

RFID Workshop - Comment, P049106
The Samuelson Law, Technology, and Public Policy Clinic (the Clinic) at the
University of California-Berkeley's Boalt Hall School of Law

Federal Trade Commission Public Workshop
Radio Frequency Identification: Applications and Implications for Consumers

We file this comment to emphasize the privacy issues related to tagging of information goods such as books, CDs, and DVDs. The potential for surveillance inherent to RFID technologies is uniquely invasive in the information goods context. Individuals have strong expectations of personal privacy in their choice of information goods, which are reinforced by social norms, public policy, and law. While the privacy issues in information goods are particularly keen, large-scale item level tagging has already begun. More than 130 libraries in North America have tagged their holdings, including books, music, and video, at the item level.¹ Libraries thus provide a useful case study to examine the actual risks to privacy posed by RFID in one context. There is reason to believe that item level tagging of information goods will expand into the retail space and will increase dramatically in coming years.² For these reasons it is important to assess these privacy threats and to take appropriate technical and policy measures.

In this comment, we examine briefly the normative, legal, and policy connections between privacy, the First Amendment, and information goods. We distinguish the treatment of information goods in the retail and library settings and describe the technical differences between tags and readers used in each setting. Next we describe the threats to privacy created by the introduction of RFID into these settings. We describe our work with the Berkeley Public Library as a case study. In conclusion we recommend that the FTC (1) conduct a special workshop for the use of RFID with information goods to more carefully assess the implications in this unique environment, and (2) develop a guideline for RFID use that clarifies which practices may be deceptive or unfair.

2.0 Information Goods, Institutional Norms, Individual Expectations, and Law

Individuals have strong expectations of privacy in their choice of information content for reading, listening, and viewing. These norms are reflected in the culture and policies of institutions that provide information goods, as well as statutory and constitutional protections.

¹ As of mid-2003, approximately 200 libraries had installed RFID systems. Large-scale implementations include the University of Connecticut, the University of Nevada, and the Las Vegas Library in the U.S., along with the Vienna Public Library, the Catholic University of Leuven in Belgium, the National University of Singapore, and the Netherlands Library Service. Richard W. Boss, RFID Technology for Libraries; Radio Frequency Identification Systems, 39 Library Technology Reports (Vol. 6) 1 (2003); *see also* RFID in Libraries, at <http://libraryrfid.typepad.com/libraryrfid/> (a weblog tracking current library RFID implementations).

² Some grocery outlets have begun to adopt the technology in Germany (*see* <http://www.topix.net/tech/rfid>), and in England (<http://www.rfidjournal.com/article/articleview/658/1/1/>); Industry analysts predict widespread adoption of item level retail RFID tagging by 2005 – 2008 (*see* <http://www.ftc.gov/bcp/workshops/rfid/boone.pdf>)

Individuals' expectations of privacy when buying or borrowing books, music, and film stem from traditional ways to access those media with relative anonymity. Currently, individuals can purchase each of these goods with cash. In cash transactions, the point of sale terminates most opportunities to discover the buyer's identity or to monitor what use the buyer makes of the work. In other settings, people can browse information on the Internet or in a library with relative anonymity.

Established public policy aligns with and reinforces these normative customs of relatively anonymous or confidential access to information. A patchwork of existing law protects the unique privacy interests in information goods from a number of would-be intrusions in various settings.³ While the privacy protections surrounding information goods are neither complete nor uniform, taken as a whole they reflect a core policy principle: that our democratic society guarantees the right to freely speak and listen without the potential chilling effect of personal identification with the subject at hand.

