International Trade Regulation of Internet Businesses

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I. Introduction

A. E-Businesses Go Global

In only 20 years, the Internet has become an ocean for the cross-border transport of information, goods, services and software. New forms of virtual e-business enterprises have rapidly scaled into global enterprises and become a major component of global trade. Nimble, disruptive new virtual enterprises have emerged as software-driven SaaS services, highly scalable and globally uniform,[1] or as IT-enabled remote services.[2] Internet "e-business" models have reshaped the global workforce, decentralized company operations away from headquarters, recentralized employees into shared services and outsourced service centers and created work-at-home industries.

Given their ubiquity and disruption, e-businesses have also become the targets of political power, with potential for becoming victims of censorship or exclusion from local markets for political reasons.[3] E-businesses also face a new political world, dependent upon on global legal protections of intellectual property and constrained by conflicting laws on operations and taxation. They must thread the needle across complex regulation, particularly on privacy, data protection and consumer protection.

The current legal framework of global business and taxation of remotely provided wares was developed in the era before large-scale Internet businesses. Current developments in "international trade regulation" of Internet-enabled businesses are anticipated to change U.S.-EU bilateral "free trade" relations and national rights to regulate "Internet freedoms" under a UN agency.[4] These changes will impact opportunities for startups, equity investments and online or remote business services.

B. Current Trade Regulation of E-Businesses

Trade regulation reflects national treatment of imports. Abuses by exporting countries are typically resolved by the imposition of countervailing duties to offset foreign export subsidies, anti-dumping duties to prevent import sales at "less than fair value," and other forms of politically inspired economic retaliation against the "abusive" foreign country's exports. In the context of international e-business, "trade regulation" and "free trade" relate to market access and non-tariff barriers, where traditional anti-abuse rules are unlikely to be needed.

International trade regulation involving free trade agreements (FTAs) represent a partial relinquishment of sovereignty in order to gain economic benefits.

1. WTO Multilateral "Free Trade" Framework

The World Trade Organization adopted the Uruguay Round trade agreements in 1994. The WTO Trade Agreements on Intellectual Property ("TRIPs"), Trade in Services and Trade-Related Investment Measures ("TRIMs")[5] require member countries to provide non-discriminatory treatment, to make trade concessions available to all others under the "most favored nation" principle, and maintain transparency in regulation of trade. As a result, the global service economy expanded through outsourcing and offshoring of IT-enabled services.

2. UN's ITU Multilateral "Regulatory" Framework

Until December 2012, there was no multilateral regulation of "Internet freedoms." In a surprise move, in December 2012, 89 countries adhered to International Telecommunications Regulations (ITRs) of the International Telecommunications Union, a UN body consisting of countries as the only members. The ITRs claim to be a "binding global" treaty "designed to facilitate international interconnection and interoperability of information and communication services, as well as ensuring their efficiency and widespread public usefulness and availability." The treaty sets out general principles for "assuring the free flow of information around the world, promoting affordable and equitable access for all and laying the foundation for ongoing innovation and market growth."[6]

However, the treaty also assures the rights of governments to regulate the uses of the Internet locally. Hence, it was not accepted by the U.S., India or major European countries because it has the capacity to limit Web freedoms by giving to the ITU jurisdiction over the Internet's operations and content, including the right to censor, reduce telecommunications speeds and limit access to the Internet.[7] As a result, non-signatories to the ITRs have an incentive to develop their own form of Internet freedoms by separate trade negotiations.

II. EU-U.S. Free Trade Negotiations Under TTIP

In response to a global economic slowdown and perceived abuses (such as by "free-riders" and state-owned enterprises, or SOEs) under the WTO agreements, the EU and the U.S. have begun bilateral free trade negotiations in July 2013. Called the Transatlantic Trade and Investment Partnership (TTIP), such trade negotiations seek to promote transatlantic economic growth, not only in e-business, but also in aviation, automobiles, financial services and other important consumer sectors. At France's insistence, it might exclude "cultural" wares such as en-

tertainment delivered in any form (including online) and arts.[8]

III. Conflicts of Law as Barriers to EU-U.S. Trade in E-Business

U.S. IT- and e-businesses have a lot at stake in TTIP. Current non-tariff barriers limit U.S.-EU trade in IP, IT and e-businesses. Currently, more than 13 million American and EU jobs are already supported by transatlantic trade and investment.[9]

A. EU Restrictions

American e-businesses must comply with European Union internal rules when they sell online to European residents. Such European rules include the Directive on Distance Selling,[10] the Data Protection Directive[11] and EU norms on environmental, health and safety of consumer products. Given relatively low tariffs, the comparatively high compliance costs of non-tariff trade barriers in IP, IT, e-businesses and other sectors have become a target for transatlantic trade liberalization.[12]

B. U.S. Restrictions

European sellers face the same problems with a fragmented federal regime of federal, state and local regulation of Internet-based sellers in privacy, data breach notification, value-added taxation and consumer protections such as safety norms[13] and warranties for consumer products.[14]

IV. Harmonizing the Conflicts: The TTIP Agenda

Negotiations between the EU and the United States were scheduled to begin in early July 2013 to boost economic growth in the United States and the EU. As announced by the White House, TTIP aims to:

- Further open EU markets, increasing the $458 billion in goods and private services the United States exported in 2012 to the EU, our largest export market.
- Strengthen rules-based investment to grow the world's largest investment relationship. The United States and the EU already maintain a total of nearly $3.7 trillion in investment in each other's economies (as of 2011).
- Eliminate all tariffs on trade.
- Tackle costly "behind the border" non-tariff barriers that impede the flow of goods, including agricultural goods.
- Obtain improved market access on trade in services.
- Significantly reduce the cost of differences in regulations and standards by promoting greater [regulatory] compatibility, transparency, and cooperation, while maintaining our high levels of health, safety, and environmental protection.
- Develop rules, principles, and new modes of cooperation on issues of global concern, including intellectual property and market-based disciplines addressing state-owned enterprises and discriminatory localization barriers to trade.
- Promote the global competitiveness of small- and medium-sized enterprises.[15]

Arbitration, tariff elimination, non-tariff barriers (especially privacy and data protection rules) are of most concern to e-businesses.

