Podcast Transcript

The Data Economy and You: Data Revolution: How U.S. Privacy Laws Change the Way Data Should be Managed by Retail and Tech Industries

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Kattman: BakerHostetler is excited to bring you a three-part podcast series, The Data Economy and You. You might have heard the term data is the new oil. In this podcast series, we'll be taking a look at how the recent U.S. privacy laws are revolutionizing what it means to sell data, how data should be governed and managed by retail and tech industries, in particular, because of the new requirements, and what businesses can do to identify and mitigate against regulatory enforcement and litigation risks. I'm Amy Kattman, and you're listening to BakerHosts.

On today's episode, we'll explore these privacy laws and how they affect retail and tech companies. Our guests today are Jeewon Serrato and Craig Carpenter, Partners in the Digital Assets and Data Management Group at BakerHostetler. Jeewon is co-leader of the group's Digital Transformation and Data Economy team, and Craig serves as the Dallas Digital Assets and Data Management leader. Welcome to the show, Jeewon and Craig.

Serrato: Thanks, Amy.

Carpenter: Thanks, Amy. Happy to be here.

Kattman: Jeewon, let's start with you. What is different about the CCPA and why is it so significant?

Serrato: Amy, we planned this three-part podcast series because we are finding that our clients are just getting pulled into so many different directions. And there is really no hiding from these new data economy issues. First, today, we're going to be focused on legal compliance where businesses are trying to keep up with what seems to be a never-ending avalanche of new privacy and consumer protection laws about data. While in the second podcast, we're going to be focused more about the response to the regulatory enforcement inquiries that we're seeing and the litigation claims. And then in the third podcast, we're going to be talking about bringing it back to the business. What is the business behind advertising, and how do we balance it all? And all with limited budgets and uncertain business environments where data optimization and customer engagement are more important than ever.

The significance of the CCPA has been that for some of these privacy concepts like fairness and transparency, that they got codified and there is teeth in the law. The California AG has enforced the law actively since July 2020, and the U.S.'s very first privacy-focused agency, the California Privacy Protection Agency, starting from July 2023, is now dedicated to rulemaking and enforcement of this law. Furthermore, eleven additional states since 2020 have followed California's lead and have enacted laws that provide for new consumer rights as well as data governance and contract requirements. What that means is that the data that was collected and processed by retail and tech industries that were primarily unregulated and are now heavily regulated, and the businesses are having to stand up new privacy programs to comply with these legal requirements. We were privileged to act as defense counsel in several of these California AG investigations over the last three years, including the first ever California AG CCPA settlement, which was publicized last August. And what we learned from those and from ongoing regulatory inquiries is that privacy is no longer a nice to have. For businesses to compete and what's been dubbed as the Data Revolution, access to clean data, data that is actionable without stepping into any of these landmine issues is now table stakes, a must-have and sometimes, even existential.

Kattman: Craig, what do companies think about these new and upcoming privacy laws in the U.S., and how do they impact business strategy?

Carpenter: Yeah, I think for a lot of companies this creates a tricky situation, especially companies in the technology and retail sectors, as Jeewon mentioned, which until recently these haven't really had to operate in a heavily regulated environment for the most part. Especially compared to financial services and healthcare and education, technology and retail have avoided a lot of the heavy data regulations, and so this is a little bit new for them. And so, these companies find themselves in a business environment where, on the one hand, they're trying to get closer to their consumers. And a lot of companies are having this directive come straight from the top, straight from leadership, and the C-suite, and companies are pushing to invest in Omnichannel sales, and look for ways to maximize their marketing budgets with things that have provable ROI. And we see this a lot with the expansion of ad tech over the last few years. And there is this perception on the business side, which I don't think is untrue, that if you're in retail or tech, and you don't play the data game, meaning you don't optimize your first party data, you don't utilize customer insights, and you don't otherwise participate in this data revolution that Jeewon mentioned, you're essentially going to lose, and your competitors are going to pass you up and you're going to lose sales. So, however, on the other hand, as Jeewon mentioned, you're now in this legislative environment where you're not supposed to be doing things like tracking consumers cross-platform and across sites, and you're not supposed to be hoarding this information and keeping it forever as we have in the past. And you're also supposed to be all of a sudden giving consumers additional choices about what information you can collect, and what you can do with it. And so, for me, there is almost this direct conflict and what the business side of these companies want to do, which is get closer to consumers, which, again, I don't know is necessarily a bad thing. And then what the laws are saying, where they're saying you can't do some of these things because we consider it a bad thing. And this conflict is really coming at a time where some of this stuff is what companies want to maybe need to do to thrive in various tough economic environments. And then States and regulators and plaintiff's _______ think that companies shouldn't be doing these things. And so, you see this conflict really starting to arise with the enforcement of CCPA, as Jeewon mentioned. And then especially now in light of some of the recent legislative action coming out of California surrounding data brokers, specifically the Delete Act, and which the term data brokers itself almost even kind of starts to take on this negative connotation, and there is all of a sudden a perception that collecting data on consumers makes you a bad guy.

