SUMMER 2019

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Higher Education HIGHLIGHTS

The Newsletter of the Higher Education Practice

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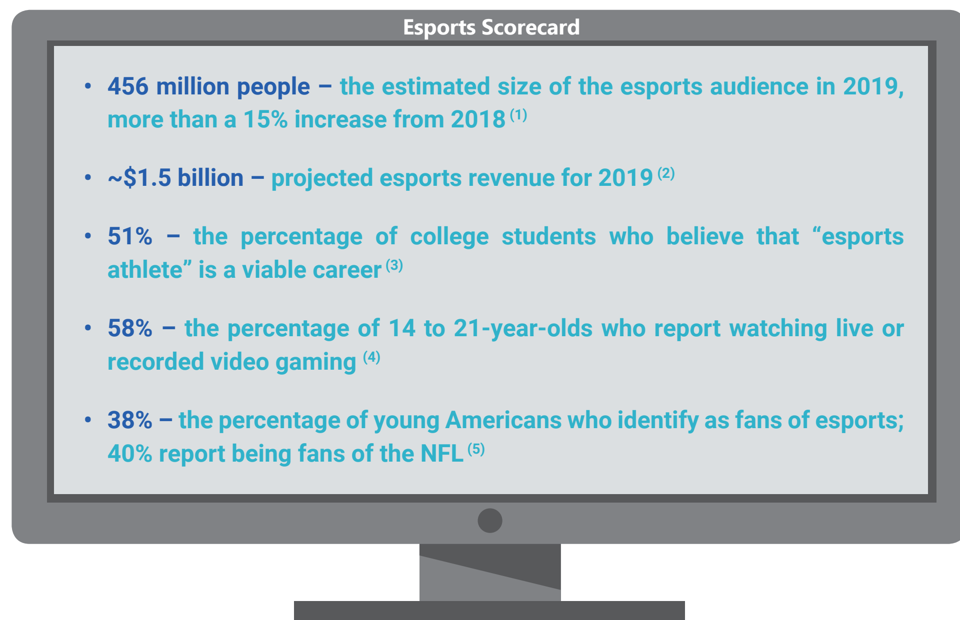
Collegiate esports: an expanding "field of play" with emerging legal implications

By: Amy Piccola and Andrea Brockway

Electronic sports (esports), also known as competitive video and computer gaming, continues to boom in popularity. Esports is a spectator-driven phenomenon: some reports estimate the global esports audience will total 456 million in 2019, a sizeable increase from the 395 million-person audience in 2018, and industry revenue generated in 2019 could reach nearly $1.5 billion. [1-2]



This explosive growth is notable at the collegiate level. The National Association of Collegiate Esports ("NACE"), a nonprofit membership organization focused on growing and advancing collegiate varsity esports, reports that at the time of its inception in 2016 only 7 colleges and universities had varsity esports programs; NACE now reports 130+ member institutions, 3,000+ student athletes, and $15 million in esports scholarships and aid.[6]

1. Jelle Kooistra, *Newzoo's Trends to Watch in 2019*, NEWZOO (January 3, 2019), https://newzoo.com/insights/articles/newzoos-trends-to-watch-in-2019/.
2. Cynthia Ramsaran, *Taylor's 2019 Esports Trends Report*, TAYLOR (February 8, 2019), https://taylorstrategy.com/2019-esports-trends-report/.
3. Rebecca Heilweil, *Infoporn: College Esports Players Are Cashing in Big*, WIRED (Jan. 21, 2019), https://www.wired.com/story/infoporn-college-esports-players-cashing-in-big/.
4. Jacqueline Martinelli, *The Challenges of Implementing a Governing Body for Regulating Esports*, 26 U. Miami Int'l & Comp. L. Rev. 499, 504 (Spring 2019).
5. *Id.*
6. The National Association of College Esports, https://nacesports.org/about/; for a list of NACE members and higher education varsity programs see Sean Morrison, *List of varsity esports programs spans North America*, ESPN, https://www.espn.com/esports/story/_/id/21152905/college-esports-list-varsity-esports-programs-north-america.

