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NTIA
U.S. Department of Commerce
via email
re: Information Privacy and Innovation in the Internet Economy NOI

To whom it may concern:

Please accept the following comments in response to your Notice of Inquiry "Information Privacy and Innovation in the Internet Economy."

The substance of my comments are reflected in two academic articles that I am attaching. The first one is a piece called *Information Privacy in Cyberspace Transactions* published in the Stanford Law Review, way back in 1998. (Some of the thinking that I did for this article started when I myself work for the NTIA and helped write the 1995 white paper on Privacy and the NII: Telecommunications-Related Personal Information.) As with many law reviews, it is a long treatment. But, the bottom line is that if one seeks a contractarian solution to promote efficiency as well as fairness, certain ground rules have to be established, and in my view, the Statutory Appendix provides a concrete way to do so. It is drafted as a bill that could be adopted by Congress tomorrow. It could also easily guide the formulation of regulations or best practices. If you look at nothing else, I encourage you to look at that Appendix.

The other article, titled *Self-Surveillance Privacy*, is a work-in-progress, with co-authors from UCLA's Center for Network Embedded Sensing (including Prof. Deborah Estrin of computer science). In this article, we focus on the emerging problem of self-surveillance privacy -- what to do with the information that we are increasingly collecting about ourselves by measuring our locations, time, and behavior. Although that topic may seem narrower than the general "call" of your Notice of Inquiry, our solution is meant to be novel and extendable.

In our view, simple contractarian approaches of incrementally superior notice-and-consent can only do so much. If you need evidence, just look at the Internet world around us and clickwrap terms-of-service that no one ever reads. (The cognitive and behavioral economics literature predict and confirm such behavior.) Moreover, technological aides that match preferences such as P3P or promote security such as encryption also have limited value. Again, look at the world around us.

We believe that privacy should no longer be conceptualized centrally as maximizing individual "choice" about how personal data is processed. That sort of "choice" framing inevitably brings us back to toward fiddling with some ideal contractarian position, with minor tweaks on consumer notice provisions. Instead, we suggest that privacy, especially for policymaking purposes, might be just as well framed in terms of the flow or bandwidth of personal data in the information ecosystem. The flow of that data has predictable policy consequences, and that is what policymakers should focus on -- regardless of whether some individual clicked on some webpage through some vaguely worded notice.

Consistent with this reframing, we call for a different policy strategy, which involves creating a new intermediary, which we call the Privacy Data Guardian (PDG). The PDG's central job is to maintain a Privacy Data Vault on behalf of her clients. The PDG would have legally enforceable fiduciary duties to her client, and we suggest that self-surveillance data held by the PDG should be protected by an evidentiary privilege. Think "lawyer" merged with "librarian". The details appear in the draft. More important than our specific policy recommendations is the general approach toward thinking outside of the box regarding privacy. I welcome any further engagement.

Sincerely,



Jerry Kang

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Professor of Asian American Studies (by courtesy)

Korea Times - Hankook Ilbo Chair in Korean American Studies