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## FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY

The Federal Trade Commission, a US agency created in 1914 to police the problem of “bigness,” has evolved into the most important regulator of information privacy – and thus innovation policy – in the world. Its policies profoundly affect business practices and serve to regulate most of the consumer economy. In short, it now regulates our technological future. Despite its stature, however, the Agency is often poorly understood by observers and even those who practice before it. This volume by Chris Jay Hoofnagle – an internationally recognized scholar with more than fifteen years of experience interacting with the FTC – is designed to redress this confusion by explaining how the FTC arrived at its current position of power. It will be essential reading for lawyers, legal academics, political scientists, historians, and anyone who is interested in understanding the FTC’s privacy activities and how they fit in the context of the Agency’s broader consumer protection mission.

Chris Jay Hoofnagle is adjunct full professor at the University of California, Berkeley, School of Information, and faculty director of the Berkeley Center for Law & Technology at the School of Law. He teaches about the regulation of technology, focusing on computer crime law, cybersecurity, internet law, privacy law, and consumer protection law. Licensed to practice in California and Washington, DC, Hoofnagle is of counsel to Gunderson Dettmer LLP, a firm focused solely on advising global venture capital and emerging technology companies. He is an elected member of the American Law Institute.

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# Federal Trade Commission Privacy Law and Policy

**CHRIS JAY HOOFNAGLE**

University of California, Berkeley



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Frontmatter

[More information](#)

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*For my parents*

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Chris Jay Hoofnagle

Frontmatter

[More information](#)

---

The spectacle presents itself as a vast inaccessible reality that can never be questioned. Its sole message is: “What appears is good; what is good appears.”

*Guy Debord*

## Contents

<i>List of figures</i>	<i>page</i> x
<i>List of text boxes</i>	xi
<i>Introduction</i>	xiii
<i>Acknowledgments</i>	xxi

### PART I THE HISTORY, POWERS, AND PROCEDURE OF THE FEDERAL TRADE COMMISSION

<b>1</b>	<b>History of the Federal Trade Commission</b>	3
	Introduction	3
	The problems of monopoly and trust	4
	Dynamics of solving the trust problem	9
	A child of quarreling parents	11
	The early Commission	16
	Conclusion	30
<b>2</b>	<b>The FTC and the rise of consumerism</b>	31
	The second wave of consumer protection	32
	Passage of the 1938 Wheeler–Lea Amendments to the FTC Act	36
	The rise of consumerism	41
	The 1970s: action and reaction	53
	The KidVid controversy	60
	The KidVid reaction	65
	Conclusion	66
<b>3</b>	<b>The modern FTC</b>	67
	The Reagan years	68
	The modern FTC and its emergence as privacy regulator	73
	Conclusion	80

<b>4</b>	<b>Organizational and procedural basics</b>	82
	Introduction	82
	Organization	83
	The three bureaus	90
	Oversight	96
	Powers of the Commission	98
	Conclusion	117
<b>5</b>	<b>Unfair and deceptive practices</b>	119
	Deception Statement	123
	Unfairness	130
	Substantiation	134
	The public interest requirement	139
	State unfair and deceptive acts and practices statutes	140
	Conclusion	141
<b>PART II THE FTC'S REGULATION OF PRIVACY</b>		
<b>6</b>	<b>Online privacy</b>	145
	Privacy basics: goals, scope, fair information practices	148
	The pre-internet privacy matters	155
	The first internet privacy matters	156
	Black letter: privacy unfairness and deception	159
	FTC privacy remedies	166
	The Federal Communications Commission as complement to the FTC	168
	Ongoing privacy tussles	169
	Conclusion	192
<b>7</b>	<b>Privacy of children</b>	193
	Children's privacy	195
	The Children's Online Privacy Protection Act of 1998	198
	COPPA as a privacy measure	208
	Conclusion	214
<b>8</b>	<b>Information security</b>	216
	Incentive conflicts and information security	218
	The information security cases	225
	Conclusion	235
<b>9</b>	<b>Anti-marketing efforts: e-mail, telemarketing, and malware</b>	236
	Spam	240
	Telemarketing	249



