

# Other Foreign Legal Provisions Affecting International Online Commerce

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## **Other Foreign Legal Provisions Affecting International Online Commerce**

### **Canadian Foreign Privacy and Data Protection Laws**

The Canadian Personal Information Protection and Electronic Documents Act (PIPEDA),<sup>298</sup> which prohibits, in a commercial context, the collection, use, or disclosure of personal information about Canadian residents without their consent, has been held to apply to foreign companies.<sup>299</sup>

Canada's strict anti-spam law (CASL)<sup>300</sup> and the regulations promulgated thereunder<sup>301</sup> apply to anyone who sends a commercial electronic message<sup>302</sup> to any "electronic address"<sup>303</sup> in Canada. Unlike the U.S. CAN SPAM Act,<sup>304</sup> CASL is an opt-in law: The sender must obtain consent from the recipient before sending a commercial solicitation. The sender must provide full, valid contact information and must not use a false or misleading subject line. There are exceptions for e-mails by potential customers and responses thereto, people who know each other, transaction confirmations, safety notices, and the like.<sup>305</sup> An exception interesting to parties outside Canada is that the law "does not apply to a commercial electronic message . . . if the person who sends the message or causes or permits it to be sent reasonably believes the message will be accessed in a foreign state that is listed in the schedule [a list of more than 100 major countries] and the message conforms to the law of the foreign state that addresses conduct that is substantially similar to conduct prohibited under section 6 of the Act. . . ." <sup>306</sup>

### **Foreign Data Retention Laws**

The first foreign attempts at data retention were made by governments themselves, in the form of laws requiring service providers to permit governmental authorities to tap into all Internet traffic in the country, presumably to allow the government to retain data.<sup>307</sup> Although it is now common knowledge that governments monitor Internet traffic, the current approach is for governments to shift the burden of data retention to the online service provider (which may be a private company if the company has its own e-mail server), by requiring data

retention at the source. The most prominent foreign data retention legal provision is the EU Data Retention Directive,<sup>308</sup> which requires EU member states to enact legislation requiring providers of public electronic communications services, including both phone and Internet providers, to retain traffic and location data for a minimum of six months and up to a maximum of two years, so that these can be made available to law enforcement authorities. The Data Retention Directive has been controversial, and Germany's Constitutional Court held that the directive is unconstitutional.<sup>309</sup>

### **Foreign data localization laws**

Laws are increasingly being promulgated requiring a company anywhere in the world that collects information about a nation's residents store that information on servers physically located within that nation, effectively outlawing cloud servers.<sup>310</sup> The motives behind such laws vary: boosting the domestic IT industry, ensuring the ability to monitor.

### **Foreign decryption back-door laws**

The debate rages on as to whether services that offer message encryption should be required to provide law enforcement with "back doors" – the ability to decrypt messages.<sup>311</sup>

### **Foreign consumer protection laws**

With regard to foreign consumer protection laws that affect online business, the European Union is of primary concern. As was the case for the Privacy Directive, consumer law in the EU is based on several Directives issued by the European Commission. Each member state must pass a national law that complies with the Directives, but the national laws can and do vary. As one commentator stated, "E-shops in Europe currently must deal with twenty-seven consumer protection rules in order to transact business across the Union."<sup>312</sup> The Consumer Goods and Guarantees Directive<sup>313</sup> states that guarantees regarding consumer goods must be clearly stated in writing, and must state that the consumer has certain statutory rights that are unaffected by the guarantee. Individual member states may

adopt more stringent protections. The Consumer Rights Directive<sup>314</sup> regulates consumer contracts for goods, services and digital content entered into away from the business premises (e.g., online); a few areas such as travel, health care, and gambling are not covered. Provisions include pre-contractual information requirements, consumer withdrawal rights, delivery requirements, and surcharge limitations.<sup>315</sup>

### **Other Laws and Rulings**

Europe's highest court, the European Court of Justice, has held that the use of competitor's trademarks as keywords for Internet advertising is not an infringement under European law, as long as consumers can easily determine which company has sponsored the ads.<sup>316</sup> In response, Google announced plans to sell keywords to European advertisers.<sup>317</sup> These advertisers may, however, be found liable for false advertising if the contents of their ads are deceptive.

