A Hegelian Basis For Information Privacy As An Economic Right

Marco De Boni
Martyn Prigmore
Leeds Metropolitan University,
School of Computing

ABSTRACT

We briefly discuss the current state of the electronic privacy debate, with particular emphasis on the move towards regarding information privacy as an economic right. Current proposals are examined, and seen to derive from pragmatic, problem driven analyses, rather than clear philosophical foundations. The Hegelian concept of privacy is examined with a view to providing a philosophical basis for privacy as an economic rather than a social/human right.

1 CURRENT APPROACHES TO INFORMATION PRIVACY

With the advent of electronic information systems, and more recently of internet technologies and electronic commerce, the issue of personal privacy has become more pressing. One particular aspect concerns the privacy of personal data and personal communications which, following Clarke (2000), we refer to as 'information privacy'. The introduction, and recent strengthening, of data protection laws in Europe can be seen as a recognition by the state that "consumers are uneasy with their personal information being sent world-wide" (Privacy International 1999). Thus information privacy is central to the current debate on electronic privacy. Accordingly it is this aspect, rather than bodily privacy or privacy of behaviour, on which we focus. Note, though, that our analysis can also be applied to these other aspects of privacy.

In recent times, and particularly in Europe, privacy has come to be seen as a human or social right arising from the nature of the relationship between the individual and society. The trend towards incorporating a right to privacy in law can be ascribed to the growing belief that "Privacy underpins human dignity and other key values, such as freedom of association and freedom of speech" (Privacy International 1999 "Overview"). "Privacy possesses moral value since ... [it] supports the development of individual dignity and autonomy" (Cavoukian 1999 p4). Under this analysis, the right to defend our privacy interests follows from the rights conferred upon us as members of society and as human beings. These rights arise from the nature of the relationship between the individual and society.

This tradition sees its clearest formulation in various international treaties, particularly Article 12 of the Universal Declaration of Human Rights (UDHR 1948) and Article 17 of the International Covenant on Civil and Political Rights (ICCPR 1976). The most comprehensive translation of these rights into privacy protection legislation is the recent EU legislation on Data Protection (Council Directive 95/46/EC).

The European approach to information privacy as a human right is not universally welcomed. As electronic commerce expands, some argue that the legislative approach to privacy protection could become "overly bureaucratic and cumbersome" (Cavoukian 1999 p8). In response to this perceived threat to the efficient conduct of business a number of authors have advocated a shift in emphasis from privacy as a human right to privacy as an economic right.

There have been several attempts to outline how the market can be used to secure information privacy as an economic right. The simplest approach is to note that consumers who value their privacy will be unwilling to enter into transactions with businesses that do not respect their customer's privacy. Thus, if privacy truly is a concern for most consumers, market forces will ensure that businesses that respect consumer privacy will succeed; those that do not will fail. Thus consumer privacy can be protected by consumer pressure alone, with no need for government regulation, or even industry self-regulation. In this simple market model the individual owns their private information, and chooses whether or not to give it to a business as part of a transaction. Subsequent use of the information by the business, including onward sale to third parties, is at the discretion of the business.

Swire (1997) identifies two constraints on business attitudes to consumer privacy in this simple model: consumer preference, and publicity. Consumers who value privacy will deal with businesses that respect this. Businesses that respect privacy will advertise this fact to attract custom.

From this analysis we can identify two major flaws. Unless consumers have information about the attitudes of competing businesses they cannot make informed choices. Thus, for the market to work, businesses must formulate and publicise privacy policies. However, it is not sufficient simply to have a policy, it must be enforced. Given this requirement for effective implementation of well publicised privacy policies, the financial gain from respecting consumer privacy must outweigh the cost to business of implementing and publicising privacy policies. This additional cost will be passed on to the consumer who must weigh it against their preference for information privacy. It is possible that even strong consumer preference for information privacy will be outweighed by pure financial considerations. This is particularly true when consumers come to purchase necessities. Thus, it is not clear whether the economics of privacy will ever favour the general implementation of effective privacy policies.

From a market perspective, this is not a problem. If customers value privacy less than they value a bargain, then there is no problem. However a consumer may make a rational choice to give up their privacy in a given transaction, because of immediate financial benefit. Yet they cannot recover that privacy. In particular, the business acquiring the private information may sell it on to third parties, thus depriving the consumer of the opportunity to decide between privacy and cost in future transactions.