Cambridge University Press

978-1-107-12678-7 - Federal Trade Commission Privacy Law and Policy

Chris Jay Hoofnagle

Frontmatter

[More information](#)*Contents*

ix

Malware	259
Conclusion	267
<b>10 Financial privacy</b>	268
Creation of the Consumer Financial Protection Bureau	269
The Fair Credit Reporting Act of 1970	270
The Gramm–Leach–Bliley Act	289
The Fair Debt Collection Practices Act of 1978	298
Conclusion	305
<b>11 International privacy efforts</b>	306
The basics of European privacy law	309
The Safe Harbor	319
Office of International Affairs	325
Technical assistance	325
Investigative assistance	326
The US SAFE WEB Act of 2006	326
Conclusion	328
<b>PART III CONCLUSION</b>	
<b>12 Strengthening the FTC and protecting privacy</b>	331
The FTC has to share the responsibility to protect privacy	331
The FTC needs to update its economic understanding of privacy problems and remedies	337
Tempering the FTC's supervisory role	342
Understanding the FTC as a common law-style body, freed from many common law restrictions	343
Recognizing the harms-based approach as a policy invention	344
Shifting to reliance on unfairness	345
Limiting advertising data to advertising purposes	347
Reframing online advertising and third-party tracking as security threat	348
Moving from remediating fraud to promoting security	350
The need to defend the FTC	351
Conclusion	363
<i>Bibliography</i>	367
<i>Index</i>	393

## Figures

I.1	Michael Lantz's <i>Man Controlling Trade</i> : the Pennsylvania Avenue version	<i>page</i> xiv
I.2	Michael Lantz's <i>Man Controlling Trade</i> : the Constitution Avenue version	xv
1.1	Edward W. Kemble, "Having a Bully Time," <i>Harper's Weekly</i> , March 30, 1912	12
1.2	Commissioner George Rublee	14
1.3	Chairman Joseph Davies	17
12.1	The bridled horse	364

## Text boxes

The Progressive Party Platform of 1912	page 5
The Democratic Party Platform of 1912	7
The Republican Party Platform of 1912	8
FTC timeline: 1887–1915	11
George Rublee, a father of the FTC	14
Unfair methods of competition in the 1920s	22
The Federal Technology Commission?	25
FTC timeline: 1918–1937	27
100,000,000 <i>Guinea Pigs</i>	32
FTC timeline 1937–1959	35
<i>On Man Controlling Trade</i>	39
President Kennedy: Consumer Bill of Rights, March 15, 1962	41
The Surgeon General's Report of 1964 and the Cigarette Rule	43
FTC timeline: 1960–1979	45
The Tennessee Gang	49
Does the FTC effectively regulate advertising?	53
On advertising anxiety	58
A shape-shifting agency	70
Consumerism and its critiques	71
FTC timeline: 1980–2006	74
Publishers' hair shirt on consumer protection	76
The effective commissioner	85
The Commission as scapegoat	87
Agency operating cost and recovery of monetary relief	94
Blowback and creating a constituency	96
Controlling the power of the FTC	99
So many rules	101
Structural versus case-by-case approaches	104
The slows	109
The Personal crusades against the FTC	112
How the common law addressed deception	120
The Printers' Ink Statute	122

Cambridge University Press

978-1-107-12678-7 - Federal Trade Commission Privacy Law and Policy

Chris Jay Hoofnagle

Frontmatter

[More information](#)

xii

*List of text boxes*

On puffing	126
The Communications Decency Act	133
Brand names and deception	137
What is the FTC's mission?	139
Privacy does not sell – neither did safety	149
Privacy: not a modern concept	151
Consumer protection: education versus structuralism	170
Changing privacy policies	181
Privacy as fourth-wave consumer protection	186
Reinvigorating consumer protection	189
Television and Online advertising	196
A sample of mid-century consumer protection regulations	201
Chairman Pertschuk's lessons on regulation	209
The FTC as lion or lamb	219
Free markets and consumer protection	228
The promises of innovation	230
Does privacy law work?	238
Spam's enemies	241
Is technology neutral?	249
Should regulation be technology neutral?	254
Marketing miasma and the GLBA	290
A masked man testifies on debt collection tactics	298
The blanket security interest	301
European privacy stakeholders	307
Sources of European privacy rights	311
The D-Word: Dignity	318

