



CCPA, Selling & Ad Tech *Finding a Clear Path*

GT Privacy Webinar Series

June 30, 2020

FOR INFORMATIONAL PURPOSES ONLY. THIS PRESENTATION IS NOT INTENDED AS LEGAL ADVICE.

Today's Presenters



Sarah Barrows

Director Privacy, Product & Policy Counsel



Sarah.Barrows@nextroll.com



Darren Abernethy

Of Counsel

Greenberg Traurig - San Francisco

abernethyd@gtlaw.com



Gretchen Ramos (Moderator)


Co-Chair, Data, Privacy & Cybersecurity Group

Greenberg Traurig - San Francisco

ramosg@gtlaw.com

Overview

- ✓ **Goals**
- ✓ **The Relevant Ad Tech CCPA Provisions**
- ✓ **Digital Advertising – Players, Mechanics and Methods**
- ✓ **The CCPA and Ad Tech**
 - **Application & Interpretations – Determining Likelihood of “Sale”**
 - **Vendor Contracts and Cookie Reviews**
 - **Do Not Sell Approaches (with a Publisher Focus)**
- ✓ **On the Horizon – CPRA, the Crumbling Cookie, and More**



**CCPA's
Relevant Provisions**

CCPA Back Story...in 30 seconds

From a cocktail party



To a ballot initiative



To an 11th hour law



To amendments



To now finalized proposed regulations



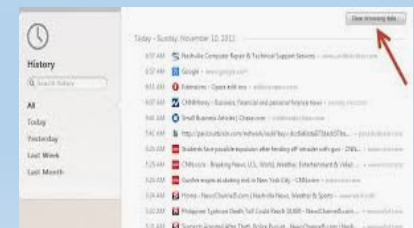
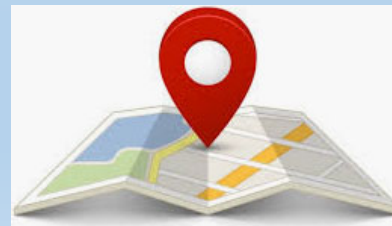
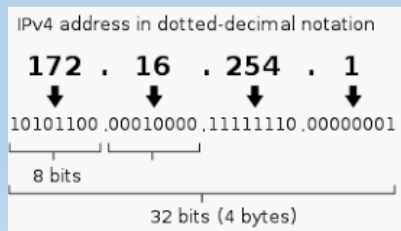
To enforcement starting...**tomorrow!**



Personal Information Definition

Broadly defined to include:

- Identifiers, including online IDs and IP addresses
- Unique, persistent IDs used to recognize a device linked to a consumer or family, over time, and across services, including cookies and other persistent and probabilistic identifiers
- Geolocation data and
- Internet and other network activity information, including browsing, search, and usage data



Selling & Collection Definitions

“Sell,” “selling,” “sale,” or “sold,” means:

- selling, *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 a third party
- *for monetary or other valuable consideration*

“Collection” means:

- buying, renting, gathering, obtaining, receiving, or accessing any personal information pertaining to a consumer by any means
- includes receiving information from the consumer, either actively or passively, or by *observing the consumer’s behavior*





Digital Advertising – Players, Mechanics and Methods



Digital Advertising 101



- The Internet is “free,” right? Well...
 - But if we use services at no cost as consumers, then who pays for them?
- **Publishers**: The entity that owns, controls or operates a website or mobile app through which end users interact online.*
 - *Examples*: news sites, mobile app games, messaging apps, etc.
- **Advertisers/Brands**: The entity that has a product or service that it wants to present to end users as they interact with publishers in the digital world.
 - *Examples*: car makers, CPG, retailers, restaurants, travel, B2B tech, etc.