A. Arbitration of Trade-Related Investment Disputes

Under TTIP, U.S. companies investing in European Union would be entitled to a special arbitration under well-established principles for disputes between foreign investors and host governments. Such disputes involve involuntary "taking" (or "indirect appropriation") of private property for governmental purposes. While the European Commission asserts that there have been no such disputes involving intellectual property or other property,[16] there is an increasingly fine line between "police power" and "public order" rights of governments and the "taking" of private property.

For example, a "taking" of an Internet service provider's business might occur when a government shuts down access in order to reduce public debate on social networks. Google's experience in facing interruptions in access and then exiting from mainland China to Hong Kong and then entirely out of China is instructive on the risks of ISPs and e-businesses. A "taking" may also occur when "extortionate" regulatory conditions to market access are imposed that exceed a reasonable state police power.[17]

Use of an arbitral forum in international investment disputes is a voluntary erosion of state sovereignty. As included in bilateral investment treaties (BITs) that the U.S.[18] and the EU[19] each have with less developed countries, such arbitrations have been *effective* in keeping host governments from adopting unusual regulations that stifle commerce and deplete the value of foreign investment. By yielding such sovereignty across the Atlantic, the negotiators hope to inspire others (e.g., India and *China*) to follow the model.

B. Elimination of U.S.-EU Tariffs

1. ***Low Tariffs.*** By definition, a tariff is the customs duty payable upon importation, before goods (or ser-

vices, investments or intellectual property rights and goods and services incorporating such rights) can enter the local market. Since current tariff levels between the U.S. and the EU are approximately 4%, the elimination of tariffs will not be so important as a trade goal.

2. ***Brazil's Tariffs on Importation of Foreign Services.*** As a goal for liberalization of trade, "elimination of tariffs" should also apply to import taxes on foreign-sourced services. Brazil has adopted a regime of tariffs on imported services. Dubbed the ISS, the tax applies to foreign services delivered remotely via the Internet or from a foreign source. Foreign services subject to the ISS tax include Software as a Service (SaaS), remote IT assistance (help desk), outsourced software application development and maintenance (ADM) and online training and educational courses.[20] By targeting such practices of the Brazilians, TTIP could open markets for U.S. and EU service providers to provide such online or remote services to Brazilian customers, assuming Brazil were to join on a multilateral basis later.

C. Cutting "Behind the Border" Non-Tariff Barriers

1. ***Why NTBs Are So Difficult to Free Trade.*** The TTIP negotiations target "barriers that lie behind the customs border—such as differences in technical regulations, standards and certification."[21] By definition, a non-tariff barrier (NTB) impedes the free flow of goods, services, investment and/or intellectual property without imposing any tariff on importation. NTBs are not necessarily "technical barriers to trade' (TBTs).[22] NTB's reflect a country's regulatory framework for protection of consumers, safety, environment and health. For example, the EU and the U.S. each impose consumer product safety standards, but the particular norms are different. As a result, there is little possibility for selling automobiles across the Atlantic.

NTBs are politically sensitive just because they reflect local legislation and administrative rulemaking that are supposedly "neutral" and "technical." However, where technical standards are equivalent, they can be used for protectionism.

The 1994 WTO agreement on the elimination of TBTs barriers opened the door to further negotiations to eliminate NTBs.[23] In Internet businesses, the primary NTBs are those that protect consumers from fraud, invasion of privacy (or one's "private life"), child pornography, civil rights abuses and unfair trade practices. Both the EU and the U.S. have elaborate regimes for consumer protection.

2. ***TTIP Agenda on NTBs.*** The impact of any TTIP agreement would be felt mostly in non-tariff barriers such as consumer safety, privacy, data protection and other compliance requirements for e-businesses:

- The objectives of the [NTB] chapter would be to yield greater openness, transparency, and convergence in regulatory approaches and requirements and related standards-development processes, as well as, inter alia, to reduce redundant and burdensome testing and certification requirements, promote confidence in our respective conformity assessment bodies, and enhance cooperation on conformity assessment and standardization issues globally.
- Cross-cutting disciplines on regulatory coherence and transparency for the development and implementation of efficient, cost-effective, and more compatible regulations for goods and services, including early consultations on significant regulations, use of impact assessments, periodic review of existing regulatory measures, and application of good regulatory practices.
- Provisions or annexes containing additional commitments or steps aimed at promoting regulatory compatibility in specific, mutually agreed goods and services sectors, with the objective of reducing costs stemming from regulatory differences in specific sectors, including consideration of approaches relating to regulatory harmonization, equivalence, or mutual recognition, where appropriate.
- A framework for identifying opportunities for and guiding future regulatory cooperation, including provisions that provide an institutional basis for future progress.[24]

3. ***"Harmonization, Equivalence and Mutual Recognition" for NTBs.*** Current differences in regulatory standards cost businesses substantial compliance costs and delay new product introduction. The TTIP negotiators would pursue the reduction of such non-tariff barriers in three possible ways.

a. *Mutual Recognition.* First, each side could agree to mutually recognize foreign regulations as "legally adequate" to meet its own regulatory purposes, without having to change its own internal regulations. Akin to comity, this solution seems the most likely in areas where the consumer (and the voter) is seen as accepting reciprocity, such as in a "globally compliant" automobile, aircraft, airline service or online business or entertainment service.

