

# Your Privacy is Optional

By Reg P. Wydeven  
April 23, 2011

As an attorney and an American, there are certain documents that I view as pretty sacred, such as the Declaration of Independence and the Constitution. Not all legal documents are perfect the first time around, so they need some tweaking. In 1789, James Madison introduced the first ten amendments to the Constitution to the First U.S. Congress. Collectively known as the Bill of Rights, the amendments were ratified by three-fourths of the States on December 15, 1791.

Contrary to popular belief, the Bill of Rights does not establish rights for the American people; it actually imposes a series of limitations on the power of the United States federal government to protect those natural rights that all people are inherently entitled to. Such rights of liberty and property include freedom of religion, speech, assembly, association, the press, and the right to keep and bear arms. The Bill of Rights ensures protections for criminal matters, including the requirement of an indictment by a grand jury for any capital crime, a speedy, public trial with an impartial jury and the prohibition of double jeopardy.

The Bill of Rights protects the very fundamental rights we enjoy as Americans that we fought in the Revolutionary War to establish and numerous wars since then to preserve. That's why it mildly annoys me when the phrase "Bill of Rights" is used in other contexts, such as the Airline Passengers' Bill of Rights and the Patients' Bill of Rights.

Well, the latest incarnation is the "Commercial Privacy Bill of Rights," introduced last week by U.S. Senators John McCain and John Kerry. The bi-partisan bill aims to allow consumers to control who has their personal information and what they're doing with it. In other words, consumers should be able to "opt in" to services they approve and "opt out" of those that may compromise their data.

The bill mandates that companies, such as websites like Facebook, Twitter and Google, inform internet users in clear language about the data the company is collecting and its intended use of that data. These companies are required to implement an "opt-in" mechanism for data collection that requires internet users to actively click something to consent to the data collection. The mechanism is needed whenever companies engage in the "collection, use, or transfer of sensitive personally identifiable information." As of now, many companies collect or distribute this information without obtaining explicit consent.

The bill also requires "a robust, clear, and conspicuous mechanism for opt-out consent for the use by third parties of the individuals' covered information for behavioral advertising or marketing." Unfortunately, the bill does not dictate how companies must implement the "opt-in" and "opt-out" elections.

McCain and Kerry released a joint statement about the bill, indicating that the current era of corporate self-policing has jeopardized consumer data. The statement goes on to say, "Americans have a right to decide how their information is collected, used, and distributed and businesses deserve the certainty that comes with clear guidelines."

Many groups support the measure, including tech giants Microsoft, Intel, HP and eBay. Some feel the bill does not go far enough. The Center for Digital Democracy, an online consumer protection outfit, wants the bill to be beefed up and include a "do not track" list, which is similar to a "no call" list for telemarketers.

Of course, the bill has its detractors. The Direct Marketing Association opposes any bill governing data collection "without a showing of actual harm to consumers."

I'm all for a bill that protects privacy. I'm just not crazy about the name.

*This article originally appeared in the Appleton Post-Crescent newspaper and is reprinted with the permission of Gannett Co., Inc. ©2011 McCarty Law LLP. All rights reserved.*