2.1 The Constitution – Association with Purchase and Borrowing Records

The Constitution protects individual rights of free and private inquiry against government intrusion, through both the First Amendment's prohibition of any law that abrogates freedom of speech⁴ and the Fourth Amendment's limits on government surveillance.⁵ The Supreme Court has pronounced that the First Amendment protects the right to inquire freely as the logical corollary to freedom of speech: "The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry."⁶ The Court has found that this right requires protecting the anonymity of speakers. As new technology capable of monitoring access to speech further develops, surveillance shifts to cover *access* to speech as well as its expression. In other words, as surveillance technology spreads in use, free speech depends increasingly on a right to read with relative anonymity.⁷

Constitutional interests in open, surveillance-free use of information limits the Government's power to discover the nature of its citizens' intellectual consumption. The Supreme Court provided a compelling example of this boundary in *United States v.*

³ See, e.g., the Video Privacy Protection Act, 18 U.S.C. § 2710 (2002).

⁴ "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. Amend. I.

⁵ "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. Amend. IV.

⁶ *Griswold v. Connecticut*, 381 U.S. 479, 482. See also *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64-65 n.6 (1963) ("The constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication."); *Smith v. California*, 361 U.S. 147, 150 (1959) (stating that "the free publication and dissemination of books and other forms of the printed word furnish very familiar applications" of the First Amendment); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) ("The right of freedom of speech and press has broad scope. . . . This freedom embraces the right to distribute literature . . . and necessarily protects the right to receive it."); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (circulation of expressive material is constitutionally protected) (cited in *Tattered Cover v. City of Thornton*, 44 P.3d 1044, 1051 n.11 (Colo. 2002)).

⁷ Julie Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 Conn. L. Rev. 981, 1010 (1996).

Rumely, holding that Congress could not compel a wholesaler of politically controversial books to disclose sales records at a congressional hearing.⁸ In *Denver Area Educ. Telecommunications Consortium v. FCC*,⁹ the Supreme Court struck down a statutory provision requiring subscribers of indecent cable television programming to first register in order to receive those programs. The Court found that the requirement abridged the broadcaster's speech rights and represented an unconstitutional restriction on individuals' right to view privately.¹⁰ Further, the Court struck down a statute requiring individuals to identify themselves in order to receive controversial material, recognizing the burden such rules place on accessing information.¹¹

Protection of book sales records received keen public attention in the Kramer Books-Monica Lewinsky matter.¹² In 1998, Kramer sued to stop subpoenas from Independent Counsel Kenneth Starr for Monica Lewinski's book purchase records. The store's owner stated that it is their company policy to "not turn over any information about [their] customers' purchases."¹³ Kramer was successful in blocking Starr's subpoenas. Many organizations, including the Association of American Publishers, the American Library Association, the Publishers Marketing Association, and the Recording Industry Association of America, lauded the action and announced formal support for bookstore defense of consumer privacy as a matter of policy.¹⁴

⁸ 345 U.S. 41 (1953). Though the Court declined to rule explicitly on First Amendment grounds because the committee in question was only empowered to investigate lobbying activities and bookselling could be considered outside its scope, Justice Frankfurter noted that the statute at issue carried "the seeds of constitutional controversy" and the Court was required to construe laws to preserve their constitutionality. *Id.* at 43-45. Explaining the privacy interest at stake, Justice Douglas wrote, "When the light of publicity may reach any student, any teacher, inquiry will be discouraged." *Id.* at 57 (Douglas, J. concurring).

⁹ 518 U.S. 727 (1996).

¹⁰ "[T]he "written notice" requirement will further restrict viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the "patently offensive" channel. *Id.* at 754. See also *Lamont v. Postmaster General*, 381 U.S. 301, 307, (1965) (finding unconstitutional a requirement that recipients of Communist literature notify the Post Office that they wish to receive it); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) (striking down a statutory provision requiring scrambling or hours restrictions on the broadcast of adult programming and citing "the First Amendment interests of speakers and willing listeners—listeners for whom, if the speech is unpopular or indecent, the privacy of their homes may be the optimal place of receipt").

¹¹ *Lamont, DBA Basic Pamphlets v. Postmaster General*, 38 U.S. 301 (striking down a statute requiring the post office to ask intended recipients to confirm desire to receive Communist mail).

