MIPLC Munich Intellectual Property Law Center — Augsburg München Washington DC

Munich Intellectual Property Law Center (MIPLC) Lecture Series

on

International Data Transfers and

the Nexus Between Data Protection/Privacy & Trademark Law

at

Max Planck Institute for Innovation and Competition

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Ray Thomas, Jr.

Attorney and Data Privacy Subject Matter Expert

IBM Corporation

Mikołaj Rogowski

Privacy Attorney

Intel Corporation

Agenda

Data Protection

Information: Governance & Security

Compliance

International Data Transfers

Nexus Between Data Protection/Privacy & Trademark Law

Conclusions and Recommendations

Q&A

Closing

Data Protection

Protection of Personal Data

- Art. 12 of the 1948 Universal Declaration of Human Rights:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks

- Art. 7 EU Charter of Fund. Rights: respect for private and family life:

Everyone has the right to respect for his or her private and family life, home and communications.

- Art. 8 EU Charter of Fund. Rights: protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

- Protection of personal data increasingly important to customers

Information: Governance & Security

Terms, Relationships & Threshold Task

Information Security (IS)

Data Protection/Privacy (DP)

Information Governance (IG)

Protection syn. with *security* (EU) -versus- **Privacy** syn. with *secrecy* (US)

IS is the quintessential principle/concept of DP

- ➡IS equates to "integrity and confidentially" principle(s) – *See* GDPR Article 5(1)(f)
- ➡IS is integrated with, and oft-times serves as the compliance-prerequisite for, other DP concepts (e.g., insecurity can lead to unlawful International Data Transfers)

IG allows organizations to first gauge data-risk, and then determine the appropriate level of IS

- ➡General Data Protection Regulation (GDPR) – Article 32(1): ". . . "[T]he controller and the processor shall implement appropriate technical and organizational measures to ensure a level of security *appropriate to the risk* . . . ."
- ➡Sensitive Data: *What*? (identify); *Where*? (locate); *How*? (valuate)

IG is the starting point!

ROOT of the Non-Compliance Problem

Tame the "Big Data" Beast:

Volume to Relevance (Information Governance)

then Secure (Information Security)

ROTten Fruit (no use/duty)
[Redundant, Obsolete/*Outdated*, Trivial]

65%

-VS-

Crown Jewels (valuable/sensitive)
[Prized Possession: "Data is the New Oil"]

35%

Reality TV

Discovery Channel

Analogy #1: Gold-mining

Pay-dirt (**volume**)

Wash-plant (**mechanism**)

Information-nuggets (**relevance**)

Safe-guard (**security**)

Analogy #2: *The Closet*

Lost in *The Closet* (**volume**)

Roll-up Sleeves, Shed BS𝄞T (**mechanism**)

Organized *The Closet* (**relevance**)

Lock *The Closet* (**secure**)

Compliance

Data Protection Compliance – A Moving Target

Jurisdiction of the EU Member States data protection authorities

- Real and effective activity
- Minimal activity sufficient e.g:
  - mainly directed at an EU Member State
    - properties
    - language
  - representative in an EU Member State
  - Weltimo (C-230/14)

Relevant legal sources:

- General Data Protection Regulation (Directive), CJEU
- National law and case law
- Article 29 Working Party (European Data Protection Board): guidance
- National Data Protection Authorities: guidance and case law

International Data Transfers

Data Exportation/Importation

EU Data Protection Directive (95/46/EC)

General Data Protection Regulation (2016/679):

- Transfers only to non-EU countries with *"an **adequate level** of data protection".*
- Commission may find that a non-EU country ensures an **adequate** level of protection.

Safe Harbour Decision

- Commission initially found that USA do not provide adequate legal protection.
- Reaction: 7 Safe Harbor Privacy Principles + 15 FAQs, backed by FTC enforcement deemed "adequate protection", as per European Commission Decision **2000/520**.