b. *Harmonization.* Second, the two sides could change internal regulations by adopting a trade agreement that defines harmonized standards to supersede the existing differences. In such a "lowest common denominator" approach, consumer protections might not be the same, but they could be substantially equivalent, thereby promoting trade. How far the EU and the U.S. might go towards

simplification and harmonization of regulating Internet businesses depends on economics (the number of jobs likely to be created) balanced against public order concerns (consumer protection in each economy).

c. *Equivalence or New Standards.* Third, trade negotiators could liberalize trade by adopting "new" "global" standards for particular industries, or simply declare that their respective standards conform to a new, higher-order standard. In essence, governments would look to experts in non-profit organizations who have already developed, and continue to improve, "best practices" and international "standards" for quality, consumer protection, safety and minimal environmental impact.

4. ***The Disciplines of Standards.*** Adoption of a "standards-based" legal framework would change regulation from one of government-defined rules to process-driven standards that change. Businesses would have to follow processes and procedures for continuous improvement, not merely adhering slavishly to bureaucratic standards adopted in a political process. Moreover, to be politically acceptable, "standards" must be neutral, mature, administered by globally accepted legitimate standards-defining organizations[25] and not controlled by special interests. Finally, any standards-based method for mutual recognition and enforcement of "minimally acceptable" regulations depends on the maturity of the industry. Automobiles and aircraft have a track record over 100 years. Internet-based service industries are younger but maturing.

a. *Consumer Protection Through Quality Standards.* The International Organization for Standardization (ISO) adopted a general "quality" standard, ISO 9000 that demands fulfillment of eight principles for quality in the design and management of goods or services. The revised ISO 9000:2008 series of standards is based on eight quality management principles that senior management can apply for organizational improvement:

1. Customer focus
2. Leadership
3. Involvement of people
4. A "process" approach
5. System approach to management
6. Continual improvement
7. Factual approach to decision-making
8. Mutually beneficial supplier relationships.[26]

Adopting technocratic regulation in lieu of politically driven regulation would be a novel approach and would support harmonization only if the political goals are shared.

b. *Environmental Protection Through "Green" Standards.* When it announced the TTIP trade talks, the EU Commission acknowledged consumers' fears of losing existing EU consumer protection. The Commission announced that TTIP will not eliminate the right of either side to regulate "environmental, safety or health" issues or result in compromises on consumer protection or the environment.[27] In the environmental arena, adoption of international standards would be highly political and dependent on harmonizing potentially conflicting political objectives. Thus, in environmental protection, for example, ISO Standards in the ISO 14000 series specify requirements for establishing an environmental policy, determining environmental impacts of products or services, planning environmental objectives, implementation of programs to meet objectives, corrective action and management review.

D. "Harmonizing" Privacy Rules as an NTB

1. ***The EU's "Adequate Protection" and "Opt-In" Consent Standards.*** Based on the stated NTB and "harmonization" principles, in theory a TTIP agreement could result in harmonized privacy rules. This could occur if the EU merely declared that the U.S. legal regime of data protection is "adequate protection" for the specific rights of EU data subjects under that directive. Harmonization of privacy laws might be feasible by giving American consumers data privacy rights roughly similar to the rights of European residents, though enforcement procedures would have to be developed, and differences in enforcement (such as regulatory versus civil rights litigation) would have to be developed.

Currently, the core of the EU's privacy protections requires organizations collecting personally identifiable information (PII) to (i) identify the purposes (or to be very specific about the purposes), (ii) limit the collection of PII to collecting only those data needed for such purposes, (iii) limit the use and disclosure to what is needed for such purposes and (iv) delete the PII when no longer needed for such purposes. The EU enforces these rules.

The EU adopts an opt-in approach to personal consent, while the U.S. permits an opt-out approach (but does prohibit spam).[28]

The European Commission has recognized that some non-EU countries (even the U.S. in some cases) provide "adequate protection."[29] Canada's privacy law sets forth ten basic principles akin to the EU's eight principles.[30] California's legislature is considering a draft law that would broadly define personal data (to include geolocation, IP address information and many other categories) and give data subjects information about how their personal information is being used.[31]

2. ***Possible New EU "Right to Be Forgotten."*** Harmonization means that new policies on privacy would need to be adopted only after dialogue. For the controversial proposed European "right to be forgotten,"[32] the U.S. constitutional freedom of speech would need to protect the right to comment on someone's behavior.[33] One U.S. diplomat warned that adoption of "the right to be forgotten" would elicit a trade war.[34] Since then, the EU has recognized the vital importance of mutuality in adopting new "fundamental rights" like privacy.

3. ***U.S.'s "Inadequate" Protection by "Opt-Out" or Vague "Opt In."*** Current U.S. privacy rules allow voracious collection of PII with minimal disclosure of uses or aggregation resulting in pinpointing of individuals. U.S. Internet businesses can collect and track sensitive PII such as geolocation, which, when aggregated with other data collected by different services and linked by "cookie" identifiers, can be used commercially. Geolocational data might be disclosed actively (by the individual "signing in" to a geolocational website) or inactively (by GPS tracking). In either case, such data can be used to push an advertising message or discount coupon. Pending U.S. legislation would adopt EU-style disclosure and consent requirements, and would differentiate between "ordinary" PII and "sensitive" PII,[35] and would prohibit employers from obtaining from job applicants or employees "a user name, password, or any other means for accessing a private email account" for any social networking website, or taking employment disciplinary action in case of refusal.[36]

4. ***Conflicting Regimes on Remedies for Privacy Breaches.*** Any TTIP negotiation would require resolution of differences in legal enforcement against breaches of privacy rights. The U.S. approach depends on regulatory enforcement of "unfair trade practices" by the FTC (which can order injunctions and payment of fines) and on private rights of "victims" (and "whistleblowers" protecting victims) for damages under defamation and civil rights laws and, in California, a state data security breach law. The EU approach depends on regulatory enforcement by Data Protection Agencies (DPAs) which levy fines and issue injunctions. EU laws do not generally allow American-style "class actions."

