8-5-2013

Diminishing Sovereignty: How European Privacy Law Became International Norm

McKay Cunningham

Follow this and additional works at: http://digitalcommons.law.scu.edu/scujil

Recommended Citation
Available at: http://digitalcommons.law.scu.edu/scujil/vol11/iss2/5
Diminishing Sovereignty: How European Privacy Law Became International Norm

McKay Cunningham*
TABLE OF CONTENTS

I. Information and the Internet .................................................. 423

II. Privacy in Europe ................................................................. 428

   A. A Fundamental Right .......................................................... 428

   B. The European Union Directive ............................................. 430

      1. Processing Personal Information ....................................... 431

      2. Data Transfers ................................................................. 432

      3. Enabling Transfers That Conform ..................................... 435


      5. Safe Harbor: Compromise and Criticism ........................... 438

   C. International Trend ............................................................ 440

III. Privacy in America .............................................................. 441

   A. Free Speech and Private Information ................................... 443

   B. Self-Regulation and Private Information .............................. 444

   C. Private Data as Property .................................................... 445

   D. Big Data ............................................................................. 446

   E. Reluctant Conformity ......................................................... 447

IV. Privacy Law of Tomorrow .................................................... 449

   A. Emerging Economies ......................................................... 450

V. Conclusion ............................................................................ 452
I. Information and the Internet

There is a tendency to forget how young the Internet is. Modern computing and data trafficking are not even historical pre-teens. The personal computer was not widely available to consumers until the late 1970s, and the Internet was not fully commercialized until 1995.1 Less than two decades later, seventy-six percent of Americans own at least one personal computer and seventy-seven percent regularly rely on the Internet.2 Increasingly, businesses, schools, news organizations, and financial institutions offer their services exclusively online.3 The U.S. Department of Homeland Security reports a high level of integration and reliance, noting that “our economy and national security are fully dependent upon . . . the information infrastructure,” and that “the core of the information infrastructure upon which we depend is the Internet.”4

Not only are business and infrastructure web-reliant, but social interactions are now online affairs. More people spend more time online due to social networking, which represents one of the fastest growing sectors of Internet use.5 “[T]he time spent on these websites is growing three times faster than the overall Internet rate, and using social networking websites is currently the fourth most popular online activity.”6 Younger demographics more than their senior counterparts eschew traditional forums of social interaction in favor of social

---

networking sites, leaving those without Internet access outside the social norm.⁷ “Increasingly, being connected to society means being connected to the Internet.”⁸

Some nations have declared Internet access a fundamental right,⁹ claiming that their citizens must be able to access the Internet in order to exercise freedom of expression and other fundamental human rights, providing that states have a responsibility to ensure that Internet access is broadly available. Such protections are not without merit. The uprising in Egypt demonstrated the Internet’s vital role in organizing popular revolution as well as the Internet’s role in attempts to quash it.¹⁰ Unfortunately, the Egyptian government’s decision to truncate Internet access to forestall revolution has been repeated. Syrian officials recently cut Internet access nationwide,¹¹ a move that may evidence desperation since Internet access is important to both insurgents and establishment alike.¹² If nations, like Egypt and Syria, can sever Internet access to frustrate popular uprisings, declaring such access a fundamental right provides some assurance.

Not only is Internet access and reliance relatively new, its scope is enormous and growing. Wal-Mart, for example, generates more than one million transactions an hour, which requires more than 2560 terabytes. By the end of June 2012, Facebook reported 955 million monthly active users and 552 million daily active users.¹³ Twitter estimated over 500 million users and a website that generates “over 400 million tweets a day.”¹⁴ Recent YouTube use equates to “500 years of YouTube video are watched on Facebook each day.”¹⁵ Approximately 247 billion emails are sent every day.¹⁶ And it is only getting bigger.

⁷ See Teens on Social Networks, eMARKETER (Apr. 16, 2009), http://www.emarketer.com/Article/Teens-on-Social-Networks/1007041 (stating that seventy-five percent of American teens use social networks, and predicting that number to increase to seventy-nine percent by 2013). See also Amanda Lenhart, Adults and Social Network Websites, Pew Internet (Jan. 14, 2009), http://www.pewinternet.org/Reports/2009/Adults-and-Social-Network-Websites.aspx (finding that seventy-five percent of adults, ages eighteen to twenty-four, use online social networks).

⁸ See Jake Adkins, Note, Unfriended Felons: Reevaluating the Internet’s Role for the Purpose of Special Conditions in Sentencing in a Post-Facebook World, 9 J. TELECOMM. & HIGH TECH. L. 263, 264 (2011).


¹¹ See Sean Ludwig, Internet Shut Down in Syria Amid Mass Protests, VENTUREBEAT (June 3, 2011), http://venturebeat.com/2011/06/03/internet-shut-down-in-syria-amid-mass-protests/ (“When a Middle Eastern country is in the thick of an uprising, it’s almost expected that challenged governments will shut down the Internet to hinder protesters from communicating.”).


¹⁴ Id. at 181.

¹⁵ Id. at 182.

The rate of Internet penetration in developing countries continues to grow. While Internet penetration among many African nations, for example, ranks among the lowest, the growth rate—the rate of new Internet users in Africa—far eclipses the rest of the globe. China added over twenty-seven million Internet users in 2011. At 487 billion gigabytes, the world’s digital content reduced to a stack of books would reach to Pluto ten times.

This increasing quantity of information coursing through the Internet spawned a burgeoning industry in data aggregation and analytics. Data mining and analytics generally refer to the collection and analysis of large datasets to divine patterns and relationships among the data that enable enterprises to predict consumer behavior. In 2012, the data collection and analytics industry showed revenues of over $5 billion dollars. A recent study predicts that the “Big Data market is on the verge of a rapid growth spurt that will see it top the $50 billion mark worldwide within the next five years.” The field is a large one that is rapidly growing larger, because consumer information is an increasingly valuable commercial asset.

The commercial boom and the benefits inherent in analyzing large amounts of data are offset by a number of concerns including erosion of personal privacy. Much has been written that memorializes and chronicles privacy abuses in the Internet age. A recent empirical study at U.C. Berkeley will suffice for the purposes of this Article as an example of privacy abuse. In 2009 and 2011, researchers gathered data on Internet tracking technologies. Among other findings, they discovered that persistent tracking of personal Internet behavior was not only common but also relatively unknown to consumers. Over two years, the study showed that “the number of tracking cookies expanded dramatically and that advertisers had developed new, previously unobserved tracking mechanisms that users cannot avoid even

---


23. Id.

24. Id.
with the strongest privacy settings. By design, these technologies inhibit consumer choice, obscuring the common practice of monitoring Internet behavior and collecting personal information. In 2010, the Wall Street Journal published several articles highlighting Internet monitoring. One article noted that the “nation’s 50 top websites on average installed 64 pieces of tracking technology onto the computers of visitors, usually with no warning.” As one commentator baldly put it:

The information that you (insert name, address, age, income, and social security number here) read both Newsweek and your daily horoscope; buy Häagen-Dazs® ice cream; travel annually to New Mexico; have a standing prescription for Prozac® and buy a variety of different OTC antacids as well as a number of different brands of lubricated condoms; have joined three different health clubs for short sojourns over the past two years; always order a salad in restaurants; never joined Weight Watchers® (and, in fact, have a 31” waist and a body mass index of 25); and give money to public television, is exceedingly valuable for the crassest of reasons: Anyone who has that information can sell it.

Non-consensual harvesting of personal data is not relegated to a few rogue businesses. One estimate reported ninety-two percent of web sites collect personal data. Another industry-funded survey that included 361 web sites and 7500 servers, found that ninety-three percent of those sites collected personal information. Monitoring, recording, collecting, and disseminating private information can now be accomplished with incredible ease, tasks previously impracticable in the pre-Internet age.

The relatively infantile age of information accessibility stemming from the open architecture of the Internet presents policymakers with legal problems that have little precedent outside of awkward and imperfect analogy. How can regulation retain the Internet’s benefits

25. Id. See also Christine A. Varney, Comm’r, Remarks before the Privacy & American Business National Conference, Consumer Privacy in the Information Age: A View from the United States (Oct. 9, 1996), available at http://www.ftc.gov/speeches/varney/priv&ame.shtm (stating that personal information is being collected at rate and to degree unthinkable even five years ago).


31. See Gelman, supra note 21, at 1318 (“Most information on the Internet is captured, indexed, saved, and searchable.”).

32. See, e.g., Louis John Seminski, Jr., Tinkering with Student Free Speech: The Internet and the Need for a New Standard, 33 RUTGERS L.J. 165, 169–70 (2001); Russell L. Weaver, Speech and Technolo-
while simultaneously limiting its misuses, an especially daunting task given the Internet’s
global reach and the impracticability of linking personal data to a certain location, geography
and/or jurisdiction?

