I. New Technologies Affecting Privacy

The need for the specific legal recognition and protection of the right to privacy is exacerbated by the development of new technologies that facilitate the invasion and interference with an individual’s privacy. It is indisputable that the capacity, power, speed, and impact of information technology has been, and continues, accelerating rapidly. With these advancements there is also a corresponding increase in the risks to privacy. The competing interests at play are the demands of a democratic society, the need and appetite for electronic commerce and information technology, balanced against the reality that technologies that might be invasive of privacy also have the potential for unprecedented opportunities for enlightenment, prosperity and security. Traditionally, privacy law has developed in tandem with technology and has constantly reshaped itself to meet the privacy threats embodied in new technologies. The information revolution, however, has been taking place at such speed and affecting so many areas of privacy law that the orthodox, adaptive legislative and judicial process has failed to address digital privacy problems adequately.

Within the context of the development of information technology, the magnitude of what some call the “digital revolution” is unprecedented. The last generation has seen technological change on a scale matching or exceeding that

175 See Daniel J. Solove, Privacy and Power: Computer Databases and Metaphors for Information Privacy, 53 Stan. L. Rev. 1393, 1394 (2001) (the author describes the impact of digital technology on our day to day life such as how we bank, shop, and participate in other innocuous daily activities).
178 See Solove, supra note 175, at1393-94.
of the industrial revolution. Three relatively recent major digital developments have affected our concept of privacy greatly: (1) the increase in data creation and the resulting collection of vast amounts of personal data – caused by the electronic recording of almost every transaction; (2) the globalization of the data market and the ability of anyone to collate and examine this data; and (3) the lack of the types of control mechanisms for digital data that existed to protect analog data. These three developments all concern the changes wrought by digital technology on the ability to manipulate, store and disseminate information.

In the modern age the amount of digital information generated is extraordinary. Every interaction with the Internet and with social networks, every credit card transaction, every bank withdrawal, and every magazine subscription is recorded digitally and linked to specific users. In the analog world, these transactions were either not recorded at all or recorded on paper in a single location; therefore, the information was not as easily accessible as it is today. All of this information, once it is collected in networked databases, can be sent instantly and cheaply around the globe. In this newly commoditized information market, buyers anywhere can collate and manipulate the data for marketing, profiling, and, in some instances, for nefarious purposes. Individuals have little ability to control this collection or manipulation of their data. Not only does much of this happen far from the reach of regulators, but most people are not even aware of what information has been collected about them or for what purpose it is being used.

But while all of these changes affect information, not only informational privacy has been affected, autonomy is also imperiled from the interference with one’s daily life by digital technology. When almost every activity leaves a digital trail, government and private monitoring become less about analog surveillance

179 See Eugene R. Quinn, Jr., Tax Implications for Electronic Commerce over the Internet, 43 J. TECH. L. & POL’Y 1, 50 (1999) (the author compares the Industrial Revolution with the “digital revolution” and claims that the “digital revolution has the potential to cause societal change on a magnitude that is even greater than that caused by the Industrial Revolution”).

180 See Berman & Mulligan, supra note 177, at 553-54.


182 As compared to old-fashioned cash commerce today’s “e-commerce” allows merchants to track your “clickstream” through the use of “cookies,” and are able to track your interests based on what you view as well as what your purchase, while credit companies are able to record your purchase. See In re DoubleClick, Inc. Privacy Litig., 154 F. Supp. 2d 497, 501-05 (S.D.N.Y. 2001).

183 See Berman & Mulligan, supra note 177, at 554.

184 See Solove, supra note 175, at 1095.

185 As do other areas of privacy. See generally Julie E. Cohen, A Right to Read Anonymously: A Closer Look at “Copyright Management” in Cyberspace, 28 CONN. L. REV. 981 (1996) (for example, digital technology threatens the ability to participate