Even if privacy policies are generally adopted by businesses, it is not clear that consumers will accept them. The role of trust, particularly in e-commerce, is crucial (see Edouard and White 1999); consumers must trust businesses to implement their privacy policies effectively. Again, the simple market model has no way of ensuring that business stick to their stated privacy policies. In particular, if a policy changes a

consumer cannot know whether private information surrendered under the old policy will be managed by the business in accordance with the old policy.

Several authors have been moved to attempt to construct more sophisticated markets in information privacy, ones which do not fall foul of the criticisms outlined above. Their main aim is to deal with the asymmetrical bargaining power that lies at the heart of the critique of the simple market model: how can the consumer make rational choices about surrendering their information privacy in favour of a particular business; and how can a consumer trust a given business to manage their information as expected once it has been surrendered?

Some authors have advocated self-regulation as one way to bolster consumer confidence within the simple market model. The key concept is that businesses can themselves effectively regulate the market. This regulation can take many forms. Bennet (Bennet C J for the Canadian Standards Association, *Implementing privacy codes of practice*, PLUS 8830, August 1995 pp18-21 – quoted in Cavoukian 1999) identifies five categories of self-regulation for privacy policies: company codes, sectoral codes, functional codes (e.g. codes of practice for marketing), technological codes and professional codes. For each form of self-regulation "industry can be involved at one or any number of points in the process of legislating, enforcing or adjudicating the rules" (Swire 1997). Thus self-regulation is concerned with pragmatic approaches to protecting information privacy in a free market.

Self-regulation had been criticised as "wolves herding sheep - for the benefit of the wolves, not the sheep" (Clarke 2000). A more telling criticism is the lack of any rational philosophical underpinnings for self-regulation. In the pure market model there is a clear principle underlying the mechanism: an individual's private information is theirs to dispose of as they choose. Self-regulation is proposed to ensure that this choice is given with the individual's full, free and informed consent; it is a technical adjustment to rescue a failed principle.

Other authors have noted that "self-regulation is rarely voluntary" (Noam 1997) and requires at least the threat of, potentially more onerous, government regulation. Since the motivation for establishing an economic right to privacy is to avoid the bureaucracy associated with government regulation self-regulation can be seen as a poor compromise: bureaucracy without authority. The alternative is to establish a genuine market in private information, where individuals are paid for surrendering their information privacy.

Again, there are different technical approaches to establishing such a market. One such would allow individuals to charge for the *collection* of their personal information. This charge would be made within the terms of a formally agreed contract. An example of such a mechanism is the supermarket loyalty card, where a supermarket will offer an individual customer discounts in return for the right to collect and use private information about that individual's shopping patterns.

A more sophisticated market is realised by vesting the individual with intellectual property rights in their private information. This formulation extends the previous 'right to charge' mechanism, allowing individuals to charge for *collection and subsequent use* of the information, including onward sale to third parties and any

subsequent trading of their information. The charging regime may be very simple, say a flat rate for collection and use, or extremely complex, with variable charges based on a commodities style market.

Most advocates of an economic right to information privacy assume that "personal information belongs to the individual to whom it pertains" (Cavoukian 1999 p18). This seems a pragmatic approach, yet there is no clear justification for the principle. Individuals generate private information merely by existing. Business adds value to this information by collecting and analysing it. One might easily argue that personal information belongs not to individuals, who generate it without apparent effort, but to those who expend time and effort to collect it.

The default allocation of property rights in information privacy to individuals is substantially undermined by the commonly held view that "…a market for personal information would not have as its first objective the regulation of privacy abuses or the enhancement of privacy, but rather, an economically more efficient flow of personal information …" (Cavoukian 1999 p21). The right to information privacy is seen as subsidiary to the right of businesses to do business. Where there are "significant transactions costs to making contracts … an efficient allocation of rights would be one in which the transactions and negotiation costs are minimised" (Varian 1997). In other words, if the benefits to consumers from a market in information privacy are perceived to be less than the costs to business of entering that market, property rights can be re-assigned in favour of business.

All current approaches to creating a so-called economic right to information privacy seek to secure for businesses an efficient way of utilising this 'new' commodity; information privacy. The lack of any firm philosophical foundation for the economic right to information privacy means that when a particular approach is seen to impose additional costs on business, it can be discarded. Until proposals for an economic right to privacy are given a firm philosophical basis they are unlikely to gain general support. Here, we seek to give a rigorous formulation of the economic right to information privacy, based on the extensive analysis of privacy carried through by Hegel.

