



Privacy: An International Perspective

Marty Abrams

August 18, 2008

Today's Objectives

- ❑ Introduce the international privacy environment
- ❑ Give you a sense of the diversity and similarities
- ❑ Alert you to risks
- ❑ Perform some future forecasting

International Differences are a Challenge

- ❑ Traditional data protection law begins with the fundamental right for an individual to control information that pertains to him/her
- ❑ US law consumer protection based, but individual autonomy a value
- ❑ Lesson from China: Individual autonomy not part of the Chinese culture; same goes for much of Asia
- ❑ However, protection of individuals from the harmful use of information or the negative effects of bad security are very relevant
- ❑ Inter-operability require American globals to build on common interests, this tends to be accountability based

Privacy & Security

- ❑ Privacy is the appropriate use of information
- ❑ Security is the protection of information
- ❑ One can't have good privacy with bad security
- ❑ For consumers, privacy includes security

Breaking Privacy into its Elements is Helpful

- Pieces include:
 - Information security
 - Consumer protection
 - Cultural aspects, such as autonomy
- Security and consumer protection are common from place to place, system to system
- Autonomy is different everywhere
 - Global companies must build respect for those differences and be accountable for promises

The Privacy World is Divided Into Six Parts

- ❑ United States
- ❑ Europe
- ❑ British Commonwealth
- ❑ Latin America
- ❑ Asia
- ❑ Everything else

Privacy Enforcement Agencies

- Privacy enforced as part of a consumer protection agenda
 - Key issue is unfair practices
- Privacy enforced by independent data protection agency
 - Key issue is protection of individual autonomy

European Union

- ❑ 27 members, 27 different laws and authorities
- ❑ EU Data Protection Directive “harmonizes those 27 laws (in your dreams)”
- ❑ Extremely process-driven
- ❑ Key elements
 - Privacy a fundamental human right
 - Individual control – consent
 - Purpose limitation
 - Independent data protection authorities
- ❑ Data may only be transferred to places with adequate protection

British Commonwealth

- ❑ Canada, Hong Kong, Australia, New Zealand
- ❑ Independent data protection authorities
- ❑ More practical approach, but still rooted on individual consent
- ❑ Only Canada has been found adequate by EU
- ❑ All are part of the APEC process

Latin America

- ❑ The battleground between the EU and US
- ❑ Spain has attempted to recruit the region for Europe
- ❑ Argentina passed a law, created an authority, and then funded it at a very minimal level
- ❑ Mexico has been a continuing skirmish between independent agency model and consumer protection based approach
- ❑ It is now part of the ecommerce discussion

- Japan – one law enforced by 34 different agencies
 - Not culturally based
 - Security the real issue
- South Korea – Consent-based law that is always in change
- India – Data security and international respect are the issues
- China – Want European adequacy, law is in the future
 - Clash between culture and adequacy
- Southeast Asia
 - Outsourcing driven

The Rest

- Privacy issues are frozen in Antarctica
- Issues are emerging in Africa with outsourcing

Future Direction

- ❑ Cross-border data transfers are part of standard business process – stopping flows is just not possible
- ❑ Harmonization on security and preventing harm very possible; cultural aspects will be harmonized when pigs fly
- ❑ However, mutual respect very possible
- ❑ Based on organizational accountability

Accountability Rooted In Data Protection History

- OECD Principle 8

- APEC Principle 9

- *“A personal information controller should be accountable for complying with the measures that give effect to the Principles stated above. When personal information is to be transferred to another person or organization, whether domestically or internationally, the personal information controller should obtain the consent of the individual or exercise due diligence and take reasonable steps to ensure that the recipient person or organization will protect the information consistently with these Principles.”*

- Canadian Privacy Law

Examples of Accountability-Based Regulation in the United States

- ❑ Red Flags Rule
- ❑ Authentications Rule
- ❑ Safe Guards Rule
- ❑ Extension of Safe Guards to non-financial institutions through the Federal Trade Commission Act
- ❑ Sarbanes Oxley

Links to Trends in Prioritization

- Potential harms are defined
- Organization must develop policies and processes to prevent those harms
- Links to concepts articulated by the community of data protection commissioners
- Links to trends in cross-border data transfers
 - Binding Corporate Rules
 - Cross Border Privacy Rules
- Defining harms is a challenge

How to Reach Me

THE CENTER
FOR INFORMATION
POLICY LEADERSHIP
HUNTON & WILLIAMS LLP

mabrams@hunton.com