Code, Law and Privacy: Privacy Invading, Enhancing, or Neutral?

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Lessig’s theory of “Code as Code”

*Code and Other Laws of Cyberspace* (1999)

- Real world things are “regulated” by
  - law,
  - norms,
  - the market and
  - the architecture of the world – in cyberspace, this is “code” ie technology/software

Hence software “code” regulates like legal “code”.
Modes of regulating “things”
What Lessig gets

• While “real world” architecture often simply exists, eg gravity, code is explicitly designed and owned
• Ordinary democratic/judicial/executive controls applied to law rarely applied to writers/owners of code
• -> “Democratic deficit” of code – living in a Microsoft or RIAA world – much remarked on
• DMCA most obvious attempt to date to explicitly control code (circumvention hacks) with law
What Larry doesn’t say, quite

- Code “trumps” law
- More effective than law at enforcing legal rights in cyberspace
- **example 1.** In IP field, law could not stop the Internet being the “death of copyright”, but encryption and DRM systems very (well, fairly) effectively enforce IP rights
- Problem: May also enforce private rights of code owners to exclusion of “commons” rights granted in balance, eg fair use/fair dealing
Example 2: Code, law and speech

- The Internet enables almost unstoppable (by law) distribution of and access to pornography.
- Code – filters – allow illicit content to be stopped by user, or “upstream” by ISP or government, before user gets access.
- Code trumps law: but Lessig argues unlimited use of filters – leaving matter to market and users - should not be allowed, because of free speech concerns (self censorship, and censorship of others).
- Thus rejects PICS as desirable architecture – “perfect” uncontrolled filtering.
Code, law and privacy: What Larry doesn’t get quite right

• Lessig promotes idea that novel code tends to be privacy invasive – pervasive search and monitoring (technological determinism/pessimism?)
• Examples given: ubiquitous surveillance cameras, data collection by e-commerce B2C websites, creation of profiling info
• Backs a market and code solution; fighting code with code – P3P as a solution to data collection/profiling.
• Criticised extensively by Schwartz, Reidenberg and (ahem) Edwards
• If law was needed to trump code and the market in relation to PICS to defend free speech, why not in relation to P3P to defend privacy?
Another approach to code, law and privacy

- Code promotes the agenda of those who own and/or write it.
- Thus whether code is privacy-invasive, enhancing or neutral depends on who own/write it.
- “Users” – consumers, citizens - have generally little power or ability to tweak code to own ends.
- Technopoly thus melds with invisible hand of the market.
Examples of pro and anti privacy code

Anti privacy code

• *Off line example*: CCTV in UK is ubiquitous, rampant and almost uncontrolled by law or public “users”.

• *On line example*: Gmail recently beta-ed by Google has been widely criticised by privacy activists eg Privacy International
But new forms of code are coming..

- Pro privacy code example 1: The new generation of blogging and “social interaction” sites - Orkut, Friendster, etc - show close concern for building in architectures of privacy. Live Journal has sophisticated code to allow highly selective and flexible disclosure and restriction of personal information, as well as proviso for anonymity. (Kozlow, 2003)
User Info

User Information

Below is user information for Chris. If you are this user, you can edit your information (or choose what information is considered public) at the Edit Info page.

User: catabolism (612775)

Name: Chris

E-mail:

Interests: 29: beaches, beer, belle and sebastien, bowie, bristol, buffy, comics, conventions, devon, eastenders, environment, fandom, fanzines, grange hill, intranets, languages, movies, pulp, restaurants, science, science fiction, sopranos, spaced, sparks, strokes, travel, white stripes, wine, writing. [Modify yours]

Friends: 22: andrewducker, biblio, bohemiancoast, brisingamen, bugshaw, crunchv71, dmw, green, amber, grytpype, thynne, hawkiida, headgardener, major clanger, peake, purpletigrion, red cloud, rhubarbfoot, smallphoenix, sneerpout, swisstone, the gardener, the maenad, yonmei

Friend of: 37: akicif, andrewducker, biblio, bohemiancoast, brisingamen, bugshaw, dalmeny, dmw, dougs, drploka, fishlifter, flyingsauce, green, amber, groliffe, gummitch, headgardener, karmicnull, la marquise de , lproven, major clanger, maryread, miramon, mrhedgehog, numbat, peake, purpletigrion, red cloud, sbisson, smallphoenix, sneerpout, squirrelswing, swisstone, the gardener, the maenad, the magician, tingle, yonmei
Friends: 92: adela terrell, akicif, akirlu, animoose, athenais, bibliofile, bibliogirl, billzilla, blufive, bohemiancoast, boxofdelights, brisingamen, brithistorian, bugshaw, callistra, captainblue, catabolism, childeric, cloviscvbunny, daemongirl, daveon, davidcook, drjon, drpete, drploka, fishlifter, flickgc, flyingsauce, fragrantzodiack, fredcritter, gerisullivan, green, amber, gummitch, guylbles, hazelchaz, headgardener, hnpcc, jamesb, jerrykaufman, john, d, owen, juliebata, kimhuett, ksp24, ladyjillian, ladymoonray, liveavatar, madcatwoman, maryread, micheinrz, mintogrub, miraman, mircea, mishalak, mister wolf, numbat, oilygrl, owlrig, peake, perlmonger, pickledgnger, pmcmurray, ramtops, replyhazy, rbthefish, rrrylsin, sbisson, serendipoz, shebang zine, sneerpout, spacecrab, spikeiowa, spiritrover, steer, stillcarl, swisstone, tamiam, teal7, the gardener, the maenad, the magician, the mysterons, ther实景s, tingle, to eat flowers, ursulav, vampwillow, wanderingharper, whumpdotcom, wild irises, wilfulcalt, yonmei, zarabee