Kattman: Jeewon, Craig mentioned Delete Act. Would you explain that to our listeners?

Serrato: The Delete Act is an evolution from the CCPA. At least that is the way I'm thinking about it. The CCP already went through a number of amendments, and the Delete Act builds on top of the existing data broker registration requirement in California as well as the very broad definition of what constitutes a data sale. The sponsors of the Delete Act have said that the legislative intent in the Delete Act were to patch an apparent loophole in the CCPA. They wanted the entities to delete, the data brokers to delete the information even if the data was aggregated from other sources, and not collected directly from consumers. The Delete Act will require the California Privacy Protection Agency to create a system by 2026, which would allow consumers to make a single data deletion request to all data brokers. There are currently over 500 data brokers registered, and while there's been discussion about whether this law is constitutional, and we'll see if it survives judicial review and other litigation challenges, the legislative intent is clear. There appears to be strong interest among the lawmakers in trying to give control back to the consumers in terms of how data is proliferated, shared with different third parties, and to make it easy for consumers to opt out of certain data usages. How this law is ultimately going to be implemented starting from the design of this one stop shop deletion mechanism remains to be seen, and our clients are currently very invested in analyzing how their advertising and third-party relationships need to be reassessed based on the challenges anticipated ahead.

Kattman: Thanks, Jeewon. Craig, what is a data broker, and which companies consider themselves to fall under this category?

Carpenter: Yeah, it is interesting. Because, as Jeewon mentioned, the Delete Act builds upon this concept that's been around now for a couple of years of the data broker registration laws. And so, we know that two states, Vermont and perhaps unsurprisingly California enacted data broker laws in 2018 and 2019 respectively. And so, these data broker laws, the first iteration required registration, as Jeewon mentioned, for data brokers. And so, now the Delete Act is coming in to really make the consumer choice easier with respect to data brokers. But the concept of data brokers is not new. And so, the existing acts define the term data broker broadly to include any business that knowingly collects and sells to third parties the personal information of a consumer with whom the business does not have a direct relationship. And this is subject to a few exceptions, including businesses that comply with Graham Leach and the credit reporting agencies, and HIPAA. And so, there is a few exceptions. Interestingly, this year and what we perceive could be a growing trend, Oregon and Texas joined California and Vermont in passing laws requiring data brokers to register within the state. And so, as mentioned, the definition of data broker from these existing laws that is going to be applied in the Delete Act is fairly broad. And like Jeewon alluded to, I think it'll be interesting the impact that this new law will have on the ad tech ecosystem and other companies that we don't traditionally think of as necessarily data brokers, as in companies that sell customer lists, or companies that sell customer attributes as their primary business model. It will also be interesting, I think, to see what, if any, impact this will have on the shift towards retail media networks which leverage first party data, but otherwise provide insights to third parties similar to traditionally what data brokers do. And I think you see this, there is almost an analogy, there is this push to treat data collection online similar to how telemarketing has been regulated for years in the formation of the one stop shop mechanism, which was the do not call list now is what we see coming up in the Delete Act. So, interesting analogy there between the telemarketing regulation.

Kattman: Jeewon, based on what we discussed today, how do you see these regulations changing the way businesses engage in online advertising?

