

Privacy: It's Not Just A California, Facebook & Google Issue

Privacy Moves From Net Neutrality Offshoot to the Front Page

- After Congress vacated the FCC's 2015 ISP Privacy Order, 24 states plus the District of Columbia considered ISP specific privacy legislation from 2017-18
- Meanwhile in Europe, the EU passed the General Data Protection Regulation of 2016 which imposed privacy regulations on all companies collecting personal data. GDPR went into effect in May 2018
- Then came the FB/Cambridge Analytica scandal
- Privacy moves from a partisan telecommunications/net neutrality issue to the front page of every newspaper

Who Could Forget?

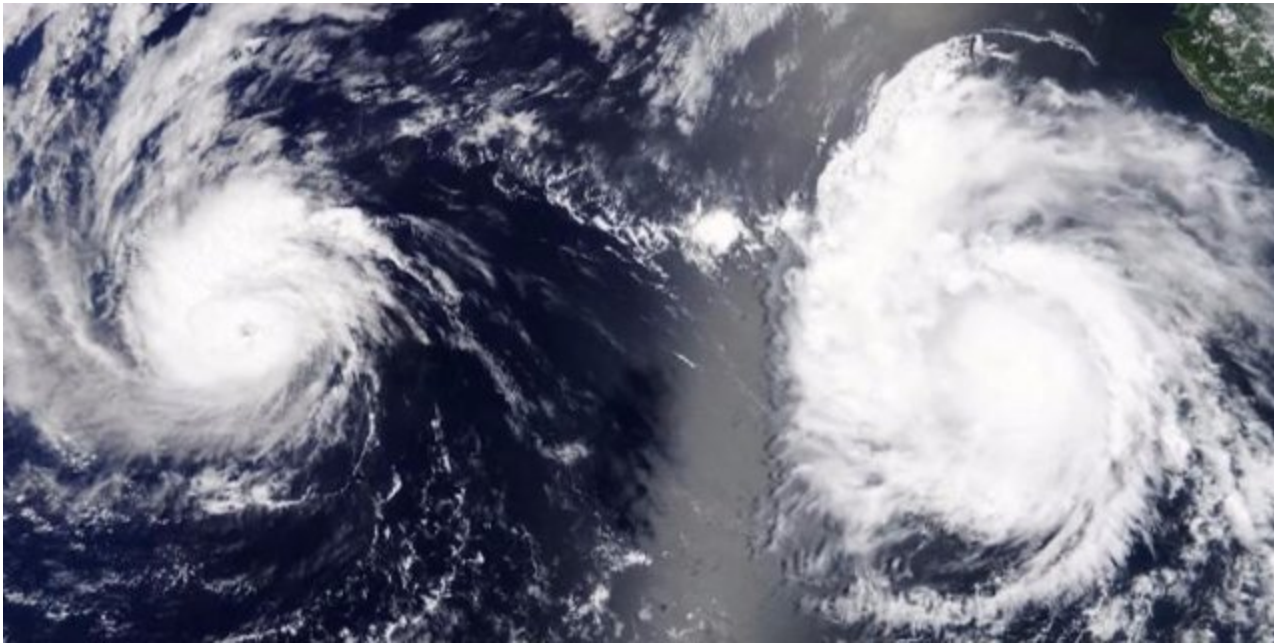


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Why Now?

- The Cambridge Analytica (CA) scandal crystalized in a tangible way the issue consumers disliked most about privacy and the internet:
 - Consumers have no control over who has access to their personal data
- In the CA scandal, CA (a FB App Developer) gave FB users a “personality test”
- By taking the test, those FB users “consented” to provide access to their FB Friends’ personal data -- the FB platform enabled that access (though FB argued that the sale of that data to political organizations violated their TOS)
- Though only 270K FB users took the test, CA obtained personal data on more than 87M FB Users which may have then been used to target political advertising in some fashion

Two Storms Colliding



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California: Cambridge Meets The California Privacy Ballot Initiative

- In August 2017, a California Real Estate investor named Alastair Mactaggert funded an organization dedicated to putting specific privacy regulations on the ballot for the California November 2018 elections. To make the ballot, the initiative needed the signatures of +385K Californians
- On March 17, 2018, the FB/CA story broke
- On April 10-11, 2018, Mark Zuckerberg testified in front of Congress
- On May 4, 2018, Californians for Consumer Privacy filed 625K signatures in support of the ballot initiative (almost 2x the required number)
- On June 28, 2018, Californians for Consumer Privacy withdrew its request for a ballot initiative as the California legislature passed the California Consumer Privacy Act

But It's Not Only California....