The collegiate "field of play"

According to one report, 51 percent of college students believe that esports athlete is a viable career. [7] Recognizing the trend, many institutions of higher education are leveraging collegiate esporting opportunities as a recruitment tool to draw a broader student population. Some schools have developed a specialized esports curriculum while others recognize "official" esports teams and offer esports scholarships. By investing in esports programming, colleges and universities may also attract – and draw revenue from – a new and different fan-base from that of their traditional collegiate sports teams. Popular games such as League of Legends ("LoL") and Rocket League feature official collegiate leagues. [8] More than 80 colleges have official LoL teams,[9] and many schools offer scholarships specifically for LoL gamers. [10] Tespa, a collegiate esports organization including a network of college chapters, ESPN, and others, have held widely popular esports competitions in arena-sized gaming venues. In May 2019, ESPN Events (teaming up with Tespa, Collegiate StarLeague, and others) held its first ever collegiate esports championship, with 22 qualifying teams from 20 higher education institutions. All 5 of the winning teams will receive scholarships. [11]

The "rules of the game"

With rapid industry growth in the past year alone, there have been some apparent growing pains, especially relating to the collegiate level governance of esports. The NCAA's Board of Governors decided on April 30, 2019 to shelve the prospect of the organization's oversight of esports and the holding of esports competitions.[12] Prior to this decision, NCAA president Mark Emmert had expressed concerns with diversity and inclusion in esports. According to statements made by President Emmert at the organization's annual conference this past January, 95 percent of esports competitors are male. [13] Emmert is also reported to have cited concerns of "misogyny" and "violence" in esports content, and "concerns about health and wellness around those games."[14] To that end, the NCAA's recent decision to decline adoption of college esports is no doubt related, at least in part, to the question of how, if at all, Title IX regulations would affect esporting eligibility, participation, and scholarships.[15] It should be noted that many in the esports community are opposed to NCAA governance, arguing regulations tailored to traditional sporting may curb the growth of collegiate esports, and hinder gamers' opportunities to win prize money or collect through streaming. [16]

Although the NCAA has opted to sit on the sidelines, on May 22, 2019, LoL publisher Riot Games announced the creation of a governing body to oversee its college and high school esports. [17] The Riot Scholastic Association of America ("RSAA"), which will only oversee LoL competitions, has a six-member advisory board that includes some university representatives. [18]

Despite tremendous growth in fan-base and revenue, the regulation of collegiate esports remains nascent. While schools have started to recognize and thus legitimize esports, there is a patchwork of organization, governance, regulation, and competition across intercollegiate esports. So, while RSAA's announcement is a step in the right direction in creating a governance framework, collegiate esports would perhaps benefit from a single body establishing uniform rules.

Legal considerations for collegiate esports: reviewing the "playbook" from professional esports

Esports implicates a constellation of areas of law including sports, entertainment, employment, antitrust, immigration, and intellectual property and trademark. While the legal framework supporting, and some may argue, hindering, professional esports is still developing in its own right, those involved in (or trying to manage) collegiate esports can take some cues and learn lessons from their professional counterparts. For example, legal issues have emerged around professionals' "gamer" contracts. Leading the charge is professional gamer Turner "Tfue" Tenney who recently sued esports entertainment company Faze Clan Inc., his agent, alleging the company signed him to an exploitive contract that entitles it to 80 percent of any third-party revenue for his streamed videos. *See Tenney v. Faze Clan Inc. et al.*, No. 19STCV17341, complaint filed, 2019 WL 2195136 (Cal. Super. Ct., L.A. Cty. May 20, 2019) (alleging the "onerous" and "one-sided" gamer agreement limits his competition for sponsors). Contracting parties should also be mindful of state and federal regulations relating to health insurance, wages, overtime, and non-compete and arbitration provisions. Other considerations such as gamers unions and collective bargaining rights may be on the horizon.

With industry watchers agreeing that esports athletes will continue to be featured in popular marketing campaigns (even Nike got into the game, featuring professional LoL gamer Jian "Uzi" Zihao alongside LeBron James in its 2018 Chinese "Dribble &" campaign), endorsement and merchandising deals will, and should, be subject