5. ***Possible Convergence***

a. *HIPAA Standards in the U.S.* For certain PII, public policy is identical on both sides of the Atlantic. Under the Data Protection Directive, governments must assure "the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data."[37] That directive includes rules on the electronic exchange, privacy and security of health information. Similarly, under HIPAA and its regulations,[38] the federal government adopts standards for the electronic exchange, privacy and security of health information, including on accountability of organizations and designated agents, obtaining consent, limited uses, limited disclosures, limited retention, accuracy and updates, security safeguards, transparency about privacy practices, individual access and to health matters, limited disclosures and enforcement procedures.[39]

A HIPAA-compliant solution for all PII would be costly to business and would stunt the growth of many e-businesses. So businesses need to understand the costs and risks of an enforcement action under any harmonized privacy protocols under any TTIP FTA.

b. *Mutual Safe Harbor.* The agenda for "market access" invites speculation on possible outcomes based on comity, with reciprocity in respecting each other's regulations as reasonably sufficient to achieve each other's public policy within existing laws. In Internet and e-businesses, liberalization of market access rules might result in making the unilateral adoption by U.S. businesses of the EU data protection and privacy rules (adopted by diplomatic framework in 2000) into a bilateral, reciprocal "Safe Harbor" agreement. European ISPs and e-businesses might be able to adhere to U.S. privacy, data protection and data breach notification rules by some similar bilateral agreement.

Such a reciprocal "Safe Harbor" regime could have significant internal impact on U.S. state and local regulations of e-businesses. While the U.S. Constitution bars the federal government from regulating many "local" state businesses, any e-business uses means of interstate commerce and thus may be used as a jurisdictional basis for U.S. federal governmental harmonization of state and local rules on data protection, privacy and data breach notification on networks that access the Internet.[40]

c. *Prior Approval vs. Self-Governance.* Under French law, the sales of a company's client list requires prior notification to France's DPA.[41] Assuming the EU and the U.S. can agree on substantive equivalency of rights, they must also agree on the mutual recognition of administrative procedures, such as prior approval instead of self-governance and later audit.

6. ***Benefits of Mutual Consultation and Decision-making.*** TTIP raises a fundamental question as to how to best promote trade while protecting a sacred cow (NTB) of the "fundamental rights" of one's citizens. In an ideal world, all nations would adopt basic rights as their own legislation, and trade agreements only achieve a "lowest common denominator" because local legislative processes reflect different cultural and constitutional frameworks. Harmonization requires continuing consultations, and a trade agreement might not be politically acceptable for legislatures or their voters, since a trade agreement is fun-

damentally non-democratic except for the technicality of ratification.

V. Impact of Bilateral FTA on Multilateral Trade

The WTO Doha Round has stalled, if not failed. One purpose of bilateral trade agreements in this context is to set standards for WTO participants that could be adopted by other countries in a new WTO multilateral agreement.[42] TTIP might be used to deny access to the privileged bilateral relationship to "free-rider" countries that sign multilateral trade agreements but practice protectionism. Such protectionism might arise from the state's refusal to arbitrate its own international responsibility for illegal and unfair trade subsidies for export markets, preferring instead to unilaterally impose countervailing duties against another state that adjudicated such subsidies.[43] Or it might arise from the use of SOEs that receive government financial support and dump products in foreign markets at less than fair value[44] or that are "national champions" whose government refuses to permit management to sell their e-business subsidiaries to foreigners.[45] Or it might arise from restrictions on market access to the free-rider's economy. The multilateral liberalization of international trade in services, intellectual property and investment from the Uruguay Round has failed to address the free-rider problem.

The impact would be felt most by China, where protectionist laws and/or SOEs enable it to be free-riders on the MFN and non-discriminatory rules under current WTO agreements. The negotiations could counter "any trade-related issues or disputes that arise due to government censorship or disruption of the Internet among United States trade partners."

VI. Conclusions

Cost-Effective Regulations. TTIP faces the risk of failure if it cannot reduce levels of regulation, reduce compliance costs, and preserve "fundamental rights" and "civil rights." This tightrope will take a few years, but could yield significant benefits.

Consumer Protections. Depending on implementing legislation, consumers or businesses could face a reduction in their current legal rights under U.S. federal and state laws.[46] Any meaningful trade liberalization under a TTIP agreement could be difficult to achieve because policymakers might decide that key consumer protections should not be sacrificed for the sake of improving trade. Consumer groups may oppose any Internet-focused TTIP "harmonization" or reduction in consumer protections as a "back door" tool to defeat existing consumer protections.[47] This argument neglects that each side has strong, and strengthening, policies for consumer protection.

Data Processing Services After Privacy Harmonization. Is privacy harmonization necessary for increased trade and investment? Existing avenues already yield similar results, except that U.S. data centers cannot process EU PII without a Safe Harbor commitment. With a declaration that U.S. privacy rules are "adequate protection" for EU PII, American data centers, software developers and business process outsourcers could have a greater market and might even compete effectively with India and other low-wage countries based on economies of scale.

Employment. TTIP has been promoted as a tool for creating jobs in the EU and the U.S.. But the TTIP agenda omits tech visas. For e-businesses, the jobs that count require technical skills in software design, databases, analytics, business process management and cybersecurity. TTIP could promote employment by including special FTA-approved tech visas,[48] just as the North American Free Trade Agreement does, particularly to support more transatlantic tech services.

