
NY DESERVES DIGITAL FAIRNESS

We know companies track our every click, search, and video view.

But people often do not know or consent to the ways companies collect, use, retain, share, and monetize our personal information. In fact, researchers found that it would take 76 workdays to read all of the privacy policies one encounters in a year.¹ And yet, the consequences of the use and abuse of personal information can be profound. Precisely-targeted pricing, advertising, and other automated decision tools are used to exclude people of color, women, and older people from housing, credit, and employment opportunities in ways that would be unthinkable in the offline world.²

THE PROBLEM

During the 2016 election, personal information was even used to target advertisements to Black Americans urging them not to vote.³ In addition, privacy violations can lead to a range of harms including lost money, harassment, public embarrassment, and reputational damage. Misuse and abuse of personal information in the digital age can limit awareness of and access to opportunities, exacerbate information disparities, and erode public trust and free expression. It can also disincentivize people from participating fully in digital life and utilizing online services.

Meanwhile, government agencies increasingly turn to automated decision systems – digital tools that aid or replace human decision making – to determine everything from teacher evaluations and child custody to sentencing, probation, and parole. Computer-generated decisions have the veneer of objectivity, but these systems are built on human inputs, and they produce biased results. Automated decision systems all too often harm people who already face bias and discrimination.

THE SOLUTION

The Digital Fairness Act (A. 3308/S. 2277)

will put control back in peoples' hands. It requires affirmative, opt-in consent from people before their personal information is captured or used. It also includes heightened protections around biometric information like fingerprints and facial scans, because such information is impossible to change. The bill prohibits surreptitious surveillance by consumer products and provides people with the ability to access and delete their personal information and to transfer their personal information to another company.

Companies that collect intimate, personal information have specialized knowledge about us that they can use to their benefit and our detriment. The Digital Fairness Act will require companies collecting intimate information and benefiting from specialized knowledge to put our interests above their own. The legislation forbids companies from taking advantage of their users in the same way doctors are forbidden from using their medical knowledge to take advantage of their patients.

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The legislation also provides guardrails for government use of automated decision systems. It bans discriminatory digital tools and gives communities a say over whether and how state and local governments use automated decision systems.

Most importantly, the Digital Fairness Act will address many of the harms that arise from the abuse and misuse of personal information in the digital age. It makes clear that using personal information to discriminate against someone – say by denying them a mortgage because of their race – is both unlawful discrimination and an unfair trade practice.

The bill includes enforcement mechanisms that will incentivize

companies to comply. Individuals can sue when their rights are violated, and the state Attorney General and district attorneys or city attorneys in cities with more than 750,000 residents may also file suit.

Finally, the Digital Fairness Act requires digital literacy and privacy education in K-12 public and charter schools. This education will help students learn how to protect their privacy and to identify, assess, and evaluate information they see online – including the misinformation and “fake news” that proliferate in digital spaces.

The Digital Fairness Act will help New Yorkers take control of their online lives and provide a roadmap for the rest of the country to do the same.

Privacy is popular in New York and across the country. Ninety-two percent of Facebook users alter the social network’s default privacy settings,⁴ demonstrating that they wish to choose with whom they share personal information. Similarly, ninety-two percent of Americans believe companies should obtain individuals’ permission before sharing or selling their personal information.⁵

The Digital Fairness Act operates on an opt-in model, which means that companies must have individuals’ affirmative consent before they collect or use their personal information. This puts the incentives in the right place. Companies want people to share their personal information, which means they are incentivized to make opting in easy and opting out hard. Instead of burying individuals’ options in legal jargon and complex terms and conditions, an opt-in model will incentivize companies to appeal to and earn the trust of the people whose information they want to collect and use. This model is particularly important for people who do not have the time or knowledge to navigate opt-out options. This disproportionately includes the elderly, the disabled, and those for whom English is not a first language, as well as economically disadvantaged people.

ENDNOTES

¹ Alexis C. Madrigal, *Reading the Privacy Policies You Encounter in a Year Would Take 76 Work Days*, THE ATLANTIC, Mar. 1, 2012,

<https://www.theatlantic.com/technology/archive/2012/03/reading-the-privacy-policies-you-encounter-in-a-year-would-take-76-work-days/253851/>.

² See Galen Sherwin & Esha Bhandari, *Facebook Settles Civil Rights Cases by Making Sweeping Changes to Its Online Ad Platform*, ACLU SPEAK FREELY, Mar. 19, 2019, <https://www.aclu.org/blog/womens-rights/womens-rights-workplace/facebook-settles-civil-rights-cases-making-sweeping>.

³ Natasha Singer, *Just Don’t Call It Privacy*, NYTIMES, Sept. 23, 2018, <https://www.nytimes.com/2018/09/22/sunday-review/privacy-hearing-amazon-google.html>.

⁴ Emil Protalinski, *13 million US Facebook users don’t change privacy settings*, ZDNet, May 3, 2012, <https://www.zdnet.com/article/13-million-us-facebook-users-dont-change-privacy-settings/>.

⁵ Christopher Boone, Vice President of Real World Data and Analytics, Pfizer, *The Business of Big Data*, Testimony before the FTC Hearings on Big Data, Privacy, and Competition (Nov. 6, 2018).