



Podcast Transcript

The Data Economy and You: Data Dividend: What is personal data worth?

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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 wrap up our three-part series on The Data Economy and You. We'll explore the ecosystem of data in advertising, the value of this data, and how to maximize its uses while maintaining compliance. Our guests today are Jeewon Serrato and Aaron Goodman, attorneys in the Digital Assets and Data Management Group at BakerHostetler. Jeewon is a partner and a co-leader

of the group's Digital Transformation and Data Economy team, based in San Francisco, and Aaron serves as counsel in the practice group and is based in Chicago, focusing on ad tech and digital media transactions. Welcome to the show Jeewon and Aaron.

Serrato: Thanks for having us, Amy.

Goodman: Thanks for having us, Amy.

Kattman: Aaron, I'd like to begin with you. Will you explain who the players are when it comes to data in the advertising and digital media space, and how do they drive value from the use of data?

Goodman: Sure. You know, the ecosystem has really changed over the last few years. We used to have a relatively simple ecosystem where on the one end, you had the advertisers who wanted to show their ads to consumers and were willing to pay publishers to be able to show their ads on the publisher owned media. Today, you have a much more complex ecosystem with many different players and most of them use data in one way or another. You still have advertisers who want to pay publishers to be able to show their ads to consumers on the publisher media, and you still have publishers who have media space available that they want to sell to advertisers in order to allow them to show their ads. But now, in between the advertiser and the publisher, you have several different participants in this ecosystem who all play different roles and provide different services. And most of these players also collect and use data.

To name a few, you have for example, DSPs, demand side platforms and ad exchanges. And these are platforms that allow advertisers to buy and media providers, publishers to sell media space on an impression-by-impression basis through real time bidding. And so, if you think about it, if I'm going to a website and the website is loading in my browser this gives the publisher of that site an opportunity to put that impression, in other words, I'm about to view the website and ads on it, and it gives the publisher an opportunity to put that up for bid to advertisers who may wish to bid on the opportunity to show me an advertisement within that space. And along with that comes the use of data for advertisers to determine how much they may be willing to bid, and whether they even would like to bid on the opportunity to show me an ad. You also have data suppliers and data providers who are really third parties that deal in data. And so, they provide data which has been collected in various different ways and combine, and they make this data available to the different players in the in the ad tech ecosystem to use for targeting ads, measuring ads, and other use cases. And then you have measurement and verification providers who take data from campaigns and they use it to do things like track conversions, provide attribution, meaning helping advertisers understand where a conversion came from, and also to do fraud prevention and to measure viewability.

And then finally, you have ad servers who have really two main functions. One is to deliver the ad content to a user so they can see the ad, and then in doing that ad servers also collect numerous pieces of data about the user and the user's

device who is viewing the ad. So, you have all these different players, and there is a lot that I haven't mentioned, and they're all using data in one way or another. So, things that data may be used for, some examples, might be to target the right audience, to understand who the audience is, an advertiser, for them to understand who the audience is, and who their target market might be. One other example might be to limit the number of times a particular user may see the same ad. That is called frequency capping because it is not a good experience for a consumer to see 1,000 instances of the same ad in one day. And then to measure the return on investment that advertisers get from their ad campaigns.

So, I think that in sum, we've really moved into a space where you have a lot of complexity, and a lot of different players within this ecosystem, and data sort of runs through the entire ecosystem, and is the currency that the whole ecosystem is based off of.

Kattman: Thanks, Aaron. Jeewon, what role does the legal department have to understand and apply governance around advertising and marketing?

Serrato: Amy, as we talked about in our first podcast in this series for the data economy, the laws have passed since 2020 in the United States to really change what it means for advertisers to have public knowledge, or to create data-driven ads or, simply put, to target audiences. I think the complexity of this ecosystem that Aaron explained is exactly why these laws have been passed. In the last three years, starting from the CCPA, we have heard over and over again that what is driving these new privacy laws, and this focus, and the use of targeted advertising is this concept that data is being proliferated. That there are many layers of third parties who are involved in trying to measure the ad performances, and to target and profile consumers. And so, because now with these new privacy laws, the personal data definition includes the data that is used for advertising, like IP address, mobile device identifiers and cookies, marketing departments can't just simply engage in getting panel data or buy user experiment observations or conduct ad testing without running into legal requirements. So, the legal departments now I think have a pretty important role to play in identifying these new legal issues that is related to the use of data for marketing and advertising.

