



book reviews

AND ACADEMIC ARTICLES

Property Rights in Personal Information – Two Analyses

In a recent law review article, Professor Paul M. Schwartz of Brooklyn Law School observes the high level of concern among Americans about who has access to their personal information in cyberspace and the decisions that are made about them with that information. Professor Schwartz acknowledges the increasing involvement of government agencies and rising public concern. However, he says, no easy solution is in sight because information privacy raises “some of the most important and difficult regulatory issues for the Internet.”

The bulk of the law review article discusses mechanisms for establishing privacy standards on the Internet. It contains an extensive analysis of Stanford law professor Lawrence Lessig’s influential 1999 book, *Code and Other Laws of Cyberspace*.

Professor Lessig, described by *The Wall Street Journal* as “one of academia’s avant-garde thinkers about cyberspace and the law”, argues that Internet privacy could be protected by legally assigning to every individual a property interest in that person’s personal information. This would be coupled with software transmission protocols, such as “P3P” (Platform for Privacy Preferences), to permit individuals to gain more control over the use of personal information on websites they visit. Professor Schwartz finds a number of difficulties with the “proprertization” of privacy, suggesting that it would only heighten flaws in the current market for personal data. He then proposes an approach to Internet privacy built around fair information practices.

To read more about the discussion

of Internet privacy by Professors Lessig and Schwartz, see Paul M. Schwartz, “Beyond Lessig’s Code for Internet Privacy: Cyberspace Filters, Privacy Control and Fair Information Practices”, 2000 *Wisconsin Law Review* 743. See also Lawrence Lessig, *Code and Other Laws of Cyberspace* (1999).

Clinton administration’s chief counselor for privacy challenges estimated cost of complying with Internet Privacy Legislation

Peter Swire, formerly the Clinton Administration’s Chief Counselor for Privacy, has challenged a recent study estimating the costs of complying with Internet privacy legislation. He states that he challenged the study because of his belief that it will be irresistibly tempting for critics of privacy legislation to quote the estimated costs as though the figures are realistic.

The study, released on May 8 by the Association for Competitive Technology, was prepared by Robert W. Hahn, a Resident Scholar of the American Enterprise Institute. The study argues that the cost of complying with Internet privacy legislation could exceed \$30 billion. Professor Swire, now a Visiting Professor of Law at George Washington University Law School, says the analysis is seriously flawed and that the cost figures are seriously overstated.

Professor Swire’s criticisms fall into two main categories. First, he argues that the study does not adequately address the key issue for any cost estimate – what is the baseline against which the cost comparison is made? “In measuring the difference between a world with

legislation and one without legislation, what behavior do we expect in the world without legislation? Without a clear picture of the world without legislation, we cannot assess the extra cost of the world with legislation.”

Second, Swire argues, the assumptions in the study drive toward substantially overstated costs. The study assumes that small sites would spend as much as large sites to comply. It assumes too many sites. Each site would have to achieve unrealistically demanding standards. And each site is assumed to spend the large premium needed for a customized first-of-a-kind system, with no packaged software and no learning from experience.

Swire also criticizes the study because it quantifies only the costs of privacy protection, with no estimate of the benefits.

Professor Swire’s web site contains his full analysis: www.osu.edu/units/law/swire.htm. The Association for Competitive Technology web site contains further details about the study, including responses to critics of the study: www.actonline.org/issues/privacystudy.asp.