7. *See* fn. 3 *supra*
8. Andrew Hayward, *NCAA Votes to Not Govern Collegiate Esports*, THE ESPORTS OBSERVER (May 17, 2019), https://esportsobserver.com/ncaa-nogo-collegiate-esports/.
9. *While NCAA stalls game publisher forms college esports body*, AP NEWS (May 22, 2019), https://www.apnews.com/1cd02c47b7004823a8a41f84090465f0.
10. Tom Schad, *NCAA tables possibility of overseeing esports*, USA TODAY (May 21, 2019), https://www.usatoday.com/story/sports/college/2019/05/21/ncaa-and-esports-not-just-yet-organization-tables-possibility/3751122002/.
11. Press Release, *ESPN EVENTS* (May 12, 2019).
12. *See* fn. 8 *supra*
13. *NCAA's Emmert Talks Impact of Sports Betting, Concerns on Esports*, SBJ DAILY (Jan. 25, 2019), https://www.sportsbusinessdaily.com/Daily/Issues/2019/01/25/Colleges/NCAA.aspx. It should be noted that other sources dispute the 95% statistic. See e.g., Tim Reynolds, *NCAA's Emmert expresses concern over wagering, esports*, AP NEWS (Jan. 24, 2019), https://www.apnews.com/7d62e621e8dd4c3bb1edfc54363c40c6 (noting other studies "suggest the gap between male and female [esports] players – while still tilted heavily toward men – is much smaller than [95%]").
14. *Id.*
15. *See* fn. 8 *supra*
16. *See* fn. 9 *supra*
17. *See* fn. 8 *supra*
18. *Id.*

to increasing scrutiny. And gamers are not alone – their inventor/developer and publisher counterparts must address intellectual property, licensing content, and franchising issues.

Despite the new frontier, we can anticipate that many of the issues under consideration by, and challenges faced in, the professional sector will replicate themselves in the higher education context (particularly if the area remains free of a cohesive governance structure). Those issues and challenges are set against the backdrop of an even broader question: are collegiate esports properly categorized as a "sport" in the traditional sense or as "extracurricular activities" or "performing arts?"[(19)] It remains to be seen how, and whether, esports will be definitively classified at the collegiate level, creating yet another question mark in the legal landscape. Legal issues cropping up around collegiate esporting may include, to name a few:

- Title IX implications, including for example, recruitment of student athletes, equal opportunity of participation, consideration of creation of co-ed teams, proportional athletic scholarships, esports course offerings, protection against harassment, and diversity;
- Cyberbullying policies and disciplinary implications;
- Funding and budgeting for esports teams and programming;
- Drug abuse and drug testing collegiate esports gamers. Reports of misuse of performance enhancing drugs, "doping," or abuse of prescription medications typically used to treat attention deficit disorder are common;
- Integrity in esports, including regulation of gambling and corruption, such as game rigging;
- Broadcasting rights/streaming agreements;
- Intellectual property, including licensing issues if student-developed content is "published"; and
- Contract and tort law, including for example, allegations of putting esports gamers in a false light and tortious interference with contractual relationships.

This is an exciting and dynamic industry to watch (pun intended) and Saul Ewing Arnstein & Lehr will keep you updated as the legal landscape develops.

19. For a detailed discussion about this still unresolved question see *The Future is Now: Esports Policy Considerations and Potential Litigation*, Holden, Kaburakis, Rodenberg, JOURNAL OF LEGAL ASPECTS OF SPORT, 2017, 27, 46-78 (2017). Notably, the United States, along with Russia, Italy, Denmark, Nepal, China, Korea, South Africa, and Finland all recognize esports participants as professional athletes. The International Olympic Committee similarly recognizes video games as competitive "sports." *See* fn. 4 *supra* at 503.

President Trump's Executive Order on Free Speech Creates Uncertainty for Colleges and Universities

By: Joseph D. Lipchitz and Zachary W. Berk

Promote free speech. This concept sounds simple. Yet, this simple concept has reached the U.S. Supreme Court time and time again, and now it is the subject of an Executive Order. To put in context the new Executive Order, a quick reference to two historical decisions is warranted.

More than 90 years ago, Justice Brandeis called for "more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357 (1927). Nearly 70 years later, though not departing from Justice Brandeis' call for more speech, the U.S. Supreme Court cautioned against government involvement that "*requires* the utterance of a particular message." *Turner Broadcasting System v. Federal Communications Commission*, 512 U.S. 622 (1994)(emphasis added). On March 21, 2019, the Trump Administration elected to wade into the intersection of these two fundamental concepts by issuing the Executive Order, entitled "Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities."

The Executive Order in broad strokes directs 12 federal agencies, including the Department of Education, National Science Foundation, and Department of Defense, along with the Office of Management and Budget, to "take appropriate steps" to ensure that educational institutions receiving federal funding "promote free and open debate on college and university campuses" and "avoid creating environments that stifle competing perspectives."