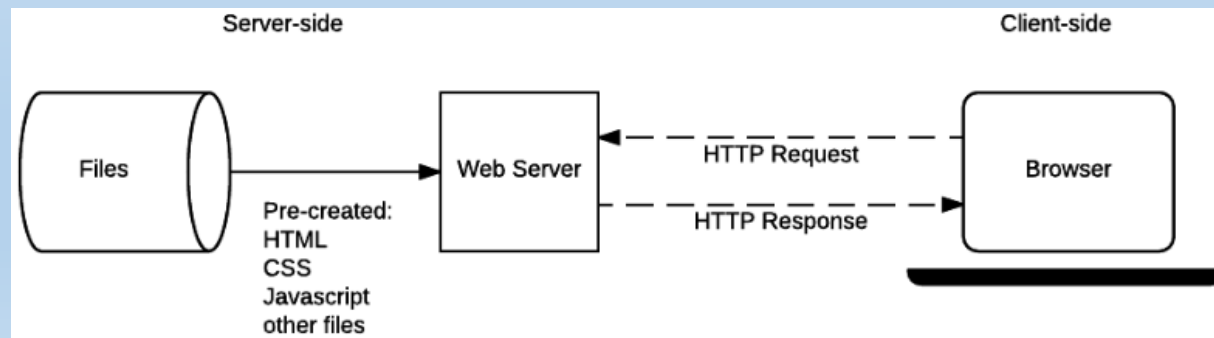


Digital Advertising 101 – Site Code

- *Usually while integrating “third party” outside content at their direction
 - E.g., fonts, images, analytics, social media, tags/pixels, videos and advertisements



```
2 <html lang="en">
3 <head>
4 <title>My perfect website</title>
5 <meta charset="utf-8" />
6
7 <link rel="preconnect" href="//s3.mysite.com" />
8 <link rel="preconnect" href="//www.mysite.com" />
9
10 <meta name="viewport" content="width=640, initial-scale=1">
11
12 <script>
13 var mytag = mytag || {};
14 mytag.cmd = mytag.cmd || [];
15 (function() {
16   var gads = document.createElement('script');
17   gads.async = true;
18   gads.type = 'text/javascript';
19   var useSSL = 'https:' == document.location.protocol;
20   gads.src = (useSSL ? 'https:' : 'http:') + '//www.mytagervices.com/tag/js/gpt.js';
21   var node = document.getElementsByTagName('script')[0];
22   node.parentNode.insertBefore(gads, node);
23 })();
24 mytag.cmd.push(function() {
25   var homepageSquareSizeMapping = mytag.sizeMapping().
26     addSize([945, 250], [200, 200]).
27     addSize([0, 0], [300, 250]).
28     build();
29   mytag.defineSlot('/1023782/homepageDynamicSquare', [[300, 250], [200, 200]], 'reserved-div-1');
```



Digital Advertising 101 – Cookies

- Understanding of 1st and 3rd party cookies
- Web browsers accept and store cookies on behalf of domains, and share them with the domains that set the cookies
- E.g., to remember preferences, shopping carts, fraud, video loading, analytics, to allow personalization, and tracking for profiling/targeted advertising



Digital Advertising 101 – Mobile

- **Mobile web (cookie) vs. mobile in-app (device ID or other identifiers)**
- **Banner ads, video ads, interstitial mobile ads, native app-based ads... may vary based on smart phone, tablet, IoT-connected devices**
- **Precise geo-targeting possible, based on WiFi, Bluetooth/BLE, cell tower triangulation, GPS, etc.**



Digital Advertising 101

- **Interest-based advertising (IBA)** is a means of serving more tailored ads to a common device or browser, per interests inferred from the end user's intent signals and activity.
- **Personalized**. If online content will be paid for through advertising (just as it is done scattershot on TV or in magazines), then make it user-relevant.
- **How?** Programmatically, such as via real-time bidding. (Ordered chaos...)

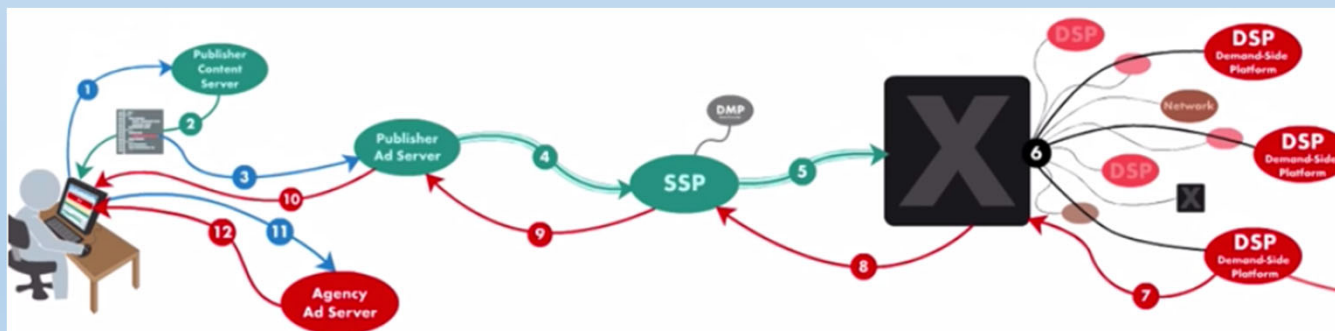


Digital Ads 101 – Identifiers & Segments

- For desktop/mobile web browsers: User goes to a webpage and a small text file—a “cookie” is placed on the device (e.g., user8675309).
 - For mobile apps, temporary **mobile ad/device IDs** are used...e.g. IDFA, GAID
- Cookie/ad ID stores certain non-PII characteristics re: what user clicked on, pages visited, and other engagement/intent signals deemed to be “interests.”
 - **Also tremendously helped by invisible pixels and JS “tags,”** as vehicles to end request and receive info back to 1st and 3rd P servers.
- A user’s interests are added to an audience segment (from verticals to very granular)...so the user ID is associated w/certain matched categories...which can then be targeted in a brand’s multi-segment ad campaign.

