Enforcing Privacy Law: Why Private Litigation Is Essential

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Thank you for inviting me to testify about the effective enforcement of privacy laws. My name is Daniel J. Solove, and I'm the Bernard Professor of Intellectual Property and Technology Law at the George Washington University Law School. I am Faculty Co-Director, GW Center for Law & Technology and Faculty Director, Privacy & Technology Law Program.

My remarks will summarize a recent paper I wrote called ***Enforcing Privacy Law: Why Private Litigation Is Essential***. The paper is available to download for free at https://ssrn.com/abstract=6083968. The paper provides citations and support for the statements in my testimony, and it elaborates on many of the arguments made below.

Enforcement is an essential dimension for effective privacy and data protection laws—and it is probably the most important one. No matter how many privacy laws are enacted and how strong the laws are, if enforcement falls short, the laws will fail to achieve their goals.

Unfortunately, the enforcement of privacy laws is often weak and inadequate, a plague that renders them infirm. Privacy enforcement has long been condemned as weak and ineffective. Countless studies show that compliance with privacy laws is poor, with many companies not complying at all. For companies that comply, the percentage of the budget devoted to privacy is paltry.

Government enforcers lack the resources, size, budget, and speed to keep up with their enforcement duties. They face political pressures that greatly constrain them from exercising the full extent of their powers.

New privacy laws often dump enforcement into the hands of existing enforcers without any additional budget or personnel. Enforcement becomes an unfunded mandate for agencies already overwhelmed with work and strapped for resources. These problems, along with weak penalties and structural impediments compel enforcers to adopt strategies and make tradeoffs that undermine effective enforcement.

I will make four primary arguments.

1. First, the effectiveness of privacy laws depends upon enforcement, and poor enforcement can neuter even a strong law. The enforcement of privacy laws is currently quite weak.

2. Second, government enforcement has many substantial shortcomings that undermine its effectiveness. Government enforcement requires far more resources, insulation from political interference, consistency, and potency. Even with considerable improvement, there ultimately will be a ceiling. In most cases, government enforcement will never be nearly enough.

3. Third, enforcement is about incentives. Far too often, the incentives are poorly aligned for organizations to follow the law. Government enforcement is rarely sufficiently dissuasive. The risk equation comes out heavily in favor of non-compliance or poor compliance because penalties are not severe or frequent enough to outweigh the benefits of noncompliance.

4. Fourth, enforcement from multiple enforcers and enforcement mechanisms works best, and private litigation is an essential part of the enforcement equation, adding dimensions to enforcement that

government enforcement lacks.

THE SHORTCOMINGS OF GOVERNMENT ENFORCEMENT

Government enforcement has many shortcomings that limit its effectiveness.

Political Constraints

Government enforcement is constrained by political limitations. There are strong political realities that restrict how aggressively government enforcers can enforce—and often, these realities result in their pulling their punches or leaving many of their powers untapped.

Like nearly all U.S. government agencies, the FTC is subject to significant political pressure from both the legislative and executive branches. Congress must confirm FTC commissioners, and it can curtail the FTC's powers dramatically. This happened with KidVid in the 1970s. Congress sternly punished the FTC for its attempt at a rulemaking attempt to limit advertising to children. Congress cut funding and took away the most efficient way for the FTC to promulgate rules. As a result, the FTC's enforcement actions have been too conservative. The FTC has left a large amount of its power unused, likely due to the necessity of strategically navigating a political landscape riddled with landmines.

Lack of Resources

Most government enforcers are woefully under-resourced in both funding and personnel. Data protection agencies are generally poorly funded and staffed.

In the U.S., state attorneys general have limited time and staff to enforce. U.S. federal enforcement agencies also suffer from a similar lack of resources. For example, the FTC enforces about eighty statutes, most of which aren't related to privacy. The FTC's budget in 2025 was $425.7 million. Professor William Kovacic, former chair and general counsel of the FTC stated that an adequate budget for the FTC should be more than $1 billion. In 2020, the FTC had only 61 staff devoted to privacy protection. Compare this to the EU, where in 2023, Ireland's Data Protection Commissioner had 150 employees and Germany's Data Protection Agency had 745.

But even these numbers are far from sufficient. Most EU data protection authorities have begged for larger budgets and more personnel, but their pleas haven't been answered. EU regulators have stated they're overwhelmed by the workload. Most have said their funding is inadequate and they are understaffed.

When flooded with complaints, enforcers are spread thin and unable to give most cases the time and attention they deserve. Companies know that enforcement agencies are in a position of weakness and can bargain harder for a gentler settlement. They can call an agency's bluff knowing the agency will be reluctant to litigate.

Weak Penalties

Government enforcement can be ineffective when penalties are too weak. Many fines are low. Government enforcers often settle for fines that are far lower than the maximum fines allowable under the law. Many enforcement penalties are merely warnings to sin no more or orders to start following the law.

Failure to Compensate Harmed Individuals

Many privacy laws lack a means of compensating harmed individuals. A consumer gets harmed, but the money goes to the state coffers.