Taxation. TTIP's agenda does not include harmonization of sales or VAT taxes on digital goods. Pending U.S. federal legislation might, if enacted, open the debate to administrative simplification of cross-border collection of sales and VAT taxes from e-businesses.[49] Such simplification could be separate from the current OECD, U.S. and EU core principle, under income tax treaties, to impose local income tax only if a foreign enterprise has a "permanent establishment" in the taxing jurisdiction.

Cross-Border Startups. Many EU countries promote startups through R&D tax credits, tax holidays,[50] hiring credits and other incentives. Liberalized trade and investment under a TTIP agreement would heighten the value of comparative incentives in each direction.

Cross-Border Investments. A TTIP agreement alone might not increase investment, but it could increase M&A or joint ventures. The TTIP agenda omits specific attention to how to "simplify" governmental review of cross-border mergers and acquisitions.

Business Participation in the TTIP Process. As a a new process for innovation in regulatory and administrative procedures, TTIP raises expectations but could result in surprises for e-businesses. While businesses do not participate in trade negotiations, they have an interest in identifying the particular foreign NTBs that limit or bar their entry into foreign markets or impose unreasonable burdens. Businesses like automobiles, aviation and data processing need to identify such NTBs and press their governments for reduction of regulatory burdens.

Endnotes

1. E-businesses have adopted new business models across the full spectrum of research and development (e.g., pharmaceuticals),

design (e.g., architecture), marketing and sales, logistics, customer service and assemblages of funding (crowd-funding), professionals (e.g., "hoteling" and virtual professional services organizations).

New businesses have grown from e-discovery and electronic document review and data extraction, mobile gaming, gamification of marketing, health care informatics and distance learning. The "Internet of Things" collects massive data from multiple sensors, interprets data flows and enables high-velocity stock market trading, rapid police response and complex risk management for "smart" businesses. Virtual law firms and virtual global consulting companies relying on shared collective knowledge databases and legal process outsourcing support services are competing for talent and clients.

2. The Internet has spawned "ancillary services" (outsourcing) industries to enable outsourcing of virtually any information technology (ITO) or business process (BPO). E-businesses extend beyond back-office "voice-based" services (such as call centers and help desks) and "non-voice services" (such as the application and development of software, managed network security and data centers, database creation and administration for any kind of non-digital business). Outsourcing services have progressed from nearshore to offshore or some blend, from functional to multi-functional and multi-jurisdictional, and from domestic to global shared service centers for multinationals.

3. Pending U.S. legislation would require the Federal government to identify "any trade-related issues or disputes that arise due to government censorship or disruption of the Internet among United States trade partners." U.S. publicly traded companies would be required to disclose company "policies applicable to the company's internal operations that address human rights due diligence through a statement of policy that is consistent with applicable provisions of the Guidelines for Multinational Enterprises issued by the Organization for Economic Co-operation and Development." Proposed "Global Online Freedom Act of 2013," H.R. 491, §§ 105, 201 (113th Cong.) (introduced Feb. 4, 2013). *See* existing U.S. and foreign export control regulations as well.

4. This article does not address "trade regulation" under the rubric of national security, counterterrorism or state-sponsored espionage or counter-espionage.

5. World Trade Organization, *WTO Legal Texts, The Uruguay Round Agreements*, http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

6. International Telecommunications Union, "Final Acts of the World Conference on International Telecommunications (WCIT-12)," available at http://www.itu.int/pub/S-CONF-WCIT-2012/en (Dec. 2012).

7. Violet Blue, ZD Net, "FCC to Congress: U.N.'s ITU Internet plans 'must be stopped,'" http://www.zdnet.com/fcc-to-congress-u-n-s-itu-internet-plans-must-be-stopped-7000010835/ (Feb. 5, 2013); Stephen Kaufman, "International Treaty Puts Free Internet in Jeopardy," http://iipdigital.usembassy.gov/st/english/article/2013/02/20130205142109.html#axzz2YI8mjXRG (Feb. 5, 2013).

8. Angela Diffley, "France will veto EU-U.S. trade talks if culture is included," http://www.english.rfi.fr/americas/20130613-france-will-veto-eu-us-trade-talks-if-culture-inclded (June 13, 2013); Jean-Pierre Frodon, "*Pourquoi l'Exception Culturelle est un combat légitime*," http://www.slate.fr/story/74443/excection-culturelle-legitime (June 26, 2013).

9. Office of the Press Secretary, U.S. White House, "Fact Sheet: Transatlantic Trade and Investment Partnership," http://www.whitehouse.gov/the-press-office/2013/06/17/fact-sheet-transatlantic-trade-and-investment-partnership-t-tip (June 17, 2013) ["White House TTIP Fact Sheet"].

10. The EU Directive on Distance Selling protects consumer across borders by mandating certain disclosures by online merchants and giving a 14-day period for the consumer to rescind "off-premises" and "distance" (telephone, fax or Internet only) transactions. Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0007:en:NOT.

11. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, *Official Journal L 281, 23/11/1995 P. 0031 – 0050*, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML ["Data Protection Directive"].

12. U.S.-EU High Level Working Group, Final Report, *High Level Working Group on Jobs and Growth*, trade.ec.europa.eu/doclib/html/150519.htm> (Feb 11, 2013) ["HLWG Report"].

13. *See, e.g.*, Consumer Product Safety Act of 1972, Pub. L. 92-573, 88 Stat. 1207 (Oct. 27, 1972), *available at* http://www.cpsc.gov/en/Regulations-Laws--Standards/Statutes/.