However, the Executive Order provides no framework as to how the executive agencies are to determine whether a college or university is complying with the Order's policy goals and directives. Similarly, there are no specific penalties for non-compliance, nor any discussion as to how penalties are to be assessed. Yet, the Order comes against a well-documented backdrop of the Executive Branch threatening to withdraw federal funding from academic institutions deemed to be hostile to free speech in the eyes of the Trump Administration.

The Backdrop To The Executive Order

For years, President Trump has been critical of campuses which he felt were unfriendly toward conservative speakers and

writers. For example, in 2017, the University of California at Berkeley cancelled a speech by the right-wing provocateur Milo Yiannopoulos, the former editor of Breitbart News. In response, President Trump tweeted: "If U.C. Berkeley does not allow free speech and practices violence on innocent people with a different view – NO FEDERAL FUNDS?"

The President's Public Remarks Upon Signing The Executive Order

On the afternoon of March 21, 2019, in the East Room of the White House, President Trump, flanked by students representing various conservative causes, reiterated his view that academic institutions deemed "hostile" to free speech should not receive federal funding:

> *In America, the very heart of the university's mission is preparing students for life as citizens in a free society. But even as universities have received billions and billions of dollars from taxpayers, many have become increasingly hostile to free speech and the First Amendment....Under the guise of 'speech codes' and 'safe spaces' and 'trigger warnings,' these universities have tried to restrict free thought, impose total conformity, and shut down the voices of great young Americans like those here today...All of that changes today...Taxpayer dollars should not subsidize anti-First Amendment institutions.*

While the political rationale of the Executive Order was clear, the Order itself provides no clarity on how a school's "commitment" to free speech will be evaluated and judged.

What Does It All Mean?

Given the Executive Order's lack of clarity, specificity, and discussion of due process, many in higher education speculate that this was simply a way for the President to pander to his base. Others fear that the President actually intends for federal bureaucrats to determine what constitutes "promoting free speech." Given the President's history, does that mean institutions must invite alt-right individuals or climate change skeptics to speak or risk the loss of federal funding? Or does it mean that institutions must permit and help facilitate speeches by controversial individuals on campus when they are invited, regardless of the amount of opposition and the speaker's message? Application of the Executive Order in line with the former would likely be deemed unconstitutional and violative of the First Amendment. It is therefore critical to monitor any guidance promulgated by the Department of Education, and other agencies, in response to the Executive Order.

It is equally important to ensure that the fear and uncertainty created by the Executive Order does not lead to the very self-censorship that the First Amendment abhors. That is best accomplished by academic institutions individually and collectively monitoring federal funding levels and ensuring government transparency in the decisions surrounding federal funding.

Hazing Laws: Is Pennsylvania's Strict Law the New Trend?

By: William T. "Toby" Eveland and Andrew Bollinger

Forty-four states and the District of Columbia have anti-hazing laws. Those that do not (yet) have anti-hazing laws on the books include Montana, Wyoming, South Dakota, New Mexico, Alaska and Hawaii.

One of the strictest criminal laws for hazing in the country was just passed in Pennsylvania. In response to the tragic death of Timothy Piazza, Pennsylvania adopted legislation to prevent and criminalize hazing at colleges, universities, and secondary schools. The new law, known as the *Timothy Piazza Anti-hazing Law, 18 Pa. C.S. § 2801*, et seq. (the "law"), implements a variety of new requirements for higher education institutions and imposes strict criminal sanctions.

Since Pennsylvania's law passed, eight states, including Texas, Florida, Indiana, New Jersey, Ohio, South Carolina, California, and Louisiana, have proposed stricter hazing laws. Many of these proposals are comparable to Pennsylvania's law. Therefore, given the possibility that Pennsylvania's strict stance may be indicative of the new trend, below, we answer some of the questions and requirements about the new PA law.