¹² *Supra* note 13.

¹³ http://internet.ggu.edu/university_library/if/bookstore.html#challenge; The American Booksellers Association and the American Booksellers Foundation for Free Expression supported Kramer's move with an amicus brief. *Id.*

¹⁴ Other supporters included the Freedom to Read Foundation, PEN American Center, the International Periodical Distributors Association, the Periodical Wholesalers of North America, the National Association of College Stores, the Periodical and Book Association of America, the Media Coalition, the American Civil Liberties Union, and the National Association of Recording Merchandisers. http://internet.ggu.edu/university_library/if/bookstore.html#challenge. In the Tattered Cover case, the government sought to identify the purchaser of a how-to book on making methylene through the records of a local bookstore. The bookstore won a challenge to the warrant on First Amendment grounds, the judge in the case noting that such a disclosure would implicate the expressive rights not just of the purchaser but of the entire book-buying public. *Tattered Cover v. City of Thornton*, 44 P.3d 1044 (Colo. 2002). The Colorado Supreme Court described the constitutional interest in information goods thus: "Bookstores are

2.2 Legislation – Association with Purchase and Borrowing Records

Congress and state legislatures have created a variety of industry-specific statutes that shield records of individual inquiry from disclosure to public and private parties alike. These laws are generally based on Fair Information Practices and limit the collection, retention, and disclosure of data.¹⁵

Overall, the statutory protections for information about individual use of information goods are both stricter and more specific than other statutory privacy protections. This reflects the heightened sensitivity to the expressive interest in information goods. For example, at the federal level, the Cable Television Privacy Act of 1984 protects cable television subscribers from unfair data collection and use,¹⁶ and the Video Privacy Protection Act protects video rental records from release without a court order.¹⁷ Similar laws at the state level protect library check-out and circulation information from release with without a court order in 48 states.¹⁸ The remaining two states have published legal opinions supporting the privacy of library borrowing

places where a citizen can explore ideas, receive information, and discover myriad perspectives on every topic imaginable. When a person buys a book at a bookstore, he engages in activity protected by the First Amendment because he is exercising his right to read and receive ideas and information.” *Id.* at 1052. Colorado’s constitutional protection of free speech is stricter than the federal floor, so it is not clear how the analysis might result in another jurisdiction.

¹⁵ U.S. Department of Health, Education and Welfare, Secretary's Advisory Committee on Automated Personal Data Systems, Records, Computers, and the Rights of Citizens viii (1973), available at http://www.epic.org/privacy/consumer/code_fair_info.html.

¹⁶ 47 U.S.C. § 551 (2002).: (a) Cable providers must provide notice to subscribers regarding what personal data they collect, how they disclose and use it, and how subscribers may access their own data; (b) providers may not use the cable system to collect personal information other than as required to provide service; (c) providers may not disclose personal information without consent except as needed to provide service; even if served with a court order, providers must give subscribers notice and may not divulge individual programming choices; (d) providers must give subscribers access to their own personal data; and (e) providers must destroy personal data when it is no longer needed.

¹⁷ 18 U.S.C. § 2710 (2002). Passed in 1998 in response to the disclosure of Supreme Court nominee Robert Bork’s video rental records by a newspaper. Also grounded in FIP principles, the VPPA limits the parties to which video rental stores may disclose rental records to law enforcement with a warrant and civil litigants with a “compelling need,” and requires stores to destroy rental records “as soon as practicable.”