2 A PHILOSOPHICAL BASIS FOR PRIVACY AS AN ECONOMIC RIGHT

Questions about freedom and privacy have been the subject of philosophical investigation since Plato's Republic (for a discussion of the Platonic idea of freedom and its relationship with ethics and politics, see, for example, Hildebrandt (1933)) . One of the most compelling examinations of the concept of "private" and therefore of privacy has been by Hegel, most notably in his Encyclopaedia and his Philosophy of Right (see Hegel 1817 and Hegel 1821). We shall concentrate here on Hegel's Philosophy of Right which exposes in a clear and rigorous manner his investigation into privacy issues.
It should be noted however that no summary can do justice to the density of Hegel's writing and what follows should be seen as an "appetiser" rather than an exhaustive interpretation.

Privacy, intended as the right to be "private", belonging to me and not to others, is essentially a *right to freedom*. Not, it must be added a negative concept of freedom (freedom *from* interference, challenge or observation) but a positive concept of freedom without restriction. But Hegel does not start with the concept of "private" to reach the idea of "right" (as if to say: given the idea of "private", we must prove that it is a right); rather, the idea of "private" is derived from the reflection on "right" itself (i.e. it is the careful reflection of the idea of "right" which brings us to the idea of a right to privacy). In Hegelian terms, "right" has as starting point the concept of freedom, and specifically of free will (Hegel, Grundlinien der Philosophie des Rechts, 1821, par.4): to understand the meaning of "right" we must first examine the concept of "freedom". When talking about rights we are therefore talking about the expression of freedom, the expression of a will. Right is in the first instance the "immediate being" of freedom (par. 40), a being which finds itself opposed to a nature which is different from itself and which reveals the being of will as a subject (will) in contrast to an object (nature) (par. 39). Freedom is therefore not infinite but is circumscribed, and the free will acts to take away these objective limitations to itself. In everyday terms, people, beings with a free will find they are not infinitely free: their freedom is constrained, by nature, by the world, by other people. But people want their freedom, *notwithstanding* these limitations. The right to privacy is the right for a person to be free *against* the will of others who want to express their liberty by intruding into this first person's freedom. It is the right to de-prive *others* of their liberty to be able to express *my* liberty: what is private for me is deprivation for another who is not me.

In this sense the discussion on privacy is reminiscent of Hegel's treatment of property. Property is for Hegel the sphere of personal freedom (41), the first element of "Right": it is the expression of the abstract free will (40). Property is the exterior object which I claim as *my* possession (45): property is therefore *private* property (45). In that it is private and mine it is therefore in the same relation to others as we have seen is privacy: its being mine de-prives others of its being theirs. The right to privacy is therefore essentially the right to property: the concrete expression of personal free will.
The free will however is not isolated in its being, and freedom can only have true existence in the relation between one free will and another (70). In simpler terms, a person is not isolated, and therefore a person's free will must develop a relationship with the free will of others. Private property is therefore not just the result of my subjective will, but is the result of a common will: the contract (70). A Person is not an isolated owner of private property, but has needs which necessitate interaction with other people who are also owners of private property: this interaction, which may take place as exchange, gift, commerce etc., is the place of the contract. This interaction allows me to divest myself of *my* property: the contract allows me to cease being an owner of something and grants ownership to another person (74). In Hegelian terms, I can *alienate* what is my private property (65): what I owned ceases to be mine and is seen as something essentially different ("alien") from me.

Returning to the problem of privacy, this means a person may "alienate" what was seen as their "private" sphere through a contract: what is commonly referred to as "privacy" is merely a type of private property and, as such, may be subject to contract, given away, exchanged or sold. In the moment *my* privacy is subjected to contract, it ceases to be *mine* and hence also ceases to be private: it becomes something "alien"

which I may dispose of as I will. It is therefore perfectly reasonable to subject "privacy" to a contract in the same way as is work: as a free person I may decide to sell my work for a certain amount of hours a day, subjecting "my" work to contract so that it is no longer "mine", but belongs to the other party in the contract (a firm, for example) for the agreed term. But work is only one of many things which belong (are private) to me: work is, in other words, one of many types of my private property or of my sphere of privacy. In the same way as I sell (by "alienating" it) my work, I can therefore sell other instances of my privacy by subjecting them to contract: indeed, the same contract that regulates my work may regulate the other aspects of privacy I wish to dispose of.

