

**The Futility of Data Privacy Self-Management:
The Federal Trade Commission and Failed Notice and Choice Privacy Policy**

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Submission to:

PrivacyCon

January 14, 2016

Federal Trade Commission, Washington, DC

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Abstract

In an attempt to contribute to the scholarship assessing the value of notice and choice privacy policy (e.g. McDonald and Cranor, 2008; Nissenbaum, 2009; Ben-Shahar and Schneider, 2011; Solove, 2012), this presentation combines policy and quantitative survey analysis to demonstrate how the FTC's report *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* advances a futile data privacy self-management agenda. Three FTC recommendations discussed in the report are assessed:

- 1) Privacy Notices: "Privacy notices should be clearer, shorter, and more standardized to enable better comprehension and comparison of privacy practices."
- 2) Access to Data: "Companies should provide reasonable access to the consumer data they maintain; the extent of access should be proportionate to the sensitivity of the data and the nature of its use."
- 3) Consumer Education: "All stakeholders should expand their efforts to educate consumers about commercial data privacy practices." (FTC, 2012: viii)

The first assessment of the FTC's efforts involves the presentation of results from an ongoing quantitative survey analysis co-authored with Dr. Anne Oeldorf-Hirsch (University of Connecticut) demonstrating the extent to which digital citizens ignore terms of service (TOS) and privacy policies online. Preliminary data from the more than 500 individuals surveyed suggests that quick signup options are preferred when joining a new social networking site, allowing users to bypass the informed consent process. Reasons for the

failure of the notice model include: length and complexity of the policies, as well as the perception that TOS and privacy policies have little impact on a user's life. Further analysis of the data promises to reveal justifications for the privacy paradox (Nissenbaum, 2009) as well as various behavioral nuances that lead users to ignore TOS and privacy policies.

The remaining policy analysis consists of the application of a longstanding critique of problematic models of participatory democracy privileging self-governance. In 1927, Walter Lippmann published *The Phantom Public*, arguing for what he referred to as the 'fallacy of democracy'. He wrote, "I have not happened to meet anybody, from a President of the United States to a professor of political science, who came anywhere near to embodying the accepted ideal of the sovereign and omniscient citizen" (Lippmann, 1927, 11). Beyond the challenges of omniscience, Lippmann argued, had we the faculties *and* the system for enabling millions to realize popular rule, to control all areas of government ranging from the military, to infrastructure, to education and healthcare, none would have time for work, family or enjoyment. The realization of this 'unattainable ideal' would leave society at a standstill.

Calls for data privacy self-management, or the ability for a single individual to control how their personal data is collected, used and disclosed (Solove, 2012), highlight comparable self-governance challenges to those identified by Lippmann, and a correspondingly similar demand for pragmatic alternatives. Had we the faculties and the system for enabling every digital citizen the ability to understand and continually manage the evolving data-driven Internet, to control the data being collected, organized, analyzed and sold by every commercial organization, government agency and data broker, to

understand and provide informed consent to every terms of service and privacy policy - would we have time to actually use the Internet? To live? To work?

In the Big Data context, Lippmann's pragmatism champions citizen empowerment by critiquing a governance model that fails to achieve practical self-governance outcomes. Achieving pragmatic alternatives to data privacy self-governance will not be easy; however, the first step towards a plan that expresses the true possibilities of its subject, requires movement beyond romantic notions that remain as impossible as direct democracy within a nation of millions.

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