Cambridge University Press

978-1-107-12678-7 - Federal Trade Commission Privacy Law and Policy

Chris Jay Hoofnagle

Frontmatter

[More information](#)

## Introduction

At the Pennsylvania Avenue entrance to the Federal Trade Commission (FTC) headquarters in Washington, DC, one encounters a statue of a powerful man wrestling an enormous, elegant horse. The beast has a sinister look. Its ears turned back, it is about to bite the man. The man's exaggerated brawn is not enough to bridle the menace, as the horse's positioning is dominant. While titled *Man Controlling Trade*, the work suggests that trade is an irrational evil that will escape man's control.

Just around the corner, on Constitution Avenue, stands an accompanying work. But in this work, the man appears sinister, a vengeful punisher of the horse. He has a powerful hold upon a more sympathetic animal. The man has bridled the horse.

In crafting these two works, Michael Lantz (1908–1988) captured the ambivalence many have about the regulation of trade. Businesses are a driver of wonderful innovations and conveniences, and an engine of American power. But at the same time, without some control, business can run wild, serving only itself.

The statuary also serve as a metaphor for supporters and critics of the FTC, now a 100-year-old institution. Some see it as a misguided, even harmful, burden to business, while others view any discipline it can muster against business as a good.

This book will explain these tensions through the lens of the FTC as a primary regulator of information privacy. Its activities, often in the form of public settlement agreements with companies, form the most important regulation of information privacy in the United States. Given the political economy of online regulation, Congress is unlikely to take action on online privacy. For the immediate future, the FTC will be the most important institution shaping the course of the information economy.

### THE FTC AND PRIVACY

The FTC (also “Agency” or “Commission”) has a colorful 100-year-long history. It is a complex agency. Practice before the Agency has suffered because of a lack of familiarity with its broad powers and with its diverse responsibilities in commerce.

Cambridge University Press

978-1-107-12678-7 - Federal Trade Commission Privacy Law and Policy

Chris Jay Hoofnagle

Frontmatter

[More information](#)

xiv

*Introduction*

For instance, the FTC is responsible for over seventy laws, concerning fraud in college scholarships, false labeling of “dolphin-free” tuna, health warnings on cigarettes, the labeling of furs and wool products, and even the sanctioning of boxing matches. Thus, privacy is just a small part of the Agency’s efforts, but other areas of concentration inform how the FTC handles privacy matters. For the purposes of this book, privacy is defined broadly as the FTC’s consumer protection activities relating to regulation of data about people. Thus, for this work, privacy includes both informational interests (how data are collected, used, and secured) and access to self-interests (how businesses contact or gain the attention of consumers).

Businesses and governments can use information to increase efficiencies, build new products and services, and enhance security. But privacy advocates have valid concerns about these practices, as privacy rights are about allocations of power, and these allocations are often “zero sum.” A business or government right to use data about someone can come at a personal or societal cost. Often, uses of information for security simply shift risk, sometimes making the risk systemic (consider business adoption of the Social Security number to decrease business and credit risk and the concomitant rise of identity theft) rather than reducing it. The FTC’s task is to chart a path acknowledging these competing values and risks. The need for an expert agency to elucidate these values and risks is more important today than ever. The FTC approach assumes that once options are elucidated, competition will help consumers come to a privacy outcome that is consistent with their preferences.

The FTC was founded during a time of widespread public concern about monopoly and trusts. The nation was primarily agrarian, and most people probably felt the



FIGURE 1.1. Michael Lantz’s *Man Controlling Trade*: the Pennsylvania Avenue version.  
Photo credit: Rachel Lincoln.

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978-1-107-12678-7 - Federal Trade Commission Privacy Law and Policy

Chris Jay Hoofnagle

Frontmatter

[More information](#)

FIGURE 1.2. Michael Lantz's *Man Controlling Trade*: the Constitution Avenue version. Photo credit: Rachel Lincoln.

effects of industrialization without understanding them. New businesses and opportunities arose much too quickly for existing law to police abuses or to serve as a check on massive concentration of industries.