14. *See, e.g.*, the minimum federal standards for consumer product warranties under the Magnuson-Moss Consumer Product Warranty Act, 15 U.S.C §§ 2301 *et seq.*, http://uscode.house.gov/download/pls/15C50.txt; implied warranties under Article 2 of the Uniform Commercial Code; and the consumer's rights to rescind unconscionable transactions, if the court determines that "the contract or any clause of the contract to have been unconscionable at the time it was made," under Section 2-302 of the Uniform Commercial Code. See., e.g., NY UCC § 2-302, http://public.leginfo.state.ny.us.

15. White House TTIP Fact Sheet; *see also* Office of the U.S Trade Representative, "Fact Sheet: United States to Negotiate Transatlantic Trade and Investment Partnership with the European Union," http://www.ustr.gov/about-us/press-office/fact-sheets/2013/february/U.S.-EU-TTIP (Feb. 13, 2013).

16. Eur. Comm'n, "FAQ on the EU-U.S. Transatlantic Trade and Investment Partnership ('TTIP')," p. 6, http://trade.ec.europa.eu/doclib/docs/2013/may/tradoc_151351.pdf (June 17, 2013).

17. *Koontz. v. St. John's River Water Mgt. District*, 570 U.S. ___, slip op. at p. 7 (June 25, 2013), http://www.supremecourt.gov/opinions/12pdf/11-1447_4e46.pdf (invalidating a local water district's "extortionate" demands imposed as a condition for granting a permit for construction of improvements on land owned by a builder).

18. U.S. Department of State, "*Bilateral Investment Treaties in Force*," http://www.state.gov/e/eb/ifd/bit/117402.htm. This list includes the Czech Republic, Croatia and Poland, all members of the EU.

19. See generally Nathalie Berlosconi-Osteralder, "*Analysis of the European Commission's Draft Text on Investor-State Dispute Settlement for EU Agreements*," Investment Treaty News, http://www.iisd.org/itn/2012/07/19/analysis-of-the-european-commissions-draft-text-on-investor-state-dispute-settlement-for-eu-agreements/ (June 19, 2012).

20. Egil Fujikawa Nes, "*The Cost of Importing Services into Brazil*," http://thebrazilbusiness.com/article/cost-of-importing-services-to-brazil (Apr. 13, 2011). This tax on imported services is structured like a tariff because it is exonerated and refunded when the imported services are used as a component of another service or product resold in Brazil. *Id.*