In this climate, the European Union has emerged as the decisive leader not only for EU
Member Nations, but worldwide.33 Even countries that do not agree with EU policy conform
to it.34 This Article suggests that e-commerce and the Internet spawned a new form of poli-
cymaking that enables nations to bend global law without resorting to treaties or other tradi-
tional legal tools.

Where the globalization of commerce has been characterized by outsourcing, greater in-
ternational connectivity and transnational supply chains,35 the globalization of policymaking
finds discrete expression in international data privacy law. The worldwide trend toward na-
tional data privacy law provides an interesting and ongoing exemplar of the future of interna-
tional policymaking. Data privacy law is a complex field wrought with divergent philosophies
and ideals that nevertheless is achieving international conformity.36 At one end of the spec-
trum, many nations view privacy as essential—a fundamental right enjoyed by their respec-
tive citizens.37 On the other end of the spectrum, data privacy yields to free expression and
unregulated commerce.38 Despite these, and a host of other opposing views, data privacy reg-
ulation continues to accelerate both in the number of states adopting national data privacy
laws and, perhaps more importantly, in the harmony those laws share with each other.39 This
Article asks how data privacy law, which itself only recently found heightened significance
with the rise of the Internet, evolved from a confederacy of dissimilar laws to an evolving
harmony of global legislation.

---

33. Steven R. Salbu, The European Union Data Privacy Directive and International Relations, 35 VAND.
J. TRANSNAT’L L. 655 (2002); Virginia Boyd, Financial Privacy in the United States and the European
Union: A Path to Transatlantic Regulatory Harmonization, 24 BERKELEY J. INT’L L. 939, 956
(2006); Marcia Cope Huie et al., The Right to Privacy in Personal Data: The EU Prods the U.S. and
34. See Sunyi Yuen, Exporting Trust with Data: Audited Self-Regulation as a Solution to Cross-Border
Data Transfer Protection Concerns in the Offshore Outsourcing Industry, 9 COLUM. SCI. & TECH.
REV. 41, 18–26 (2008) (detailing the sectoral laws in both India and the Philippines and the subse-
cquent move to national data protection laws); Daniel R. Leathers, Giving Bite to the EU-U.S. Data
Privacy Safe Harbor: Model Solutions for Effective Enforcement, 41 CASE W. RES. J. INT’L L. 193,
35. See Lan Cao, Corporate and Product Identity in the Postnational Economy: Rethinking U.S. Trade
36. See Graham Greenleaf, Global Data Privacy Laws: Forty Years of Acceleration, (Univ. of N.S.W.
364) 1 [hereinafter EU Charter].
38. See Leathers, supra note 34.
39. See Greenleaf, supra note 36.
II. Privacy in Europe

A. A Fundamental Right

The contrast between the United States’ and European Union’s approaches to data privacy illustrates the unlikely harmonization of their laws. In the European Union, data privacy is a fundamental right.40 While the European Union has long recognized the concept of various fundamental rights, until recently such rights were not native to the European Union, but imported from national constitutions and the European Convention on Human Rights.41

It must also be stated that fundamental rights form an integral part of the general principles of law whose observance the Court of Justice ensures. For that purpose, “the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories.”42

This patchwork of borrowed fundamental rights gave way, in 2000, when the European Union ratified its own statement of fundamental rights—the Charter of Fundamental Rights.43 Among the rights included in the Charter is the right to privacy.44 Importantly, the Charter specifies a privacy right in relation to the Internet and modern computing.45 Under Article 8, 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.46

The Charter also recognizes a fundamental right to privacy in general.47 The historical origins undergirding this commitment to privacy derive in part from Nazi exploitation of European census records preceding and during World War II. Many contend that the extensive accumulation of personal data by the Nazi regime facilitated pre-war abuses of human rights.48 In 1984, data protection experts concluded that “one of the prime motives for the

41. See Bigam, supra note 34, at 224.
42. Id. (citing Case C-305/05, Ordre des barreaux francophones et germanophone v. Conseil des Ministres, 3 C.M.L.R. 28 (2007)).
43. EU Charter, supra note 37, pmbl.
44. Id. arts. 7–8.
45. Id. art. 8.
46. Id.
47. Id. art. 7 (“Everyone has the right to respect for his or her private and family life, home and communications.”).
48. See Lynn Chuang Kramer, Private Eyes Are Watching You: Consumer Online Privacy Protection—Lessons from Home and Abroad, 37 TEX. INT’L L.J. 387, 397 (2002); Michael W. Heydrich, Note, A
creation of data protection laws in continental Europe is the prevention of the recurrence of experiences in the 1930s and 1940s with Nazi and fascist regimes.\footnote{49} Such abuse in recent history of private and personal information undergirds European vigilance in “protecting personal privacy and resisting state intrusions into private life.”\footnote{50} A few years after World War II, the United Nations adopted the Declaration of Human Rights, a document that laid a foundation for legal protection of privacy rights. The Declaration provided that “[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence.”\footnote{51} Several European nations enacted a series of privacy and data protection laws in the following decades. Sweden became the first nation to enact a comprehensive national data privacy law with its Data Act of 1973.\footnote{52} In 1973 and 1974, the Council of Europe’s intergovernmental body passed resolutions recommending that member states adopt data protection laws.\footnote{53}

In the 1980s non-governmental organizations like the Organization for Economic Cooperation and Development (OECD) attempted to articulate legal principles governing data privacy that could be widely implemented and perhaps unify divergent national laws.\footnote{54} These guidelines initially proved fruitless. The problem ultimately forced resolution. Multiple and conflicting privacy laws within Europe motivated the harmonization of privacy law, given that conflicting privacy laws discourage commerce and the free flow of information from one nation to the next.\footnote{55} Over fifteen years after the OECD articulated proposed data privacy guide-

\footnote{49} COLIN J. BENNETT, REGULATING PRIVACY: DATA PROTECTION AND PUBLIC POLICY IN EUROPE AND THE UNITED STATES 1, 30 (1992) (quoting David H. Flaherty, Nineteen Eighty-Four and After, 1 GOV’T INFO. Q. 431 (1984)).


\footnote{52} David Banisar & Simon Davies, Global Trends in Privacy Protection: An International Survey of Privacy, Data Protection, and Surveillance Laws and Developments, 18 J. MARSHALL J. COMPUTER & INFO. L. 1, 95 (1999). But see Heydrich, supra note 48, at 417 (suggesting that the United States originated the right to privacy and that the first data privacy legislation was passed in the German state of Hesse in 1970).


\footnote{54} The Organization for Economic Co-operation and Development (OECD) is an international economic organization of over thirty countries founded in 1961 to stimulate economic growth and world trade. It was originated in 1947 to run the U.S.-financed Marshall Plan for reconstruction of a war-torn continent. History, OECD, http://www.oecd.org/about/history/ (last visited Apr. 5, 2013). For background information on OECD, see BENNETT, supra note 49, at 136–40.

lines, those guidelines would largely become the template for binding legislation throughout Europe.56


B. The European Union Directive

The 1995 European Directive marked a sea of change in the previously elusive attempts at unifying data privacy law in Europe. Although almost twenty years old, the Directive remains the single most impactful data privacy law worldwide.59 The Directive’s twin purposes seek to (1) protect fundamental privacy rights, and (2) promote the “free flow of personal data between Member States.”60 To do so, the Directive imposes restrictions on organizations that process personal data and grants rights of access and correction to “data subjects”—EU residents protected by the Directive.61

Specifically, the Directive requires each of the European Union’s twenty-seven Member States to pass a privacy law that encompasses both government and private entities that process personal data.62 These national laws are not relegated to specific industries, such as the medical or financial industries, but reach all processing of data relating to an EU resident’s personal information.63 Data processors must comply with a number of “data quality principles.” Personal data must be: (a) processed fairly and lawfully; (b) collected for legitimate and specified reasons; (c) adequate, relevant and not excessive in relation to the purposes for which it is collected; (d) accurate and, where necessary, kept up to date; and, (e) retained as identifiable data for no longer than necessary to serve the purposes for which the data were collected.64

These requirements may appear harmless, but they implicate a world of transactions: they would arguably bar a bank from reviewing its own customer files for good prospects, limit market estate planning services, as well as restrict an employer from keeping records or

56. See Kramer, supra note 48, at 390 (citing JOHN DICKIE, INTERNET AND ELECTRONIC COMMERCE LAW IN THE EUROPEAN UNION 55–64 (1999)).
60. See Data Protection Directive, supra note 58, art. 1.
61. Id.
62. Id.
63. Id. art. 8.
64. Id. art. 6.
backup files for several years. If relegated to the twenty-seven Member States of the European Union, these requirements may indeed seem innocuous, but the Directive’s reach far exceeds its grasp. While the European Union has no jurisdiction to directly bind those states outside its union, the Directive endeavors to do so anyway. It does so (1) by broadly defining “processing personal information” and (2) by prohibiting transfers of personal data to entities that fail to ensure an “adequate level of protection.”

