provide web sites. Managers and editors whose business account for about two thirds of current media web sites were recently surveyed by a team of researchers at USC's Annenberg School of Communication and UC Berkeley's Graduate School of Journalism. The study found a poor performance by Web sites that track people's movements online and collect personal data. Only about 38 percent bothered to tell their readers what they were doing with this data (Pryor, 2001).

A central question here is, do you really think your life is private? The world knows many things you might have thought were no one else's business. A citizen in a developed country leaves a trail of digital footsteps from birth to death, which multiplies by orders of magnitude with online banking, e-commerce, and m-commerce using mobile phones. Institutions that possess detailed personal records about consumers include Departments of Motor Vehicles, the Internal Revenue Service, the Social Security Administration, the Franchise Tax Board, Visa, MasterCard, American Express, TRW, every bank you've ever worked with, your travel agent, any airline whose frequent flyer program you've ever joined, telephone and electric companies, all sorts of professional organizations, local governments, boards of education, utilities, and more (Ahituv, 2001).

Soon your privacy will decrease even more. In this new millennium, one can acquire goods and services by mail, phone, computer, or by visiting the mall and browsing in stores. The social price we pay is the loss of privacy. As e-commerce, cellular companies, and governmental databases are integrated together, this loss of privacy will only increase (Ahituv, 2001).

III. INFORMATION GATHERING WITHOUT CONSENT

The Internet has made it possible for marketers to gather information without the immediate knowledge of consumers. By using tracking software and cookies, organizations are able to gather new types of information, such as click-and-viewing patterns, that can be used to target and profile individual consumers. The collection of this

data permits marketers to sell advertising on their Web sites (Caudill, 2000; Milne, 2000; Sheehan, 2000). Although these technologies bring with them the same privacy concerns as traditional database marketing, consumer data is now stored on a platform that is potentially accessible to the entire Internet world (Phelps, 2000). The possibility increases that this data will be accessed and utilized for purposes other than that for which it was intended (Milne, 2000; Thomas, 1997).

With the emergence of real-time person-location technologies, biometric identifiers, and mini processors that are embedded in products, product packaging, and people, the issue of collecting unsolicited data will continue to be an issue (Clarke, 1999; Milne, 2000). An indicator of future issues is the case of RealNetworks, a company that manufactures a popular software program for listening to music on computers. The corporation was recently sued for utilizing software to transmit information about users' listening practices across the Web to company headquarters. The software provided details about which music each customer listened to, the number of songs they copied, and a serial number that was matched to consumer's e-mail address. The lawsuit claimed that the transmissions of user habits were not disclosed in the privacy practices of RealNetwork (Milne, 2000; Quittner, 1999).

IV. HISTORICAL FOUNDATIONS FOR THE RIGHT OF PRIVACY

Rights can be broken down into two major categories, human rights or natural rights and legal rights. Laws often appear to be centrally about rights that people have, especially in the United States. There are constitutional rights, for example the right to free speech, the right to freedom of religion, the right to keep and bear arms, the right to be free from being forced to testify against yourself, the right to the equal protection of the laws, and the right to be represented by a lawyer. There are also other rights that are not explicitly set out as such in the text of the Constitution, the right to privacy being one of them. The right of privacy through a continuing process of judicial interpretation has attained the status of an enforceable constitutional right.

The rights set forth in the Constitution are but concrete versions of deep human rights or natural rights, rights that would exist even if the Constitution did not exist (Schauer, 1996). This is the main spirit of American tradition, which sees rights as something the government protects, rather than something created by government. A good example of this is the recognition of "inalienable rights" in the Declaration of Independence. Rights are antecedent to or independent of positive law. The concept has been extended to an international view of human rights. For example when we condemn another nation for violating human rights of its citizens, we do not care if the violation was permitted by domestic law. We possess human rights because we are human, not because we are citizens of that particular country. Since legal rights may be superseded by moral rights, the relationship between legal and moral rights becomes a central issue (Schauer, 1996).

The U.S. Constitution with its natural law tradition was influenced by the views of philosophers such as John Locke (Schauer, 1996). Locke's writings can provide a basis for a distinction between fundamental rights and conventional rights under law. No government may properly infringe upon a fundamental right. Not every legal right, or even every Constitutional right, is based on a fundamental right. We have a Constitutional right to vote for a congressman every two years, but the state and national government would do no wrong if, following the amendment process, they made a congressman's term four years instead of two, based on a judgment that this would be for the general good. But those Constitutional rights that we call fundamental rights such as free speech, are supposed to represent rights against the Government in the strong sense; that is the strong point of our legal system, that it respects fundamental rights of the citizen. If citizens have a moral right to free speech, then governments would do wrong to repeal the First Amendment that guarantees free speech, even if they were persuaded that the majority would be better off if speech were curtailed (Dworkin, 1977).

