Digital Compliance: What's New (and Risky) in Privacy, Tech, and AI

Practical Guidance on Cutting Edge Concerns

Tyler Thompson

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Agenda (Scary Scenarios)

1. Cookie Lawsuit
2. Data Retention
3. Generative AI
4. Website Scraping
5. Mobile App Removal
6. Digital Accessibility Claim

About The Data

GT conducts a comprehensive survey of the privacy and compliance practices of the entire Fortune 500, as well as the 100 most downloaded mobile apps in each app store. Data in this presentation is pulled from this survey.

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Scenario 1: Cookie Lawsuit

You receive a class action demand letter alleging that your website's use of the Meta pixel violates the federal Wiretap Act as well as a variety of state laws.

Plaintiff found the alleged violation through commonly available settings in their social media account, and through use of your site.

Plaintiff alleges $15k in statutory damages for each occurrence, with potentially millions of occurrences across the class.

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Cookie Lawsuit: Background

- Under the Federal Wiretap Act, a person is prohibited from "intentionally intercept[ing] … any … electronic communication."
  - States have equivalent rules with varying consent standards
  - 2022 3rd and 9th Circuit decisions have increased litigation.
- Three technologies: Session replay, chatbots, and use of the Meta pixel.
- HIPAA and VPPA should also be considered.
- Compliance overlaps with, but is not the same as, new US privacy laws.

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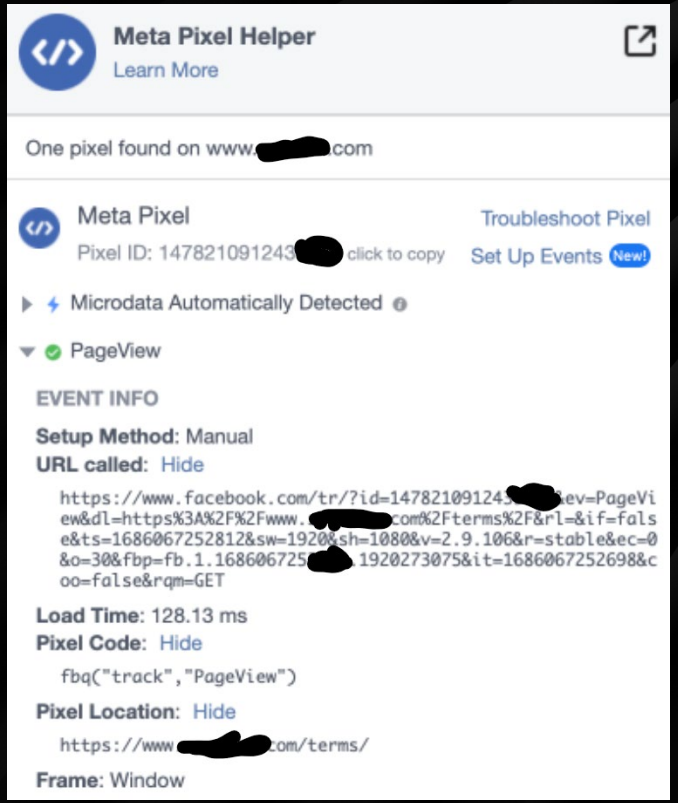

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Cookie Lawsuit: What Now?

- These are nuisance claims, but uncertain enough to command higher values:
  - Settlement range: $25k-$100k, depending on a variety of factors
    - 7 figure settlements have happened
  - Possible reputational issues if the claim proceeds
- Expect new claims until remediation and mitigation of issues.
- While claims are currently limited to select, more common pixels *the claim could apply to numerous technologies*

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Cookie Lawsuit: What Now?

- Use experienced counsel: most of these claims are coming from a handful of plaintiff's firms, meaning experience with opposing counsel is a key advantage.
- Leverage your terms of use: A well drafted terms of use with a strong arbitration provision (with mass arbitration defense), class action waiver, and limitation of liability can drive down cost.
- Be Aggressive: Typical plaintiff firms are looking for a quick win, so show expertise and show willingness to litigate.

