Privacy 101

A Brief History of Privacy

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A Brief History of Privacy

- What is "Privacy"?
- The History of Privacy
- The Legal Terrain
- Privacy for Industry
- Building a Compliance Program

Many Things to Many People

- Anthropologists
  - Birds, bees, and privacy
- Sociologists
  - Creation of community, management of intimacy
- Political Scientists/Legal Scholars
  - “expression of personality”
  - “zone of prima facie autonomy”
  - “ability to regulate information” (secrecy, anonymity, and solitude)

Multiple Legal Dimensions

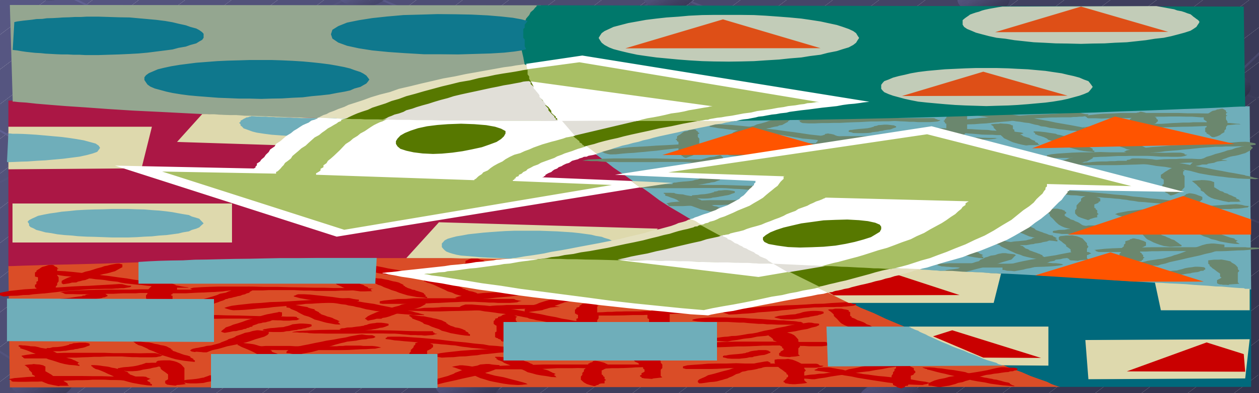
- **Tort Privacy**
- **Freedom from search and seizure** (4th)
- **Free speech** (1st)
- **Fundamental decision** (14th)
- **Informational Privacy** (largely legislative)

The Courts and Privacy

- 1890 – ***right to privacy***
  - promoted in article by Warren and Brandeis (tort-based privacy)
- 1928 -- "***the right to be let alone***"
  - (Brandeis dissent in Olmstead -- search and seizure)
- 1958 – nexus of ***anonymity*** and speech
  - (NAACP v. Alabama) (disclosure of member list)
- 1967 – "***reasonable expectation***"
  - (Katz v. US -- search and seizure)
- 1977 – no "***zone of privacy***" where data is protected and used within broad police powers of state
  - (Whalen v. Roe -- disclosure of prescription data)

Informational Privacy

- Why is it needed?
  - Avoiding embarrassment
  - Avoiding misuse
  - Avoiding harm
  - Creation of intimacy
- At what cost?
  - Commerce
  - Truthfulness
  - Community
- PRIVACY BALANCE



Scrooge?