Edward Snowden

- United States intelligence services established a programme called ‘PRISM’.
- Unrestricted access to mass data stored on servers in the US owned or controlled by internet and tech companies.

Max Schrems

- Head of privacy action group Europe v Facebook (“EvF”).
- Main Objective:

  “We want to know if our fundamental rights are respected and enforced against tech giants like Facebook, or if our rights are only existing on the paper”.

- Privacy NGO 'None of Your Business' to suport consumer cases

Schrems C-362/14

Safe Harbour
Commission Decision 2000/520

No '**adequate**' level of protection:
- **General** and **unlimited** derogation
- No reference to **effective legal protection**
- DPAs not absolutely bound by the decisions
- DPAs must investigate in light of factual developments

WP29 Privacy Shield Report

Privacy Shield
Commission Decision 2016/1250

?

- Lack of "clear guidance" from DOC and FTC
- Need of oversight and enforcement activities
- May 25, 2018 deadline for the ombudsman
- Will challange

EEA

Binding Corporate Rules

?

- Approval proces 18 – 24 months
- Uncommercial terms
- Recognition
- Potential challenges
- Onward transfers - corporate group only

Standard Contractual Clauses

?

- Uncommercial terms
- No liability cap
- Often no protection in practice
- Under challange - **Schrems II**

Consent

?

- Can be withdrawn at any moment
- **WP29 guide on transparency:** need to explicitly mention all third countries

outside EEA

Nexus Between Data Protection/Privacy & Trademark Law

Relevant Quote

"An ounce of **prevention**
is worth a pound of **cure**"

Benjamin Franklin [fire-safety advice?!?!?]

“I see [trademark issues]”

The Sixth Sense

Evidence of Sanity

❖ **INTERNATIONAL TRADEMARK ASSOCIATION (INTA)** ⇨ hub of TM world

- ✓ Data Protection Committee-Vice Chair (Inaugural term launched 01/01/2016)
- ✓ General Session-panelist at Annual Meeting in Barcelona, Spain (05/21/2017)
- ✓ Table Topic-moderator at Annual Meeting in Barcelona, Spain (05/22/2017)
- ✓ Roundtable-participant in Fort Worth, Texas (10/27/2015)

❖ **INTERNATIONAL ASSOCIATION OF PRIVACY PROFESSIONALS (IAPP)** ⇨ hub of DP world

- ✓ KnowledgeNet Meeting-moderator in Dallas, Texas (10/17/2016)

❖ **COLLABORATIVE PARTNERSHIP BETWEEN INTA & IAPP**

- ✓ INTA Delegate to IAPP Global Privacy Summit in Washington, DC (04/19/2017)

Tainting of Goodwill

Trademarks/Brands ⇨ *Goodwill* ⇨ *Attract & Retain Customers*

Big Data Breach (Payment Cards)
2013: Hackers decided to target global US-based retailer & gained access to corporate network, resulting in compromise of 130 million customers' payment card data
Did the retailer suffer brand damage and reputational harm resulting in the loss of its customers' trust in the retailer's willingness or ability to *adequately protect sensitive payment card data*?

First Administrative Complaints (International Data Transfers)
2017: US Federal Trade Commission finalized consent agreements with three companies that deceived consumers by falsely claiming completion of certification process for EU-US Privacy Shield framework
Did the companies suffer brand damage and reputational harm resulting in the loss of customers' trust in the companies' willingness or ability to: *i) be honest; and ii) adequately protect exported sensitive personal data*?

Conclusions and Recommendations

Final Thoughts & Takeaways

- Need of legal certainty
- Far-reaching consequences

Final Thoughts & Takeaways (cont.)

"It is time to shift from reactive programs to proactive strategies"

Shaun Donovan - former Director of US OMB

Intellectual + Property = Sentimental Value and Goodwill

"It's All About the Benjamins"

Sean "P. Diddy" Combs - CEO of Bad Boy Records

Q&A

Closing