

Stop the Data Feeding Frenzy

Our laws are not built to protect victims of ideologically-driven data hacking.



Who is coming for your data?

By Michael Gottlieb | Feb. 23, 2015 | 10:25 a.m. EST



Imagine someone breaks into your home and steals a box that contains some of your bank and tax records, and perhaps some of your personal mementos such as pictures and letters. They then give the box away to a stranger and disappear. If you find that stranger in possession of your box, you will be able to recover it, because the law does not allow the stranger to keep, copy or use your property simply because he had no role in stealing it.

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Now imagine, instead of a box taken from your home, a hacker breaks into your computer network. The hacker steals your bank and tax records, your pictures and correspondence, but all in digital form. The hacker disappears, but not before handing over all of your data to an Internet file sharing site, which in turn makes the data available all over the world. Not only does the file sharing site refuse to return your data, but soon thereafter, individuals are disseminating your private pictures, emails and tax returns via their Twitter accounts. Indeed, they claim a constitutional right to do so.

This is the dilemma faced by data breach victims: Data are not, and perhaps cannot be, subject to the same set of legal protections as tangible, physical property. Our laws have failed to keep pace with the ways in which our privacy depends on the security of electronic data. This problem is not well understood or widely discussed. Indeed, at the recent White House [cybersecurity summit](#) at Stanford University, the challenge of containing the spread of stolen data was not on [the agenda](#).

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Until we develop a clear framework for addressing the problem of stolen data, efforts to improve cybersecurity will be incomplete. Data breaches are inevitable. For most organizations, it is a question of when, not if, they will be struck. That unfortunate reality means that an effective approach to cybersecurity cannot focus solely on prevention. To be prepared, organizations must treat breaches as a certainty, take steps to minimize risks wherever possible, and make plans to contain the damage that is caused when breaches take place.

These difficulties are compounded by the evolving nature of data breaches. Traditionally, hackers have targeted companies such as Anthem, Target, Home Depot and Neiman-Marcus to make money. The hackers break into corporate networks and steal data, such as credit card or Social Security numbers, which they then sell on the black market. Our current laws are directed at this kind of breach. We have imperfect, but strong, state and federal laws prohibiting identity theft, rapidly-improving encryption practices, and improving international law enforcement cooperation against criminal networks that trade in personally identifying information.

The 2014 cyber-attack on Sony Pictures Entertainment unleashed a new kind of threat: data breaches motivated by ideology rather than financial gain, but aimed at private rather than governmental entities. Today, both non-profit and for-profit organizations around the world face the prospect of having all of their data released to the public by hackers who disagree with their speech, work or political activities. The chief objective of this new breed of hackers is to take private information and make it public in order to intimidate or embarrass the victim. To succeed in that endeavor, the hackers depend on the witting or unwitting assistance of others to disseminate, spread and publish the stolen information as widely as possible.

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Our laws are not designed to address these challenges. Data breaches are generally followed by an open season on the victim's most sensitive information. Some of that information concerns purely corporate interests; some of it concerns the privacy of employees, customers or third parties. Unfortunately, once hackers hand such data off to a third party, it may be impossible to recover or contain. There are stolen property laws in many states, but there are questions about whether such laws apply to information rather than physical property. There are trade secrets laws, but a trade secret may be lost forever if it is revealed (even involuntarily) to the public. And even where a law does apply, the First Amendment may still protect those who decide to publish the information.

If data breaches are indeed inevitable, the current situation is untenable. If we are serious about helping the individuals and organizations who are victims of data breaches, we can and must do better than a system that throws up its hands the moment information is stolen.

An effective regime against this new form of data breach will require updating and rationalizing a set of overlapping and often contradictory laws relating to stolen property, consumer privacy, identity theft, copyright, trade secrets and more. That effort must find a way to balance cherished First Amendment



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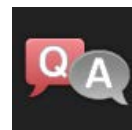
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values against the legitimate privacy interests that individuals have in the information that organizations hold about them, as well as the interests those organizations have in keeping their own information confidential.

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This project, however, cannot be limited to our laws. The robust protections that the First Amendment affords require that media organizations themselves consider what self-imposed restraints can be applied in the aftermath of a breach. Such self-policing is destined to be imperfect, and will no doubt be difficult given the demands of the 24-hour news cycle. But it is necessary. After all, it is only a matter of time until hackers steal, and someone attempts to release in public, the confidential sources of a major news organization.

The reforms described above will not be easy. But unless we find ways to address the feeding frenzy that inevitably follows data breaches, our best efforts to improve cybersecurity will continue to fall short.

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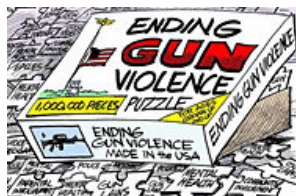


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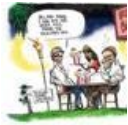
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