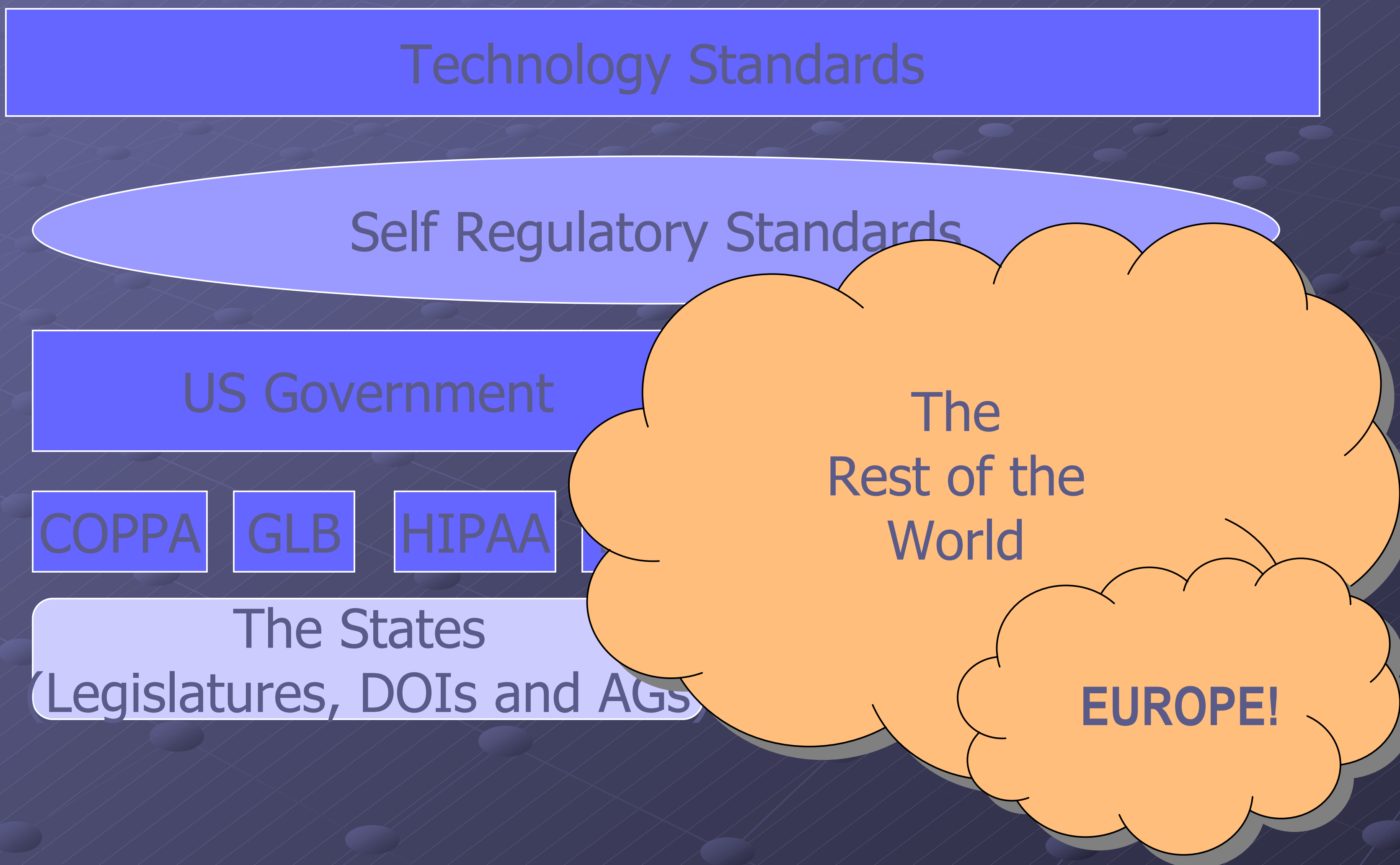
or

George Bailey?

Fundamental Right, or Sectored Protection?

- Fundamental Right
  - Europe
  - Canada
  - Australia
  - New Zealand
- Sectored Protection
  - US

The Law – A Road Map



US Privacy Law – Alphabet Soup

- HIPAA – health data
- GLBA – financial data
- COPPA – kids online
- VRPA – video rentals
- TCPA – telemktg
- FCRA – credit
- Patriot Act
- Privacy Act – governmental use of data
- State laws:
  - Insurance
  - Genetic privacy
  - GLBA add-ons
  - SPAM

Where's the Harm?