1. **What is the Timothy Piazza Anti-hazing Law, 18 Pa. C.S. § 2801, et seq.?**

   The anti-hazing law expands the scope of activities that constitute hazing and imposes criminal liability on individuals, colleges, universities, secondary schools, and organizations, such as sports teams, fraternities, and sororities, on both a local and national level. Under the law, hazing includes causing, coercing, or forcing a minor or student to do any of the following for the purpose of initiation in or affiliation with an organization: (i) violate federal or state criminal law; (ii) consume any food, liquid, alcohol, drug, or other substance that subjects the individual to a risk of emotional or physical harm; (iii) endure brutality of a physical nature, including whipping, beating, branding, calisthenics, or exposure to the elements; (iv) endure brutality of a mental nature, including activity adversely affecting the mental health or dignity of the individual, sleep deprivation, exclusion from social contact, or conduct that could result in extreme embarrassment; (v) endure brutality of a sexual

nature; (vi) endure any other activity that creates a reasonable likelihood of bodily injury to the person. [1]

One of the components of the new law is the direct imposition of criminal liability on institutions and organizations. Institution is defined as "an institution located within [Pennsylvania] authorized to grant an associate or higher academic degree."[2] Organization is defined as any of the following: (1) a fraternity, sorority, association, corporation, order, society, corps, club or service, social or similar group, whose members are primarily minors, students, or alumni of the organization, an institution or secondary school; or (2) a national or international organization with which a fraternity or sorority or other organization is affiliated. [3] Under the law, institutions and organizations can be held criminally liable if they "intentionally, knowingly or recklessly promote" hazing or aggravated hazing. [4] Fines can range up to $5,000 for each hazing offense and $15,000 for each aggravated hazing offense, and may additionally include any other relief as a court deems "equitable." [5]

2. What does the new law require?

The law requires the immediate adoption of anti-hazing policies by higher education institutions and imposes bi-annual reporting obligations on them. Each institution must maintain a report of "all violations of the institution's anti-hazing policy or Federal or State laws related to hazing that are reported to the institution." The contents of the report must include: (1) the name of the subject of the report; (2) the date when the subject was charged with a violation of the institution's anti-hazing policy or federal or state laws related to hazing; (3) a general description of the violation, investigation, and findings; and (4) the date on which the matter was resolved. [6]

Each institution must adopt a written policy prohibiting hazing and, pursuant to that policy, must adopt rules prohibiting students or "other persons associated with an organization" from engaging in hazing. Each institution must also provide a program for the enforcement of its anti-hazing policy and must adopt appropriate penalties for violations of the policy, which may include: fines, withholding diplomas and transcripts, withdrawal of formal recognition, probation, suspension, dismissal, or expulsion. The initial report was due on January 15, 2019 and required information from the previous five years. Going forward, reports will be due bi-annually on January 1 and August 1. [7]

3. Does the law leave any unanswered questions?

Yes. For instance, how does the new law apply to persons "associated with an organization" if those persons are not students or employees? Further, can an institution be sued in civil court for not following the statute? The law does not address the imposition of civil liability.

Additionally, the new law states that institutions must report "all violations that are reported," but what exactly does this mean? Is the reporting requirement limited to violations that have been "admitted" or "adjudicated," or does it broadly include "allegations?" And what does it mean to say that a matter has been "resolved?"

Further, the report must provide the name of the "subject of the report," but how does an institution include student information without violating the Family Educational Rights and Privacy Act's (FERPA) prohibition against disclosing "personally identifiable information?"

4. Can we expect additional legislation in the future?

Yes. On the heels of Pennsylvania's new anti-hazing law, many states have taken (or are taking) similar action, including California (AB 1155), Florida (SB 1080; HB 727), Indiana (HB 1526), Louisiana (HB 443), New Jersey (S 3039), Ohio (SB 329), South Carolina (H. 3056), and Texas (SB 38). Other states are expected to follow suit.

1. *18 Pa. Stat. and Cons. Stat. Ann. § 2802.*
2. *18 Pa. Stat. and Cons. Stat. Ann. § 2801.*
3. *Id.*
4. *18 Pa. Stat. and Cons. Stat. Ann. § 2804-2805.*
5. *Id.*
6. *18 Pa. Stat. and Cons. Stat. Ann. § 2809.*
7. *18 Pa. Stat. and Cons. Stat. Ann. § 2808.*

Title IX Challenges Against Programs Fostering Gender Diversity on the Rise

By: Carolyn Toll

Within the past year, numerous administrative complaints have been filed with the Department of Education's Office for Civil Rights alleging that collegiate programs supporting women violate Title IX. The complainants argue that because Title IX protects all persons from discrimination on the basis of sex, programs specifically designed to advance women on campus unlawfully discriminate against males.