Aristotle is one of the earliest sources of natural law theory. Aristotle insists, first, that there is a distinction between laws that merely have been enacted, and which may or may not be good laws, and those that have been enacted according to the higher law of nature. In the same context he distinguishes laws that are best for the individuals for whom they are enacted and laws that are the best in the absolute sense. Therefore, for Aristotle,

natural law has an existence apart from the conventional or positive laws that humans enact to deal with matters of everyday justice (Wiltshire, 1992).

But how are we to arrive at knowledge of this higher law? Aristotle holds that the special capacity of human beings is to exercise the mind in accordance with rational principles and that first principles are apprehended partly by induction, partly by perception, and partly by developing the habits of reason (Aristotle, 1984; Wiltshire, 1992). John Locke quotes this phrase of Aristotle in his Essays on the Law of Nature in the support of his formulation of natural law (Von Leyden, 1954). Locke's reference suggests that Aristotle's doctrine may be properly understood as one of the original sources of the theory of natural law. Additionally, Aristotle assumes that human beings are born with a natural tendency to be good. This tendency does require habituation and right education, but there is a natural ability that enables human beings, aided by the exercise of reason, to discern what is morally good and just (Aristotle, 1984; Wiltshire, 1992).

V. WHAT IS THE PROBLEM OF PRIVACY?

We come now to the task of defining privacy, as well as the problem of the invasion of privacy. Privacy is neither an economic problem nor a political problem. It is a moral/legal problem. Today, more than 100 years after Brandeis and Warren (1890) articulated the notion that privacy referred to the "the right to be left alone," there is no agreed-on definition of privacy. Neither is the right to privacy explicitly granted in the U.S. Constitution. Rather, privacy is a legal privilege whose foundation lies in the First, Fourth, Ninth, and Fourteenth Amendments to the Constitution (i.e., freedom of speech, protection against unreasonable searches and seizures, the notion that the enumeration of specific rights in the Constitution does not preclude the existence of other rights, due process, and equal protection) (McWhirter, 1992; Phelps, 2000; Tuerkheimer, 1993).

The uncertain constitutional standing, along with a century of court rulings, scholarly and legal discussions, and legislative actions, has codified the notion that privacy is not a unified or singular concept but is a term that entails at least four different dimensions or discrete legal torts: (1) intrusion (i.e. physically invading a person's solitude or seclusion), (2) disclosure (i.e., publicly disclosing embarrassing private facts), (3) false light (i.e., false public portrayals), and (4) appropriation (i.e., use of a person's image or identity without permission) (Prosser, 1960; Phelps, 2000). This four-dimensional perspective, which has been embraced by most courts and has guided much state and federal legislation, has at least two major implications for web marketing (McWhirter, 1992; Phelps, 2000). First, it drastically limits the legal applicability of the privacy concept to information practices that use market-level, or non-individual-specific data (Nowak, 1995; Phelps, 2000). In other words, there are few legal constraints on privacy issues pertaining to aggregate data, but when the data becomes individually specific then there may be legal issues. Second, the judicial evolution of this perspective suggests that the majority of marketing uses of personal data do not constitute a tort of invasion of privacy. Legal interpretations, combined with the difficulty of showing actual harm, suggest that intrusion, public disclosure, and false light have little judicial relevance to database or direct marketing practices (Nowak, 1992; Phelps, 2000). It is the fourth dimension, appropriation, however, wherein the privacy dimension appears most directly related to direct marketers' gathering and use of individual level information (Nowak, 1997).

The fourth dimension, appropriation, is the privacy dimension that is most directly related to direct marketers' use and gathering of individual level information. Evolving from the early "right of publicity" cases, appropriation has the most widely accepted and strongest legal foundation. In *Zacchini vs. Scripps-Howard Broadcasting* the Supreme Court ruled that appropriation (i.e., the unauthorized commercial use of one's image or name) is an invasion of privacy (Novak, 1997).

Successful attempts to invoke privacy claims are likely to revolve around "appropriation" arguments. Marketers have operated under the assumption that they can do what they want with individual-level information, pointedly that which the consumers have willingly and knowingly provided. With the use of relational databases, the increased use of direct response and database marketing tactics, and the indiscriminate renting or selling of personal information, this may no longer be an appropriate assumption (Goldman, 1991; Laurie, 1990; Nowak, 1997).

VI. CONCLUSIONS

Consumer privacy is a public policy issue that has received substantial attention over the last three decades. This privacy issue affects both consumers and marketers. With the emergence of online marketing come new privacy concerns that may require regulatory legislation (Caudill, 2000; Milne, 2000).

Since the right to privacy is an important issue for consumers, it is imperative to know the foundations of this right. A discussion of privacy concerns of on-line consumers was presented. Dimensions of the nature of privacy and right to privacy both in law and philosophy were examined.

The invasion of privacy on the Internet is a complex issue. There is a need to develop a policy that balances consumer privacy concerns with information needs of marketers.

An area of future research is to develop a policy that balances consumer privacy concerns with information needs of marketers.

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