Abusive Practice	Harm	Response
Identity Theft Stolen Credit Cards Violated Privacy Policy	FRAUD THEFT DECEPTION	Unfair/Deceptive Trade Criminal Law Civil Actions
Health Data Abuse Financial Data Abuse Children's Data Abuse	DATA MISUSE (insurance, credit, jobs, parent control)	HIPAA GLBA, FCRA COPPA
Invasive Marketing	IRRITATION	TCPA, State "do not call"

Deconstructing Privacy

Fair Information Practices

What are we protecting?

- Personal information
  - Data that can identify an individual
    - Name
    - Address
    - SSN
    - Phone number
    - Triangulated data?
- Sensitive information
  - Health info
  - Financial info
  - Political info

Fair Information Practices

- NOTICE
- CHOICE
- ACCESS
- SECURITY
- ENFORCEMENT

MINIMALIZATION

LIMITED USE

NOTICE

- The most fundamental of privacy protections
- Describes:
  - Data being gathered
  - Purpose
  - Secondary uses
  - Length for which it is held
  - Access/Security
- Transparency!

CHOICE

- Do your data subjects agree to the use of their data?
- The great debate:
  - Opt-in
  - Opt-out

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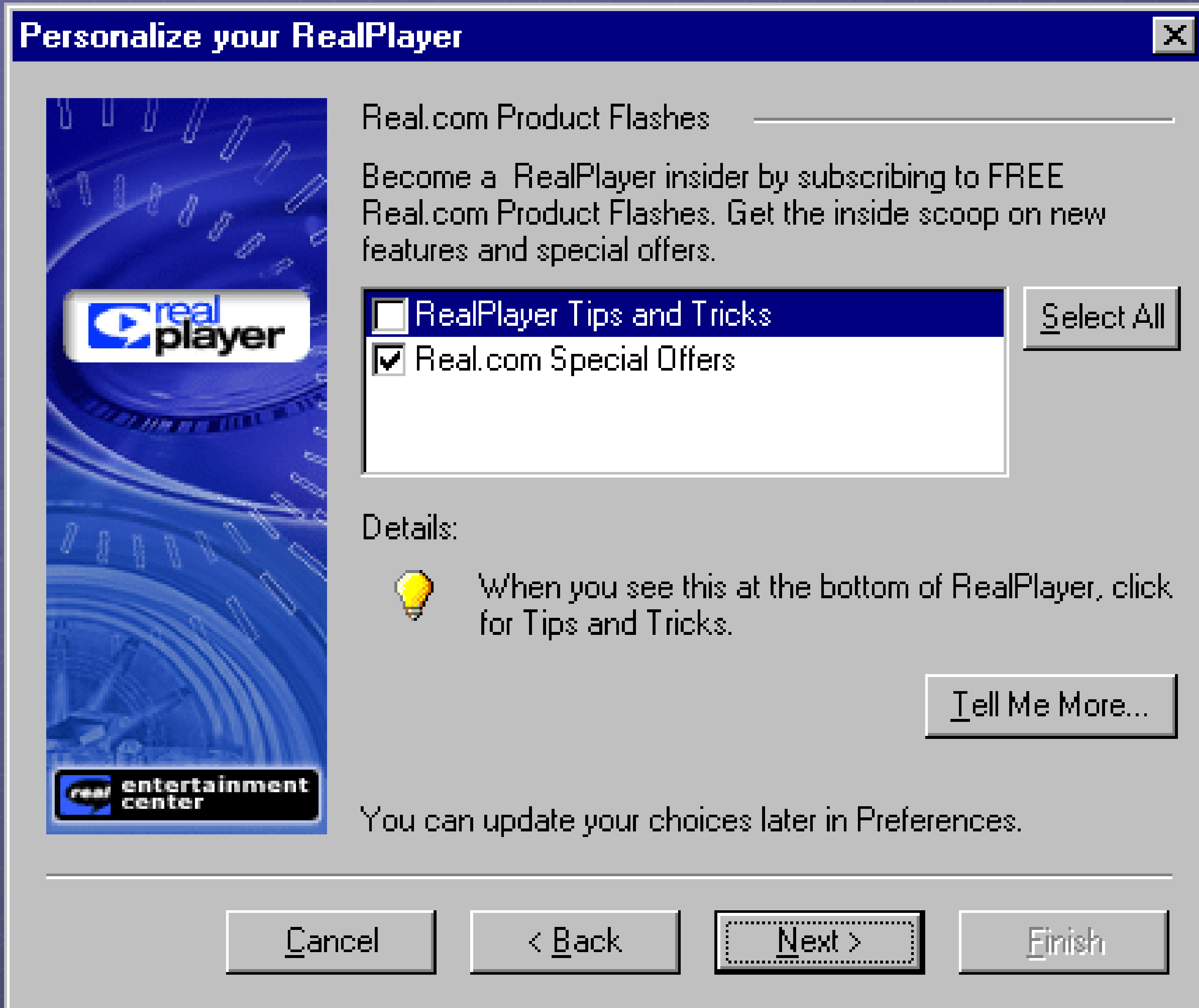
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MonsterHut on Choice

