Comprehensive US federal privacy legislation: “This is the conversation we need to have”

Eugene Oscapella reports

Late to join the party, but enthusiastic once it did, Microsoft has added its voice to the call for comprehensive federal privacy legislation in the United States. And singing the same tune is Commissioner Pamela Jones Harbour of the US Federal Trade Commission.

Speaking at an IAPP conference held in early March in Washington, DC, Brad Smith, Senior Vice President and General Counsel at Microsoft, acknowledged that developing such legislation would be a complicated task, but that the time for action had arrived. Mr Smith’s words were not random musings. He had already issued a “white paper” on behalf of Microsoft in November 2005, outlining the company’s support for federal legislation. And, he noted, companies like Intel and HP had been calling for such legislation for some time.

The Microsoft white paper noted that much of the privacy regulation in the United States occurs at the state level, and that laws are inconsistent. A set of business practices that is legal and commonplace in one state may be prohibited just across the state line. In addition, said the paper, the number of state privacy laws is increasing quickly. Between January 2004 and November 2005, more than 20 states enacted financial privacy laws. At the same time, continued the paper, Congress has enacted federal privacy provisions in legislation specific to certain industries:

• The Gramm-Leach-Bliley Act for financial institutions;
• The Health Insurance Portability and Accountability Act of 1996 (HIPAA) for health care providers;
• The Cable Act for cable operators;
• The Communications Act for telecommunications carriers.

Added to this mix of laws, pointed out the white paper, are specific laws to address children’s online privacy, spam, telemarketing and junk faxes. Concerns over spyware and identity theft are prompting a further array of federal legislative proposals.

Concludes the white paper, “this has led to an overlapping, inconsistent and incomplete patchwork of state and federal laws that creates compliance chaos for businesses and uncertainty for consumers.” Mr Smith drew an analogy to the confusion over multiple mandatory nutritional labeling requirements in the United States that eventually led to a common labeling standard.

Mr Smith identified several reasons, beyond the inconsistencies caused by the patchwork of legislation, for moving to comprehensive federal data protection legislation:

• Consumer confidence about privacy on the Internet and privacy in general was declining. Some people were losing confidence in buying on the Internet. Mr Smith referred to the findings of a recent Consumers Union survey that 25 per cent of Internet users have stopped making

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Legislation struggles to keep up

Privacy crises occur in all countries. Management must respond in the short term, while legislation, reflecting national culture, struggles to keep up.

South Africa has an eye on becoming a serious player in the global outsourcing market. Its proposed data protection bill incorporates certain specific features of Roman-Dutch and common law and would make its Information Commissioner responsible for both the Protection of Personal Information Act and the Promotion of Access to Information Act which directly affects companies (pp.16-17).

Singapore has decided to assess the efficacy of its existing laws covering aspects of privacy (p5). Singapore is at the centre of the 21 member APEC process, and is the only Asian country joining Australia, Canada and the USA in a study group on information sharing and cross-border cooperation.

Latin America is pulled in two directions, towards the APEC model, led by Chile, and towards the EU model, led by Argentina (pp.18-19). Culturally, Latin American countries differ from other regions with privacy associated with intimacy rights, the right to be left alone.

In the United States, partly stimulated by multiple and well publicised privacy breaches, the call for comprehensive federal privacy legislation grows louder with explicit support from a Federal Trade Commissioner, Pamela Jones Harbour and Brad Smith, Microsoft’s General Counsel (pp.1-4).

Many of the headline-grabbing privacy incidents, occur online - as Hong Kong realised to its dismay when the personal data of an estimated 20,000 people were posted on the web. And as things stand, there are few remedies in the country’s rather “toothless” privacy law (pp.10-13).

EU Data Protection Commissioners express concerns about e-mail tracking (pp.21-22) and RFIDs (pp.26-27). And we continue with Portugal, in the next instalment in our series on employee monitoring (pp.25-26).

Google has won applause for taking a stand against the US government earlier this year, in defence of its customers’ privacy rights (pp.8-9). Will other companies show the same concern? What steps will they take to avoid privacy crises? PL&B’s 19th Annual International Conference in Cambridge July 3-5th provides the perfect opportunity to find out what leading companies and privacy regulators are doing. We hope that you will join us.

Lucy Fisher,
Editor
PRIVACY LAWS & BUSINESS

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South Korea fights spam with new laws

While South Korea legislators are tackling spam with a succession of legal amendments, they have not yet adopted a comprehensive privacy law. Professor Whon-il Park reports

It's like a war between a spear and a shield.

Recently Internet users in Korea have been perplexed to discover that the number of unsolicited e-mails is constantly on the increase. Mail server administrators are also complaining that new types of spam are too sophisticated to block. They say that more than 90 percent of incoming mail is spam.

Recently the Korean government declared an all-out war against spam by amending the Act on the Promotion of Information and Communications Network Utilization and Data Protection, etc. (the “Act”, visit: www.worldlii.org/int/special/privacy /for reference).

Spammers never sleep, while lawmakers are involved in numerous political affairs other than preparing a comprehensive data protection act that public opinion is longing for in Korea. Government officials and specialists worry that Internet users’ e-mail boxes are increasingly occupied by messages which are harmful to youngsters, and that spammers are extending their targets to include mobile phones.

As a result, lawmakers agreed to add strict anti-spam provisions to the existing act rather than discussing the proposed comprehensive acts on data protection, which seem to be full of controversies.

Existing anti-spam regulations

So far, South Korea has implemented specific but not so effective anti-spam regulations. The current act enables Internet users to refuse unsolicited e-mails.