Serrato: The specific focus on online advertising by these new privacy laws have been surprising. It's been a surprising take away for us. While Europe focused on access and deletion rights, the U.S. gave consumers the right to opt out of targeted advertising, and required companies to assess whether certain ad tech activities constitute a “sale” of their customer data. How a company builds websites and mobile apps and how they manage all of the myriads of online tracking technologies that used to be handled more by IT or marketing to a certain extent. And that is now a legal question. So, the lawyers that are advising the companies on these new state privacy laws in the U.S. has meant that we not only have to think about designing data governance programs and communicating them up front in notices and privacy policies, but they also have to be really hands on to understand the technical requirements, and to give instructions for the data sharing that occurs on the back end. While online advertising moves at lightning speed. And that meant having governance programs around all of the company service providers ad tech partners, and third parties. We've learned that legal compliance requirements are very granular and sometimes deviates from the expectations of an EU based program, for example, so a specific investment has been needed to separately assess the new legal requirements.

Kattman: Thanks, Jeewon. As a final question for both of you, what do you think about digital assets on the Internet as a whole? Craig, maybe we'll start with you.

Carpenter: Yeah. I think just to echo what Jeewon said, I think these laws and this trend, if it keeps growing in this direction of consumer protection, it may really have the opportunity to shake up the way the Internet works, has worked for the last 20 years. I think that this trend towards consumer choice and consumer protection with respect to digital advertising may change the value proposition for free services online and the freemium services that have proliferated for the last 20 years. The theory behind the free service and freemium model was that the consumer data was the product, right? So, you can get free services because in response you're giving your data. There is an old saying that if you don't know what the product is, you're the product, and that was the model that these freemium services and free services online were built off of. But now with these new laws that may not be possible. And so, I think this may cause businesses to rethink their relationship with consumers online.

And you could take the doom and gloom approach of, this is going to be, hurt businesses, and stifle innovation, or possibly may lead to innovation and new business practices. We maybe see this with the rise of retail media networks, may cause a shift to more paid service models online which we are already starting to see in certain areas of social media and content creation. And data is becoming a protected asset versus how it was treated in the past. And so, consumers get to control this asset, and businesses are having to change the way they think about data and practices that were okay in the past, such as hoarding data, keeping it forever, using it for whatever purposes businesses want. These days, those practices are, at best, frowned upon, or worst. illegal now. And so, I think it'll be interesting over time to see how this plays out. I think it’ll also be interesting to see how this privacy legislation withstands things like judicial review and the business interest, which, if we're talking about retail and tech being regulated, we know there's significant war chests for things like lobbying. And so, we already are seeing a lot of interest from legal challenges including recently with the California Age-Appropriate Design Code being held up in court, potentially, and then also significant lobbying by Big Tech. And so, this trend is happening towards consumer protection, but we'll see if it can withstand some opposition.

Kattman: Jeewon?

Serrato: Over the last year, or maybe even several years, we have seen significant legislative developments and court challenges that are centered around what truly is the product that the consumer is buying in the digital economy, and what limits the law or the regulators can place on how private businesses build, launch, and sell products and services online. It is without question that data has value, and as Craig said, sometimes data is the product. I think one of the main questions for businesses will be the question about data ownership. If the digital properties, products, and services are offered for free, who owns the data? Should businesses continue to have the ability to collect and use data that is aligned with their business strategies? Or will they be challenged by litigation claims and regulatory increase as we're seeing them that seek to put limits on how these digital assets are marketed to consumers? These questions are being brought on not only by privacy regulators globally, but also anti-trust and consumer protection agencies as we see privacy become more and more a consumer protection issue under the larger rubric or unfair competition, false advertising, and the safety practices.

Kattman: Thanks so much for joining us today, Jeewon and Craig.

Serrato: Thanks for having us on the podcast, Amy.

Carpenter: Thanks Amy.

Kattman: If you have any questions for Jeewon or Craig, their contact information is in the show notes. Join us next week as we dig into privacy litigation trends with partners Jeewon Serrato, Bethany Lukitsch, and Matt Pearson. As always, thanks for listening to BakerHosts.