- The FB/CA scandal combined with California's passage of the CCPA has triggered a number of states to begin their own legislative processes to protect the privacy of their citizens
 - Washington state appears poised to enact its own privacy bill this month modeled after GDPR (rumor has it that this style of legislation will be pushed in at least 5 other states)
 - As of mid February, 8 other states have introduced California-like (or California-lite) bills targeting the collection and use of personal data
- In Washington DC, the tone suggests that privacy is coming..... Just a question of when and what

Exactly What's In The California Consumer Privacy Act (CCPA)?

- Who is protected?
 - Natural persons (not corporations)
 - California residents (residency defined by California Tax Code)
 - Rights are granted broadly, meaning application broader than just traditional consumers:
 - Students with respect to schools
 - Patients with respect to doctors/hospitals/healthcare providers
 - Employees with respect to employers
- Who Must Comply?
 - Any entity doing business in California with:
 - Annual gross revenue of \$25 Million; or
 - Personal information of 50,000 or more California residents; or
 - 50% or more annual revenue from selling California residents' personal information

CCPA - Personal Information

- Essentially, any information linked to an individual person is considered personal information under the CCPA
- But even data tied to an identifier (a cookie, an advertising identifier, an IP address), a household or a device is considered to be personal information – a major shift
- Personal information also includes any inferences drawn from any of information to create any kind of consumer profile reflecting consumer preferences, characteristics, psychological trends, predispositions, behavior, attitude, intelligence, abilities or aptitudes.

CCPA - Personal Information

- Personal information that includes not only a person's name or address, but any kind of "identifier" like a cookie, an advertising ID, IP Address, MAC address or any other unique identifier that enables linking pieces of data to an individual, household or device
- Personal information includes any "commercial" information, including property records, products or services purchased or considered, purchasing or consuming histories or tendencies (think marketing profiles), biometric information, internet or other electronic network activity (which includes websites visited, browsing or search history, and any consumer interaction with a website, application or advertisement)
- It also includes any form of geolocation data, audio, electronic, visual, thermal, olfactory data; information related to professional, employment, or educational information.

CCPA - Consumer Rights

- Right to Disclosure of the Collection/Use/Sharing/Sale of Personal Information
- Right of Access to Data
- Right to Opt Out of Sale of Personal Information
- Right to Deletion
- Non-Discrimination

CCPA – Disclosure of/Access to of Personal Information

- In advance (via a privacy policy or a specific California Notice)
- Right of Access (in response to a “verifiable consumer request”)
- Notice Must Include:
 - the categories of personal information business collects from the consumer;
 - the source of that data;
 - the business or commercial purpose for the use/processing/sale of the personal information;
 - the categories of third parties with whom the company shares or sell the personal information;
 - categories of personal information sold or shared

CCPA - Opt Out of Sale of Personal Information

- Consumers have the right to direct a business to not sell the consumer's personal information
- Broad Definition of Sale: “[S]elling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating orally, in writing, or by electronic or other means, a consumer's personal information by the business to another business or third party for monetary or other valuable consideration.”
- In many cases, sharing data = selling data
- Do you have analytics or advertiser technology on your website to deliver ads? You are most likely selling personal information.