1. Processing Personal Information

The Directive’s wide-ranging breadth and reach find expression in the definitions of those who must comply. Three definitions, all generous in scope, capture more than they exclude: The Directive applies to (1) personal data, that is (2) processed by (3) controllers or processors. “Personal data” is defined in the Directive as: “any information relating to an identified or identifiable natural person (‘data subject’); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.”

Personal data is not limited to a lay understanding. It includes more than names, national identification numbers, bank accounts, and addresses. It encompasses information that can lead to identification directly or indirectly. Labeled an “expansionist view,” it is “irrelevant if information has already been linked to a particular person, or might be so linked in the future; this view treats identified and identifiable data as equivalent.” Data becomes personal information when it enables anyone to link information to a specific person, even if the person or entity holding that data cannot make that link.

The Data Protection Working Party, a representative body drawn from EU Member States and charged with fostering consistent interpretation of the Directive’s requirements, issued an opinion in 2007 clarifying the definition of personal information. The Working Party determined that a person is “identifiable” when, “although the person has not been identified...
yet, it is possible to do it.” Information need not identify an individual with specificity to constitute “personal data;” the mere fact that the information is related to an individual capable of being identified qualifies it as “personal data” under the Directive. One commentator has suggested that “anyone who posts personal information about another person on his or her own social networking profile or uses personal information from another person’s profile could be deemed a ‘data controller’ subject to the data protection obligations of the Directive.”

The Directive combines the broad definition of personal data with a broad definition of “data processing:” “any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction.”

Any collection, use, and transfer—even the redaction and deletion thereof—constitutes “processing.” This definition intentionally encompasses data processed automatically as part of a filing system. The Directive defines those deemed to have “processed” personal data as either data controllers or data processors. A data controller is “the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data.” Data controller, thusly defined, captures more than big businesses and data aggregators like Corelogic, Datalogix, EBureau, and ID Analytics. As one commentator notes, children recording orders for Girl Scout cookies, individuals organizing their business contacts, and students operating websites that require registration all qualify as data controllers.

These purposefully broad definitions capture a wide array of organizations that “process” “personal data.” But entities and individuals outside the twenty-seven Member States of the European Union might claim exemption from its jurisdictional reach. The Directive, however, encompasses a surprisingly broad range of non-E.U. entities by forbidding transfers of personal data.

2. Data Transfers

“Because of its potential effect on other nations that interact with or do business in Europe, [the data-flow restriction] may be the most controversial feature of the Directive.” The Directive levies significant restrictions on those entities in the European Union that process
personal information. This added cost of business had potential for creating unintended yet unforeseen consequences, namely incentivizing companies to outsource data processing beyond E.U. borders. A company doing business in Spain might decide, for example, to relocate its principle place of business outside the European Union to avoid the cost of complying with the Directive. To forestall such an exodus, Article 4 of the Directive extends its reach to “equipment” within a Member State.

Each Member State shall apply the national provisions it adopts pursuant to the Directive to the processing of personal data where “the controller is not established on Community territory and, for purposes of processing personal data makes use of equipment, automated or otherwise, situated on the territory of the said Member State, unless such equipment is used only for purposes of transit through the territory of the Community.”

This provision not only dissuades EU companies from relocating, it also reaches a host of non-EU entities. Many organizations headquartered in countries outside the European Union have been surprised to learn of their obligation to comply with EU law. A U.S. company based in Ohio engaged in e-commerce must comply with the Directive if that company uses “cookies” to sell items online and has even one EU customer. A cookie, generally understood, installs a program on the consumer’s computer that tracks and remembers transactions. The shopping cart icon that “remembers” what a customer selects and puts those selections in a virtual shopping cart serves as a common illustration. Because an EU customer’s computer is used in the transaction due to the “cookie” installed on that computer, EU-based “equipment” is used for the purpose of processing personal data and the strictures of the Directive apply. The national law of the Member State in which the customer’s computer is located governs the data processing conducted by the Ohio company.

Many have criticized this provision as overreaching, especially when applied to non-EU based entities processing intra-company data housed outside the European Union. Such criticisms do not solely target the “equipment” provision outlined above because the Directive includes additional restrictions on data transfers that are arguably more intrusive. In other words, the Directive’s reach does not stop with data processing that uses EU-based “equip-

86. Id. at 140–41.
87. See PRIVACY AND DATA SECURITY LAW DESKBOOK, supra note 77, § 18.02[A][1][c].
88. Data Protection Directive, supra note 58, art. 4.
89. Id. art. 4(c).
90. See Hoofnagle et al., supra note 22, at 276 (“One way that websites track users is through ‘cookies,’ small text files that typically contain a string of numbers that can be used to identify a computer. For instance, a website might set a tracking cookie on a user’s computer with a key (a fancy word for the cookie name) such as ‘id’ and value (the unique identifier assigned to a user) such as ‘123456789.’ Advertisers can then access the ‘id’ cookie and track how user 123456789 visits different websites.”).
91. See id.
93. See PRIVACY AND DATA SECURITY LAW DESKBOOK, supra note 77, § 18.02[A][1][c].
94. See, e.g., Kuner, supra note 67, at 87.
The Directive specifically targets data transfers to “third countries,” outlining a host of requirements before personal data can leave Europe.96 Article 25, in fact, baldly prohibits the transfer of personal data to a third country (any Non-EU or European Economic Area (EEA) country) unless the European Commission (“Commission”) deems that country has an “adequate level of protection.”97 Data about EU residents can only go to those countries that have enacted data protection laws that the Commission deems “adequate.”98 Given the broad definition of “personal information,” the global economy, and the free flow of data over the Internet, this restriction appears unmanageable at best. The Commission currently recognizes only nine countries as adequately compliant: Andorra, Argentina, Canada, Faroe Islands, Guernsey, the Isle of Man, Israel, Jersey, and Switzerland.99

To join this very short list, the Commission conducts a formal evaluation of the transferee country’s laws and practices. The transferee country “shall be assessed in the light of all the circumstances surrounding a data transfer,” including the nature of the data, the purpose and duration of the proposed processing, the “rules of law, both general and sectoral,” in the transferee country, and the “professional rules and security measures which are complied with in that country.”100 The formal designation as “adequate” allows transmission of personal data from France to Argentina as if the same information was transferred from France to Spain.101 Again, only nine countries have met the standard.

The heart of this Article suggests that the European Union, through the Directive, is forcing international compliance even from nations that would resist it. If only nine nations comply with the Directive in a manner sufficient to meet the EU standard, how does the Directive ensure compliance from the rest of the international community? Does this mean that data about EU residents can only exist within the EU and nine random countries?

---

96. Id.
97. Id. art. 25(1).
98. Id.
99. See Greenleaf, supra note 36, at 3 n.2.
100. Article 25(2) of the Directive articulates five factors: (1) the nature of the data, (2) the purpose and duration of the processing operation, (3) the country of origin and the country of final destination, (4) the rule of law in force in the third country, and (5) the professional rules and security measures adhered to and implemented by the receiving entity in the third country. Data Protection Directive, supra note 58, art. 25(2). The prohibition in Article 25 is subject to exemptions, provided in Article 26, when (1) the data subject has consented “unambiguously” to the transfer; (2) the transfer is necessary to the performance of a contract between the data subject and the controller or of a contract in the interest of the data subject concluded between the controller and a third party; (3) the transfer is legally required or necessary to serve an “important public interest;” (4) the transfer is necessary to protect “the vital interests of the data subject;” or (5) the transfer is from a “register which according to laws or regulations is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate legitimate interest.” Id. art. 26.
101. Id.
3. Enabling Transfers That Conform

As mentioned, the Directive forbids transfer of EU personal data to countries like the United States because the Commission finds U.S. data protection laws inadequate; that is, unless “adequacy” can be established by other means.102 In practice, the adequacy requirement has been relaxed to apply on an ad hoc individual basis, rather than by nationality. Three avenues103—outside of a formal nationwide adequacy finding—allow non-EU entities to receive and process EU personal data: (1) binding/model contracts, (2) binding corporate rules, and (3) safe harbor self-regulation.104

Model contracts allow legal transmission of personal data outside of Europe by requiring “binding,” “standard,” or “model” contractual clauses.105 The Directive empowers the Commission to approve transfers of personal data even to third countries that fail to ensure an “adequate level of protection” if the data controller erects “sufficient safeguards” via “certain standard contractual clauses” consistent with a “Commission’s decision.”106 Under this approach, the contractual clauses incorporate by reference the data protection laws of the Member State in which the data exporter is established.