These "reverse gender" discrimination complaints share a common theme – i.e., that women are no longer underrepresented in higher education and that the alleged "gender favoritism" and "special treatment," offered through these programs, must come to an end.

Who is filing the complaints?

Anyone may file a discrimination complaint with the Office for Civil Rights – the person or organization filing the complaint need not be a direct victim of the alleged discrimination. As a result, male activist organizations have become active in this space. One such organization is the National Coalition for Men, which is the nation's oldest men's nonprofit. For its part, in addition to filing complaints against the University of Pennsylvania and Northeastern University, the National Coalition for Men has formed an all-volunteer law firm that specifically takes on complaints of male discrimination.

High-profile individual complainants include: Kursat Christoff Pekgoz, a University of Southern California PhD Candidate and Mark Perry, a professor at the University of Michigan-Flint.

- Pekgoz, in addition to filing complaints against multiple universities (Yale University, Princeton University, and the University of Southern California, among others), has published an online how-to "guide" for federal complaints against higher education institutions, which he refers to as "a toxic environment against men."
- Perry similarly advocates for what he considers equal protection for men, arguing that women are unlawfully and unfairly "still treated like they're underrepresented, like they're weak and victims and need all this support."

What programs are being targeted?

The most commonly called-into-question programs include:

- scholarships and financial aid targeted at women
- women's networking groups, conferences, initiatives, or events
- women's studies departments
- women's science and engineering chapters

Some of the programs under attack are exclusively available to women, but not all. According to the complaints, even programs that do not specifically bar men from joining may still violate Title IX because of minimal male participation and a discriminatory effect and hostility to men.

What's Next?

The future of these collegiate programs remains murky. As the Department continues to investigate some programs, other institutions have voluntarily removed gender-specific requirements for scholarships and awards, and have opened up clubs, camps, and student organizations to all students, regardless of gender identity.

In a more formal action, Tulane University reached a resolution agreement with the Department relating to female-only scholarships and programs. Under the terms of the resolution agreement, Tulane will ensure that by September 6, 2019 "it is not treating male students differently on the basis of sex" through its financial assistance, experimental learning opportunities, programs, and student organization, and it will provide updated training to ensure nondiscrimination against males. While lacking additional detail, the resolution agreement itself likely signals that the Department is taking these complaints seriously and is ready to take action.

GDPR Year One: Hot Spots for Enforcement Activity

By: Alexander R. Bilus and Patrick M. Hromisin

What can organizations learn from the first year of enforcement of the European Union's General Data Protection Regulation (GDPR)? Quite a bit, if you pay attention to what the EU government regulators are doing.

Over the course of the GDPR's first year, numerous enforcement proceedings have taken place throughout Europe. These actions have been leveled at companies ranging from a Danish taxi company to a Portuguese hospital to the multinational tech giant Google. The penalties dished out by regulators have ranged from orders to stop or limit data processing, to nominal fines, to a fine of €50 million.

These enforcement proceedings show how regulators are prioritizing the myriad new obligations that the GDPR imposes on controllers and processors of personal data. As organizations continue working to understand and comply with GDPR provisions that are sometimes broad and ambiguous, these proceedings provide some helpful concrete examples of how the rubber has met the road. The following are some key aspects of the GDPR that have served as the basis for enforcement actions.

EU Regulators Are Focusing on These Areas of Concern

Validity of Consent

Several organizations have run into enforcement problems in connection with the GDPR's consent provisions. The GDPR requires organizations to obtain consent from individuals for a number of processing operations, including the processing of sensitive personal data (such as biometric data) or certain cross-border data transfers. Organizations also choose to use

consent as their “lawful basis” for a wide variety of other data processing purposes. But consent must be “freely given, specific, informed, and unambiguous,” and must be manifested by “a clear affirmative action.” And it must be as easy for an individual to withdraw consent as it is to give it.

In January of 2019, CNIL (the French data protection authority) fined Google €50 million, the largest fine issued under the GDPR to date, on the basis that Google was not adequately getting its Android phone users’ consent relating to personalized ads and speech recognition. CNIL found that the consent wasn’t valid for two reasons. First, Android users were not adequately informed because Google spread information about its processing across multiple documents relating to multiple software platforms, meaning a user would have to navigate through each document prior to giving consent in order to understand the scope of the consent. Second, Google used a pre-checked “I agree” box on its consent form, which did not satisfy the GDPR’s requirement of a clear affirmative “opt-in” action by a user. CNIL also issued an enforcement order against a smaller company called Vectuary in November of 2018, finding that it had also failed to obtain valid consent for location data used in targeted advertisements.

