Chapter XIV
A Frame Analysis of Privacy Regulation in an International Arena:
Understanding Interdependency in a Globalized World

Vinita Agarwal
Purdue University, USA

Charles J. Stewart
Purdue University, USA

ABSTRACT

The conceptualization of privacy has been the subject of much debate for more than a century in scholarship ranging from social philosophy and sociology to law, finance, and medicine. Legal issues concerning the right to privacy, moreover, are part of a complex web of state and national laws. This chapter examines the international legal issues resulting from the European Union's 1998 Data Protection and Privacy Directive and its effects on online interactions in a global context. The authors believe this focus will help individuals interacting in international cyberspace understand and adapt to varying cultural and national perspectives of privacy in such contexts.

INTRODUCTION

While the authors realize that legal issues concerning the right to privacy are part of a complex web of state and national laws and court decisions, and that strict constructionalists reject the notion that privacy can be found in the emanations of guarantees embodied in the penumbras of constitutional amendments, we have focused this chapter explicitly on the international legal issues resulting from the European Union's 1998 Data Protection and Privacy Directive. We

believe this focus will help those who operate in an increasingly globalized world to understand and adapt to the implications of differing theories and philosophies concerning the complex issue of privacy in their day-to-day environments. Let us begin by reviewing the legal and philosophical notions of privacy in the U.S.

The conceptualization of privacy has been the subject of much debate for more than a century in scholarship ranging from social philosophy and sociology to law, finance, and medicine. We can trace its legal precedents in the U.S. to the end of the nineteenth century, notably to a seminal article by Warren and Brandeis in 1890 which conceptualizes privacy primarily as the "right to be left alone." Scholars such as William Prosser and Patricia Mell see Warren and Brandeis as being the first to start law review discussions recognizing privacy as property and a personal right. Since 1890, privacy has been mentioned in many landmark cases dealing especially with reproductive choice and marital rights such as in *Roe v. Wade* in 1973 and *Griswold v. Connecticut* in 1965. The Supreme Court has found that penumbras or zones of privacy emanated from the Bill of Rights (First, Third, Fifth, and Ninth Amendments), even though they are not mentioned explicitly in the Bill of Rights. When synthesizing cases that followed the Warren and Brandeis article, Prosser (1960) identified four invasions of privacy: unreasonable intrusions upon an individual's seclusion, appropriation of an individual's name or likeness, unreasonable publicizing of an individual's private life, and unreasonable publicizing of an individual to place the person in a false public light.

Traditionally, privacy in the U.S. has been conceptualized as a value that arises from the fundamental human need to control access to one's actions, thoughts, information, appearance, and other aspects of individual identity and autonomy. Scholars such as Etzioni (1999) have identified its historical evolution in three stages: pre-1890 when privacy principles derived from property law, 1890-1965 when privacy developed from tort law, and post-1965 when constitutional evolution became the basis of privacy. Today, while the right to privacy is not explicitly elaborated as a constitutional right, most states recognize the existence of the common law right to privacy, and the Supreme Court in several instances has upheld the right to privacy as a constitutionally protected right.

Several congressional acts contain explicit exemptions to protect the principles of privacy. For example, the Freedom of Information Act (1966) protected the right of public access to U.S. government records, the Children's Online Privacy Protection Act (2000) protected the confidentiality, integrity, and security of personal information collected from children by Web sites, the Gramm-Leach-Bliley Act (1999) addressed regulatory agencies of financial institutions with regard to security standards of personal information, and the Health Insurance Portability and Accountability Act (1996) ensured integrity and confidentiality of medical information. Allen (2004) and Solove (2002, 2006) write that numerous state public records laws also contain privacy exemptions and many state constitutions contain provisions explicitly providing for a right to privacy. From a historical perspective in the U.S., changes in information technology, starting with photography, have been intimately associated with changes in the conceptualization of privacy. The development of telephones, computers, and recent electronic and digital forms of communication have had fundamental implications for the legal-cultural understandings of privacy and its expression in the social, political, commercial, medical, and personal domains of society. For example, several notable cases have dealt with governmental use of technology for surveillance, including *Olmstead v. United States* (1928) and *Katz v. United States* (1967), and were interpreted under the protections afforded by the Fourth Amendment. Increasingly, the assimilation of computers has facilitated large-scale collection, storage, and