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Comments on Information Privacy and Innovation in the Internet Economy

The following comments are submitted for consideration as part of the Department's comprehensive review of privacy policy and innovation in the Internet economy, pursuant to the Department of Commerce's April 23, 2010, Notice of Inquiry.[1]

The Department's thoughtful consideration in this key area of economic growth is essential to ensuring the continuation of the United States' leadership in global electronic commerce. The Notice of Inquiry addresses precisely those areas in which the Department should focus its attention, and, in particular, the need for international negotiations to resolve the persistent legal conflicts that hamper innovation and global competition.

In summarizing the current U.S. privacy framework, the Department, however, overlooks much of the distinctly U.S. contribution to the development of rights of privacy. For instance, although the Department correctly notes the importance of the 1980 OECD *Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data*, it neglects to note that these principles were based on the 1973 report by the U.S. Department of Health, Education, and Welfare, *Records, Computers, and the Rights of Citizens*, which first called for a code of fair information practices.

More fundamentally, the Department's scope of inquiry should extend beyond statutory pronouncements and various regulatory codes and proposals to appreciate and express the organic fullness of U.S. privacy protections. U.S. privacy law is as least as much a creation of constitutional law and the courts, as it is of the legislature, and the Department will miss much of the distinctly American contributions to international privacy law if it focuses too much on the various codes of privacy practice being developed by regulatory agencies. This omission is

[1] For the sake of clarity, I note that these comments reflect my personal views and do not reflect the views of any law firm, its clients, any government, or any other organizations with which I am affiliated or represent.

particularly significant because U.S. companies base much on their risk assessment on these common law restrictions. Few would doubt that the potential for a consumer class action based on a privacy tort is as significant as the potential for a notice of a regulatory inquiry in shaping corporate behavior. U.S. enforcement of privacy rights by the threat of potentially enormous punitive damages and the vigorous and inventive class action plaintiff's bar is a very significant driver of actual compliance in the U.S., and it is an aspect of privacy law in which many EU countries can offer relatively few comparable examples. Failing to give a vigorous explanation of the full basis of U.S. privacy law neglects much of its long-standing constitutional origins and can give foreign governments the distinctly incorrect impression that U.S. privacy law is a recent innovation in response to the European Union's Data Protection Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. OJL 281, 23 Nov. 1995 p.31. Moreover, it can leave U.S. interests subject both to EU-style complex regulation as well as the common law enforcement largely absent in the EU.

Particularly in light of the need to ensure sufficient flexibility in privacy norms to match the development of the Internet economy, we should emphasize, not diminish, the common law's special genius in adapting to innovations. Surely the Department should cite Warren & Brandeis's 1890 *The Right to Privacy*, 4 Harvard Law Review 193, as a seminal formulation of U.S. privacy law, as much as it does the thoughtful publications of the White House during the 1990s. It bears emphasis, particularly in the context of the European Union negotiations, that the U.S. Constitution has since its inception respected rights of privacy and autonomy by guaranteeing our First and Fourth Amendment freedoms. At the heart of the Fourth Amendment lies "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Winston* v. *Lee*, 470 U.S. 753 (1985) (quoting *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)); *see also California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 65 (1974) (recognizing right to be let alone as embedded within Constitutional limits upon searches and seizures). Our Supreme Court has consistently recognized that, "[t]o protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting); *see also Katz* v.

United States, 389 U.S. 347, 362 (1967) (Harlan, J., concurring) (recognizing a reasonable expectation of privacy in the substantive content of telephone discussions).

Some foreign commentators on U.S. law have been particularly fond of noting that, under the Fourth Amendment, the Supreme Court "consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties" *Smith* v. *Maryland*, 442 U.S. 735, 743-44 (1979) (citing cases); *see United States* v. *Miller*, 425 U.S. 435, 443 (1976). Particularly in light of this trend and the European Union's nascent consideration of these issues of governmental privacy under the Lisbon Treaty, it is important for the Department to express that our Fourth Amendment continues to provide robust privacy protection for the Internet economy by protecting the contents of communications. *See Katz* v. *United States*, 389 U.S. 347, 362 (1967) (Harlan, J., concurring) (recognizing a reasonable expectation of privacy in the substantive content of telephone discussions). Indeed, the Fourth Amendment concerns that information loses privacy interests when it is conveyed to third parties are not relevant to the First Amendment in many contexts, because the First Amendment is fundamentally concerned with protection of communication, and communication inherently involves conveying information to third parties. As the Supreme Court has made clear, First Amendment rights to anonymity and privacy continue to exist even though information is communicated to a third party. *See, e.g., NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1960). These rights are as vital to the Internet economy as ever because "[a]nonymity is a shield from the tyranny of the majority." *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (citing J.S. Mill, *On Liberty and Considerations on Representative Government* (R. McCallum ed. 1947)); *see also, e.g., Watchtower Bible & Tract Soc'y* v. *Village of Stratton*, 536 U.S. 150 (2002); *Buckley* v. *American Constitutional Law Found., Inc.*, 525 U.S. 182, 200, 204 (1999).

