CONSUMER PRIVACY AND DATA PROTECTION

First Edition

Daniel J. Solove
John Marshall Harlan Research Professor of Law
George Washington University Law School

Paul M. Schwartz
Jefferson E. Peyser Professor of Law
U.C. Berkeley Law School
# SUMMARY OF CONTENTS

<table>
<thead>
<tr>
<th>Contents</th>
<th>xi</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preface</td>
<td>xv</td>
</tr>
<tr>
<td>Acknowledgments</td>
<td>xvii</td>
</tr>
</tbody>
</table>

## 1 INTRODUCTION
- A. Information Privacy, Technology, and the Law 1
- B. Information Privacy Law: Origins and Types 3

## 2 PERSPECTIVES ON PRIVACY
- A. The Philosophical Discourse about Privacy 23
- B. The Definition and the Value of Privacy 25
- C. Critics of Privacy 45

## 3 FINANCIAL DATA
- A. The Fair Credit Reporting Act 53
- B. The Gramm-Leach-Bliley Act 88
- C. Federal and State Financial Privacy Laws 91

## 4 CONSUMER DATA
- A. The U.S. System of Consumer Data Privacy Regulation 103
- B. Tort Law 133
- C. Contract Law 142
- D. Property Law 159
- E. FTC Section 5 Enforcement 162
- F. Statutory Regulation 191
- G. First Amendment Limitations on Privacy Regulation 235

## 5 DATA SECURITY
- A. Introduction 261
- B. Data Security Breach Notification Statutes 264
- C. Civil Liability and Standing 269
- D. FTC Regulation 288

| Index | 303 |
# CONTENTS

Preface xv

Acknowledgments xvii

1 INTRODUCTION 1

A. INFORMATION PRIVACY, TECHNOLOGY, AND THE LAW 1

B. INFORMATION PRIVACY LAW: ORIGINS AND TYPES 3

1. Common Law 3

(a) The Warren and Brandeis Article 3

(b) The Recognition of Warren and Brandeis’s Privacy Torts 6

- William Prosser, Privacy 8

- Lake v. Wal-Mart Stores, Inc. 10

(c) Privacy Protection in Tort Law 13

(d) Privacy Protection in Evidence Law 13

(e) Privacy Protection via Property Rights 14

(f) Privacy Protection in Contract Law 15

(g) Privacy Protection in Criminal Law 15

2. Constitutional Law 15

3. Statutory Law 16

4. International Law 20

2 PERSPECTIVES ON PRIVACY 23

A. THE PHILOSOPHICAL DISCOURSE ABOUT PRIVACY 23

1. The Concept of Privacy and the Right to Privacy 23

2. The Public and Private Spheres 24

B. THE DEFINITION AND THE VALUE OF PRIVACY 25

- Alan Westin, Privacy and Freedom 26
CONTENTS

● Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object* 31
● Daniel J. Solove, *Conceptualizing Privacy* 34
● Anita L. Allen, *Coercing Privacy* 38
● Paul M. Schwartz, *Privacy and Democracy in Cyberspace* 40
● Spiros Simitis, *Reviewing Privacy in an Information Society* 42

C. CRITICS OF PRIVACY 45
● Fred H. Cate, *Principles of Internet Privacy* 50

3 FINANCIAL DATA 53

A. THE FAIR CREDIT REPORTING ACT 53
1. FCRA’s Scope and Structure 55
   ● United States v. Spokeo, Inc. 56
2. Permissible Uses of Consumer Reports 60
   ● Smith v. Bob Smith Chevrolet, Inc. 63
3. Consumer Rights and Agency Responsibilities 69
4. Civil Liability and Qualified Immunity 70
   ● Sarver v. Experian Information Solutions 72
5. Identity Theft and Consumer Reporting 78
   ● Sloan v. Equifax Information Services, LLC 80

B. THE GRAMM-LEACH-BLIELY ACT 88

C. FEDERAL AND STATE FINANCIAL PRIVACY LAWS 91
1. State Financial Laws 91
2. Laws Regulating Government Access to Financial Data 92
3. Identity Theft Statutes 93
4. Tort Law 95
   ● Wolfe v. MBNA America Bank 95

4 CONSUMER DATA 101

A. THE U.S. SYSTEM OF CONSUMER DATA PRIVACY REGULATION 103
1. Structure 104
2. Types of Law 106
3. Personally Identifiable Information (PII) 111
   ● Pineda v. Williams-Sonoma Stores 113
   ● Apple v. Crescent 115
4. Injury and Standing 124
In re Google, Inc. Privacy Policy Litigation 126

B. TORT LAW 133
   ● Dwyer v. American Express Co. 133
   ● Remsberg v. Docusearch, Inc. 139

C. CONTRACT LAW 142
   1. Privacy Policies 142
      ● Jeff Sovern, *Opting In, Opting Out, or No Options at All* 142
      ● Michael E. Staten & Fred H. Cate, *The Impact of Opt-In Privacy Rules on Retail Markets* 145
   2. Contract and Promissory Estoppel 149
      ● In re Northwest Airlines Privacy Litigation 150

D. PROPERTY LAW 159

E. FTC SECTION 5 ENFORCEMENT 162
   ● In the Matter of Snapchat, Inc. 164
   ● FTC v. Toysmart.com 172
   ● In the Matter of Facebook, Inc. 178
   ● In the Matter of Sears Holdings Management Corp. 185

F. STATUTORY REGULATION 191
   1. Entertainment Records 192
      (a) The Video Privacy Protection Act 192
         ● Daniel v. Cantell 194
         ● In re Hulu Privacy Litigation 194
         ● In re Hulu Privacy Litigation 194
      (b) The Cable Communications Policy Act 203
   2. Internet Use and Electronic Communications 204
      (a) The Children’s Online Privacy Protection Act 204
         ● United States v. Path, Inc. 206
      (b) The Electronic Communications Privacy Act 210
         ● In re Google, Inc. Gmail Litigation 211
         ● Dyer v. Northwest Airlines Corp. 219
      (c) The Computer Fraud and Abuse Act 221
         ● Creative Computing v. Getloaded.com LLC 222
         ● United States v. Drew 225
   3. Marketing 229
      (a) The Telephone Consumer Protection Act 229
      (b) The CAN-SPAM Act 231

G. FIRST AMENDMENT LIMITATIONS ON PRIVACY REGULATION 235
   ● Rowan v. United States Post Office Department 236
5 DATA SECURITY 261

A. INTRODUCTION 261

B. DATA SECURITY BREACH NOTIFICATION STATUTES 264

C. CIVIL LIABILITY AND STANDING 269
   • Pisciotta v. Old National Bancorp 269
   • Reilly v. Ceridian 273
   • Resnick v. AvMed 275

D. FTC REGULATION 288
   • FTC v. Wyndham Worldwide Corporation 290
   • In the Matter of Trendnet 297

Index 303