BIG DATA GOVERNANCE - ADVISING THE MARKETING AND DEVELOPMENT TEAM

Pamela J. Garay
AVP & International Privacy Officer, Assurant

Shannon Straw
Senior Assistant General Counsel, YP

Jonathan Soll
Chief Privacy Officer, VP & Assistant GC, Western Union

Amanda M. Witt
Partner, Kilpatrick Townsend & Stockton LLP
“DATA-RELATED” PRIVACY LAWS - BACKGROUND

• It has become “best practices” for a US-based company with US customers to post an “online privacy policy”.

• Privacy Policy is legally required if:
  - Collect PII under California, DE or FL law
  - COPPA, HIPAA, GLB
  - No general Federal Privacy law
  - FTC “Fair Information Practice Principles” : Notice, Choice, Access

• Essence of the laws - tell consumers what you are doing, then adhere to your statements

• If you have “big data” plans, make sure that your Privacy Policy permits such uses.
Mid-2000’s:

• “Online Behavioral Advertising”: means any process used whereby data is collected across multiple web domains owned or operated by different entities to categorize likely consumer interest segments for use in advertising online.
WHAT THE CONSUMER SEES

Tuned in by Leo Michael

...AND, FOR MIDDLE-AGED, LEFT-HANDED BOWLERS WITH ARTHRITIS NAMED JIM, THE PAIN RELIEF COULD BE HUGE!

JIM IS PERSONALLY INTRODUCED TO ADDRESSABLE ADS.
“DATA-RELATED” PRIVACY LAWS - BACKGROUND

• OBA can seem creepy at times by consumers - how should it be addressed?

• Dec. 2007: FTC issues draft self-regulatory principles (kick-started things)
  1. Transparency and consumer control
  2. Reasonable security and limited time for data retention of consumer data
  3. Affirmative consent for material changes to existing privacy promises
  4. Affirmative consent to using sensitive data for OBA
PRIVACY LAWS

Industry Self-Regulatory Initiative
- Digital Advertising Alliance (4A’s, ANA, DMA, IAB, NAI, AAF, BBB) issues Self-Regulatory Guidelines for online behavioral advertising

Government Initiatives
- Federal Trade Commission
- Congress
- Executive Branch (Dept. of Commerce)
- State Attorneys General
APPLICABILITY OF CURRENT LAWS

- Common law privacy and trespass
- CAN-SPAM
- Electronic Communications Privacy Act of 1986
  - Intentional interception of contents of electronic communications using a device (e.g., server?)
  - Intentional disclosure of intercepted material with knowledge of acquisition wrongdoing
  - Certain exceptions for necessary incident and ordinary course and consent
- Computer Fraud and Abuse Act
  - Intentional access exceeding authorization to a protected computer in furtherance of a fraud and damages of $5k; or
  - Intentional transmission of code that accesses a protected computer and causes damages
APPLICABILITY OF CURRENT LAWS

- **FTC Act**
  - Section 5 - Unfair and deceptive trade practices
  - Application to spam, spyware, search and pop-up advertising, information security and behavioral advertising
- **Lanham Act**
  - Misrepresentation or omission of material fact that affects purchasing decision and causes damage
- **The Telephone Consumer Protection Act (TCPA) and FCC Rules**
  - Prohibit texting to mobile numbers without express consent
  - Statutory fines, so significant amounts of litigation
- **Video Privacy Protection Act of 1988**
  - Wrongful disclosure of video tape rental or sale records
  - Not preemptive of broader state video privacy law
PRIVATE LAWS

- Industry Self-Regulatory Principles - mirror FTC guidelines
  - Education, Transparency, Consumer Control, Data Security, Material Changes, Sensitive Data, and Accountability
- OPT OUT / DO NOT TRACK
PRIVACY LAWS

- No longer just “online”
  - Evolved to include **MOBILE**, including mobile Apps
  - Evolved to bring **OFFLINE DATA** into the database for targeting, in an anonymous manner
- COPPA rule for kids marketing
SCENARIO NO. 1