103. The Directive’s article 26(1) authorizes a number of other exceptions legally to transmit personal data outside of Europe even to a “third country” that fails to offer an “adequate level of protection.” Data Protection Directive, supra note 58, art. 26(1). A data controller or processor can legally send personal data outside of Europe to the United States, or any other country, if:

(a) the data subject has [freely] given his consent unambiguously to the proposed transfer [to be enforceable, a consent must indeed be unambiguous and freely given; EU data authorities take the position that a consent must specifically list the categories of data and the purposes for the processing outside the EU; in the employment context, consents may be deemed presumptively not freely given, merely because of the imbalance in bargaining power between employer and employee]; or

(b) the transfer is necessary [not merely convenient] for the performance of a contract between the data subject and the controller or the implementation of precontractual measures taken in response to the data subject’s request; or

(c) the transfer is necessary [not merely convenient] for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and a third party; or

(d) the transfer is necessary [not merely convenient] or legally required on important public interest grounds, or for the establishment, exercise or defense of legal claims; or (e) the transfer is necessary [not merely convenient] in order to protect the vital interests of the data subject; or

(f) the transfer is made from a register which according to laws or regulations is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate legitimate interest, to the extent that the conditions laid down in law for consultation are fulfilled in the particular case.

Id. 104. See Leathers, supra note 34, at 199–200.

105. See Data Protection Directive, supra note 58, art. 26(4).

106. Id.
Binding corporate rules function similarly, but serve a more permanent, less ad hoc purpose. Binding corporate rules track EU data protection standards and allow multinational organizations to conduct business with EU counterparts without having to draw up model contract language for every transaction. The relevant Member State’s data protection agency must approve binding corporate rules, which can be an arduous and lengthy process. As a result, relatively few binding corporate rules have been approved.

4. Safe Harbor: The American Exception

Finally, organizations and individuals in the United States can comply with the Directive and thereby receive and process personal data from the European Union if they self-certify under the Safe Harbor provision. The Safe Harbor provision—available only in the United States—represents a compromise between EU and U.S. regulators. As laid out below, the United States’ aversion to data privacy regulation, coupled with uneven enforcement, undermines the European Union’s view of data privacy as a fundamental right.

The Directive drew a hard line by outlawing data transfers to any third country that fails to offer “adequate” data protection, presenting a live threat to U.S.-based companies reliant on data from their own European employees, customers, suppliers, and associates. The European Union has not waivered from its characterization of U.S. privacy law as “inadequate” to protect privacy rights because of U.S. piecemeal privacy regulations. It is not difficult to imagine the range of transactions affected by such a severe restriction of data. A U.S. multinational company with employees or customers in the European Union would have to pull down or drastically restructure interactive websites and company intranets, stop customer reservations, delete frequent-customer databases, discontinue customer help lines, discard customer and employee directories, discontinue routine financial transactions including credit card transactions and check-clearing, and overhaul or discontinue routine mail, delivery documents, e-mails, and telephone calls. “As soon as the Directive became effective in 1998, it became clear that it actively threatened data flows between the two largest trading partners on Earth.” As one commenter put it, such action “would immediately destroy a $1.5 trillion transatlantic economic relationship.”

The U.S. Department of Commerce and the European Commission bargained for two years before agreeing to a “Safe Harbor” exception in 2000, avoiding serious disruption be-

---

107. This option was created by the Data Protection Working Party, which is an advisory body that was created by article 29 of the Data Directive. See Data Protection Directive, supra note 58, art. 29.

108. See PROSKAUER ON PRIVACY: A GUIDE TO PRIVACY AND DATA SECURITY LAW IN THE INFORMATION AGE § 14-3 (Christopher Wolf ed., 2007).

109. See PRIVACY AND DATA SECURITY LAW DESKBOOK, supra note 77, § 18.02[B].

110. See id.

111. See Leathers, supra note 34.

112. See Data Protection Directive, supra note 58, art. 25.

113. See Leathers, supra note 34, at 198.

114. Dowling, supra note 102.

tween the trading partners. The compromise sought to bridge the differing approaches in the European Union and the United States, simplify the means for U.S. organizations to comply with the EU Directive, and shield EU organizations that transfer personal data to U.S. organizations. Eligibility for Safe Harbor protections requires U.S. organizations to be subject to the jurisdiction of the Federal Trade Commission (FTC) or the Department of Transportation. The Safe Harbor requirements themselves largely track the Directive’s requirements, although not precisely.

The Safe Harbor privacy principles are essentially those required by the Data Directive: (1) notice; (2) choice; (3) onward transfer; (4) security; (5) data integration; (6) access; and (7) enforcement. Consequently, it appears that the Safe Harbor provision merely mirrors the Directive, raising the query: How is the Safe Harbor a “compromise” between EU regulators intent on forcing U.S. compliance with the Directive and U.S. officials anxious to avoid the same? The compromise is embodied by the voluntary and largely self-regulatory implementation of these data protections.

Companies that apply for Safe Harbor self-certify that they comply with the restrictions listed above. No government official reviews or authorizes whether any given company in fact complies with Safe Harbor principles before awarding certification. Instead, the Department of Commerce keeps an online list of entities that certify their compliance with Safe Harbor. A company need only notify the U.S. Department of Commerce that it intends to comply with Safe Harbor and publicly declare compliance on its website.

120. See PRIVACY AND DATA SECURITY LAW DESKBOOK, supra note 77, § 18.02[B].
121. See Leathers, supra note 34, at 201 (“The Safe Harbor is a voluntary self-certification system that is unique to the U.S. . . . .”).
122. See U.S.-EU Safe Harbor List, EXPORT.GOV, https://safeharbor.export.gov/list.aspx (“In maintaining the list, the Department of Commerce does not assess and makes no representations to the adequacy of any organization’s privacy policy or its adherence to that policy. Furthermore, the Department of Commerce does not guarantee the accuracy of the list and assumes no liability for the erroneous inclusion, misidentification, omission, or deletion of any organization, or any other action related to the maintenance of the list.”) (last visited Apr. 5, 2013).
123. See id.
124. Id. See also PRIVACY AND DATA SECURITY LAW DESKBOOK, supra note 77, § 18.02[B].
5. Safe Harbor: Compromise and Criticism

Neither the European Union nor the United States fully embrace the Safe Harbor provision. While the European Union views privacy as a fundamental right, safeguarded by the Directive and directly administered and enforced by public authorities, U.S. officials view data privacy as a matter of compromise, and advocate private-sector self-regulation as the best method of enforcing privacy principles.  

EU officials criticize self-regulation, noting that many of the few organizations that have self-certified do not in fact comply with Safe Harbor principles. Two years into the Safe Harbor agreement, an EU Commission issued a working paper that reported significant non-compliance. Many U.S. companies that claimed to protect private data lacked “the expected degree of transparency as regards their overall commitment or as regards the contents of their privacy policies.” The Commission found that U.S. companies often failed to display the mandatory public statement of adherence to the Safe Harbor principles, and that many of the privacy statements that the Commission did locate inaccurately reflected Safe Harbor principles. The Commission concluded that “less than half of organisations post privacy policies that reflect all seven Safe Harbor Principles.”

