

Draft Issues Paper on Consumer, User Protection and Privacy

This paper is a 'draft working paper' reflecting the preliminary findings of the drafting team. It has been subject to review by all WGIG members, but it does not necessarily present a consensus position nor does it contain agreed language accepted by every member. The purpose of this draft is to provide a basis for the ongoing work of the group. It is therefore not to be seen as a chapter of the final WGIG report, but rather as raw material that will be used when drafting the report. This draft working paper has been published on the WGIG website for public comment, so it will evolve, taking into account input from governments and stakeholders.

1. Issue

Consumer and User Protection and Privacy are related but separate issues.

Consumer Protection refers to the protection of consumer rights. Enhancing such rights will likely lead to some increased business cost in the immediate term but in the long run, they increase business by increasing the confidence of consumers to consume.

User Protection is a narrower concept and is intended to protect users, who tend to be naïve regarding the internet, *vis a vis* the experts, such as content providers or internet service providers. There are three factors that should be monitored: availability of service, quality of service and price of service. Service providers may manipulate these three to their favour against the interests of the consumer. On the other hand, if the three factors are too inflexibly monitored, service providers may find it difficult to make a profit, which in the end works against the interests of users and potential users.

Privacy protection refers to the protection of personally identifiable data such that they are used only for the purposes the person has allowed. With a digital medium such as the internet, where data can be cross-matched, the potential for abuse of privacy is greater. And as more activities of people – their jobs, their hobbies, their friendships, their social and political activities – are conducted online, being able to track online activities would mean being able to monitor society.

While privacy is recognised as a human right, it is a right that balances the competing and legitimate interests of government and business to intrude upon privacy under law. Governments may do so in the course of investigating crimes; corporations may do so to better their marketing efforts and customer service.

There are two main and conflicting paradigms to privacy. The first paradigm treats privacy as a human right, which means that it cannot be negotiated away. This is the approach adopted by the European Union in its Data Protection Directive, and by the United Nations in the Universal Declaration of Human Rights¹. The second paradigm treats privacy as an agreement between two parties that can be bargained and negotiated; this is the position that much of the rest of the world adopts.

There have been attempts to bridge the two with a “safe harbour” provision that the US Department of Commerce has negotiated with the European Union such that those who subscribe to the safe harbour provisions are deemed to comply with the European Union paradigm.

Privacy protection can add to the costs of providing service and content over the internet.

The Internet has given rise to a number of novel issues. For example, one issue is whether users should be required to declare their identity when accessing the Internet, registering a domain name, or

¹Article 12: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence...”

creating a website. Another is the lifetime of information on the Internet: how long should information about oneself, made perhaps through a newsgroup discussion 10 years earlier, be used by a potential employer.

2. Attribution to categories

Access for all.

Other issues for consideration.

3. SWOT Analysis

Protection of consumers and users on the internet can only work against a backdrop of consumer protection in the offline world. It is not possible to have strong online consumer protection without equivalent protection offline. Without such protection, consumer and user protection will be limited only by specific contractual terms. E-commerce cannot flourish where there is no consumer confidence.

On privacy, the war on terrorism is holding, and even rolling back, initiatives that would enhance privacy. For now, the trade-off between security and privacy has largely been accepted with little quibble. But as the war winds down, concerns over privacy will rise again. And like consumer protection, weak privacy rules will diminish consumer confidence.

Privacy, especially in a globally connected society, is a fundamental element of democracy; the possibility not to disclose social, political or religious beliefs, health problems, or other sensible elements of one's identity is necessary to prevent discrimination.

Where laws may be promulgated to promote a greater shared understanding of consumer protection, greater benefit will accrue to e-commerce and other online activities.

4. Actors (who, with whom?)

Governments the world over are concerned about consumer protection and privacy. The concern over privacy is greatest in Europe and the European Union in particular.

There is an International Consumer Protection and Enforcement Network (ICPEN) <http://www.icpen.org/> that brings together about 30 countries, mostly OECD members, to "share information about cross-border commercial activities that may affect consumer interests".

Non-profit groups around the world also exist to advance consumer and privacy interests. Often, these groups are divided along business vs consumer lines. While not necessarily antagonistic to each other, the groups do have divergent interests.

There are organizations that use privacy enhancing tools (PET) technology. Some commercial ones have folded.

Policies that concern privacy and consumer rights are developed at ICANN

5. Forums (where?)

(a) who participates

(b) nature of forum

There are a few associations of consumers associations that meet regularly. Some of the associations are industry-specific. Their common goal is to advance consumers' rights. Typically, these are non-profit organizations that try to be independent of business and government.

There is no major forum for privacy internationally. A significant reason is that privacy is culture-bound; there are non-governmental organizations in countries that aim to advance privacy protection.

6. Governance mechanisms (how?)

(a) objectives of the rules system

(b) content of principles, norms and rules

The objective of governance is to advance consumer protection. Often it is done through legislation as that is the most effective way of sanctioning offenders. Legislation is usually targeted at misleading information and practices, fraud and identity theft, unauthorized access and other forms of mischief – offences that are manifest in the Internet world through techniques such as some forms of spam, spoofing, phishing, and the dissemination of viruses, worms, trojans and spyware..

The protection of privacy, however, is slightly different in that the consumer is being protected against the whims of both the government and the retailer. Legislation is usually targeted at minimizing if not outright eliminating the exploitation of personally identifiable data that had been given earlier for some other specific use. Phishing, dictionary attacks and e-mail address harvesting are examples of techniques that may be used to capture personal information on the Internet.

7. Adequacy measured against criteria / benchmarks set out in Declaration of Principles:

(a) multilateral

(b) transparent

(c) democratic

(d) capacity to address Internet governance in a coordinated manner

(e) multi-stakeholder approach

(f) other

Consumer Protection

The nature of consumer protection is such that the laws at the national level must have support from government, business and the consumer. Consumer protection at the global level can only exist where there is such a base of support at the country level. Given the lack of such consumer protection among developing countries, it is difficult to see how global protection can exist.

Consumers associations want to be independent, or at least perceived to be independent of government and business pressures.

Countries that are part of ICPEN also tend to have consumer protection, and are able to meet most if not all of the benchmarks set out above.

Privacy

There is no universal agreement on privacy because of the different paradigms on the subject. The EU's data protection directive, especially the clause barring the transfer of information to third countries without adequate data protection, sets the benchmark other countries have to meet. The US's safe harbour provision is one such attempt. Canada, Australia and Singapore have made similar attempts to meet the benchmark. The Australian effort has been declared not to meet the benchmark.

There are some seals for online privacy, which are essential self-regulating associations of members who agree to abide by certain norms. However, these seals do not have widespread acceptance. Also, like any self-regulating group, decisions are not transparent or democratic.

8. Additional comments

Online consumer protection makes sense only against a backdrop of offline consumer protection. Governments must therefore pass the offline laws for online protection to be fully workable.

Privacy concerns have taken a backseat to security concerns as expressed by the USA, whose interests and concerns cannot be ignored. However, the privacy genie is out of the bag: consumers do want some privacy protection. So work in this area cannot be neglected.

Strengthening consumer protection, including privacy, where the laws are weak or even non-existent will boost the use of e-commerce. The OECD countries are aware of this; developing countries are lagging here.

Resolving these issues will make users more confident about the online world.