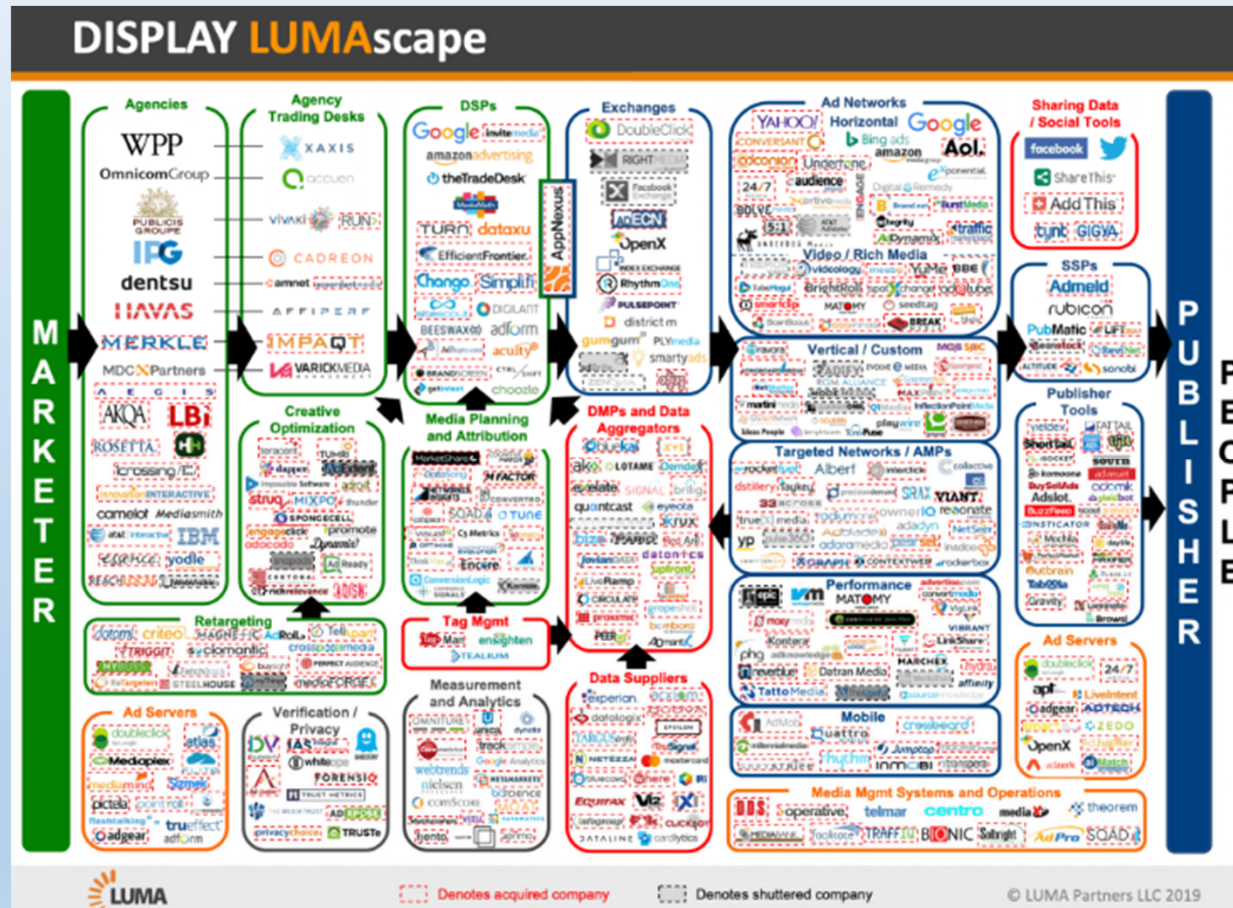
Digital Ads 101 – Mechanics (IBA + RTB)

- **Collection.** Publisher uses cookies and similar technologies on site/in-app to collect info re: user's device, user, and their visit/interactions.
- **Auction.** User's info goes into a **"bid request"** for advertisers (+tech partners) to bid on a publisher's inventory (+partners) via ad exchange
- **Inferred Accuracy.** The more detailed/enriched the bid request's info, the more valuable it is due to higher likelihood of accurate targeting.