21. Eur. Comm'n, "Transatlantic Trade and Investment Partnership (TTIP)," http://ec.europa.eu/trade/policy/in-focus/ttip/ (June 23, 2013).
22. See WTO Agreement on Technical Barriers to Trade, available at World Trade Organization, WTO Legal Texts, The Uruguay Round Agreements, http://www.wto.org/english/docs_e/legal_e/legal_e.htm.
23. World Trade Organization, *"WTO Legal Texts," listing all of Uruguay Round agreements including Agreement on "Technical Barriers to Trade,"* http://www.wto.org/english/docs_e/legal_e/legal_e.htm.
24. HLWG Report, at p. 6.
25. The International Organization for Standardization is a network of national standards organizations that has adopted over 19,500 standards in business and commerce since its inception in 1947. http://www.iso.org/iso/home/about.htm. For automobiles, "SAE International is a global body of scientists, engineers, and practitioners that advances self-propelled vehicle and system knowledge in a neutral forum for the benefit of society." http://www.sae.org/about/board/vision.htm.
26. American Society for Quality, ISO 9000 and Other Quality Standards, http://asq.org/learn-about-quality/iso-9000/overview/overview.html.
27. "The negotiations will not be about lowering standards: they are about getting rid of tariffs and useless red-tape while keeping high standards in place. There will be no compromise whatsoever on safety, consumer protection or the environment. But there will be a willingness to look pragmatically on whether we can do things better and in a more coordinated fashion. Obviously, each side will keep the right to regulate environmental, safety and health issues at the level each side considers appropriate." Eur. Comm'n, "FAQ on the EU-U.S. Transatlantic Trade and Investment Partnership ('TTIP')," p. 6, http://trade.ec.europa.eu/doclib/docs/2013/may/tradoc_151351.pdf (June 17, 2013).
28. Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2013, or "CAN-SPAM Act of 2013," Pub. L 108-187, 117 Stat. 2699, *available at* http://www.ftc.gov/os/caselist/0723041/canspam.pdf.
29. *Id.* Art. 28. Article 25(2) defines what is "adequate protection" for a transfer of EU-sourced personal information to a third country like the U.S.: "2. The adequacy of the level of protection afforded by a third country shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations; particular consideration shall be given to the nature of the data, the purpose and duration of the proposed processing operation or operations, the country of origin and country of final destination, the rules of law, both general and sectoral, in force in the third country in question and the professional rules and security measures which are complied with in that country." The process for determining "adequate protection" is described at Eur. Comm'n, "Commission Decisions on the Adequacy of Protection of Transfers of Personal Data to Another Country," *available at* http://ec.europa.eu/justice/data-protection/document/international-transfers/adequacy/index_en.htm. Qualifying countries are Andorra, Argentina, Australia, Canada, Faeroe Islands, Guernsey, Israel, Isle of Man, Jersey, New Zealand, Switzerland, Uruguay, as to Air Passenger Name Records for airlines reporting to the Department of Homeland Security, and as to voluntary adoption by American companies of EU data privacy rules, the "Safe Harbor" administered by the U.S. Department of Commerce.
30. Canada's Personal Information Protection and Electronic Documents Act ("PIPEDA"); Industry Canada, "Electronic Commerce in Canada," http://www.ic.gc.ca/eic/site/ecic-ceac.nsf/eng/gv00466.html.
31. See California's draft "Right to Know Act of 2013" (Assembly Bill 1291), amending Cal. Civil Code § 1798.83, *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1291.
32. See proposal by Viviane Reding, Vice President, Eur. Comm'n, "The EU Data Protection Reform 2012: Making Europe the Standard Setter for Modern Data Protection Rules in the Digital Age," 5 (Jan. 22, 2012), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/26&format=PDF.
33. For analysis, see Jeffrey Rosen, "The Right to Be Forgotten Online," 64 Stanford U. L. Rev. Online 88 (Feb. 13, 2012), *available at* http://www.stanfordlawreview.org/online/privacy-paradox/right-to-be-forgotten. This debate has been put on the back burner for now.
34. OUT-LAW.com, "U.S. diplomat: If EU allows 'right to be forgotten'...it might spark TRADE WAR, 'Things could really explode' warns U.S. Foreign Service man," (Feb. 5, 2013), *available at* http://www.stanfordlawreview.org/online/privacy-paradox/right-to-be-forgotten.
35. The "Do Not Track Me Online Act of 2011," 112th Cong., H.R. 504 (2011), was never enacted. It would have required the Federal Trade Commission to impose a privacy rule requiring the user's consent to the harvesting, use or disclosure of a PII, on the online activity of the individual, including "(i) the web sites and content from such web sites accessed; (ii) the date and hour of online access; (iii) the computer and geolocation from which online information was accessed; and (iv) the means by which online information was accessed, such as a device, browser, or application," as well as any "unique or substantially unique identifier, such as a customer number or Internet protocol address," name, postal address or other location or email address or the user's "screen" name. *Id.*, § 2(3). "Sensitive" PII would include "precise geolocation information and any information about the individual's activities and relationships associated with such geolocation." A new proposal is pending: "Do Not Track Online Act of 2013," S. 418, 113th Cong., 1st Sess. (Feb. 2, 2013), *available at* http://thomas.loc.gov/cgi-bin/query/z?c113:S.418.
36. See pending "Social Networking Online Protection Act," H.R. 537, 113th Cong., 1st Sess. (Feb. 6, 2013), *available at* http://thomas.loc.gov/cgi-bin/query/z?c113:H.R.537.
37. Data Protection Directive, *supra*, Preamble #68 and Art. 1.
38. Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-191, 100 Stat. 2548 (1996) and 45 CFR Pts. 160 (privacy rule), 162 (data security rule) and 164 (breach notification rule), *available at* http://www.law.cornell.edu/cfr/text/45/160 *et seq.* For U.S. Code citations, see U.S. Govt. Printing Office summary at http://www.gpo.gov/fdsys/pkg/PLAW-104publ191/content-detail.html.
39. See Dept. of Health and Human Services, "Summary of the HIPAA Privacy Rule," *available at* http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/.
40. The Racketeer-Influenced and Corrupt Organizations Act, 42 U.S.C §§ 1961 *et seq.*, adopts "regulation of interstate commerce" as the federal jurisdictional basis for federalizing offenses that would otherwise not be federal offenses.
41. Metro News, «Virgin : «Pouvoir sortir d'un fichier clients est un droit absolu,» quoting French attorney Gérard Haas, *available at* http://www.metronews.fr/high-tech/virgin-pouvoir-sortir-d-un-fichier-clients-est-un-droit-absolu/mmgc!STiH8CObEcoLo/; *X v. Société Bout-Chard*, Arrêt n° 685 du 25 juin 2013 (12-17.037), *available at* http://www.courdecassation.fr/jurisprudence_2/chambre_commerciale_financiere_economique_574/685_25_26909.html (French Cour de Cassation, Chambre commerciale, financière et économique, Docket ECLI:FR:CCASS:2013:CO00685, June 25, 2013).