4: crush all human, lj maintenance, news, paidmembers

4: alisonscottblog, ploka, trufen, twolumps feed

Mutual Friends: 80: adela terrell, akicif, akirlu, animoose, athenais, bibliofile, bibliogirl, billzilla, blufive, bohemiancoast, boxofdelights, brisingamen, brithistorian, bugshaw, callistra, captainblue, childeric, daemongirl, daveon, davidcook, drjon, drpete, drploka, fishlifter, flickgc, flyingsauce, fredcritter, green, amber, gummitch, guylbles, hazelchaz, headgardener, hnpcc, jerrykaufman, john, d, owen, juliebata, ksp24, ladyjillian, ladymoonray, liveavatar, madcatwoman, micheinrz, mintogrub, mircea, mishalak, mister wolf, numbat, oilygrl, owlrig, peake, perlmonger, pickledgnger, pmcmurray, ramtops, replyhazy, rohanfish, rrrylsin, sbisson, serendipoz, shebang zine, sneerpout, spacecrab, spikeiowa, spiritrover, stillcarl, swisstone, tamiam, teal7, the gardener, the maenad, the magician, tingle, to eat flowers, vampwillow, wanderingharper, whumpdotcom, wild irises, wilfulcalt, yonmei, zarabee
Example 2: And take spam..

- Spam enormous problem. 60-80% of all mail spam in spring 04. Huge costs to industry. Highly privacy invasive at home and work.
- Technology clearly far more effective at preventing spam than law *on its own* – see ITU discussion, July 04.
- EC Privacy & Electronic Communications Directive 2002 brought in opt in, ECD 2000 introduced compulsory labelling - implemented UK October 03 and 02 – no sign of effect on the 90% of spammers based outside EU area.
- US Federal Can the Spam Act, January 04 – little sign of effect. FTC has just come out against “Do Not Spam” registry as more trouble than it’s worth. Congress hearings May 04 highlight avoidance tactics. Origin spoofing and “zombie drones” prevent enforcement even when spammers in jurisdiction.
Code solutions for spam

• Contrast huge activity to develop effective technical/code solutions
• AOL/EarthLink/M$/Yahoo! anti spam alliance
• IETF co-ordinating efforts to build authentication of origin scheme for trusted email
• Why? Because commerce in general, network operators and ISPs suffer financially through having Internet clogged to busting.
• “Users” benefit from this code even though they don’t have power to write it or money to commission it – not through “law” enforcing privacy rights but because the market has good reasons to develop privacy friendly code
So, why do owners choose to write privacy friendly code (or not)?

- **Gmail**: privacy invasion is to produce revenue (targeted ads). Early indications are market prefers features (storage and search capacity) to privacy “bug”

- **CCTV** – users largely seem to prefer (alleged) reassurance against crime/disorder to privacy

- **Live Journal**: open source project, free, deals with much very personal information. Is it privacy enhancing because the “users” wrote the code themselves? Perhaps not (though the writers ARE all users) but privacy is a strong incentive to use LJ rather than other sites => revenue (paid accounts) and goodwill.

- **Spam** - commercial dividends produce privacy for individual consumers more or less as side effect.
Parting thoughts

• Code does indeed seem to trump law in privacy domain, but this is not always bad news for privacy rights.
• Code is neither inherently privacy invasive not enhancing. It reflects the values of writers/owners.
• Consumers will rarely lobby for privacy as a feature as they favour price, convenience, branding, protection from crime, etc.
• Where does this leave the role of privacy activists?
• Does the new generation of users – not only “always on”, but “always visible” on broadband, IM, mobile phones, Urban Tapestry – actually value privacy? If not code is not likely to build it in as a feature, especially as code is built to spec of early adapters and techno-keenies. Is privacy an eternal verity or a blip feature?
• Clearly still a role for privacy activism re areas like credit card disclosures, government wiretap, ID theft.
• But does this mean lawyers. activists should concentrate on promoting architectures of privacy only in selected privacy-critical domains not as general value?