No one is allowed to send direct marketing (DM) mails for profit contrary to an addressee’s explicit refusal. Spammers in violation of this prohibition can be fined up to 30 million won (equivalent to US$31,000). E-mail senders are required to indicate “AD” or “DM” in the e-mail’s subject line. The content should include an explanation as to how to refuse the unsolicited message, the source where the e-mail address(es) were collected, and some useful information about the sender. Using technological means to avoid refusal or to register e-mail addresses for the purposes of DM automatically is also subject to a fine.

If a data subject suffers any damage as a result of the information service provider (“ISP”) violating the data protection provisions, the data subject may claim for damages against the ISP. Claims for damages may be filed with the Personal Information Dispute Mediation Committee (“PIDMC”) or with the court depending on the amount of damages.

Further anti-spam amendments

During the last couple of years, there have been anti-spam amendments to the Act. The amendment in January 2004 called for ISPs to protect Internet users’ personal information by preventing spammers from collecting, abusing or misusing such information:

a. When an ISP wants to obtain the consent of a user, it shall notify the user of the installation and operation of automatic data collection devices including Internet log-in data files, and it shall stipulate such matters in the general terms of a service contract.

b. The Minister of Information and Communication (“MIC”) may develop and distribute the software to stop, and report to the authorities, the unsolicited commercial e-mails.

c. A user’s right is confirmed with respect to the provision of his or her personal information. The MIC may implement mandatory data protection guidelines for the security measures of the information and communications network to enhance security. The MIC may establish some standards necessary for data protection.

d. In order to facilitate a dispute settlement, a 15-member PIDMC will put minor personal information disputes to a sub-panel composed of five or less Committee members.

e. ISPs shall not make an agreement in violation of data protection provisions.

f. Attempts at invasion without authorization or beyond the authorized capacity to access another’s information and communications networks, for illegal purposes, is subject to imprisonment for up to three years or fines not exceeding 30 million won.

In December 2004, when some lawmakers were busy making proposals for comprehensive data protection, the National Assembly passed an amendment with its entry into force three months later. It purported to prevent illegal and harmful information in cyberspace and to minimize users’ inconvenience by curtailing non-selective unsolicited messages.

g. The MIC is required to make a policy to develop and to distribute data protection technologies.

h. Anybody, and this includes - of course - ISPs, is strictly prohibited from transmitting or exhibiting media and contents which are harmful to minors. ISPs whose daily website viewers and average sales for the previous three months exceed a certain criteria, shall have an in-house guardian protecting minors from any harmful content and receiving complaints from youngsters in line with a self-regulatory framework.

i. Any transmission of commercial messages via telephone and facsimile without prior permission of the addressee is prohibited. However, only small businesses with home offices are allowed to transmit commercial messages, without prior permission, to the addressees with whom the senders have established a seller-customer relationship and have collected the addresses like telephone numbers by themselves.

j. Automatic extracting programs to collect e-mail addresses without prior permission from the Internet homepages.
EU DP Commissioners condemn e-mail tracking

EU privacy commissioners warn that the tracking of e-mails without the recipients’ knowledge is in breach of the EU Data Protection Directive. Laura Linkomies reports

The company behind DidTheyReadIt software proudly announces on their website that “When you use DidTheyReadIt, every e-mail that you send is invisibly tracked without alerting the recipient. But when they read your message, you will immediately receive the following information: when, exactly, your e-mail was opened, how long your email remained opened, and where, geographically, your e-mail was viewed.”

The Florida-based software developer, Rampell software, is now at the centre of unwanted attention by the EU Data Protection Working Party, which identifies DidTheyReadIt as a privacy intrusive product in its recent opinion on the provision of e-mail screening services (see box on next page). The group says that this type of processing is secretly performed and in breach of the data protection principles requiring transparency in the collection of personal data. The privacy commissioners continue to say that unambiguous consent from the recipient of the e-mail is necessary.

As there are other similar products on the market, Rampell software feels that the group has taken an unfair aim at them.

Michael Hansen, Administrative Manager of Rampell Software, says: “Nearly every single commercial e-mail is tagged in a way to know if you received it using the exact same system as DidTheyReadIt uses. This is not a novel technology that we designed; it has always existed since the days that e-mail began. We just made it available to consumers.”

But the tricky issue is that recipients are not aware that the e-mails are being tracked. E-mail programmes such as Netscape and Outlook Express also allow the sender to request a return receipt from the recipient. However, the recipient can choose not to reveal whether, and when they opened the e-mail.

A representative from the French Data Protection Commission, the CNIL, explained to PL&B: “When one changes the way a technology is used, in this case web bugs, the whole picture changes - and data protection rules lead to different conclusions. Technology as such is hardly ever illegal. What causes problems is the use organisations make of it. It is a clear fact that the very functioning of DidTheyReadIt runs against the principle of fair collection of data and does not provide for basic data protection rights.”

Rampell software is of the view that the Working Party has not fully understood the technical issues at hand. The company states that it respects privacy, and that the product does not pose any privacy risks to individuals.

How e-mails are tracked

The service Rampell software provides is not new - in fact, the software was launched in 2004. The service can be used in two ways, either by downloading a programme called DidTheyReadIt Background Tracker, that automatically tracks all the e-mails that are sent, or by adding “didtheyreadit.com” to the end of the recipient’s e-mail address. Subscribers are charged $50 a year for the service.

DidTheyReadIt tracks e-mails by using web bugs that are embedded in the e-mail. They are imperceptible image files that detect the IP address of the recipient’s computer, and can then guess where the recipient is located. There are limitations, however, as the software cannot display a web bug in e-mail clients configured to display text only.

Rigo Wenning, Staff Counsel at the World Wide Web Consortium, explains that web bugs have been used by marketers at least since 1998, and does not see DidTheyReadIt as a new