

Industry Self-Regulation of Online Privacy
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In *Self-Regulation and the Media*, 51 Fed. Comm. L.J. 711 (1999), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=184279, I discussed calls for industry self-regulation in place of or in addition to government regulation of online privacy. I reviewed the literature on self-regulation to define it and identify purported advantages and disadvantages. I analyzed the track record of self-regulation in broadcasting, children's advertising, news, alcohol advertising, comic books, movies, and video games. I identified five factors that influence whether self-regulation works: 1) industry incentives, 2) government's ability to regulate, 3) existence of measurable standards, 4) public participation, and 5) industry structure. Applying these factors, I concluded that self-regulation of online privacy was not likely to be successful.

Nonetheless, self-regulation has become a major means to address privacy concerns. In this paper, I undertake an examination of self-regulatory efforts in three privacy contexts.

First, I examine the safe harbors established under the Children's Online Privacy Protection Act of 1998 (COPPA). In *Self-Regulation and the Media*, I identified the potential for the COPPA safe harbors to supplement FTC enforcement of the COPPA rules. Safe harbors may shift some regulatory costs to the private sector while ensuring that industry participants are subject to minimum standards. This approach could allow flexibility and take advantage of industry's superior knowledge without having to rely solely on the industry's self-interested choices. The public's ability to comment on proposed safe harbor programs and the need for FTC approval could provide additional safeguards. The FTC has subsequently approved six safe harbor programs: In 2012, the FTC revised the COPPA rules, including standards for approving safe harbor programs. This paper will assess the effectiveness of the COPPA safe harbor programs and the likely impact of the recent changes.

Second, I address the effectiveness of self-regulatory programs for the collection of information on websites not covered by COPPA. In recent years, a consortium of trade associations known as the Digital Advertising Alliance developed a self-regulatory program called "AdChoices." It utilizes an icon to let consumers know that a website is engaging in behavioral advertising and gives them an opportunity to opt out.

Finally, I examine the United States-European Union Safe Harbor framework. This framework was developed to bridge the differences between the European Commission's Directive on Data Protection, which prohibits the transfer of personal data to non-European Union countries that do not meet the EU "adequacy" standard for privacy protection, and the US approach. This voluntary program is designed to facilitate transatlantic trade. Participating companies must comply with the Framework's requirements, publicly declare that they do so, and certify compliance to the Department of Commerce annually. A company claiming to comply with the Safe Harbor that does not, may be subject to an enforcement action by the FTC. In 2012, the European Commission proposed major reforms to the Privacy Directive, which have stimulated debate over the effectiveness of this Safe Harbor program.