Source: Interactive Advertising Bureau, <https://www.youtube.com/watch?v=-GlgI9RRuJs&t=2s>

Ad Tech Alphabet Soup



Source: <https://lumapartners.com/content/lumascapes/display-ad-tech-lumascape/>

A low-angle, upward-looking photograph of several modern skyscrapers. The buildings are characterized by repetitive horizontal window patterns and sharp geometric lines. The sky is a clear, vibrant blue, dotted with soft, white cumulus clouds. The perspective creates a sense of height and architectural grandeur.

GT GreenbergTraurig



Putting the Pieces Together: The CCPA and Ad Tech

How This Works



Plain reading of definitions “Personal Information”, “Collection” and “Selling” suggests:

personal information is “made available” when a website publisher makes a cookie ID associated with a consumer available to intermediaries like ad exchanges and others through RTB bid requests, or when a website publisher makes personal information available to an ad network or a DSP or an agency that it allows to cookie, tag or pixel its site.

However, a business does **not** “sell” PI when it “uses or shares with a service provider PI of a consumer that is necessary to perform a **“business purpose”** (if notice is provided to consumers AND the service provider does not further collect, sell or use the PI except as necessary to perform the biz purpose).

Business Purpose

(d) "Business purpose" means the use of personal information for the business's or a service provider's operational purposes, or other notified purposes, provided that the use of personal information shall be reasonably necessary and proportionate to achieve the operational purpose for which the personal information was collected or processed or for another operational purpose that is compatible with the context in which the personal information was collected. Business purposes are:

- (1) Auditing related to a current interaction with the consumer and concurrent transactions, including, but not limited to, counting ad impressions to unique visitors, verifying positioning and quality of ad impressions, and auditing compliance with this specification and other standards.
- (2) Detecting security incidents, protecting against malicious, deceptive, fraudulent, or illegal activity, and prosecuting those responsible for that activity.
- (3) Debugging to identify and repair errors that impair existing intended functionality.
- (4) Short-term, transient use, provided *that* the personal information is not disclosed to another third party and is not used to build a profile about a consumer or otherwise alter an individual consumer's experience outside the current interaction, including, but not limited to, the contextual customization of ads shown as part of the same interaction.
- (5) Performing services on behalf of the business or service provider, including maintaining or servicing accounts, providing customer service, processing or fulfilling orders and transactions, verifying customer information, processing payments, providing financing, providing advertising or marketing services, providing analytic services, or providing similar services on behalf of the business or service provider.
- (6) Undertaking internal research for technological development and demonstration.
- (7) Undertaking activities to verify or maintain the quality or safety of a service or device that is owned, manufactured, manufactured for, or controlled by the business, and to improve, upgrade, or enhance the service or device that is owned, manufactured, manufactured for, or controlled by the business.



Ad Tech and Sales



So, how to understand this?

- *E.g., as a bargained for exchange...for the PI?*
- *What is the other entity going to do with the PI?*
 - *(Create audience segments? Frequency capping? Attribution? For its own bidding considerations/enrichment? Create its own lookalike modeling activities? Use identity resolving device graph technology? PI swaps w/ others? -- **Check the entities' ToS and PP...data controller under GDPR?**)*
- **Why does it matter? Because whether a publisher's *making available* its visitors' / users' PI to an ad partner constitutes a "sale" helps establish whether the publisher (or advertiser partners) must include a "DNMPLI" link within their digital properties—as well as compliance with other CCPA obligations (i.e., what to cease after an opt-out) and honoring consumer rights. **And, liability shifting.****
- **What about "aggregate consumer information," "deidentified information" or "publicly available information"?**

Determining the Likelihood of Sale

- A pre-requisite to all is knowing what data you collect, what entities have access to your customers/users, and what control you have over their presence.
- For **websites**, a **scan** and deep-dive evaluation of the cookies and what they collect—inventory of tracking technologies, collection, and other parties.
- For **mobile**, an evaluation of the 3rd party **SDKs**, APIs, and server-to-server integrations within the app.



Determining the Likelihood of Sale

- Review of the entities' **contracts** with you—terms of service, CCPA service provider addendum and, most importantly, looking beyond these to understand whether the PI being provided is at the heart of a **bargained-for-exchange** for that PI, or is merely needed for a service to be performed on your behalf.
 - Key: **Secondary uses? Independent rights? Re-purposing** for their own business model, beyond providing your organization a contracted service?
- Risk tolerance factors in.