Finally, only a fraction of U.S. entities eligible for Safe Harbor have sought certification. A significant block of companies that would suffer “severe, adverse effects” if data transfers from the European Union were blocked have ignored the Safe Harbor altogether. “U.S. firms, even those within the Safe Harbor, are largely ignoring data-protection standards.” As of October 2006, approximately 1000 companies were participating in the program, 190 of which were “not current” in their certification. Given the cost of implementing data privacy controls and the concomitant risk of prosecution, questions remain regarding whether

---

128. Id.; Joel R. Reidenberg, Setting Standards for Fair Information Practice in the U.S. Private Sector, 80 IOWA L. REV. 497, 500 (1995) (“Despite the growth of the Information Society, the United States has resisted all calls for omnibus or comprehensive legal rules for fair information practice in the private sector. Legal rules have developed on an ad hoc, targeted basis, while industry has elaborated voluntary norms and practices for particular problems. Over the years, there has been an almost zealous adherence to this ideal of narrowly targeted standards.” (footnotes omitted)).
130. Barnes, supra note 119, at 181.
132. Barnes, supra note 119, at 181–82.
133. See Loring, supra note 40, at 459 (“The unwillingness of U.S. organizations to participate in the safe harbor can be attributed to factors such as uncertainty over enforcement issues, compliance costs, and a reluctance to be one of the first organizations to test the safe harbor. In addition, organizations may not be subscribing to the safe harbor because the EU Directive has no authority outside of Europe.” (footnotes omitted)).
more U.S. organizations will self-certify, and whether those that have self-certified will in fact comply.134

Aside from criticisms involving self-certification, many privacy advocates lament the Safe Harbor enforcement scheme. In the European Union, the Directive requires enforcement solely through government agencies.135 The Data Protection Authority in each EU Member State enforces its respective data privacy law.136 In fact, some Member States require all data collectors and processors to file annual reports.137 Conversely, enforcement of U.S. Safe Harbor provisions involves a number of self-regulatory stages before meaningful government intervention ensues, leading one scholar to note that “[p]rivate-sector enforcement is the principal method of assuring compliance with the Safe Harbor Principles.”138

The first enforcement stage involves self-certification. Organizations may either conduct a self-assessment or hire a third party to verify certification.139 Third party assessors, like BBB Online or TRUSTe, certify that the organization has a properly posted privacy policy, that the policy adheres to Safe Harbor provisions, and that the organization in fact complies with its own policy.140 Private-sector enforcement calls for implantation of a dispute resolution system to investigate and reconcile consumer complaints and empowers the mediator, arbitrator or other dispute resolution body with the ability to sanction an organization that cannot demonstrate the required level of privacy protection.141

As a result, an EU resident concerned about her personal data must first contact the U.S. company directly. The complainant could then pursue a grievance by contacting the third party company that verified compliance with the Safe Harbor provisions and argue that the company failed to adhere to its own privacy policy.142 If the third party agrees with the complainant, it directs the company to remedy the infraction. If the company fails to do so, the third party must refer the case to the agency with jurisdiction, invariably the FTC.143 Even then, the FTC has discretion whether or not to investigate.144 EU officials, dissatisfied with Safe Harbor provisions, note that it took the FTC nine years to bring its first data privacy en-

---

136. See id. art. 28(1).
137. See Leathers, supra note 34, at 206 (“Some EU member states’ Data Protection Authorities require all data collectors and processors to file annual reports.”).
138. Loring, supra note 40, at 455.
139. See Leathers, supra note 34, at 206–07 (noting that enforcement under Safe Harbor provides a multiple “layer” approach wherein the first enforcement “layer” is the initial Safe Harbor registration and subsequent annual Safe Harbor registration renewals, run by the DOC followed by an “independent recourse mechanism” before the final “layer” of government intervention).
140. Id.
141. Id.
142. Id.
143. Id.
144. See id. at 195–96.
forcement action. The FTC prosecuted a U.S. company that misrepresented its compliance with Safe Harbor principles.

Although Safe Harbor provisions require U.S. entities to treat EU personal data as if that data were physically in Europe and subject to the Data Directive, the Safe Harbor is a voluntary self-certification system that is unique to the United States and arguably suffers from inadequate enforcement. The private sector remains reluctant to implement Safe Harbor principles, and many of the few companies that have self-certified do not in fact comply with Safe Harbor principles.

C. International Trend

This Article’s central premise asks how the European Union forced international compliance with its data privacy Directive, a regulation described by one scholar as “the most rigorous privacy legislation the world has seen.” That query requires an understanding of European history and the subsequent adoption of privacy as a fundamental right. The Directive is the legal codification of this deep-seated belief, providing a range of protections for EU residents and their private data. Private data, however, knows no borders in the Internet age. Private data is no longer confined to paper dossiers and metal file cabinets, but can be many places at once, travel at light speed from one nation to the next, and can be readily collected without notice or consent.

As private data operates without borders, so must the Directive. It is this component of the Directive that bears emphasis especially in light of the seeming success obtained in securing international conformity. Broad and encompassing definitions of “personal information” and data “processing,” in conjunction with restrictions on data transfers, encourage international compliance at the risk of exclusion from the European market. The Directive allows

145. Id. (“[S]ince the Safe Harbor’s inception, the program has been subject to heavy criticism from privacy advocates and an EU oversight committee. The heaviest criticism is levied against the Safe Harbor’s inadequate internal and external enforcement mechanisms.” (footnotes omitted)). See also News Release, Fed. Trade Comm’n, Court Halts U.S. Internet Seller Deceptively Posing as U.K. Home Electronics Site (Aug. 6, 2009), available at http://www.ftc.gov/opa/2009/08/bestpriced.shtm.
146. See Leathers, supra note 34, at 201.
147. Moshell, supra note 59, at 384 (“Taken as a whole, the U.S. system of self-regulation of data protection has proved to be fundamentally flawed. Without legislation that provides a solid support structure for what little government data-protection authority exists, the United States suffers from a general lack of enforcement that stems from industry disregard for voluntary data-protection concepts.” (footnotes omitted)).
148. Salbu, supra note 85, at 137. See also id. at 139–40 (noting that “some observers believe that the U.S. Safe Harbor principles are weak and meaningless, and do not go nearly far enough, while others see them as an intolerable European incursion into sovereignty and autonomy”).
149. Id. at 137.
150. See Leathers, supra note 34, at 197–98 (“In contrast to the U.S. ‘sectoral’ approach to privacy, the EU ‘omnibus’ approach to privacy regulation views privacy as an ends with respect to its inherent nature; the EU views privacy as a protected state-of-being that is representative of individual autonomy.”).
151. See Michael Geist, Cyberlaw 2.0, 44 B.C. L. Rev. 323 (2003); Jack Goldsmith & Tim Wu, Who Controls the Internet?: Illusions of a Borderless World 188 (2008).
152. See Salbu, supra note 85.
153. Id.

440
data transfers both on a national and an ad hoc basis, but only after binding the transferee to the data protections articulated in the Directive.\footnote{154}

Although many nations have not historically embraced privacy as a fundamental right, the clear trend in global privacy law reflects an increasing adherence to EU privacy principles.\footnote{155} The first comprehensive national data privacy law, Sweden’s Data Act of 1973, marked the beginning. The forty years that followed produced at least seventy-five more nations adopting similar national data privacy laws. “The picture that emerges is that data privacy laws are spreading globally, and their number and geographical diversity accelerating since 2000.”\footnote{156} There were seven new national omnibus privacy laws in the 1970s, ten in the 1980s, nineteen in the 1990s, thirty-two in the 2000s and eight so far in the first two years of this decade.\footnote{157} At the current rate of expansion, fifty new laws will emerge in this decade.\footnote{158} The most economically significant nations notably absent are China and the United States. The Directive’s initial success in swaying international compliance is by no means complete. The United States has long resisted comprehensive data privacy laws, and its beleaguered economy seeks to optimize those industries—like data aggregation and analytics—that show promise. The next five years will reveal whether the Directive’s reach will flip U.S. reluctance into begrudged acceptance, or at last meet an obstacle that cannot be moved.

III. Privacy in America

The centralized approach exemplified by the European Union favors data protection accomplished by comprehensive legislation. By contrast, data protection laws in the United States are decentralized, fragmented, industry-specific, and largely uncoordinated among varying levels of government.\footnote{159} “While the European Union enacts legislation to counter market forces, the United States, in comparison, focuses less on government intervention in the private sector and, instead, places a greater emphasis on market constraints.”\footnote{160} The European approach is comprehensive, proactive, and preventative, whereas the United States relies on a salmagundi of laws including provisions in federal and state constitutions, federal and state statutes, federal and state regulations, common law, municipal ordinances, and self-regulatory practices.\footnote{161} This disjointed and largely reactive compendium of privacy regulation has earned the widely-used moniker “sectoral.”\footnote{162}

\footnote{154. See Leathers, supra note 34, at 199–200.}
\footnote{155. See Yuen, supra note 34, at 18–26 (2008) (detailing the sectoral laws in both India and the Philippines and the subsequent move to national data protection laws).}
\footnote{156. Greenleaf, supra note 36, abstract.}
\footnote{157. Id.}
\footnote{158. Id.}
\footnote{159. Murray, supra note 55.}
\footnote{160. Loring, supra note 40, at 425–26.}
\footnote{162. See generally, Cate, supra note 21 (noting many and disparate privacy related statutes).}
The industries beholden to data protection legislation are those that traditionally handle sensitive data, and the laws are often customized, targeting discrete elements of sensitive data or particular uses thereof. Examples of the U.S. sectoral approach include the Telecommunications Act of 1996, which restricts telecommunications carriers’ use of private customer information; the Gramm-Leach-Bliley Act, which restricts financial institutions’ use and dissemination of private financial data; and the Fair and Accurate Credit Transactions Act, which restricts credit reporting and increases protections for related personal information. Whereas the European Directive articulates a single definition of personal information that governs its twenty-seven Member States, the U.S. sectoral approach breeds multiple, often disparate, definitions. The definition of personal data under the Fair Credit Reporting Act, for example, differs from the Video Privacy Protection Act, which differs from the Gramm-Leach-Bliley Act.