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Cookie Lawsuit: Prevention & Mitigation

- **Can you remove the technology?** Removal is the only way to guarantee no further claims.
- Upgrade your terms of use
  - Arbitration (with mass arbitration controls), class action waiver, limitation of liability, try for consent here as well
- Audit your cookie/adtech/pixel use
  - Not just on your homepage, not just your current geographic location
- Don’t forget about your mobile app!

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Cookie Lawsuit: What if we can't remove the pixel?

- Implement a notice and consent structure
  - Prior, explicit, opt-in consent
    - Opt-out structures such as those required by new US privacy laws arguably *do not reduce the risk of these claims*.
    - Notice banner arguably not enough, as individual only receives notice *after* pixel is deployed.
  - Mention third parties in your banner language
- Consider geofencing to avoid state law claims, high risk circuits
- Disclose in your privacy policy

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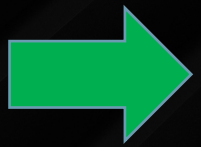

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Privacy Notice.

Customize Settings | Allow All | Decline Optional

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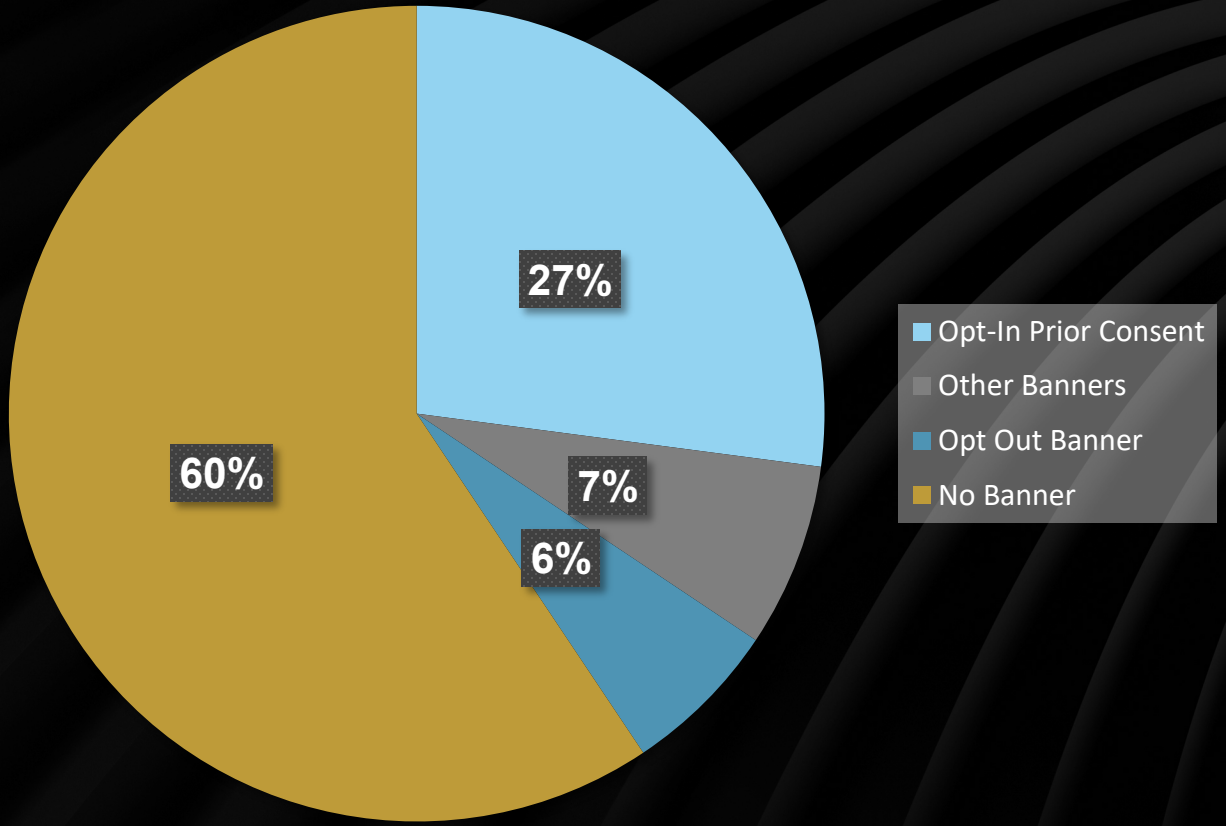
Fortune 500 Cookie Consent Banners