Determining the Likelihood of Sale

Common Use Cases:

- **Lookalike audiences on social networks?**
- **Analytics and attribution?**
- **Retargeting?**
- **IBA?**
- **Data brokers?**
- **Contextual ads?**



Opt-Out of a “Sale”

- CCPA allows CA consumers (or authorized representatives) to opt-out of the “sale” or “selling” of their PI
- DNSMPI Links on websites and mobile app landing pages
- **Key features:**
 - Business must wait 12 months before requesting that consumer re-authorize the sale of PI
 - Business must use the information from the opt-out request only to comply with the opt-out request
 - Different rules for children


Approaches to “Do Not Sell”

Self-Regulatory, Industry-Initiated Offerings



Opt Out Tools

California consumers may use these tools to send requests under the California Consumer Privacy Act (CCPA) for this browser to opt out of the sale of personal information by some or all of the participating companies.

Using these tools, you can learn about the participating companies and their privacy practices. You can also send requests to opt out under the CCPA to some or all of these companies.



When you see this green icon, you can click on it and learn about the California Consumer Protection Act (CCPA) and send opt-out requests.



<https://www.privacyrights.info/>



IAB CCPA Compliance Framework for Publishers & Technology Companies

Version 1.0

December 4, 2019

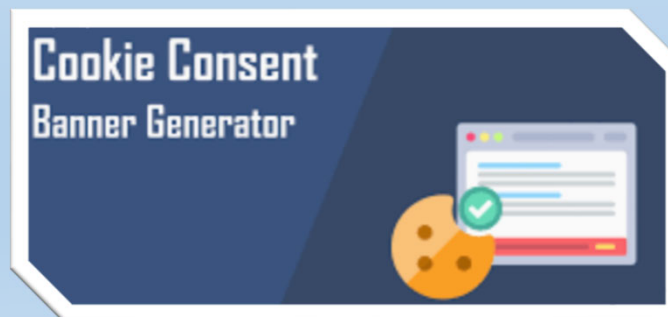
<https://www.iab.com/guidelines/ccpa-framework/>

Approaches to “Do Not Sell”

Consent Modules for Opt-Outs with DNSMPI links

- see, e.g., IAPP Privacy Tech Vendor Report

- **Implementation considerations**
 - **IP address ≠ residency**
 - **Intra-corporate relationships involving “common branding”**
 - **Opt-out right applies to “consumer,” not browser**
 - **Categorizing 3Ps vs. SPs, having that granular control**
 - **Not asking the consumer to opt-in for 12 months**



Website Approaches to “Do Not Sell”

Tag Manager-Controlled Consent Banner with Opt-In

(t) (1) “Sell,” “selling,” “sale,” or “sold,” means selling, 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 a third party for monetary or other valuable consideration.

(2) For purposes of this title, a business does not sell personal information when:

(A) A consumer uses or directs the business to intentionally disclose personal information or uses the business to intentionally interact with a third party, provided the third party does not also sell the personal information, unless that disclosure would be consistent with the provisions of this title. An intentional interaction occurs when the consumer intends to interact with the third party, via one or more deliberate interactions. Hovering over, muting, pausing, or closing a given piece of content does not constitute a consumer’s intent to interact with a third party.

- **No guidance from CA AG on efficacy or compliance status of this possible interpretation.**
- **Arguably is privacy-proactive, effectively adopting the EU ePD approach.**

What About Mobile?

- **DNSMPI links on mobile app landing pages**
- **Privacy vendor solutions for capturing opt-out consent preferences**
- **Industry solutions**
- **Limit Ad Tracking**
- **Taking position that a “sale” is not occurring with respect to SDKs and other third parties included within an application**





On the Horizon

What's Next

California Privacy Rights Act of 2020



- Initiative qualified for the Nov. 2020 statewide Gen. Election ballot.
- Clarifies the narrow role of newly defined “cross-context behavioral advertising.”
- The Act’s definition of “business purpose” includes a revised subsection for “providing advertising and marketing services, except for cross-context behavioral advertising...”
- Highly restrictive stance with respect to traditional data-driven advertising and marketing, effectively treating as a likely sale any activities beyond first-party contextual advertising and non-personalized advertising not based on a profile or predictions derived from a consumer’s inferred, past online interactions.

Changing Ads Ecosystem

- Third-party cookie deprecation and browser-based changes
- Activity around device IDs – e.g., recent Apple announcement
- Contextual advertising v2.0
- Other...e.g., emphasis on first-party data; walled gardens; closed marketplaces; and new thinking on user “identity”



Thank You & Questions



For more information, check out:

GT's Data Privacy Dish Blog:

<https://www.gtlaw-dataprivacydish.com/>

NextRoll Blog: <https://blog.nextroll.com/>