Similarly, in May of 2019, the United Kingdom Information Commissioner’s Office (“ICO”) issued a finding that Her Majesty’s Revenue and Customs (“HMRC”), the U.K. analogue to the IRS, had violated the GDPR because it didn’t obtain valid consent from users for voice identification it offered on its telephone help line. The ICO determined that consent was required because the voice data counts as “biometric data.” And it further found that the users’ consent was not valid because HMRC didn’t give them sufficient information about how their biometric data would be processed, or give them an opportunity to withdraw their consent.

Security of Personal Data

Other enforcement actions have concentrated on data security. The GPDR requires organizations to “implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk” and process personal data “in a manner that ensures appropriate security of the personal data, including protection against unauthorized or unlawful processing.”

In December of 2018, the Portuguese data protection authority, CNPD, fined a hospital €400,000 because the hospital hadn’t done enough to ensure the security of the personal data it was processing. The CNPD found that the hospital had over 900 users in its system with the access privileges granted to doctors, but only 296 doctors practiced at the hospital during the relevant period. The CNPD also found that doctors could access patient data too freely, and that the hospital hadn’t adequately documented procedures for ensuring the security of patient data. Notably, the CNPD initiated its investigation based on a media report, exemplifying the numerous ways that data privacy issues can come to regulators’ attention.

A German regional data protection authority issued a €20,000 fine against a social media platform called Knuddels in November of 2018, after the platform suffered a breach that exposed the personal data of over 300,000 users. One of the factors leading to the breach was Knuddles’ storage of user passwords in clear text. According to the regulator, the fine was relatively small because after the breach Knuddles cooperated with the government and implemented stronger security measures.

In April of 2019, the Italian data protection authority, Garante, similarly issued a €50,000 fine against a company that administered websites related to the political party known as the Five Star Movement. Garante found that the company employed insufficient security practices, including obsolete security systems that could not be patched, inadequate encryption of user passwords, and improper sharing of users’ credentials. And in the same month, the Norwegian data protection authority, Datatilsynet, issued a €170,000 fine to the municipal government of Bergen, finding that it had not adopted strong enough security measures to safeguard the personal data it was processing.

Notices to Individuals

Another regulator has addressed an organization’s failure to provide adequate notice to individuals about the processing of their personal data. The GDPR requires that controllers of personal data provide a plethora of information to individuals about their processing of that data, including the purpose of the processing, the lawful basis for the processing, how long the data will be stored, and a recitation of the individuals’ rights under the GDPR.

In March of 2019, the Polish Data Protection Authority, PUODO, fined a company €220,000 for not providing privacy notices to individuals whose data it was processing. The company is a provider of business verification services that relies heavily on public records, and in the course of its business, it acquired personal data concerning at least 6.5 million individuals. Under the GDPR, a controller is required to provide privacy notices even when it doesn’t collect data directly from individuals, and in this case, the company only provided notices to the roughly 500,000 individuals for whom it had email addresses. The company argued that the cost of providing notices by mail would nearly equal its annual revenue, but PUODO nevertheless determined that it was required to provide notices to all individuals whose data it was processing.

Data Retention

Finally, one regulator has issued a fine in connection with improper retention of personal data. The GDPR requires controllers of personal data to abide by the principle of “storage limitation,” which means that personal data must be “kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed.”

In March of 2019, the Danish data protection authority levied a fine of 1.2 million Kroner (roughly $180,000) on a taxi company in part because it improperly retained personal data. The company's own data retention policy stated that it needed to retain data collected during a taxi ride for two years. But after two years, the company only deleted the name associated with the ride and kept all other data relating to the ride, including date, GPS coordinates, and payment information. Further, the company associated the ride data with the customer's phone number in its records for an additional three years.

Looking Ahead

While much can be learned from the enforcement actions that have happened to date, more is yet to come: we know that regulators are still in the process of ramping up their enforcement activities. For example, the Irish Data Protection Commissioner has stated that her office's first enforcement decisions will be issued in the summer of 2019. CNIL issued forty-nine orders concerning personal data protection shortfalls by the end of 2018, with only ten instances of monetary penalties. The ICO has imposed no monetary penalties under the GDPR thus far, though it has issued notices of violation in some cases, and it has reported receiving over 19,000 complaints from the public since the GDPR became effective. Each data protection authority is likely to conduct more investigations and issue more penalties over the coming years.