Goodman: I agree with what Jeewon said, and then I think I would just add on top of that, that what I'm seeing is, it is becoming much more important that counsel have a good understanding of exactly what data is being collected and processed, who is using the data, what they're using it for, and how the data is flowing from one party to the other. And, because all those things are going to have an impact on how the parties are positioned under the applicable privacy laws, what agreements need to be in place amongst the different parties, and what privacy compliance obligations each will have. And so, because of this the complexity in the system, I think it's become a lot more important that attorneys who are supporting business teams within this space have a good understanding of the data flows and how the data is being collected and used.

Kattman: Aaron, how can companies perform functions like measuring the performance of their ad campaigns, and using data to target advertising while also maintaining proper compliance?

Goodman: So, that is a good question, and I think it goes back to build off of what I was just speaking on. Step number one in all of this is really having a good understanding of the data flows, and how data is being used in connection with their advertising campaigns. And once you have a good understanding of that, you can then go through the analysis to determine in each case what needs to be done from a compliance perspective. And so, the way that I usually think about these things at a high level, there are three buckets of issues that I think need to be addressed when analyzing compliance with respect to advertising campaigns. The first is usage rights and restrictions in agreement terms. And so, you want to be clear in your agreements and with, whether it is customers, vendors, partners, of, who is using the data, and what they're allowed to do with the data. So, you want to have clear usage rights and restrictions in your agreements. You generally are going to need to have some sort of data processing agreement in place, so part of your agreement should be a DPA, and that DPA is going to position the parties in appropriate roles with respect to the data. What I mean by that is under the applicable laws you're either going to be a service provider, a third party, a controller, a processor. So, there is different roles that each party in a particular transaction will play or will fill, and so you want a DPA in place that makes that clear.

And then, aside from having the right paperwork in place, and by the way, that second part, it will probably require some analysis to determine who sits in what role, and what type of DPA terms are necessary for what the actual use case is, right? So, you're going to have to walk through that analysis and make sure that you're positioning the parties the right way. And then in addition to having the right paperwork in place, there is just a practical perspective of implementing compliance, right? And so, you may, you want to have good terms in place, but then you also want to make sure that data subjects are getting noticed. If an opt-out is required, that that is being provided to the data subject, and that signals such as consents and opt-outs are being passed from one party to the other party as required. And so, the way that I always think about that part of that bucket of issues is, I walk through it in terms of placing myself in the position of the data subject, and asking, where am I getting notice of the data collection and how is it being used? Where am I being provided an opportunity to opt out if that is something that is required? And just walking through the practical implementation aspect of things.

Kattman: And Aaron, what is the cost involved when maintaining this compliance?

Goodman: So, given the complexity of the ecosystem, and all of the new laws, U.S. state laws that are coming into place, the cost can be quite high for companies. And usually when you're talking about cost of compliance in this area, there is a few things that really come into play. And number one that I could think of is the cost of the legal analysis and putting in place agreements with various different customers, partners, vendors, right? So, there is going to be some costs involved

with analyzing your privacy compliance obligations under these laws, and also, with putting in place all these agreements, and you may have a number of different vendors in this space. And so, to go through and make sure that you have the right terms in place with all of them, potentially negotiating new terms or changes to existing agreements, all of that is going to have a cost associated with it.

The second thing that comes to mind is the cost of maybe technological implementations that you might need to use or want to use that will assist you with your compliance obligations. So, these are products and services that will help you make sure that data subjects are getting the right notifications, the right notices, are being provided an opportunity to provide consent, or an option to opt out of things. And so, these are services that that help you do that, and there is obviously cost involved with that, too. And then I guess from a, putting my business hat on, from a business perspective too, there may be some cost related to a loss of data. So, meaning, the reality is that you may not be able to get as much data from data subjects and consumers in a compliant way that you maybe previously had access to. And so, from a business perspective there may be some cost to that data loss.