The self-regulatory aspect of U.S. data privacy protections emerges most clearly through the Safe Harbor provisions discussed above. Another self-regulatory industry separate from the Safe Harbor exists in credit card privacy regulation. The credit card industry requires companies that store, process, or transmit credit card information to institute and enforce a security policy, encrypt specified credit card information, and report lost data.

All told, the United States certainly legislates and enforces an array of privacy protections. Those protections, however, are not uniform and comprehensive but instead resemble an uncoordinated patchwork of sectoral privacy laws. Efforts to unify data privacy laws by enacting comprehensive legislation have been consistently rejected. Many project that a comprehensive data privacy law is unlikely in the near term, a projection that highlights U.S. aversion to comprehensive data privacy regulation. Perhaps an industry-specific and self-regulatory approach to data privacy is superior to national, omnibus regulation. In considering whether the European Directive, coupled with the international trend favoring national privacy legislation, will eventually catch up and envelope the United States, it is important to examine the U.S. rationale for resisting the same.

163. See PRIVACY AND DATA SECURITY LAW DESKBOOK, supra note 77, § 1.01.
164. Id.
168. See Data Protection Directive, supra note 58, art. 2.
169. FCRA § 1681(b) (applying to consumer reporting agencies that provide consumer reports, defined as communications by such an agency bearing on a consumer’s credit worthiness or personal characteristics when used to establish consumer’s eligibility in certain contexts).
173. Cate, supra note 21 (noting many and disparate privacy related statutes).
175. Id.
A. Free Speech and Private Information

An often-reiterated rationale for rejecting national data privacy legislation turns on the constitutional protection of free speech.176 A profound belief in the value of information drives American reluctance to embrace laws that could constrict discourse, knowledge, and exchange of ideas.177 In fact, some contend that relaxing (or even abolishing) data privacy laws advances privacy interests because open information empowers individuals to access data about themselves and eventually correct false information.178

While free speech is expressly protected by the U.S. Constitution, there is no explicit constitutional guarantee of a right to privacy. Many provisions in the Bill of Rights, however, include privacy-related protections. The First Amendment’s protections of association and speech, the Third Amendment’s prohibition against conscripting private homes to quarter soldiers, the Fourth Amendment’s protection against unreasonable searches and seizures, the Fifth Amendment’s guard against self-incrimination, and the Fourteenth Amendment’s due process and equal protection guarantees all bespeak some aspect of personal privacy.179

Regardless, those defending the U.S. approach to data privacy contend that government-mandated restrictions limiting the sharing of personal information, even in the name of “data privacy,” violate the First Amendment.180 The United States and the European Union part ways in the value each assigns to these two conflicting rights. “One person’s privacy diminishes another person’s right to know, and vice versa,”181 an oversimplification that nevertheless captures much of the discord underscoring the divergent approaches to data privacy.

Arguments grounded in the First Amendment’s protection of free speech are “ascendant in privacy discourse,”182 and “enjoy widespread currency in the legal academy, the private sector, and recent privacy jurisprudence.”183 But they are not unchallenged. Free speech, not infrequently, assumes a larger posture in academic and political debate than the courts historically allow.184 Free speech protection carries greater significance in civil rights contexts, for example, than in commercial regulation, a distinction that muddies the water and opens the door for attaching greater free speech “rights” than are merited:

176. See Huie et al., supra note 33, at 402.
177. Id.
178. See Loring, supra note 40.
181. Salbu, supra note 85, at 137.
182. Richards, supra note 180, at 1149.
183. Id. at 1151.
Such murkiness has allowed what are essentially consumer protection issues in the economic rights context to be transformed into civil rights issues of the highest magnitude, as opponents of data privacy regulation have seized upon the First Amendment as a handy means of derailing proposals to deal with the database problem.185

While those who decry adoption of a national data privacy law as violative of free speech have garnered much support, the question is far from resolved.

B. Self-Regulation and Private Information

Another argument made in favor of self-regulation in lieu of a comprehensive data privacy law focuses on the role of government. Historical distrust of centralized power, often projected onto federal government, distinguishes the United States from the European Union. Privacy advocates trumpet national privacy laws as protective of individual civil liberties, but are too often non-conversant in American skepticism of powerful central government. “[W]hen it comes to privacy, Americans generally do not assume that the government necessarily has citizens’ best interests at heart. . . . The European paradigm assumes a much higher comfort level with a far more authoritarian government.”186

EU data subjects hold a legal right to know what information others have gleaned about them and to know how such information is used.187 Although such a right is commendable, U.S. businesses customarily process personal information without disclosing anything to their customers. Grocers track consumer purchases via bar code scanners;188 retailers boost revenue by selling buyer profiles;189 magazines sell customer lists;190 photography studios hawk client information;191 and employers restrict workers’ access to their own personnel files.192 After years of freely processing customer data, requiring businesses to confer notice and obtain consent would seem ludicrous. The market, it is argued, regulates more effectively than centralized government.193 Market advocates point to the consonance of relaxed data privacy

---

185. Richards, supra note 180, at 1151. See also id. at 1149 (“The First Amendment critique . . . mistakenly equates privacy regulation with speech regulation. Building on scholarship examining the boundaries of First Amendment protection, this Article suggests that ‘speech restrictions’ in a wide variety of commercial contexts have never triggered heightened First Amendment scrutiny, refuting the claim that all information flow regulations fall within the First Amendment.”).


191. Dowling, supra note 102, at 8.

192. Id.

193. P. Amy Monahan, Deconstructing Information Walls: The Impact of the European Data Directive on U.S. Businesses, 29 LAW & POLY INTL BUS. 275 (1998). See also id. at 289 (stating that the U.S. government also traditionally relies upon the ability of industry to regulate itself, viewing a “complex legal or regulatory infrastructure as an undue restriction on the market”). But see Hoofnagle et
law with American expectations. Americans often dismiss the notion that they should be
cconcerned about advertisers’ and retailers’ use of data.

One study poignantly demonstrates how incessant information harvesting has become en-

trenched—and therefore expected—among Internet users.

The absence of a perceptible threat resulted in individuals’ reluctance to act to protect

their privacy, contributing to the transformation of privacy from an individual right to a

public value. As individual users failed to insist on their privacy preferences, the design

of Internet architecture was left to the privacy preferences of commercial actors.

Still, advocates of self-regulation maintain that if consumers demanded stricter privacy pro-

tections, the market would respond.

C. Private Data as Property

From a legal standpoint, individuals have no property right in their own personal infor-
mation. U.S. commercial interests balk at recognizing personal information as personal

property. Granting property rights in an individual’s personal data would arguably promote

information privacy in cyberspace by empowering individuals to negotiate with businesses

about the uses to which businesses are allowed to process that data. Privacy advocates, un-

successful and dissatisfied with self-regulation, view attachment of property rights to person-

al data as a potential solution. “People should own information about themselves, and, as

owners of property, should be entitled to control what is done with it.”

“Despite numerous creative academic proposals for creating property rights in personal

information, current case law provides that while individuals have no property rights in their

personal information . . . [ ] customer information databases are generally viewed as property

of the firms that hold them.’” Much has been written on the benefits and detriments of

confering a property right on personal information, which is an academic battle unlikely
to materialize in the near term.

---

194. Preston N. Thomas, Comment, Little Brother’s Big Book: The Case for a Right of Audit in Private
Databases, 18 COMMLAW CONSPECTUS 155, 156 (2009). But see Hoofnagle et al., supra note 22, at
273.