### **Other EU legislation**

In addition to the EU regulations and directives covered above,, a few other European legal issues are currently of interest to U.S.-based companies. Among them is the Copyright Directive,<sup>318</sup> which, if fully implemented, would effectively put an end to the ability of online providers to allow user-posted content. Its provisions would, among other things, require online providers to affirmatively obtain a copyright license from the owner for every copyrighted work posted by any user, and arrange to pay royalties for the display of copyrighted works, in particular news articles.<sup>319</sup> Providers would have to implement filters and scan uploaded content for copyright infringements.<sup>320</sup> The Directive has been met with disbelief and derision throughout the online industry,<sup>321</sup> and—unusual for any directive—actual street protests.<sup>322</sup> Unlike a regulation, which takes effect immediately upon enactment, the Directive requires every EU member state to enact conforming legislation, a process that will take years and will be controversial at every stage, especially since every EU member state can interpret and implement the Directive in its own way. Major questions remain whether and to what extent any such EU country-level law would be enforceable against a

U.S. company, since, unlike the GDPR, which addresses privacy issues not governed by treaty, the Copyright Directive addresses issues that are governed and indeed pre-empted by the Berne Copyright Convention, such as the remedies available to infringers who try to enforce EU rights in the U.S.

Another aspect of European law of interest only to large online companies is antitrust regulation. Between 2017 and 2019 the European Commission imposed fines totaling almost \$9 billion on Google for antitrust violations.<sup>323</sup>

### **Resolution of International Disputes: Online Aspects**

Online companies wishing to include internationally workable arbitration clauses in their contracts with foreign companies would do well to consult ICANN's list of approved dispute resolution service providers.<sup>324</sup> Although the list was compiled for the purposes of resolving international domain name disputes, the providers are generally recognized international alternative dispute resolution (ADR) organizations. In 2014, the International Institute for Conflict Prevention and Resolution (CPR) released a new set of Rules for Administered Arbitration of International Disputes. According to a CPR press release, "The new Rules . . . reflect best practices, including the arbitration work of UNCITRAL, and address current issues in international arbitration, such as arbitrator impartiality, lengthy time frames to reach resolution, burdensome and unpredictable administrative costs and requirements."<sup>325</sup>

**298 S.C. 2000, c. 5, ss. 2.**

**299 Lawson v. Accusearch, Inc. (F.C.), 2007 FC 125, [2007] 4 F.C.R. 314 (Feb. 5, 2007), available at**

<https://www.canadianjusticereviewboard.ca/articles-caselaw/case-law/lawson-v.-accusearch-inc-and-the-privacy-commissioner-of-canada-2007-fc-125.pdf>.

**300** An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act ("CASL") (Consolidated Acts of Canada, S.C. 2010, c. 23).

**301** Electronic Commerce Protection Regulations, 81000-2-175 (SOR/DORS) ("CASL Regulations").

**302** The act covers the sending of any "electronic message," which is defined as "a message sent by any means of telecommunication, including a text, sound, voice or image message." CASL § 1.

**303** "Electronic address" is defined to mean "an address used in connection with the transmission of an electronic message to (a) an electronic mail account; (b) an instant messaging account; (c) a telephone account; or (d) any similar account." CASL § 1.

**304 Pub. L. No. 99-508, 100 Stat. 1848 (1986).**

**305 CASL § 6.**

**306 CASL, § 3(f).**

**307** The first publicly disclosed law in this respect was in January 2000, when Vladimir Putin signed into law a provision allowing the Russian FSB, the KGB's successor, to be hard-wired to each of Russia's ISPs in order to have real-time access to all electronic traffic such as e-mail. A summary of the Russian law is at "Russia: Surveillance of Communications," in Statewatch (June 2000), available at <http://www.statewatch.org/news/jun00/rip3.htm>. In August 2000, the UK followed the KGB's example but added even more invasive provisions by enacting the "Regulation of Investigatory Powers Act 2000," Public Acts of the UK Parliament 2000, Ch. 23, available at <http://www.legislation.gov.uk/ukpga/2000/23/contents>, which requires all ISPs in the UK to route a copy of all data passing through their systems to MI5, the British secret police. Under the act, all subjects in the UK must surrender all passwords and decryption codes whenever a public authority demands them, and if the code belongs to a private company, the individual may not reveal to the company that the codes have been compromised.

