

ITECHLAW International India Conference
January 29, 2016

Conflict of Laws in Data Protection

Jaipat Singh Jain

Lazare Potter & Giacobas LLP

New York City



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“If the law supposes that,” said Mr. Bumble,... “THE LAW IS AN ASS...his eye may be opened by experience, by experience!”

- Charles Dickens, *Oliver Twist*, chapter 51, p. 489 (1970). First published serially 1837–1839.



Conflict of Laws in a Tale of 2 Cases

1. In the matter of a warrant to search a certain e-mail account controlled and maintained by Microsoft Corporation
Appeal pending before 2d. Cir. Ct. of Appeals
2. Google Spain SL & Google Inc. v. AEPD and Mario Costeja Gonzalez
May 2015, European Court of Justice

India Scenarios...



Warrant to disclose contents of e-mail

- Dec. 2013: warrant issued to Microsoft to compel disclosure of contents of an MSN email allegedly used for narcotics trafficking
 - Parts of an email:
 - User identification
 - User's address books, contacts, etc.
 - User's communications with ISP
 - Content of emails
- Microsoft disclosed non-content information retained by it in the U.S. and moved Court to quash the warrant to the extent it sought content stored in its datacenter in Ireland



Microsoft:

A warrant under Federal Rules is territorial by definition
Stored Communications Act (SCA) does not say it has
extraterritorial application (hence it does not)



A warrant is a warrant is a warrant

Not so Fast! Dist. Ct. sides with Government

SCA only requires *warrant to be issued using Federal procedures, i.e.* upon a finding of probable cause by a neutral magistrate. Functionally, it is a subpoena

A rose by any other name would smell as sweet

Instruments under SCA

Different instruments, depending on privacy concerns implicated, compel disclosure of data under service provider's control

Subpoena

Basic subscriber and transactional information
Contents of emails more than 180 days' old



Order

All records subject to production under subpoena, plus all other information, but not contents of emails < 180 days old

Warrant

All records subject to production under order, plus unopened emails < 180 days old

“Nothing in SCA’s text, structure, purpose or legislative history provides any basis to conclude that subpoenas and orders may compel the production of records stored abroad, while warrants cannot”

- **Microsoft:** What law controls is based on the location of data
- **Govt.:** SCA compels disclosure of content in Microsoft's control (regardless of where stored by Microsoft for the time being)

Location v. Control





Google v. Spain

AGENCIA
ESPAÑOLA DE
PROTECCIÓN
DE DATOS



- **March 2010:**

- Gonzalez asks a Catalonia newspaper, Google Spain and Google Inc. to remove links to attachment proceedings against him from some years ago for recovery of social security debts. Both decline
- Gonzales files complaint with AEPD, Spain Data Protection Authority



- **July 2010:**

- AEPD holds that newspaper was under a legal duty to publish, Goggle was not. Google was subject to EU data protection law. Gonzalez had a fundamental right to privacy
- Remove permanently all links from search results regarding attachment proceedings

- **Google appeals the decision**



CJEU Ruling

- Google both data “controller” and “processor” under EU law
- Even if server and processing was outside E.U., Google was bound by EU law
- All (except public figures) have a right to be forgotten
 - ➔ Delist search results if “inaccurate, irrelevant or excessive”



Right to Privacy trumps Right to Free Expression
Data belongs to the individual, not the processor or controller
EU law is global

Google, a Censor

- Google processes nearly 1.3m requests in 2015 to remove links
 - removes about 40%
 - denials are appealable



CNIL 

*Données personnelles :
vous avez des droits !*

- France recently directed Google to remove links worldwide, not just within EU sites. Google has not complied

India Lex Deficit



- Few laws
 - Information Technology Act, 2000, as amended, and rules thereunder
 - Various banking laws and RBI Guidelines
 - TRAI Regulations
- Few Cases; constitutional right to privacy?
- No adequacy finding; no safe harbor
- Massive surveillance architecture
 - No judicial oversight
 - Antiquated laws
 - Limited legislative involvement; Article 73 of Constitution at play



India Scenario 2

- Action items
 - Comply with ITA Rules, if applicable
 - Use of foreign-owned entities
 - Foreign data processing and storage
 - Subject to foreign law and dispute resolution
 - Reliance on contract clauses, best practices, and internal systems, controls & alerts



India Scenario 3



In the distant future, we'll forget the idea of engaging in technology at all. We'll swallow it, absorb it and wear it, without us really thinking we're engaging in technology *per se*.

- *Douglas Atkin, airbnb*

- The Limits of Consent

- Fair Information Practices enough?
- Consents will be challenged world-over; new conflict of law issues
- Develop other mechanisms and safeguards





Law is organized according to national borders. Cloud is not – the picture above is a fiction



Jaipat Singh Jain
Partner, Lazare Potter & Giacobas LLP
New York City
(212) 784-2418 * jjain@lpgllp.com