Regulating Privacy by Design
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BCLT/BTLJ Symposium
Technology: Transforming the Regulatory Endeavor
March 3, 2011
Overview

• Privacy Technology Framework
  – PETs
  – Privacy by Design

• Economic Incentives
  – Consumer demand
  – Lack of data needed for cost-benefit analysis
  – Reputational sanction

• Regulatory Incentives
  – Under existing FTC authority
  – New privacy law would enable regulatory innovation
Understanding Privacy Technology

• PETs
  – “Substitute PETs”
  – “Complementary PETs”
    • Privacy-friendly
    • Privacy-preserving

• Privacy by Design (PbD)
  – Use of PETs
  – Use of design methodology
    • Front-end software development processes and practices
    • Back-end data management processes and practices
  – Critique of FTC’s new Proposed Framework
  – The Limits of PbD
Economic Incentives

• Economics of Privacy Investments
  – Orthodox view: Rational firms should deploy privacy technologies in response to consumer demand for protection against the risks associated with data collection, unauthorized secondary use, processing errors, and improper access.

• First Problem: Weak consumer demand
  – Information asymmetries
  – Behavioral and cognitive biases
Economic Incentives (2)

• **Second problem: Lack of data needed for cost-benefit analysis**
  
  – Cost-benefit approach requires data (cost of privacy breaches and probability of their occurrence) but little is available. Absent such data, firms
    • Are less likely to undertake a cost-benefit analysis
    • More likely to adjust relevant budget up or down or adopt a more passive strategy

• **Third problem: Opportunity costs of privacy investments**
  
  – Firms have overwhelming incentives to collect and analyze as much data as possible, which severely limits their adoption of technology that would restrict such activity.

• **Upshot:**
  
  – Firms shun substitute PETs and prefer privacy-friendly PETs over privacy-preserving PETs.
Regulatory Incentives

- FTC’s Section 5 powers
  - “Privacy on the Ground”
    - Workshops, reports, guidance
    - Informed by FTC enforcement authority
  -Derive best practices from unfairness cases
    -Prohibited
    -Required
    -Recommended
Regulatory Incentives (2)

- New Law Might Allow “Regulatory Innovation”
  - Encourage industry to experiment (discrete agreements)
  - Negotiated rulemaking or other multi-stakeholder processes for defining what PbD means in specific sectors
  - Privacy safe harbors
    - Reward firms that use PbD (sticks and carrots)
    - Rewards must match up with which PETs firms adopt or how they approach PbD:
      - Substitute or possibly privacy-preserving PETs=>Avoid sticks, qualify for carrots
      - Privacy-friendly PETs=>Positive factor but not sufficient by itself
      - PbD may qualify for rewards if comprehensive and transparent
    - Require consultation in defining PbD
    - Retain oversight and enforcement powers