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Editorial

The (data privacy) law hasn't even checked in when technology takes off

Christopher Kuner*, Fred H. Cate**, Christopher Millard**, and Dan Jerker B. Svantesson***

Consider the following opening paragraphs from a Swedish law journal article:

The creation of advanced computer technology has resulted in jurists having to face a range of new and awkward problems. . . . Through interlinking, copying and other automated data processing, modern technology has made it possible to, collect, compare, and combine enormous amounts of data about every person. Also data that in and of itself is not secret can, through its currency, quantity and internal correlation place the individual under the magnifying glass and expose much of his private life . . . ¹ (our translation)

Anyone reading law journal articles within the field of data privacy law, or indeed Internet law, would have come across numerous articles with opening paragraphs such as that quoted above. What makes the quote interesting is that it was written more than 35 years ago!

The article in question was written by Professor Michael Bogdan of Lund University (then docent) and was published in 1978 in *Svensk Juristtidning*. It addresses the world's first national data privacy law, that of Sweden. More specifically, the article grapples with private international law issues stemming from the complexities surrounding *dataflykt* ('data drain' or 'data flight').

There is no doubt that we can learn many things from Professor Bogdan's interesting 1978 article. Here, we merely use it to highlight that (1) many of the key problems that need to be addressed in the modern data privacy law reforms around the world have been debated by academics for a long period, and (2) law reform is a slow process indeed.

Technology developments have been the driving force behind the evolution of data privacy law from the latter's

infancy. In their now classic 1890 article, '*The right to privacy*', Warren and Brandeis' introduced a call for a privacy rights in light of the technological development at the time:

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right 'to be let alone.' Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.' (footnotes omitted)²

There is no difficulty in transplanting this observation to modern day technologies such as Internet surveillance,³ facial recognition,⁴ and Google GLASS.⁵ Technology still is, and will continue to be, the preeminent driving force behind legal developments in the field of data privacy.

Law will never keep up with the speed of technology. This point is so widely accepted that debating it may seem pointless. And examples proving this observation correct abound. In Australia, for example, on 30 January 2006, the Attorney-General asked the Australian Law Reform Commission (ALRC) to conduct an inquiry into the extent to which the Privacy Act 1988 (Cth) and related laws continue to provide an effective framework for the protection of privacy in Australia. The result of this work only took effect in March 2014 when the Privacy Act 1988 (Cth) was amended to address some of the concerns. However, despite the eight years since the work was initiated, it is still ongoing, and at time of

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1 Michael Bogdan, 'Dataflykt över gränserna och den svenska datalagstiftningen', 1978 *Svensk Juristtidning* 1–26, at 1.

2 Louis Brandeis and Samuel Warren, 'The right to privacy' (1890) 4 *Harvard Law Review* 193, at 195.

3 See our Special Issues on Systematic Government Access to Private-Sector Data, volumes 2(4) and 4(1) of *International Data Privacy Law*.

4 Discussed in Christopher Kuner, Fred H. Cate, Christopher Millard, and Dan Svantesson, 'Editorial: Face-to-data—another developing privacy threat' (2013) 3/1 *International Data Privacy Law* 1–2.

5 Discussed in Arye Schreiber, 'Through the looking GLASS: Google Glass™, privacy, and opacity, with an Israeli law twist' (2014) 4/1 *International Data Privacy Law* 69–82.

writing, a new 236 page Discussion Paper has recently been released by the ALRC.⁶

Of course, this concern is not specific to data privacy law. Remaining focused on Australian law for a moment, we can, for example, observe that, while technology has moved on to a stage of ‘software as a service’ (SaaS), Australian law is still grappling with the question of whether downloaded software is to be classed as ‘goods’ or not.⁷

Concerns about the slow speed of legal developments are not limited to domestic law. In fact, the slow pace with which international law moves makes the situation internationally even more concerning. Consider, for example, the preparatory work on a new and ambitious convention initiated by the Hague Conference on Private International Law in 1992.

The previously proposed Convention, which was an initiative of the US government, was called the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, but was commonly referred to as the ‘judgments project’.

Due to a range of factors, the wide scope and great ambitions of the ‘judgment project’ proved impossible at the time, and despite the hard work of the Hague Conference, in late 2003, the ‘judgments project’ was replaced by a much more narrow convention proposal—the Convention on Choice of Court Agreements.

It is interesting to reflect on the status the Internet had when work on the ‘judgments project’ commenced in 1992. In 1992, Internet activities were largely focused on e-mails and so-called bulletin board systems (BBS), and the US National Science Foundation Network (NSFNET) had just a year earlier withdrawn its restriction on commercial use of the Internet, and the phrase “surfing the Internet” had just been coined.

Viewing the Convention on Choice of Court Agreements as a result of the ‘judgments project’, we can note how, in the 13 years it took for the Convention to be finalized, e-commerce and Internet usage went from infancy to a boom, resulting in the blossoming and multifaceted communications medium we have today.

Expressed in numbers, the development is simply staggering. In 1992, there were approximately 1,000,000 Internet hosts, compared with 400,000,000 in 2005. Furthermore, there were only about 50 websites on the Internet in 1992, compared with over 100,000,000 in 2005.

Assuming we have to accept that the law never will keep up with the pace of technological developments, we must still ask how far behind can we accept the law to be?

In the end, perhaps we need to articulate more clearly what exactly we mean when we say that the law cannot keep up with the pace of technology. Perhaps we need to distinguish ‘legal thinking and knowledge’ on the one hand, and ‘legal principles and rules’ on the other? Professor Bogdan’s 1978 article referred to above shows that academic commentary on the relevant legal issues was already at an advanced stage 35 years ago. And looking at a modern technology such as Google GLASS, it is striking in how much detail the legal issues involved have been discussed, analysed, and debated both by academics and other commentators. This highlights that legal thinking and knowledge, as such, is not necessarily always the tortoise while technology is the hare disappearing into the horizon.

The key question is how we can speed up the conversion of legal thinking and knowledge into appropriate legal principles and rules. Here much work is needed.

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⁶ Australian Law Reform Commission, Discussion Paper 80 *Serious Invasions of Privacy in the Digital Era* (March 2014).

⁷ See eg: *Gammasonics Institute for Medical Research Pty Ltd v Comrad Medical Systems Pty Ltd* [2010] NSWSC 267.