Slow Resolution of Cases

The process of investigating and resolving cases is often slow. In many circumstances, cases can take 2 years to more than 5 years to resolve. Technology moves at the speed of light, but enforcers must lumber carefully at the speed of a tortoise. For example, by the time enforcers resolve issues with an AI model, companies might be using models several generations newer.

Insufficient Quantity of Enforcement

Due to insufficient resources, enforcers must often enforce sporadically. For the decade between 2009 and 2019, the FTC brought only 101 internet privacy enforcement actions, an average of only ten per year.

The FTC and other enforcers find it much easier and cost-effective to settle cases or issue warnings than to risk litigation, which will drain massive resources. This incentivizes enforcers to choose clear egregious violations and to work out a resolution that the violators find acceptable.

Generally, there just aren't enough resources to enforce most violations, so a few unlucky violators must be singled out and made examples of to try to achieve general deterrence.

The Difficulties of Qualitative Enforcement

Government enforcers often enforce simple clear-cut violations rather than ones that involve more qualitative judgments. Many laws are enforced only when duties are completely ignored or done in a woefully inadequate manner. Companies can comply in a generally poor way and get away with it. The incentives to enforcement agencies are stacked against enforcing more qualitatively.

Inconsistent Enforcement

Enforcement is often inconsistent. Enforcement by state attorneys general varies considerably; some state attorneys general are aggressive whereas others have not brought any enforcement actions. Enforcers just don't have the time or resources to enforce consistently.

Failure to Incentivize Complaints

Unfortunately, most laws create poor incentives for people to file complaints with regulators. People receive no benefit or redress for their complaint, so filing a complaint is akin to performing an act of charity. Filing a complaint thus is a thankless chore.

Because many people who are aware of a violation have little incentive to file a complaint, complaint statistics are skewed. If there is no incentive for individuals to file complaints, many people will not do so.

THE IMPORTANCE OF INCENTIVES

Enforcement ultimately boils down to incentives. If the risk equation is not dissuasive enough, then the law is not sufficient. The incentive must account for the entire risk equation, which is the severity of the penalty and the likelihood of getting caught. To be effective, penalties must be dissuasive, but they often aren't.

The most clear-eyed approach to evaluating enforcement is to analyze it from the perspective of an amoral actor making a risk calculation. Enforcement must change the calculation. Violations must make violators significantly worse off than if they had never committed the violation. Why not take a gamble when there's a lot to gain, nothing to lose except the winnings, and a low probability of giving up the winnings?

Companies also know the maxim: *Better to ask for forgiveness than for permission.* Companies know the likelihood of being enforced against is low. They know that if they're caught, they can plead for mercy and get off with a light penalty. Companies know they can get away with many infractions because there are other companies with worse violations. Unfortunately, the law makes it economically advantageous to violate the law.

SHORTCOMINGS CAN BE IMPROVED BUT NOT OVERCOME

Government enforcement can certainly be improved, but several debilitating shortcomings can't be entirely eliminated. Enforcement will likely never be frequent enough quantitatively or bold enough qualitatively. Even with a dramatic increase of many times their current budget and personnel, government enforcement agencies will likely always lack sufficient resources. The political realities will also likely not disappear. Ultimately, although government enforcement can improve significantly, these realities, like gravity, will restrain it from rising to the level where it will be truly effective.

THE ESSENTIAL ROLE OF PRIVATE LITIGATION

Another way to enforce against privacy law violations is through private litigation. Private rights of action have become one of the most debated enforcement mechanisms in privacy laws—and one of the most inconsistently included.

The GDPR and many comprehensive privacy laws around the world have private rights of action. In the U.S., the laws are mixed. Many federal privacy laws include private rights of action, such as:

- the Telephone Consumer Protection Act (TCPA)
- the Electronic Communications Privacy Act (ECPA)
- the Video Privacy Protection Act (VPPA)
- the Driver's Privacy Protection Act (DPPA)
- the Privacy Act, the Fair Credit Reporting Act (FCRA)
- the Cable Communications Policy Act (CCPA)

But other federal privacy laws vest enforcement solely with government entities, such as:

- the Children's Online Privacy Protection Act (COPPA)
- the Family Educational Rights and Privacy Act (FERPA)
- the Health Insurance Portability and Accountability Act (HIPAA)
- the FTC Act, and the Gramm-Leach-Bliley Act (GLBA)

State privacy laws are also mixed. Some subject-specific state privacy laws have private rights of action,

the most notable example being the Illinois Biometric Privacy Act (BIPA). There are also private rights of action in state consumer protection laws, such as the unfair and deceptive acts and practices (UDAP) laws of many states.

But nearly all state general consumer privacy laws passed since 2018 lack a private right of action. The main exception is the California Consumer Privacy Act which has a private right of action that is limited only to data security breaches. The lack of a private right of action in state consumer privacy laws is a fatal flaw, in my view. These laws aren't effective without one.

THE VIRTUES OF PRIVATE LITIGATION

Private litigation avoids many of the problems that beset government agencies. Judges and juries are generally more insulated from industry pressure than the personnel at government enforcement agencies.

In many contexts, private litigation has succeeded in addressing societal problems that government policymakers have failed to tackle because of lobbying, corruption, and other political impediments.