A hundred years later, our society is facing serious economic change and uncertainty as a result of the information industry. Today the FTC is as relevant as it was in 1915 as an arbiter of fairness and a check on “bigness” and efficiency. For this reason, more academics have started writing about the FTC. In particular, Professors Daniel J. Solove and Woodrow Hartzog have written an important article explaining the FTC as creating a law of privacy through a common law approach.<sup>1</sup> This book agrees with and builds on the Solove and Hartzog observations through an extensive history of the FTC, an analysis of it as an agency, and a survey of all of its privacy activities.

This book argues that the FTC is among the best alternatives for regulation of privacy. It has matured into a careful, bipartisan, strategic, and incrementalist policy actor. It has shaped the marketing of internet services by establishing early in its enforcement actions that companies needed a justification to claim that their services were more private or secure. It also brought cases to establish the proposition that clear disclosures and affirmative consent are necessary when technologies monitored people in an invasive way or inside the home. The FTC is well informed by economics, while not allowing economic theory to supplant the reality of consumer experiences. Despite its moderate approach, the FTC is pilloried by

<sup>1</sup> Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 144 COLUM. L. REV. 583 (2014).

Cambridge University Press

978-1-107-12678-7 - Federal Trade Commission Privacy Law and Policy

Chris Jay Hoofnagle

Frontmatter

[More information](#)

organized business interests. This book gives context to the FTC's actions and explains the flaws of attacks on the FTC. Now more than ever, the FTC needs a defense, because attacks on it are calculated to blunt the inventiveness and efficacy of consumer protection law.

#### THE FTC AS AN AGENCY

This book explores several threads about the FTC itself as an administrative agency. First, the FTC was a radical innovation; it was unlike anything else when it was created. As Professor Gerald Berk argues, the Agency was a product of “creative syncretism.” Berk explains: “those who built regulated competition were successful precisely because they reached across historical, institutional, and cultural boundaries to find resources, which they creatively recombined in experiments in business regulation, public administration, accounting and trade associations.”<sup>2</sup> The result was an entity with many different tools that could be emphasized, deemphasized, or arranged differently to address new problems in the economy. Indeed, in the privacy field, the FTC's many tools and jurisdictional breadth are used to fashion different approaches and different compromises to privacy problems.

Second, the Commission has extraordinary powers. For a small agency, it has a tremendous effect on business. The FTC's powers, its structure, and the Agency's broad range of activities throughout its history are little understood. This book elucidates the FTC's privacy activities by situating it in its broader context and in the context of the history of consumer protection. It will broaden the understanding of privacy scholars and lawyers unfamiliar with the Agency's role in other areas of consumer protection.

Third, much FTC scholarship attempts to hang a public choice garb on the Agency. But the FTC is a public choice anomaly. Congress granted it a broad but vague mandate and then empowered it greatly over the last century. Yet, throughout its history, it has taken up the challenge of regulating new problems, such as cigarettes, “green” marketing, and, today, information privacy. It is an innovative agency that has avoided reification. The FTC has not fallen victim to capture, and, in fact, it seems to deliberately target the biggest actors in relevant markets. The FTC has also been much less swayed by partisan changes than its sister agencies. While it is true that its privacy activities changed focus under Republican Party leadership, the FTC is not a tool to discipline party loyalty among industries, nor do its privacy activities cease under Republican leadership. In recent years, competition for jobs at the Agency has been fierce, with partner-level lawyers applying for work. The Agency's leaders – both staff and commissioners – often act selflessly, for far less money than can be earned in the private sector. They also take on matters that cause enmity in industry and foreclose future opportunities for private-sector work. Public

<sup>2</sup> GERALD BERK, LOUIS D. BRANDEIS AND THE MAKING OF REGULATED COMPETITION, 1900–1932 (2009).



choice theory narratives of self-interest do not fit the Agency well, but we shall see that they fit better when public choice scholars run the Agency.

Fourth, Congress did not place traditional common law elements in the Federal Trade Commission Act. Yet, the specter of the common law still haunts the Agency. Today, commission critics emphasize the need for the FTC to prove that a practice “harmed” consumers, but this requirement does not exist anywhere in Title 15. More broadly, this book makes it clear that effective policing of information wrongs requires deviation from nineteenth-century limits on cases. It may even be the case that modern information problems cannot even be policed by an enforcement agency, and that, instead, supervisory oversight is needed.