As seen from a California IP Address

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Scenario 2: Personal Information Retention

Your company is attempting to implement data minimization as required by new privacy laws such as the Colorado Privacy Act. Personal Information is stored in dozens of company systems. Business leaders are insisting information must be kept indefinitely, either for regulatory requirements or marketing efforts.

While pondering this at the water cooler, your counterpart in HR mentioned that there is also 5 filing cabinets filled with customer records in the annex.

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Personal Information Retention

- "Personal Data should only be kept in a form which allows identification of Consumers for as long as is necessary for the express Processing purpose(s). To ensure that the Personal Data are not kept longer than necessary, adequate, or relevant, Controllers shall set specific time limits for erasure or to conduct a periodic review."
  - 4 Colo. Code Regs. § 904-3:6.07

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Personal Information Retention

- **Implement a retention policy AND schedule**
  - These need to be realistic: don't over-promise, use an implementation delay if needed.
- Policy
  - Include the Who, What, Where, Why, and How of deletion
  - Who is responsible? Business units? Legal?
  - Integrate legal holds
- Schedule
  - Definitive period start dates
  - Minimum periods as required by applicable laws
  - Maximum retention periods as required by privacy law
    - Indefinite retention isn't reality.
  - Include physical documents
  - Include citations to applicable laws

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LEGEND			
The following abbreviations are used to help define the applicable Retention Period beginning date for each category of records:			
C	For Contractual Matters, the Latest End Date whether due to Purchase, Sale, Full Performance, Payment, Breach, Termination or Final Resolution of Dispute;	**J/S**	For Litigation or Arbitration Related Matters, the Latest Date of When a Dispute Ended, such as Final Judgment Entered, Settlement Made or Payment or Performance Completed;
CR	Latest of Creation of Record, Most Recent Editing of Record or Filing of a Return or Report to which Record is Relevant. In the case of Tax Records, CR begins after the due date of such tax for the return period to which the record relates, or the date such tax is paid, whichever is the later;	**PROP**	Latest of When Property or Interest Sold or Disposed of or Final Resolution of Dispute;
		S/O	Superseded/Obsolete. When a Record has been Superseded by another Record, or is Otherwise Obsolete with no Further Legitimate Business Purpose or Use to the Company;
E	For Employment Related Records, the Latest Date of When Separated, Retired or Terminated from Employment, When Employment Application Rejected, When Job Posted, or Final Resolution of Dispute;	**TRM**	Latest of Term or Period of Coverage or Applicability; Life of Benefit; or Period within which a Claim Must be Made.

ASSETS	Tangible Capital Assets and Property	Real estate and fixtures; tangible capital property with a useful life longer than one year	Latest of PROP + 6 years, C + 3 years or S/O + 3 years	Consideration of applicable statutes of limitation for suits on contracts and a business judgment regarding the average delay in bringing suit after a breach of contract See also 26 U.S. Code § 6501 (6 years after return filed, under Internal Revenue Code)

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Scenario 3: Generative AI

Other departments are pressuring legal to approve the use of generative AI, including LLMs, for company tasks including communications, marketing, coding, and editing.

Simultaneously, employees are using their personal ChatGPT accounts for work functions. The extent to which this is happening is unknown.

You are receiving pressure both to allow the use of these technologies and to ban them.