195. Salbu, supra note 85.


197. Id. at 924.

198. See Jacqueline Lipton, Information Property: Rights and Responsibilities, 56 FLA. L. REV. 135
(2004).

199. See Samuelson, supra note 40.


201. Id.

202. Id.

203. Balaban, supra note 125, at 20.

204. See, e.g., Samuelson, supra note 40, at 1127; LAWRENCE LESSIG, CODE AND OTHER LAWS OF
CYBERSPACE, 142–63 (1999) (advocating the use of property rights to protect privacy on the Inter-
net); Richard S. Murphy, Property Rights in Personal Information: An Economic Defense of Privacy,
84 GEO. L.J. 2381, 2383–84, (1996) (arguing that personal information, “like all [other] information,
D. Big Data

U.S. businesses, of course, tend to prefer self-regulation, deferring to non-binding industry codes, and third-party programs for policing themselves and their respective markets. This not only allows business to contain costs by maintaining the status quo, it also fosters the increasingly large data mining\textsuperscript{205} and data analytics industry.\textsuperscript{206} Capturing information is easy. The difficulty—and potential revenue—comes with the ability to analyze information.\textsuperscript{207}

The data aggregation industry is big business in the United States,\textsuperscript{208} with data gathering, sorting and selling rapidly becoming the new coin of the kingdom.\textsuperscript{209} “Data collection is the dominant activity of commercial websites. Some 92 percent of them collect personal data from web users, which they then aggregate, sort, and use.”\textsuperscript{210} Data collection—as a source of revenue—was a large industry at the infancy of the EU Directive\textsuperscript{211} and continues to grow despite the Directive’s wide-ranging reach, which highlights the increasing value of consumer information as a commercial asset.\textsuperscript{212} Data analytics was an estimated $25.1 billion industry in 2004\textsuperscript{213} and a $105 billion industry in 2010.\textsuperscript{214} IBM’s 2010 study reveals that eighty-three percent of business leaders identify analytics as a top priority for their businesses.\textsuperscript{215} The revenues of the largest data-mining companies exceed $1 billion annually.\textsuperscript{216} As one scholar

\begin{itemize}
\item Tal Z. Zarsky, *Governmental Data Mining and Its Alternatives*, 116 PENN ST. L. REV. 285, 291 (2011) (“[D]ata mining is defined as the ’nontrivial process of identifying valid, novel, potentially useful and ultimately understandable patterns in data.’”).
\item Louie Velocci et al., *Clarity through Data—The Practicality of Forensic Data Mining for Valuators*, J. BUS. VALUATION, Feb. 2009, at 21 (“Data analytics is the transformation of data to extract useful information and effectively draw conclusions. This can include the use of statistical modeling, selection of representative subsets of data, curve fitting against an expected outcome, etc. Data mining, in contrast, is the application of data modeling, automated computer routines and advanced data sampling techniques aimed at the identification of unforeseen patterns within the data. Data mining uses more complex computer modeling, database analysis and theoretical modeling which often requires a significant investment in software, computer hardware and specialized data analysis resources.”).
\item Zarsky, supra note 205 (addressing the use of data mining applications in analyzing personal information and its impact upon society).
\item See Peppet, supra note 28, at 1164 (noting that corporate data mining links at least seven thousand transactions to each individual in the United States per year).
\item Joel R. Reidenberg, *Restoring Americans’ Privacy in Electronic Commerce*, 14 BERKELEY TECH. L.J. 771, 775 (1999) (“By 1998, the gross annual revenue of companies selling personal information and profiles, largely without the knowledge or consent of the individuals concerned, was reportedly $1.5 billion.”).
\item Id. at 72.
\item Id.
\item McClurg, supra note 212, at 71.
\end{itemize}
notes, “there is a lot more money (and therefore political clout) behind those companies that want to collect, publish, or use private information.” Data processing restrictions, like those embodied by the Directive, threaten those companies that rely, even in part, on data collection and re-use. For companies that do not directly rely on information trafficking for revenue, the cost of compliance with Safe Harbor principles is a disincentive.

Data mining is not limited to private enterprise. The federal government, among other public entities, increasingly employs data mining techniques for law enforcement and other governmental purposes. "Much of the 'privacy' Americans have enjoyed results from the fact that it was simply too expensive or laborious to find out intimate data about them. In the twenty-first century, technology and law have combined to erode the protection for personal privacy previously afforded by practical obscurity." The benefits gained by governmental data mining deter it from advocating on behalf of national data privacy regulation. At bottom, U.S. business interests recognize material costs if European privacy law, which requires fundamental changes in the ease with which marketing data can be garnered, sold, and used, replaces the status quo.

E. Reluctant Conformity

Strong arguments, both ideological and economic, anchor the United States to its sectoral and self-regulatory approach to data privacy regulation. In light of free speech principles, distrust of centralized government, reliance on market-based solutions, and an increasingly profitable data aggregation industry, the United States stands to lose much by adoption of national data privacy law. But the United States is slowly conforming to the EU approach nonetheless. By agreeing to Safe Harbor provisions, has the United States inextricably comingled with European privacy law? Said more dramatically: “I am in blood Stepped in so far that, should I wade no more, Returning were as tedious as go o'er.”

More and more U.S. companies are applying for Safe Harbor. The Department of Commerce (DOC) recently announced that approximately fifty companies file initial self-certifications to the Safe Harbor per month. The rate of certification is growing. In a two-year period, 2008–2010, the number of companies joining Safe Harbor certification grew by fifty percent. In 2010, there were more than 2100 companies included on the U.S. DOC’s

---

218. Rose, supra note 208.
219. See id.
221. Id.; see also Kathleen Sullivan, Under a Watchful Eye: Incursions on Personal Privacy, in THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM 128, 131 (Richard C. Leone & Greg Anrig, Jr., eds., 2003).
222. Salbu, supra note 85, at 137.
223. Rose, supra note 208.
224. WILLIAM SHAKESPEARE, MACBETH act 3, sc. 4.
226. See id.
Safe Harbor list. “Placed in context, this means that more companies join Safe Harbor in a single month than the total number of companies that have obtained approval for binding corporate rules to date . . . .”

Enforcement of data privacy laws has become noticeably more active. The Federal Trade Commission in December 2012 ordered nine data brokerage companies to reveal how they harvest and use data on consumers, toughening the agency’s posture toward the multibillion-dollar industry. In June 2012, a California company agreed to pay $800,000 to settle charges that it illegally sold personal information for employment screening. In December 2010, the FTC released a proposed framework for businesses and policymakers entitled Protecting Consumer Privacy in an Era of Rapid Change. The framework signals the FTC’s broadening enforcement scope and increased political will to prosecute data privacy infractions.

Although unsuccessful, several bills have been introduced in Congress that roughly parallel EU data privacy principles. In 1995, Representative Cardiss Collins introduced the Individual Privacy Protection Act of 1995, a bill that would amend the Privacy Provisions of Title and improve individual privacy protections. In just one year, during the term of the 106th Congress, legislators submitted twenty-nine major privacy bills affecting personal data and the Internet. Recently, the Senate Judiciary Committee approved an Act sponsored by Senator Al Franken that requires business to obtain consent from customers before collecting or sharing mobile location data. Debate continues over extensions to the Children’s Online Privacy Protection Act (COPPA), and the FTC has prodded Congress to pass a law that would require data brokers to let people examine their personal files culled from their Internet activities.
Breach notification statutes are increasingly popular among state legislatures. At least forty-five states require companies who lose or otherwise fail to secure sensitive data, such as social security and credit card numbers, to inform the affected customers that their personal data has been compromised and possibly pay fines. The increased data privacy regulations in the past two decades, coupled with the surge in companies certifying under Safe Harbor illustrate the pull of the EU Directive, especially in light of the entrenched arguments that militate in favor of self-regulation.

IV. Privacy Law of Tomorrow

The EU Directive is largely viewed as the global standard, as evidenced by the increasing number of countries that continue to adopt national privacy laws consonant with the Directive’s proscriptions. The Directive’s dominance remains somewhat surprising given its consistent characterization as the strictest data privacy law currently in force. This curiosity is partly explained by the Internet age and by data’s borderless nature in conjunction with the Directive’s prohibition on data transfers without proof of “adequacy”: “either a nation demonstrates to the EU that it can ensure adequate levels of privacy protection, or it loses access to personal data from the EU.” By barring data transfers when the transferee lacks the Directive’s protections, the Directive effectively offers the transferee (or data processor) a choice: comply with the Directive or risk exclusion from the European market.

Less than five years ago, Canada and Malaysia faced this conundrum. Malaysia, like the United States, has not historically recognized privacy as a fundamental right. Moreover, the Malaysian constitution lists freedom of speech as a fundamental right. Instead of creating a compendium of privacy rights that were industry specific and otherwise self-regulatory like the United States, both Canada and Malaysia enacted national comprehensive data laws that mirror the Directive. They are not alone. “Non-member countries are vying to meet the Directive’s ‘adequacy’ stipulation in order to transact in information arising from EU citizens.”