#### OUTLINE OF THIS BOOK

Part I of this book explores the history, procedure, and basic powers of the FTC. Chapter 1 recounts the history of the FTC’s founding and its consumer protection mission. The FTC was a product of intensely felt anxiety concerning changes in the economy, and its first mandate was to prevent “unfair competition.” The FTC faced major challenges in its early years: World War I, courts that tried to cabin the Commission’s powers of policing common law wrongs, and mediocre leaders who made it difficult for the Agency to be effective. Still, the Agency strived to be innovative and relevant. For instance, the Agency’s first matters involved technology and false advertising as a form of unfair competition.

With a historical lens in place, Chapters 2 and 3 present modern controversies surrounding the FTC’s role. Chapter 2 guides the reader through several tests of the Commission – from industry attempts to clip the wings of the Agency to highlights of its interventions. This history helps situate the modern FTC and gives context for how and why the Agency acts. It also shows that the FTC transcended many of its early challenges, finding acceptance by the courts, empowerment by Congress, and support from both Republican and Democratic executives. Chapter 3 recounts the FTC’s turn to electronic commerce and privacy. The FTC brought its first internet case in 1994, long before most Americans were online. It began privacy saber rattling in 1995, and shortly thereafter, it brought matters involving children’s privacy.

Chapters 4 and 5 are primarily descriptive, focusing the broad-ranging powers and jurisdiction of the Commission. Chapter 4 explains that the FTC can investigate and sue almost any entity. Its investigatory powers are important to understand, as the Agency tends to probe dozens of industry players before choosing investigation and enforcement actions that will promote its policy goals. Its organizational structure shields the Agency from the winds of political change and, as a practical matter, gives staff attorneys great autonomy and discretion in matter selection.

Chapter 5 focuses on the FTC’s unfair and deceptive trade practices authority, known as “Section 5.” The FTC’s authorities are broad and largely undefined. Thus, this portion of the book discusses how political efforts to define or rein in Section 5

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Chris Jay Hoofnagle

Frontmatter

[More information](#)

have generally been resisted, as the Agency has needed great flexibility to deal with new forms of noxious business practices. It also shows that much of Section 5's precedent is driven by advertising cases, which have dynamics that may not be appropriate for regulation of privacy.

Part II (Chapters 6–11) of this book dives deeply into the FTC's authorities in the context of specific privacy issues: online privacy, children's privacy, information security, anti-marketing and malware, financial privacy, and international privacy efforts. Each of these chapters presents a description of the doctrine of FTC law, but then continues to discuss and critique these doctrines normatively.

The discussion of online privacy in Chapter 6 traces how third-party information sharing and concerns about online advertising have shaped much of the privacy debate. This has skewed our understanding of privacy problems, with the public at times focusing on relatively innocuous uses of data and away from more fundamental issues such as the power of dominant social networking and search platforms, and the problem of automated decision systems that are fed by surveillance networks deployed for advertising purposes.

Chapter 7 discusses the FTC's efforts to protect children online. Because there is a broad social agreement that protecting children is important, the FTC's efforts in children's privacy are particularly strong. At the same time, Congress' emphasis on parental consent to collecting personal information about children is a burdensome requirement that drives services to avoid embracing child-oriented status and the resulting obligations. Perhaps counterintuitively, children's privacy would be better protected with weaker statutory protections for it.

Chapter 8 canvasses the FTC's many information security matters. Here again, a broad social agreement about the importance of security has given the FTC political support for bringing enterprising cases against insecurity. Security is a public good and a victim of a tragedy of the commons. Viewed in that light, the Agency's attention should be focused on structural problems that lead to identity theft and other products of insecurity.

Chapter 9 presents the "anti-marketing" laws. These are statutes and regulations that specify how technologies can be used to contact the consumer. They do little to establish information privacy rights. Yet, they demonstrate how technologically specific regulations paired with enforcement can shape consumers' privacy expectations and reduce interruptions in their lives. Anti-marketing laws complicate the narrative that regulation should be "technology-neutral" and, at the same time, they sometimes mask problematic information uses, so long as those uses do not involve contacting the consumer.