- Deceptive trade practice action by NY AG
- MonsterHut claimed their lists were "permission based" (opt-in)
- Complaint levels and lack of controls over list acquisition led judge to find violation
- Definition of opt-in:
  - Look to the default result of non-action:
    - If data is collected or used = opt out
    - If data is not collected or used = opt in

ACCESS

- The ability to review, edit or challenge data being held about you
- (Think: credit reports)

SECURITY

- The ugly stepchild of privacy
- Protections placed around data
- (more on this later today...)

ENFORCEMENT

- Governmental
- Self Regulatory
  - TRUSTe
  - BBBOnline

Gramm Leach Bliley

Gramm Leach-Bliley Act (GLB)

- Protects privacy of consumer information held by "financial institutions"
- Requires companies to give consumers privacy notices that explain information sharing practices
- Consumers have the right to limit some sharing of info
- Financial institutions may not disclose to a nonaffiliated third party any nonpublic personal information unless:
  - Provides notice to consumer of company's privacy policy, and
  - Provides opportunity to "opt out"
  - Under FCRA, Consumers have right to "opt out" of sharing credit info even if only shared with affiliates.

GLB – Applicability

- "Financial Institutions" -- companies that offer financial products or services:
  - Loans
  - Investment advice
  - Insurance
  - Banking services
- As a result, GLBA applies to:
  - Banks
  - Brokerages
  - Insurance Companies
  - Credit Companies
  - Mortgage Companies
  - Tax Preparers
  - Debt Collectors

GLB Notice Requirements

- Must be clear, conspicuous, accurate statement of privacy policy
- Must include:
  - what info company collects about consumers and customers
  - With whom company shares info
  - How it protects or safeguards info
- Applies to all non-public info company gathers about consumers
- Must be mailed or delivered in person
- Initial notice - earlier of 7/1/01 or at 1st transaction
- Annually thereafter as long as customer relationship continues

What is Nonpublic Personal Information?

- Personally identifiable financial information
- Any listing derived from using personally identifiable information
- Does not include public info including:
  - Government records
  - Widely distributed media
  - Disclosures required to be made by the government

What is Personally Identifiable Financial Information?

- Provided by the consumer
- Derived from a transaction
- Otherwise obtained in connection with product or service

Exceptions for disclosure

- Service Providers
- Joint Marketing
- Processing and Servicing Transactions
- Consent of the customer
- Protect confidentiality or security
- Lawyers, auditors and examiners
- Right to Financial Privacy
- Reporting to credit bureau
- Sale, merger or transfer of assets
- Comply with federal, state or local law

What is the Opt-Out Provision?

- The right of the consumer to instruct the financial institution not to disclose nonpublic personal information.
  - Must be explained in the Privacy Notices

GLB 2.0

- Consumer advocates attack notices as dense and unreadable
- “The biggest waste of paper in human history” (Ralph Nader)
- Consumers demand non-existent rights
- FTC Workshop, Dec. 2001 – Examines problems with GLBA notices
- Expect future modifications to GLBA
- Beware of state action (CA!)

Thanks!

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