As can be seen, the central elements of this discussion are freedom and contract: I may dispose of my privacy through a *free* decision to enter into a contract with another person. A contract is therefore the result of an act of free will (75). It is *my* decision, free and unconstrained, which allows me to de-prive myself of my privacy by subjecting it to contract. Once this has been done it makes no sense to redress the issue as the contract was the embodiment of my freedom: I could have decided not to enter into the contract just as I decided to enter into it.

Translating this problem to the issue at hand, a firm may appropriate any aspect of an customer's privacy that was subject to contract: the crucial element is that it must have been subject to contract. It is a customer's free decision whether to enter into that contract or not, but once entered into, the customer may not break the contract without committing a crime (see par. 82-103 on illegal acts, fraud and crime). Summing up, a business has a "right" to its customer's privacy insofar as this was subject to contract, and a customer has no right to grievance insofar as the contract was entered into freely.

3 THE COMMODIFICATION OF INFORMATION PRIVACY

To establish a market in information privacy it is necessary first to establish the nature and ownership of the commodity to be traded. We have seen that this commodification of information privacy is assumed by several writers without justification. We use the Hegelian analysis of privacy to provide a clear description of the nature of the new commodity of information privacy. The ownership of this commodity also follows from the Hegelian analysis.

As discussed, the right to information privacy is created by the free will of individuals who deprive others of the right to encroach upon their private information. Thus the abstract commodity that individuals claim as their own is any and all information about the said individual; their private information. This may include both information which can directly identify that individual and non-identifying, or anonymous, information, which other individuals or organisations may wish to collect for statistical purposes. The individual may choose to dispose of their private information by means of a contract, either giving away the information or selling it to the highest bidder. Thus the Hegelian analysis leads naturally to treating private information as just another commodity of exchange within the existing property law.

The Hegelian definition of private information as a commodity also demonstrates that the individual who is the subject of the information is the original owner of it. It is

they who generate the commodity through the exercise of their free will. Taking a simple example, Sherlock Holmes chooses freely to live at 42b Baker Street, London, England, and to be known by his given name. Hence the information consisting of his name and address 'Sherlock Holmes, 42b Baker Street, London, England' is his private property; he asserts the right to deny other individuals the use of this private information for any purpose other than those specified by a contract into which he has freely entered.

This broad definition of private information as the commodity of exchange in the information privacy market contrasts with the narrow definition adopted in most privacy protection regimes. These usually seek only to protect information which identifies an individual. The UK Data Protection Act 1998 defines "personal data" as:

> "data which relate to a living individual who can be identified-
> (a) from those data, or
> (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the [person controlling use of the data]"

It could be argued that the broader definition is unnecessary, bringing into consideration many trivial items. A further criticism would concern the allocation of ownership rights. As noted above, individuals merely generate the information, whereas businesses collect, collate and analyse it.

However, the broad definition of private information, and the allocation of property rights, accords with normal usage in terms of private property. Consider the case of an individual who owns a large lawn. Each blade of grass on the lawn is their 'private property', but no-one would regard picking a single blade as theft, or walking on the lawn as criminal damage. Digging up the turf, though, would count as both. Legal redress for infringements of the right to information privacy will likely follow a similar approach to infringements of over property rights. To suggest that an individual should be deprived of their private property because it is too costly to protect it neglects the fact that property law already deals with low-value items in an effective way.

Similarly, the grass just grows, but a business who harvested it for hay would not claim that their effort conferred upon them property rights over the lawn. To suggest that anyone can come along and deprive an individual of their property simply because they can make better use of it violates the basic principles of the free market and of democracy.

4 CONCLUSIONS AND FURTHER RESEARCH

Our analysis of the concept “privacy” provides a solid basis for the assertion that private information is a form of property, a commodity to be bought and sold like any other. It also provides a clear allocation of economic rights: to the individual to whom the information pertains. On this basis we can begin to consider what market mechanisms would be appropriate to manage the trading of information privacy. In particular, we can analyse existing proposals, and ask whether they provide adequate mechanisms to manage an economic right to information privacy.

A further direction of study concerns the role of the state. It is common among proponents of an economic right to privacy to assert that the state should play little of no role in the information privacy market. The state is seen as a threat to both individual and business privacy: "The key battleground lies with the competing aims of individual (and corporate) privacy versus what can be described as national interest" (Edouard and White 1999). We will examine the role of the state in the nascent information privacy market in a later paper.

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