Chapter 10 turns to financial privacy, an area where the FTC now shares jurisdiction and responsibilities with the Consumer Financial Protection Bureau. Perhaps half of all Americans do not qualify for the best credit terms, meaning that many have to use financial services offered by those operating at the margins of legitimacy. The FTC's role is thus critical, as it has jurisdiction over the

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978-1-107-12678-7 - Federal Trade Commission Privacy Law and Policy

Chris Jay Hoofnagle

Frontmatter

[More information](#)

most fly-by-night actors in the field. More generally, the Agency's activities in financial consumer protection are important because the relevant laws also protect interests in equity, inclusion, and fairness. Approaches learned from financial privacy matters may be helpful in resolving tensions arising from "big data" and algorithmic decision-making systems.

Chapter 11 provides an overview of how the FTC addresses international consumer protection problems. With the advent of spam and internet telephony, fraudsters can target Americans from afar. Congress granted the FTC strong new powers to address this problem in 2006. This chapter also summarizes European data protection law and explains how the FTC has acted as a champion of the American approach to privacy while, at the same time, moving the United States to a more European approach.

Finally, Part III (Chapter 12) assesses the FTC and suggests a path for it to intensify its pro-privacy posture. The FTC has impressive jurisdictional and enforcement powers, but its internal organization has blunted its privacy efforts. Specifically, the FTC must make its Bureau of Economics part of the pro-privacy team and update its methods for assessing consumer detriment and remedies for the internet age. The FTC must also stand up to its critics who try to impose nineteenth-century common law requirements on the Agency's cases. These critics are part of an ideological movement intent on disassembling the administrative state. While supported by the business community, these critics are more radical than their sponsors understand, and they are casting a pall on the FTC's activities.

As a society, we are always subject to changes that new technologies bring us. But today we stand at a precipice that is not well understood by the public or policy-makers. Current debates about privacy almost always focus on whether there is "harm" from activities such as behavioral advertising (marketing that is targeted based on one's past behavior). This narrative does not capture the aspirations of technology entrepreneurs. At its core, Silicon Valley has dreams of perfect control and efficiency.

The mechanisms that are being trained on one's internet clicks and decisions in order to pitch advertising today could be used for very different purposes in the future. These include technologies designed to manipulate others, to selectively make disclosures to them, and to make decisions about consumers in ways they cannot comprehend or even perceive. Someday soon, the amount of time you wait on hold to speak with a customer service representative will be keyed to your overall value to the company, whether you are likely to cancel your account, and so on. The prices you see on the Web may be set by your propensity to comparison-shop, or by your perceived desperation to get a product. Because these decisions are part of a technological system, we may not recognize the values that these systems propagate. We may also fail to understand that as a society we can choose the values that these systems propagate.

Cambridge University Press

978-1-107-12678-7 - Federal Trade Commission Privacy Law and Policy

Chris Jay Hoofnagle

Frontmatter

[More information](#)

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xx

*Introduction*

Consumers will need more than just the common law to address these kinds of inequities, if indeed we are even able to understand the problem and its provenance. Consumers will need institutions too. This final part of the book suggests interventions that the FTC could take to protect the digital citizen.

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978-1-107-12678-7 - Federal Trade Commission Privacy Law and Policy

Chris Jay Hoofnagle

Frontmatter

[More information](#)

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The photographs of the Federal Trade Commission building and of the *Man Controlling Trade* statuary are by Rachel Dawn Lincoln, <http://lincoln.photography/>.

It is difficult to create a visual metaphor for privacy, yet, the cover image, known as "12 Men in a Row Looking into Binoculars," features many elements of modern privacy problems. The modern internet is similar to a one-way mirror. The user,

Cambridge University Press  
978-1-107-12678-7 - Federal Trade Commission Privacy Law and Policy  
Chris Jay Hoofnagle  
Frontmatter  
[More information](#)

---

xxii

*Acknowledgments*

often in physical seclusion, is being silently watched by many different kinds of people – small and large businesses, governments, law enforcement, and perhaps even some scam artists. It is practically impossible to understand exactly why they are watching. Perhaps most of us know that we are being watched, but few can block their gaze.