- You work for a children’s TV network
- Your team would like to track underage users as they use the website, monitor what videos they watch on the site and what pages they visit.
- Would also like to target these viewers on social media.
THE LAWS RELEVANT TO SCENARIO NO. 1

- COPPA
- The Video Privacy Protection Act (potentially)
- FTC Guidance
- State Privacy Laws
SCENARIO NO. 2

- Your developers have proposed a new teen-targeted app, StageShow, that uses location data to match schools & students.
- It is targeted to high-schoolers and allows them to share videos and connect locally, but it lacks privacy settings, requests personal information and makes all content public.
- To address privacy, your team proposes the following disclaimer in the Apple App Store:
  
  "Please note: Everything you post in StageShow is always public and viewable by everyone, inside and outside your school. There is no way to limit the audience of your videos. We can't confirm that people who claim to go to a certain school actually go to that school. All videos you upload to your profile are fully public content."
THE LAWS RELEVANT TO SCENARIO NO. 2

- COPPA
- FTC Guidance
- The Privacy Rights for California Minors Law - the Internet Eraser Law
- EU Member State Laws?
- Others?
SCENARIO NO. 3

• Your team wants to develop the “next” Pokemon Go, but to combine it with a dog walking service that they’ll launch in the summer of 2018.
• It primarily targets Europeans, who love dogs.
• Using big data, it leads players to likely dog owners.
• More walks = more points.
THE LAWS RELEVANT TO SCENARIO NO. 3

• GDPR - under Article 4(3aa), “profiling” involves (a) automated processing of personal data; and (b) using that personal data to evaluate certain personal aspects relating to a natural person.

• Specific examples include analyzing or predicting “aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behavior, location or movements.”

• Individuals have a right to opt out from such decisions.

• Such significant automated processing can be used if it is:
  - necessary to enter into, or to perform, a contract between a data subject and controller;
  - authorized by EU or Member State law; or
  - based on the individual’s explicit consent.
SCENARIO NO. 4

• You operate a social media site and you want to partner with advertisers promoting health and medical-related products and services.

• Using big data and monitoring of social media posts, you target ads to your users with likely medical and health needs for the advertisers’ products and services.
THE LAWS RELEVANT TO SCENARIO NO. 4

- The Wiretap Act
- California's Invasion of Privacy Act
- HIPAA (potentially)
- EU Direct Marketing and Privacy Laws
- Others?
BUILD A-TEAM

- Develop good relationships.
- Find early wins.
- Get involved at the start.
- Demonstrate value.
- Use common language.
- Be mindful of culture.
- Be a good partner to or they’ll find a way around you.
- Draw it!
EXAMPLE - PICTURES PLEASE

- Send consumer email with opt in link
- Consumer clicks on link and opts in
- 2nd email sent to consumer to confirm choice
- Record consumer choice
- Send marketing email to consumer

• Use pictures, diagrams, etc. for clarity in international settings
MAKE IT FUNNY - KITTEN’S GUIDE TO CASL

They can’t use pre-checked boxes on their opt-in forms anymore.

Does that mean we have to get out?

From: https://www.smtp2go.com/blog/canadian-anti-spam-law/
PRIVACY (AND SECURITY) BY DEFAULT

- Build rules into the development and marketing processes
- Provide self-service tools (e.g., guidance, checklists) and Help resources
- Tell users when they must obtain approval and from whom
  - No collection or use of PII without approval (e.g., CPO or DPO)
  - New websites and apps require privacy and security review
  - Reasonable turnaround time for requests
PITFALLS TO WATCH OUT FOR

- Be a good partner
- Speak plainly/in person
- Provide options
- Understand the business
- Know client expectations
- Be mindful of culture
- Exercise caution when recording & using video

- Don’t be perceived as “Mr./Ms./Dr. No”
- Don’t speak in legalese
- Don’t be a stranger
- Don’t take it for granted
- Don’t hesitate to ask for help
QUESTIONS?
HOW DID THINGS GO?
(WE REALLY WANT TO KNOW!)

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