CCPA - Disclosure of the Collection, Use, or Sharing of Personal Information

- Response to “verifiable consumer request” must also:
 - associate the specific categories of personal information sold with the specific categories of companies with whom the company sold information; and
 - Provide specific pieces of personal information the company has collected about the consumer

CCPA - Deletion

- Broad Right to Request Deletion of personal information subject to limited exceptions
- Personal information once again includes inferences drawn by company from other consumer data
- Service provider must flow through deletion request to all other companies with whom it has shared the consumer's personal information

CCPA - Non-Discrimination

- Consumers have the right to exercise privacy rights without being discriminated against by:
 - Denying goods or services to the consumer;
 - Charging different prices or rates for the goods or services, including use of discounts or other benefits or using penalties for exercise of privacy rights;
 - Providing a different level or quality of goods/services
 - Suggesting that a consumer will receive a different price or rate or a different level of goods/services if the consumer exercises his/her privacy rights

CCPA - Business Obligations

- Notice
 - Must Include a description of the consumers' rights under the CCPA
 - Notice page and Business Homepage must include a Do Not Sell My Personal Information Button that links to automatic opt out
 - Privacy policy or Specific California Disclosure that includes
 - the categories of personal information business collects from the consumer;
 - the source of that data;
 - the business or commercial purpose for the use/processing of the personal information;
 - the categories of third parties with whom the company shares or sells the personal information;
 - categories of personal information sold or shared (if you do not sell personal information then provide a clear statement that says that)

CCPA - Business Obligations

- Respond
 - Respond to Verifiable Consumer Requests
 - Provide at least two methods for consumers to make request
 - Response required within 45 days (with ability for one 45 day extension for cause)
 - Provide last twelve months of data required in privacy policy/California Notice plus
 - Associate the specific categories of personal information sold with the specific categories of companies with whom the company sold information; and
 - Provide specific pieces of personal information the company has collected about the consumer
 - Provide data electronically, on request, in a “readily usable format that allows the consumer to transmit the data from one entity to another entity without hindrance”

CCPA - Business Obligations

- Deletion
 - Honor deletion requests
 - Notify all third parties with whom you have shared or sold personal information of the customer's request for deletion
- Opt Out For Sale of Data
 - Honor consumer requests for opt out of the sale of the consumer's personal information
- Training
 - All personnel who handle questions on privacy or CCPA inquiries/opt out requests must be specifically trained on the consumer's rights and required responses under the CCPA

When Do I Need to Start Thinking About Privacy?

- Companies need to start thinking about privacy now – the “lookback” period is already in effect
- While there are distinct differences in approach – CCPA, the CCPA variants in the other states, GDPR in the EU, Washington State’s pending legislation – all forms share some common characteristics:
 - Identification of the personal information collected about consumers
 - Identification of persons with whom personal information is shared or sold
 - Consumer access to the that personal information
 - The right to request deletion of data

The What – Data Inventory

- In order to comply with any of these different regimes, a business must identify the personal information your company collects about consumers through a data inventory and categorize them
- There is technology available to assist in the data inventory effort. However, as a rule of thumb, the older your underlying systems, the more likely that process is going to be manually intensive.
- Keep in mind, personal information will be obtained or generated for each service; for each phase of service (i.e., sales, provisioning, billing, repair), and through a myriad of channels (call centers, web, applications)
- You must include in this analysis any data that you acquire about consumers from third parties (i.e., demographic or credit data)
- In California, inferences drawn from this data are personal information

The What – Third Party Data

- The other potentially labor intensive task which must be completed is documenting the third parties with whom your company shares/outsources tasks and data
- You will need to identify the parameters under which the data is shared, how it is processed (is it a business purpose under the act or will it constitute a sale of information), and the restrictions on other uses, storage and/or retention
- Once again, you will have to perform this examination on every channel
 - Websites – data analytics or advertising present
 - Billing
 - Call centers

The What – Other Tasks

- Creating processes by which you can receive and respond to customer requests for access to their personal information will also take time
- Creating a process pursuant to which you can both delete data upon request and notify third parties of a deletion request
- Refining existing privacy policies (in the case of California, creating a California specific privacy statement)

Winter is Coming...

- Given the ramp-up of state activity, beginning this process quickly, particularly the tasks around data inventories and tracking third party data sharing/selling, will work to your advantage even if federal legislation stalls
- Because these tasks will be manually intensive, starting them now will play an important role in whether you will be in a position to comply with state or federal requirements in the future