**308 EU's Data Retention Directive, O.J. L 105, P.0054-0063 (2006/24/06/EC), available at** [http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0024:EN:HTML)

[lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0024:EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0024:EN:HTML).  
**309** BVerfG, 1 BvR 256/08 vom 2.3.2010, Absatz-Nr. (1-345), available at [www.bverfg.de/entscheidungen/rs20100302\\_1bvr025608.html](http://www.bverfg.de/entscheidungen/rs20100302_1bvr025608.html). An English-language report can be found at

<http://www.spiegel.de/international/germany/0,1518,681251,00.html>.

**310** Russia is perhaps the most prominent example; the Russian telecommunications agency Rozkomnadzor blocks or is threatening to block

any company that does not comply. Rozkomnadzor has blocked LinkedIn for refusing to comply; other companies such as Google, Apple, and Alibaba have complied.

**311** Russia requires this and has blocked the Telegram messaging service for failure to comply. Russia's biggest online company, Yandex, has not complied but is not yet blocked. (Yandex is registered in the Netherlands.)

**312** Schulte-Noelke, presentation at Organization for Economic Cooperation and Development conference, Washington D.C., Dec. 8, 2009; [www.oecd.org/ict/econsumerconference/44191927.pdf](http://www.oecd.org/ict/econsumerconference/44191927.pdf).

**313** Directive 1999/44/EE (25 May 1999) on certain aspects of the sale of consumer goods and associated guarantees, O. Jour. EC L 171/12, 07.07.1999, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:171:0012:0016:EN:PDF>

**314 Directive 2011/83/EU (25 Oct. 2011).**

**315 The European Commission has posted an explanation and guidelines at "The Directive on Human Rights,"**

[http://ec.europa.eu/consumers/consumer\\_rights/rights-contracts/directive/index\\_en.htm](http://ec.europa.eu/consumers/consumer_rights/rights-contracts/directive/index_en.htm).

**316** Gordon, "EU Court Rules on Ad Keywords," Wall Street Journal (July 9, 2010), at B5.

**317** Bodoni and Schweizer, "Google to Allow Trademarked Keywords Following European Union Ruling," Bloomberg News (Aug. 4, 2010), available at <http://www.bloomberg.com/news/articles/2010-08-04/google-to-allow-advertisers-to-use-trademarked-keywords-after-eu-ruling>.

**318** Directive (EU) 2019/ (Apr. 25, 2019), amending the previous Copyright Directive 2001/29/EC as well as the Database Directive 96/9/EC.

**319 Art. 11.**

**320 Art. 17.**

**321 See, e.g. Karnitschnig and Kayali, "Google's last stand on copyright," Politico (Dec. 12, 2018), available at**

<https://www.politico.eu/article/google-last-stand-copyright-rules-silicon-valley-eu-fight/>.

**322** Schulze, "Thousands protest against controversial EU internet law claiming it will enable online censorship," CNBC online (March 25, 2019), available at <https://www.cnbc.com/2019/03/25/protesters-in-germany-say-new-eu-law-will-enable-online-censorship.html>.

**323 Reported in Ranger, "Google hit with €1.49 billion antitrust fine by Europe over online advertising," ZDNet, Mar. 20, 2019**

<https://www.zdnet.com/article/google-hit-with-eur1-49-billion-antitrust-fine-by-europe-over-online-advertising/>. For an example of the basis for such fines, see European Commission, "Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service" (Factsheet), June 27, 2017.

**324** [https://www.icann.org/resources/pages/policy-2012-02-25-en?routing\\_type=path](https://www.icann.org/resources/pages/policy-2012-02-25-en?routing_type=path).

**325 CPR press release, Dec. 3, 2014. The rules are posted on the CPR website, [www.cpradr.org](http://www.cpradr.org).**

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