¹⁸ “Eleven state constitutions guarantee a right of privacy or bar unreasonable intrusions into citizens’ privacy. Forty-eight states protect the confidentiality of library users’ records by law, and the attorneys general in the remaining two states have issued opinions recognizing the privacy of users’ library records.” See

<http://www.ala.org/Template.cfm?Section=stateifcinaction&Template=/ContentManagement/ContentDisplay.cfm&ContentID=14773>. For instance, California state law provides: “All registration and circulation records of any library which is in whole or in part supported by public funds shall remain confidential and shall not be disclosed to any person, local agency, or state agency except as follows: (a) By a person acting within the scope of his or her duties within the administration of the library. (b) By a person authorized, in writing, by the individual to whom the records pertain, to inspect the records. (c) By order of the appropriate superior court. As used in this section, the term “registration records” includes any information which a library requires a patron to provide in order to become eligible to borrow books and other materials, and the term ‘circulation records’ includes any information which identifies the patrons borrowing particular books and other material.” Cal. Gov. Code § 6267 (West 2004). See also, e.g., Code of Ala. § 41-8-10 (Alabama); 75 ILCS 70/1 (Illinois); NY CLS CPLR § 4509 (2004) (New York).

records.¹⁹ These state laws mirror the express policy of the American Library Association, mandating respect for the expressive interests embodied in patron and circulation records.

2.3 Institutional and Professional Norms

While legal protections are incomplete and not uniform across different types of information good providers, business and professional practices of information goods providers reflect the legal and professional norms of protecting privacy.²⁰

In libraries, the professional norms established by librarians reinforce individual privacy expectations. In an Interpretation of the Library Bill of Rights, the American Library Association instructs that “[i]n a library (physical or virtual), the right to privacy is the right to open inquiry without having the subject of one’s interest examined or scrutinized by others.”²¹ To this end, “[r]egardless of the technology used, *everyone* who collects or accesses personally identifiable information in any format has a legal and ethical obligation to protect confidentiality.” In addition to this broad policy statement, libraries’ privacy policies typically implement Fair Information Practices—they hold patrons’ information for the shortest time possible, keep minimal patron records, and restrict access to patron borrowing records, even where not required by law to do so. While actually borrowing materials from a library requires identification and registration, libraries have historically championed First Amendment rights to free speech and freedom of inquiry, positioning themselves as staunch defenders of due process when anonymity is threatened. Similarly, while not subject to the same legislative data protection requirements applied to libraries, bookstores along with related trade associations, have often been at the forefront of privacy actions.²²

¹⁹ *Id.*

²⁰ See *infra*. Bookstores are not subject to the same legislative data protection requirements that libraries are in states that enforce library privacy laws. However, bookstores and other information good providers are “presumptively under the protection of the First Amendment” and hence subject also to the Fourth Amendment requirement that state actors seeking their records show reasonable cause and obtain a subpoena. *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973). Nonetheless, it is important to note that much of the information good supply chain, including, publishers, warehouse, and distributors, remains largely unregulated, particularly concerning non-governmental invasions of privacy.

²¹ Privacy: An Interpretation of the *Library Bill of Rights*, ALA, available at <http://www.ala.org/ala/oif/challengesupport/dealing/privacyinterpretation.pdf>. This document also states, “All users have a right to be free from any unreasonable intrusion into or surveillance of their lawful library use Users have the right to use a library without any abridgement of privacy that may result from equating the subject of their inquiry with behavior.” Similarly, an ALA policy asserts that “[t]he First Amendment’s guarantee of freedom of speech and of the press requires that the corresponding rights to hear what is spoken and read what is written be preserved, free from fear of government intrusion, intimidation, or reprisal.” ALA Policy Concerning Confidentiality of Personally Identifiable Information about Library Users, available at <http://www.ala.org/ala/oif/statementspols/otherpolicies/policypersonallyidentifiable.pdf>.

²² See, e.g., *Ashcroft v. ACLU*, 542 U.S. ____ (2004) (plaintiffs included Salon.com, an online literary journal; A Different Light Bookstores; Powell’s Bookstore; and the American Booksellers Foundation for Free Expression, among many others); *Tattered Cover supra*. (a Colorado bookseller resisted a subpoena); the Kramer Books matter *infra* (a Washington, D.C., bookseller resisted a subpoena). In these and many other litigations, the American Booksellers Association have participated, demonstrating broad industry support for private, anonymous access to information.