Enforcement actions in year one of the GDPR have emphasized the importance of complying with broad principles such as consent and security, but also with detailed provisions such as privacy notice requirements. As authorities, individuals, and companies continue to reckon with the obligations imposed by the GDPR and the enforcement authority it provides, there will surely be no shortage of notable enforcement actions in the upcoming year.

Timely Warnings: What, When, Why, and How

By: Candace R. McLaren

On April 30, 2019, two students were shot to death while attending class at UNC Charlotte. CNN reports that, in the year since the February 2018 massacre at Stoneman Douglas High School, there has been *one shooting every 11.8 days*. Notably, that number only accounts for K-12 schools; not for the hundreds of college and university campuses nationwide where it has become increasingly common for gunfire to erupt. As a result, school administrators must become adept at managing both the tragic and the unpredictable.

Regardless of experience, thinking and acting strategically in the midst of a crisis is difficult. *Planning and preparation are key*. Not only will that preparedness save lives, it will ensure that, when the dust settles and your emergency response is evaluated - and it *will be* - the protocols and policies that you carefully contemplated and drafted were properly implemented.

One area ripe for after-action review involves Timely Warnings ("TWs"). If there is one thing that my time as the Department of ED's Clery Act Compliance Director taught me, it is that TWs are the *lowest* of the Clery Act's low-hanging fruit. Those decisions – to issue or not to issue a TW – are, by far, the easiest for government officials to Monday-morning-quarterback, and often serve as the quickest path to findings of Clery Act violations. With the benefit of time, hindsight, and documentation, it takes relatively little effort for ED officials to dissect a disaster in order to determine what was done well and what should have been done differently.

TWs may be issued for Clery-reportable crimes, occurring on Clery geography, that have the potential to pose a serious, ongoing threat to the health and safety of a campus community. 34 C.F.R. § 668.46(e). As such, the key to compliance is to determine: (1) when a crime is TW-eligible; and (2) whether the circumstances surrounding that crime make it TW appropriate. 2016 Handbook at 6-12. And determining the appropriateness of a TW is about balance. Many schools fall into the trap of believing that all that is required is the assignment of the task. What they fail to realize is that compliance, or lack thereof, will be determined by the details. So "Dan" may be the person responsible for making TW decisions, but who is to contact Dan to alert him that a Timely Warning-eligible crime has been committed? How is that contact to be made, and within what period of time? What information is to be relayed to Dan? What factors are to determine his assessment? Is Dan to draft and disseminate the warning as well? And what if Dan is sick, on vacation, or otherwise unavailable?

At the opposite end of the spectrum are those schools that make the mistake of believing that "more is more." In other words, rather than trying to determine the "right" circumstances under which to issue TWs, they issue TWs for everything. Car keyed by an ex-girlfriend? TW. Fist fight between roommates? TW. Rival team's mascot theft? TW. What these schools fail to realize is that the unnecessary issuance of these warnings can lead to violations and fines just as the failure to issue necessary TWs can. 2016 Handbook at 6-13, 6-14. Moreover, inundating your campus community with unnecessary warnings puts it at even greater risk, because, when a true emergency arises, no one will be inclined to pay any attention.

So what should you do? *Before* an emergency strikes, assemble a working group to review and discuss your TW policy. Include

members of your Police/Campus Safety Department, your General Counsel's Office, your Clery Act Coordinator, and your school's administration. And make sure to discuss and determine the following:

- What TW training is being provided to your police/campus safety officers, and how often?
- When a TW-eligible crime occurs, what information do you want officers to gather and relay?
- Who is to decide whether to activate your TW protocol, and is that decision to be made by committee, or by one individual?
- What does your TW protocol consider "timely"? (2016 Handbook at 6-12)
- Once the decision to issue a TW is made, who is to draft it and how?
- What system(s) will be used to disseminate it, and what testing of and training on that system is conducted?
- Is the TW reviewed before dissemination, and, if so, how and by whom?
- Once a TW is issued, where will it be saved, how, and by whom?
- How are your school's decisions to issue/not issue TWs being memorialized?
- If the crime is not immediately solved, how will you determine whether follow-up warnings are necessary?

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