Kattman: And one final question for both of you. If you were an in-house counsel, what is the top question you would want to ask experts when planning a new compliance strategy? Jeewon, let's start with you.

Serrato: I think the top key take away here is that retail, direct to consumer businesses and tech, are now regulated, and that legal now has a role in understanding and mitigating risks related to ad tech and targeted advertising. As Aaron said, the cost to comply is high, which means the compliance strategy needs to take into consideration where the high-risk processing activities are, and determine a timeline. Much of the compliance work that we're highlighting, like designing and implementing our legal risk program for ad tech, is not built in a day. Because these are newly regulated areas, these are new legal risks, much of the clients that we work with, they don't have this in place today. So, understanding which businesses are impacted and navigating the patchwork of state, federal, and international laws that may or may not apply. We have conversations daily about which state threshold is met and which is not. And does GDPR apply in this case? Does it not? And how do you compare California with GDPR? And so, really understanding first, that these are new legal environments, these are new risks. And two, how do you really understand the patchwork of laws that overlap and have conflicting jurisdictions on the business would be the first step.

And if you missed it, we discussed the new privacy laws in the United States, and their impact during the first podcast in this series for Data Economy and You. And in the second podcast, we discussed the regulatory enforcement and litigation risks that follow from those new laws. So, having a good handle on how to identify the risks hopefully should give in-house counsels a good starting point to strategize how they're going to plan ahead. In the near term, what I'm finding is that the businesses are most concerned about how to deal with third-party cookie deprecation, which is what Aaron is going to talk about next, and in the long term,

AI seems to be driving most of the risk discussions today. So, as we are dealing with these changes in the regulatory environment and in the business practices, whether it is third-party cookie deprecation or AI, I think having a good understanding of the evolution of the privacy laws, and how they impact customer profiling and the use of ad tech is, I think, going to be a priority for in-house counsels moving in the near future.

Kattman: Thanks, Jeewon. And what about you, Aaron?

Goodman: Sure. And as Jeewon mentioned, we are seeing a lot of questions from clients about the deprecation of third-party cookies and so we're getting, we're fielding a lot of questions specifically about alternative solutions. Solutions that can take the place of the use of third-party cookies and privacy compliance related to those solutions, and we're seeing a lot of clients try various different options, right? So, there is a number of different things that are being developed and being used in this space. I haven't seen, personally, anything that has become the thing that is going to replace third-party cookies, I've seen clients trying various different things. So, you have things like, just going back to the old days with contextual advertising. So, we see clients relying a little bit more on contextual advertising. There are some unified ID-type solutions that avoid the use of third-party cookies that we see clients trying out. And then, there is things like server-side tracking and other technological implementations that don't use cookies. As well as things like clean room solutions and others.

So, we see clients trying all these things, and the questions that they're coming to us with are, in terms of dealing with these solutions, what are the privacy impacts? What are the privacy compliance impacts? Are these actually going to help us from a privacy compliance perspective? And one thing that I've noticed is, a theme that keeps coming up is, just making sure that everyone understands that a lot of these solutions still use certain identifiers that might be considered personal data under the various applicable laws and regulations. And so, I wouldn't want people to think that just because they're using a cookie-less solution, or they're not using third-party cookies that the solution or their collection of data is automatically, or use of data, is automatically privacy compliant. I want clients to understand that they still have to walk through the analysis and look at what data is being collected, how it is being used, who is using it, and you still may have privacy compliance obligations. So, it is not automatically privacy compliant just because you're not using cookies.

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

Goodman: Thank you for having me.

Serrato: Thanks for having us, Amy.

Kattman: If you have any questions for Jeewon or Aaron, their contact information is in the show notes. As always, thanks for listening to BakerHosts. Comments heard on BakerHosts are for informational purposes, and should not be construed as legal advice regarding any specific facts or circumstances. Listeners should not act

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