These comments are intended to encourage the Department to emphasize that the U.S. leadership in the protection of personal privacy on the Internet stems not only from its statutes but also from seminal cases such as the Supreme Court's recognition that the right to anonymous speech applies equally to anonymous association via the Internet. *Reno* v. *ACLU*, 521 U.S. 844, 870 (1997) (there is "no basis for qualifying the level of First Amendment scrutiny

that should be applied to [the Internet]).[2] Indeed, these First Amendment principles support key aspects of evolving notions of privacy as an aspect of broader conceptions of human autonomy, such as the rights of free association, as is *Reno* v. *ACLU*, religious liberties, and related, so-called hybrid rights such as the ability of parents to direct the education of their children, as acknowledged in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972).

In reflecting the state of U.S. privacy law, it bears emphasis that our constitutional norms continue to find fruitful elaboration in Prosser's privacy torts, as re-stated in the *Restatement (Second) of Torts* formulation of four privacy torts: Intrusion upon Seclusion, Section 652B; Appropriation of Name or Likeness, Section 652C; Publicity Given to Private Life, Section 652D; and False Light Publicity, Section 652E.

European code-based approaches to privacy can erode these fundamental liberties and aspects of the U.S. constitutional framework by potentially imposing requirements for prior regulatory approvals for use of personal information. Such concepts of prior restraint are rightly anathema to the U.S. fundamental freedom of speech, and the Department should vigorously contest efforts to undermine such freedoms.

Agreements such as the EU Safe Harbor framework well exemplify a balanced approach to privacy that respects both the fundamental rights of privacy and freedom of speech, but the Department should continually emphasize to our European allies that the fundamental human right to the freedom of speech is at least as significant as is the fundamental human right to personal privacy.

Likewise, as the various EU Member States continually remind U.S. entities of the need to comply with local laws in each jurisdiction, the Department should acknowledge and emphasize the products of our various laboratories of democracy such as the California Supreme Court decision, *Burrows* v. *Superior Court*, 529 P.2d. 590 (Cal. 1974) (reaching the opposite result from *Miller* on similar facts). Indeed, many state constitutions expressly recognize a right to privacy. Although some state courts have recognized an implicit right to privacy, explicit privacy provisions are more common and are found in Alaska, Arizona, California, Florida,

[2] The evolution of these rights into the Internet era should also inform the Department's consideration of issues, such as the protection of Internet copyright. *See, e.g.*, *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 568 (1985) (recognizing that the First Amendment does not protect copyright infringement).

Hawaii, Illinois, Louisiana, Montana, South Carolina and Washington.[3] The constitution of California, in particular, is noteworthy because its constitutional right to privacy exists even without state action. *See Hill* v. *NCAA*, 865 P.2d 633, 644 (Cal. 1994) (en banc); *see also* Cal. Civ. Code § 1798.1 ("The Legislature declares that the right to privacy is a personal and fundamental right protected by Section 1 of Article I of the Constitution of California . . . and that all individuals have a right of privacy in information pertaining to them."); *Jeffrey H.* v. *Imai, Tadlock & Keeney*, 85 Cal. App. 4th 345, 353 (Cal. Ct. App. 2000).

Global innovation is well served by the Department's thoughtful consideration of the ways in which privacy laws support and inhibit global information flows, and I entirely support this effort. In formulating its restatements of U.S. privacy law, it is vital to the accuracy of those summaries – and the living truth of our constitutional culture – that the Department reflect and embrace the various common law and state contributions to the exceptional privacy protections enjoyed by the citizens of the United States.

Please contact me directly if I may be of further assistance to the Department.

Sincerely,

/s/ Edward Robert McNicholas

[3] Alaska Const. art. I, § 22; Arizona Const. art. II § 8; California Const. art. I § 1; Florida Const. art. I § 12; Hawaii Const. art. I §§ 6-7; Illinois Const. art. I §§ 6 & 12 Louisiana Const. art. I § 5; Montana Const. art. II § 10; South Carolina Const. art. I § 10; and Washington Const. art. I § 7.