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Generative AI: Recommendations

- Implement an AI use policy
  - Be realistic: Outright prohibition is unlikely. Instead, focus on controlling specific inputs or activities.
    - Example: Prohibit input of personal information, code.
  - Include Approval and Escalation Processes: Rather than prohibition, an approval and escalation process for higher risk uses can prevent circumvention o f the policy
  - Whitelists: Create an approved list of technologies, use cases, or both.
    - Eliminates uncertainty and encourages use, saves approval process bandwidth
- Understand platform terms

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Generative AI: Recommendations

- Don’t Forget Customer Contracts!
  - Will use of AI violate confidentiality obligations?
  - Can AI systems satisfy security requirements?
  - Would a customer be surprised to find out you’re using generative AI?
- Use business accounts and logins, if available

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Scenario 4: Website Scraping

Your company is scraping massive amounts of publicly available data from the internet, including LinkedIn profiles.

At the same time, you believe your biggest competitor is scraping large amounts of data off your platform. Your CEO has asked you to stop them and bring a claim against them.

You're also worried that AI platforms are scraping your data for their purposes.

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Website Scraping: Legality

- Scraping is *generally* completely legal absent specific controls.
  - The Computer Fraud and Abuse Act (CFAA) can protect data behind password walls, accounts.
  - The Digital Millennium Copyright Act (DMCA) can create liability for IP related scraping.
  - State and case law is generally permissive, but a variety of low strength common law claims exist.
    - Trespass to chattels, unjust enrichment
- There are material privacy issues if scraping personal information

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Website Scraping: Defenses

- Legal measures
  - Terms of use: Prohibit scraping, ensure enforceability,
  - Account creation: Arguably triggers CFAA, makes terms more enforceable, provides technical barrier
- Technical measures
  - CAPTCHAs and similar technologies
  - Robots.txt file
  - Detection and authentication

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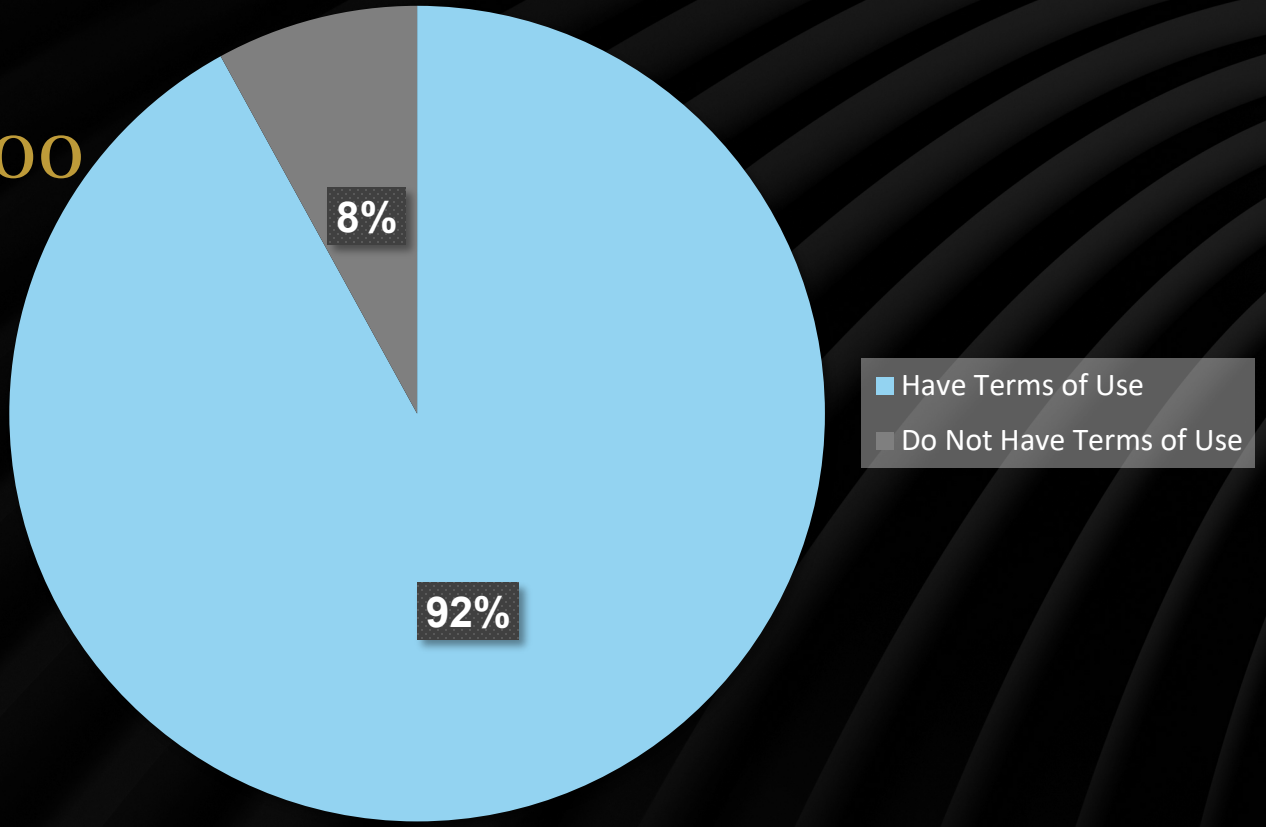
Fortune 500 Websites



