

Past, Present and Future of the CCPA

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From GDPR to CCPA

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Setting the political context

- CA has a ballot initiative process enabling people to propose both statutes and constitutional amendments
 - Initiatives require signatures from 5 percent of the votes cast for governor ~360k
 - Initiative sponsors pay canvassers to collect these signatures; less popular initiatives require more \$\$\$
- Once enacted, the legislature cannot amend them without putting the changes to a public vote!
- Adopted in 1910s as robber baron reform

How the CCPA came to be

- Proposed as legislative initiative
- Sponsor Alastair MacTaggart drafted & obtained >600k signatures
 - Conversation with Google engineer
 - Security breaches
 - Cambridge Analytica (FB went neutral on the initiative)
- Decided to withdraw with legislative promise to enact by California Consumer Privacy Act, AB 375 by initiative withdrawal deadline
 - Why?
- Signed by Gov. Brown on Jun 28, 2018, days after introduction
 - Cal. Bus. & Prof. Code § 1798.100
 - Takes effect 1/1/2020

Strategic goals: opt out with bite

- Most people don't know that they need to opt out
 - GLBA ~1% opt out
 - FCRA ~7% opt out
- Opt in has first amendment problems ala *Sorrell v. IMS Health*
- Solution: consumers may delegate their opt out rights from data sale
 - Enhance a market for privacy protection
 - Opt in for children under 16 (CSM, privacy advocates)

Strategic goal: solve the notice problem

- More than half of Americans falsely believe that “privacy policy” = no selling data to third parties
- Solution: “Do Not Sell My Personal Information” disclosure §135
 - Will become basis for first amendment challenge

Strategic goal: redefining data “sharing”

- “Sell” means selling, renting...to another business or third party for monetary or other valuable consideration”

Facebook and Google Are the New Data Brokers

Google and Facebook’s claims about data selling are as false as they are adamant. To understand why one needs to change focus from the platform-advertiser relationship, and concentrate on developer-platform incentives. To grow their platforms, Google and Facebook reward developers—in effect, pay them—with personal information. But even experts in the field miss the point because information practices are opaque and misleading, and because most experience platforms as consumers rather than as developers.

Strategic goal: deter (cheap) waiver of rights

- The CCPA forbids discrimination against consumers for exercising their rights: no denial of, different prices for, or different quality of goods/services
- However, a company may do differential pricing/service "if that difference is reasonably related to the value provided to the *consumer* [should be *business*] by the consumer's data"
- Must clearly disclose terms
- No unjust, unreasonable, coercive, usurious financial incentives
 - ∴ CCPA imposes a ceiling
 - But what would floors look like? What if the value to the business is psychological (lock-in), or some other platform value?

Strategic goal: enforcement w/o opportunism

- Most rights only can be enforced by the CA AG
 - \$2500-\$7500 for intentional violations
 - However, 20% of recovery goes to AG's "Consumer Privacy Fund!"
- Consumers can sue for data breaches (unauthorized access and exfiltration, theft or disclosure) involving sensitive information that result from a business' failure to implement and maintain reasonable security practices

Strategic goal: evergreening

- To prevent the CCPA from becoming irrelevant, the sponsor included several AG responsibilities for updating the law:
 - Broadening categories of “personal information”
 - Exceptions to CCPA to permit lawful data uses
 - How consumers can submit requests
 - Creation of a uniform opt out logo/button
 - Verification of consumer requests

The compliance reality

- Companies are starting to comply because a federal bill is unlikely
- Step 1: Data mapping/inventory
 - GDPR versus non-GDPR clients
- Create agreements with third parties to carry through CCPA obligations to service providers

Future of CCPA

- Safe harbor from litigation
- Align with GDPR
 - Why not shoot for EU “adequacy”?
- Enhance the growing market for privacy competition
- Lots of attention to data “sale,” how about data buys?