Private rights of action can escape from the vagaries of politics. When a different president or governor or state attorney general comes into power and shifts enforcement priorities, private rights of action can maintain enforcement consistency.

Private litigation can supplement government enforcement, helping to overcome problems with limited funding and staff. Success in litigation is rewarded by a payoff. In contrast, the budgets for government enforcers rarely grow with success.

Private rights of action have sometimes been understood as a way to deputize private parties into serving as "private attorneys general." The great thing about these private attorneys general is that they don't cost the state a salary or benefits or office expenses. As Stephen Burbank contends: "Allowing and encouraging private litigation can bring vastly more resources to bear on enforcement, potentially mobilizing private litigants and plaintiffs' attorneys in numbers that dwarf agency capacity."

Government enforcement of most privacy laws isn't sufficient because government agencies lack the resources to pursue most violators.

Government enforcers shouldn't have the exclusive ability to determine what cases are most important. Otherwise, they will ignore victims when cases are small or lacking in media attention on a violation.

The threat of private litigation has significant deterrent and incentive effects. Damages in class action lawsuits can add up to a large enough amount to gain the attention of upper management and corporate boardrooms.

Unlike much government enforcement, private litigation can provide plaintiffs with compensation for harm. Private enforcement through collective litigation makes it economically feasible to pursue enforcement against violations that cause many people a small amount of harm.

Private litigation enables individuals to become involved in the enforcement process. According to Professor Alexandra Lahav, litigation is essential to democracy and individual participation. Litigation "enables people to promote the rule of law and affirms our citizen-centered political system."

Litigation can also expose important information about privacy practices and compliance. Civil discovery in litigation is a powerful information-gathering tool; it functions to provide transparency.

It is immensely empowering for individuals who are victims of privacy violations to have a mechanism to stand up for themselves. Private rights of action allow victims to punch back, demand accountability, and make a powerful statement that their injuries matter and that they shouldn't be ignored or exploited in a company's quest for power and profit. Private rights of action allow victims to vindicate their rights when government enforcers forsake them.

ADDRESSING THE PROBLEMS WITH PRIVATE LITIGATION

Critics of private litigation argue that it serves mainly to enrich lawyers and generate costs to organizations without offering much financial benefits to victims.

Abusive Frivolous Litigation

The portrait of out-of-control litigation with immensely high damages and vexatious litigants is overblown and not supported by the actual evidence. Ultimately, given the tremendous underenforcement of privacy laws, it is far from clear that more private rights of action will shift the needle to the side of overenforcement.

Excessive Liability

A related critique of private litigation is that it can yield excessive damages for small harms.

Instead of being excessive, high damages might be driving a more appropriate level of compliance. It is far from clear that the damages and costs from mass litigation outweigh the total harm that violations create. In the event damages are excessive, courts also have tools such as remittitur where they can lower damage awards.

Loss of Innovation

The loss of innovation argument is often trotted out against nearly any form of regulation or accountability.

Companies already have powerful incentives to innovate—enormous sources of venture capital and investment, corporate limited liability, and the potential for gigantic profits if technologies are successful.

Where incentives are lacking is in being responsible and focusing on internalizing harm to individuals and society. For too often, innovation is worshipped blindly and for its own sake, even if what is being innovated is dangerous or harmful.

No company or industry wants to internalize cost. Externalizing costs is far more lucrative. Forcing the internalization of cost leads to safer and more responsible behavior and has not spelled the end of innovation.

THE CASE FOR MULTIPLE MECHANISMS OF ENFORCEMENT

As a general matter, given the challenges of enforcement, it is far better to have multiple enforcers and tools. Private rights of action and government enforcement each achieve different enforcement goals and have a different mix of strengths and weaknesses. They complement each other well. In most circumstances, neither government enforcement nor private litigation alone are sufficient to enforce most privacy laws.

State privacy laws with private rights of action allow for state courts to serve as alternative enforcement

zones that escape the barrier of standing, which mainly applies to federal cases. State courts can free themselves from the U.S. Supreme Court's antipathy toward privacy harm. For example, Illinois courts have interpreted the Illinois Biometric Information Privacy Act (BIPA) with a more robust conception of harm.

Companies are immensely powerful and can readily neutralize or weaken enforcement efforts, so enforcement often fares better when it is more diverse and multifarious.

CONCLUSION

Enforcement is essential to the effectiveness of privacy laws, but unfortunately, it is often woefully inadequate. There is a big difference between the text of privacy laws and the way they work in practice. Laws are hollow without rigorous enforcement.

Because the vast majority of enforcement authorities are under-resourced, overstretched, and politically-constrained, they are unable to enforce frequently and consistently enough; and they must adopt strategies that weaken their effectiveness and leave their full powers unused.

The best most resilient enforcement involves multiple enforcers using different enforcement tools. Private litigation is an essential dimension of enforcement, as it complements government enforcement by filling in where it is weak.

Enforcement should be strong, consistent and not arbitrary, rewarding of reasonable efforts and good faith, practical and strategic, qualitative, and sufficiently frequent so as not to appear as a remote risk. To be effective, privacy laws must have meaningful enforcement. Otherwise, they are empty vessels.