237. Shaw, supra note 1161; PRIVACY AND DATA SECURITY LAW DESKBOOK, supra note 77, § 15.02.
238. Shaw, supra note 161, at 520.
239. Schwartz & Solove, supra note 70.
241. Greenleaf, supra note 36.
242. Salbu, supra note 85, at 137.
243. Id. at 140 (“Through the EU’s ambitious, wide-reaching strategy, privacy has become the most prominent area of Internet regulation in which one region has tried very aggressively to manage spillover effects by exerting substantial market pressure outside its borders.”).
244. See id. at 140–41.
245. See ELEC. PRIVACY INFO. CTR. (EPIC), PRIVACY AND HUMAN RIGHTS REPORT 2006: MALAYSIA (2006), http://www.worldlii.org/int/journals/EPICPrivHR/2006/PHR2006-Malaysia.html (noting that Malaysia does not specifically recognize a right to privacy, but does provide a conclusive list of fundamental rights, including freedom of assembly, speech and movement).
246. Yuen, supra note 34.
247. Id. at 68.
Even so, there are meaningful grounds to reject the Directive. Free speech rights, including a “right to know,” and a marketplace of ideas unencumbered by artificial controls as well as a distrust of ceding Internet censorship to government remain robust rationales cutting against the Directive’s universal application.248 Similarly, market-based solutions are arguably more customizable and responsive to consumer demand.249 Finally, an emerging data aggregation and analytic industry not only offers new income in a down economy, it offers services previously unknown to business.

These benefits inherent in a self-regulatory approach are strengthened when considering the collateral costs attendant to the Directive’s reach. When Europe dictates to Canada or Malaysia, for example, what the data privacy law will be in those countries, a disregard for national sovereignty arises that potentially generates political fallout.250 Certainly both American and European officials chafe at the compromise embodied by Safe Harbor. According to one commentator, the Directive “smacks of imperialism,”251 evoking questions of whether modern colonialism will be clothed in ones and zeros.252

Homogeneity embodies another potential harm. Universal adherence to the Directive creates the norm and threatens an array of approaches that have individualized benefits. Different cultures value different principles. As exemplified by the tension between privacy and free speech, a given nation may value one more than the other. Required compliance with one culture’s belief system impoverishes the rest.

A. Emerging Economies

While there is certainly a trend favoring the Directive, full international compliance is by no means inevitable. In Africa, for example, Internet penetration is lower than in the developed world, and Africa’s growth rate of Internet users in the last decade has reached 2000%, compared to the global average of 480% growth.253 Which way will newly wired nations lean? If access to the European market is desired, only one country to date has even made it to the negotiation table, and only then agreeing to a diluted form of compliance with the Directive.

A key for newly data-reliant economies will be bargaining power. Countries seeking access to EU e-commerce and outsourcing markets must, as a preliminary condition, demonstrate “mutually acceptable harmonized regulations that would be a compromise in stringency.”254 So far, only one nation with an international trade portfolio comparable to the EU has successfully forced a meaningful compromise. The fact that only an economic super power has thus far moved Europe off its entrenched position is telling.255 Even the United States, with

---

248. Rose, supra note 208, at 455–65.
249. See id.
250. See id.
251. Yuen, supra note 34.
252. Cate, supra note 220, at 435 (“Today, our biographies are etched in the ones and zeros we leave behind in daily digital transactions.” (quoting Sullivan, supra note 221, at 131)).
253. See Esterhuizen, supra note 17; Africa Internet Use Hits 2,000 Per Cent Growth, supra note 17.
255. See id.
its substantial economic and political clout, negotiated a bypass of the procedures that merely watered down the Directive’s requirements. Recall that the core protections required in the Directive are also required for U.S. companies seeking Safe Harbor. The self-certification and U.S. enforcement procedures dilute these requirements, but importantly, the requirements are nearly identical. This highlights the extent of the Directive’s international influence on data transfer practices of entities in countries and economies of all sizes.256 The vital importance of international data transfers enables the European Union to maintain a largely uncompromising stance.

Moreover, what emerging national economy would seek refuge in the U.S. sectoral approach when the international current runs the other way? As of 2011, seventy-six countries have codified national data privacy laws, a consequential number considering that forty years ago there were none.257 This international trend accelerated shortly after the EU Directive became effective.258 While a sectoral and self-regulatory approach offers significant benefits, the sheer number of economically significant countries that have signed on represents a powerful dissuader. “For over two decades the rate of adoption of new privacy laws per year has been steadily increasing, and the regions of the globe that have such laws has been steadily expanding.”259 Moreover, countries that have promulgated privacy laws that mirror the Directive tend to be larger in size and economic significance, which further incentivizes emerging countries to join the clear trend.260

Without such bargaining power, most countries must comply with the strictest standard in the data protection system.261 “[T]he cost of failing to actively participate in e-commerce and outsourcing with members of the European Union is more likely to drive firms to organize and lobby their legislators for a political solution that permits cross-border data transfer, than the benefits derived from maintaining the existing data protection regime.”262 Countries will conform to the strictest standards because it is more cost efficient to abide by one regulatory policy—even a strict one—than multiple and divergent versions.263

This logic eerily mimics the Directive’s twin purposes: (1) protect private data; (2) facilitate free flow of data transfers by requiring a single standard to which all must comply.264 These goals are seemingly at odds with each other: If Member States legally restrict information traffic in order to protect privacy rights, don’t they thereby restrict the free flow of information among Member States? The key to reconciling this apparent conflict is legal uniformity.265 If the Member States’ data protection laws are uniform, no single Member State can

256. Yuen, supra note 34.
257. See Greenleaf, supra note 36.
258. Id. abstract (noting that the number and geographical diversity accelerated after 2000).
259. Id.
260. Id. ("Most other countries that do not yet have data privacy laws are of relatively low significance in international trade, though some countries with large populations are among them . . . .").
261. Lazer, supra note 254, at 477–78; Salbu, supra note 85, at 137.
262. Yuen, supra note 34.
263. Lazer, supra note 254.
265. Id. art. 29. Article 29 establishes the “Working Party” an advisory board made up of representatives from each of the data protection authorities in the various member states. Id. The Directive charges
impose differing standards that impede the free flow of information. Binding each Member State to a single standard for processing personal information—even a high standard—promotes privacy protection and facilitates the free flow of information.

V. Conclusion

Thomas Friedman’s bestseller, *The World is Flat*, suggested that globalization changed bedrock economic concepts. Historical and geographical boundaries have steadily eroded as information accessibility, international communication, and workflow software facilitate global—rather than national—supply chains. Adaptability and technological intelligence are required for businesses and whole economies to survive in the jaws of inevitable globalization. Friedman posits that the ubiquity of personal computing coupled with fiber optic cable spurred these fundamental shifts in economic function.

This Article suggests that globalization and “flattening” is not limited to economic principles but has bled into international policymaking. The borderless nature of data, when generated or processed on the Internet, is uncoupled from national boundaries and geographical borders. Rulemaking has been historically limited to the sovereign or other political body capable of enforcing the rule, a capability traditionally defined and embodied by nationhood.

It would seem that the answers to the above questions must be in the negative. Any other result would be repugnant to one’s commonsense and the dictates of justice, to that distribution of State jurisdiction and to that idea of international forbearance without which the present international order cannot continue.

The EU Directive ignores that history. It bypasses national sovereignty by prohibiting certain data transfers—needless of location—if the transfers fail to comply with the Directive. The Directive was never presented as an international treaty nor negotiated as such, and yet it purports to bind entities the world over. “Through the EU’s ambitious, wide-reaching strategy, privacy has become the most prominent area of Internet regulation in which one region has tried very aggressively to manage spillover effects by exerting substantial market pressure outside its borders.” The United States consistently resists compliance and not without rational justification, but even the world’s foremost economic heavyweight has par-

---

268. See generally, Kuner, *supra* note 67, at 87; Salbu, *supra* note 85, at 140 (“The global privacy debate is significant for more than the substantive issues it has identified. It also raises critical questions in regard to international relations, as areas or regions try to meet their goals in regard to a technology that has little respect for borders.”).
269. Salbu, *supra* note 85, at 140.
270. *Id.*
tially submitted and faces full submission as more and more countries join, leaving the United States increasingly isolated.

“Prior to the explosion of Internet use, a medium through which a state has purported to extend its jurisdiction throughout the entire world has never existed.”271 Undoubtedly, ongoing and serious questions remain as to whether and how the European Union will enforce the Directive as to those entities beyond its legal jurisdiction.272 As one commentator notes, the question of extraterritorial enforcement may be irrelevant:

Whatever one’s views on this dubious assertion of extraterritorial jurisdiction, the end result for companies is that it pays to ensure that Internet sites served from outside the EU, but could conceivably come within the supervision of EU data protection authorities (e.g., because they collect data from EU residents or otherwise target them), comply with at least the general principles of EU data protection law, or at least that the company running the site has a strategy in place for dealing with inquiries from EU data protection authorities.273

The United States faces the prospect of coexisting in the global market with nations whose data-protection schemes are incompatible with the U.S. theme of self-regulation. The increasing importance of international data transfer in the global economy, when combined with a global trend toward comprehensive data protection, highlights the level of success achieved by the European Union in bending international will to conform with it privacy Directive.

271. Moshell, supra note 59, at 372.
272. See Kuner, supra note 67, at 87.
273. Id. at 88.