42. "Furthermore, if the EU and U.S. are able to harmonise many of their regulations and standards, this could act as a basis for creating global rules with all the cost savings and economic benefits that would bring." *Id.*, at p. 9.
43. After the U.S. imposed sanctions on Chinese state-subsidized solar panels in 2011, China did not retaliate. After the EU imposed similar sanctions in 2012, China imposed countervailing duties on wines from France and Spain before any international dispute resolution.
44. In the Cold War era, Communist Poland was found to have "dumped" golf carts at less than fair value, and the U.S. used Spain as a reference "free market" economy for measuring the amount of dumping.
45. In 2013, France refused to permit the sale to Google of Dailymotion, a French subsidiary of a French government-controlled telecom company. This "national pride" exception to free investment rules highlights the hurdles that TTIP negotiators face in providing market access and open investment opportunities.
46. American Presidents have long used international agreements to promote and regulate trade, and American rules can be protected (and changed) when implementing multilateral conventions. In the Berne Convention Implementation Act of 1998, H.R.4262 (100th Cong., 2nd Sess.), 102 Stat. 2853-2861, P.L. 100-568, http://www.gpo.gov/fdsys/pkg/STATUTE-102/pdf/STATUTE-102-Pg2853.pdf (1988), the U.S. did not enact any "moral rights"(which the Berne Convention protects to prevent any post-assignment use (or alteration) of a work of authorship that impugns the author's moral character or reputation during the author's lifetime The U.S. changed its own copyright law by removing the requirement of registration as a prerequisite to instituting an action for copyright infringement, but the remedy for such an action would be limited to injunctive relief (unless the foreign author registered with the U.S. Copyright Office). The enabling law also eliminated the previous requirement that the author put the copyright notice on all copies. See generally, World Intellectual Property Organization (WIPO), "Berne Convention on the Protection of Literary and Artistic Works" of Sept. 9, 1886, as amended; http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html; Reference for Business, "Berne Convention," http://www.referenceforbusiness.com/encyclopedia/Assem-Braz/Berne-Convention.html.
47. Doug Palmer, "Consumer groups worry U.S.-EU trade pact will weaken health, privacy regulations," http://www.reuters.com/article/2013/05/29/us-usa-eu-trade-idUSBRE94S0XP20130529 (May 29, 2013).
48. Current L-1 visas permit "intracompany transferees" of foreign managerial or specialized knowledge workers, but they must have a one-year employment record abroad. An FTA could open the doors without this requirement. Pending U.S. immigration reform bills would increase the quota of H1-B visas, but a TTIP FTA could be exempt from such visa quotas.
49. "Marketplace Fairness Act of 2013," S. 743 (113rd Cong., 1st Sess.), approved by Senate on June 14, 2013, referred to House, *available at* http://thomas.loc.gov/cgi-bin/query/D?c113:2:./temp/~c1134gVtAv::. If enacted, it would establish a federal regime of mandatory collection by Internet-based businesses of U.S. sales taxes imposed currently by over 9,600 domestic taxing jurisdictions. Online retailers grossing more than $1 million per year would be forced to compute and collect taxes in thousands of localities, identify exemptions and tax holidays, submit monthly or quarterly tax returns to the 46 states that have sales taxes, and collect taxes from 565 federally recognized Indian tribes. New state-level "one-stop" collections services and software would soften the burdens.
50. For young innovative companies under eight years old, for example, France grants (i) 100% exoneration of taxes on profits for the first three fiscal years and a 50% abatement for the next two fiscal years, but this ends in 2013; (ii) 100% exemption from annual minimum tax (imposition forfaitaire annuelle) for the entire period of special status; (iii) upon local governmental approval, exemption for seven years on real property taxes (contribution foncière d'entreprises) and (iv) under certain conditions, 100% exemption from capital gains tax upon the sale of shares held by individuals. French Direction Générale des Finances Publiques, FAQ's on «Jeunes Entreprises Innovantes,» *available at* http://www.impots.gouv.fr/portal/dgi/public/popup;jsessionid=PMELAKP3XRPNZQFIEIPSFFA?espId=2&typePage=cpr02&docOid=documentstandard_1656; Direction d'Informations Légales et Administratives, «Jeune Entreprise Innovante ou Universitaire,» http://vosdroits.service-public.fr/professionnels-entreprises/F31188.xhtml.

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Six Things Every In-House Counsel Needs to Know About Employee Privacy Rights

By Joel J. Greenwald

Employers need to monitor their businesses and their workplaces to protect against employee data theft, employee time abuse, and other actions. Employers also have certain obligations to respect their employees' workplace privacy rights. Here are six things every in-house counsel needs to know in order to help their clients do both.

1. Company computer and phone systems are (almost) never private for employees

Under federal and state law, employers can monitor employee activity on company computers and phone systems, but should destroy any expectations of privacy by having clear monitoring policies with signed employee acknowledgements. Even so, employers do not have carte blanche to monitor employees' personal e-mail and phone calls made through company equipment. Once an employer determines that a call or email is personal, then monitoring must generally stop.

2. Employers can look to video surveillance as a method of monitoring employees

Generally, employers can monitor the workplace with video surveillance in public places without employee consent or notice (unless your workplace is unionized, in which case certain bargaining issues arise). New York labor law, however, prevents employers from using video surveillance to monitor employees in restrooms, locker rooms, changing rooms, fitting rooms, or other "room[s] designated by an employer for employees to change their clothes" unless the employer has a court order.[1] Sound recording is prohibited, however, and governed by complex wiretap laws.

3. Employees' public social media activity is not off limits to employers

Information that is freely accessible through the Internet is public information so there is generally no privacy limitation to employers' monitoring of their employees' publicly available activity (e.g., blogging, posting, commenting, "Like"-ing, "Tweet"-ing, etc.). However, employment discrimination laws may come into play and govern how information obtained online can be used (and should be stored).

Additionally, employers should not take actions to circumvent employee password protections on their private social media accounts. New York is poised to join other states in prohibiting employers from asking employees and job applicants for password information.[2]

4. It's a-OK to track employees using GPS

Knowing your employees' locations can be important to track productivity and employee efficiency. To that end, employers may legally use GPS systems to track employees who carry company phones or drive company-provided vehicles—even without notice (although, again, union bargaining rights may trump). Using GPS offers real-time tracking of assets and employees, but tracking during non-work hours is potentially prohibited.

5. Employee images, likenesses, and voice recordings are protected by statute

Sections 50 and 51 of the New York Civil Rights Law protect a person's "name," "portrait," "picture," and—in the case of section 51 only—"voice" from being used for trade or advertising purposes without the person's "written consent."[3] Employers should thus obtain their employees written permission in writing before, for example, shooting pictures or video for a company website or marketing brochure. Under section 50, any "person, firm or corporation" who does otherwise is guilty of a misdemeanor, so prudence is warranted. Section 51 imposes civil liability and authorizes any victim to seek an injunction. Providing employees with a consent form to be signed on hire is a good way to avoid running afoul of these rules.

6. Employee Social Security numbers require enhanced privacy protections

Social Security numbers (SSNs) have enhanced privacy protections under New York law and may only be obtained by employers for taxation and benefits purposes.[4] But, once obtained, employers must handle SSNs with care, including "encrypt[ion]" if necessary.[5] Accordingly, employers generally may not print SSNs on employee IDs and must take other precautions to protect this information.[6] These rules apply not only to full nine-digit SSNs, but also to "any number derived from such number," including the last four digits.[7] Employers enjoy a safe harbor for unintentional violations of these rules resulting from a "bona fide error made notwithstanding the maintenance of procedures reasonably adopted to avoid such error."[8] But access to such information should be restricted to those with a business need to know.[9]