

Facing the PII Problem: A Defining Moment in the Online Age

A recent article by Boalt Professor Paul Schwartz is resonating strongly with policymakers and practitioners.



I.D. AND IDEALS: Paul Schwartz has a plan for improving controls on the use of personally identifiable information.

“The PII Problem: Privacy and a New Concept of Personally Identifiable Information,” co-authored by Schwartz and George Washington law professor Daniel Solove, was published in Vol. 86, No. 6 of the *New York University Law Review*. As a growing number of online users know, private companies are gathering and reusing information linked to individuals without their permission. The premise of most privacy laws is that no harm occurs if personally identifiable information (PII) is not involved. At the same time, the law lacks a uniform definition of PII. The Schwartz-Solove article develops a new approach: PII 2.0.

“Right now, PII is based on a black and white rule: either there is PII and all of privacy law applies, or there is no PII and no legal protection,” Schwartz says. Because of the malleable nature of what constitutes PII, he thinks the definition of this key term should be based on a ‘risk of identification’ concept.

“Instead of the law’s current on/off switch for regulation, we call for an analysis along a continuum of graduated legal protections,” Schwartz adds. “That would give regulators and companies greater flexibility to protect information more carefully where greater potential for harm to the individual exists. Moreover, the computer science exists to make this workable.”

PII 2.0 would establish distinct guidelines for using information,

depending on whether it can be tied to “identified” or “identifiable” individuals. Sometimes apparent non-PII can be linked to individuals—and “de-identified” data can later be re-identified. To illustrate this situation, the article describes problems with current approaches to behavioral marketing and how PII 2.0 would fix them.

Schwartz, one of the world’s leading privacy scholars and an expert on this subject for over two decades, explains that U.S. privacy law has developed one statute at a time, with “no systematic thought about how they fit together.”

The article on “The PII Problem” is getting significant attention. Schwartz and Solove have delivered the keynote address at a major privacy conference in British Columbia, spoken at a Microsoft policy gathering in Washington, D.C., and presented their paper to the annual conference of the International Association of Privacy Professionals. Their article has been downloaded more than 1,000 times, and has drawn rave reviews from computer scientists and industry insiders.

“We hope to use our momentum to get Congress and other standard-setting bodies interested in adopting our idea,” Schwartz says. “Europe is revising its data protection directive, so there’s a huge policy opportunity here. This work also is just one example of how Boalt is doing transformative research into real-world problems.” —Andrew Cohen