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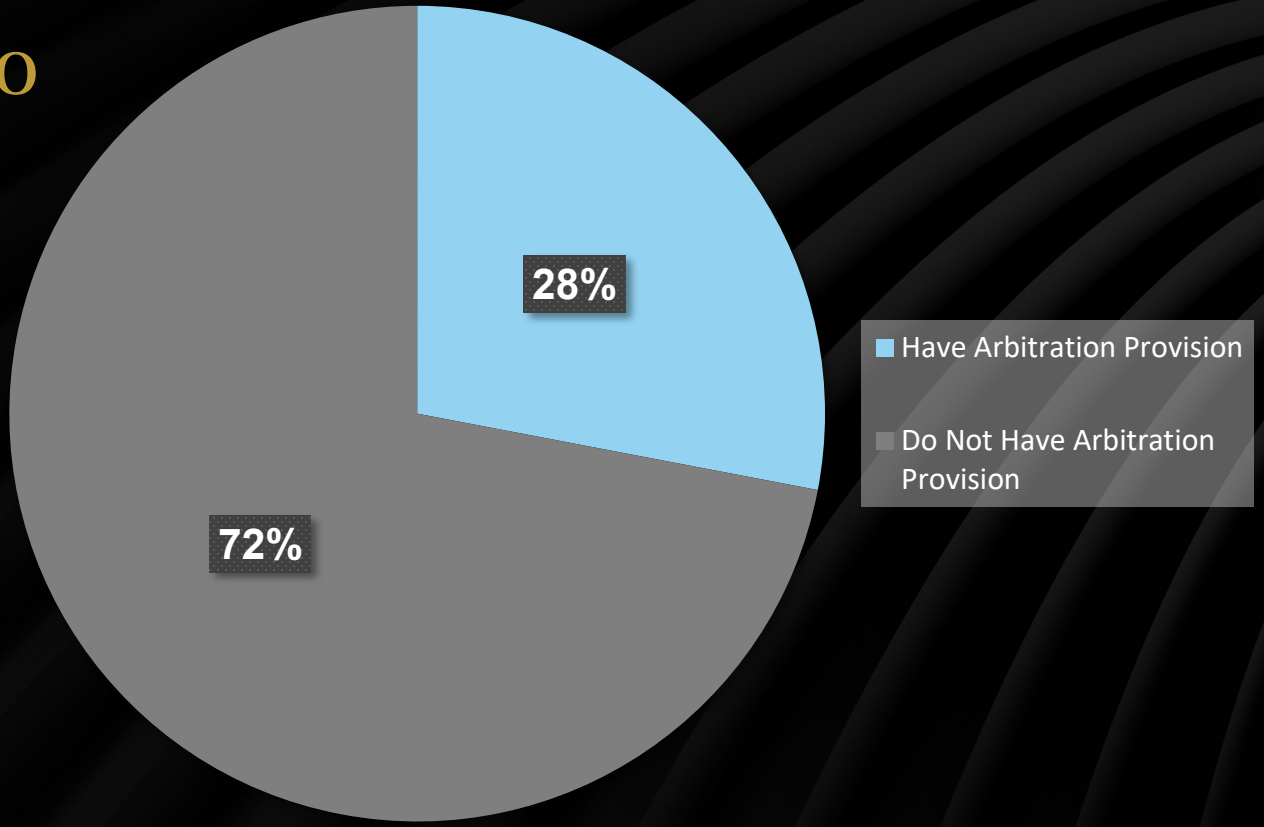
Fortune 500 Terms of Use Arbitration



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Scenario 5: Mobile App Removal

You receive a notice from an app store that your Company's app doesn't comply with some of the hundreds of app store requirements, including providing an accurate privacy nutrition label and the ability for all users to delete their accounts. The store has warned that the company has 5 days to fix these issues, or your app will be removed from the app store.

On the same day, you also receive notice from the CA AG that the use of tracking technologies in your app could trigger investigation.

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Mobile App

- App stores have hundreds of requirements, violating any of which could lead to an app being removed or not approved.
- Recommendations:
  1. Audit your app for all app store requirements
  2. Ensure privacy nutrition label accuracy and cohesion with privacy policy
  3. Consider independent security verification for Google Play store
  4. Post a comprehensive terms of use, do *not* rely on the default terms
  5. A broad, easy to use deletion mechanism is a must

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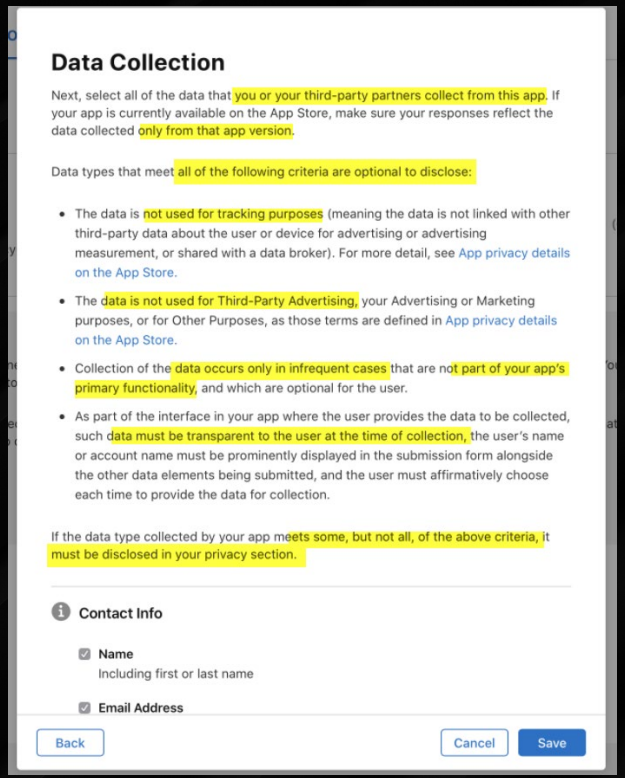

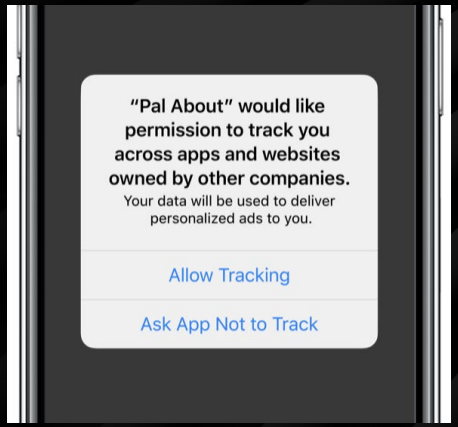

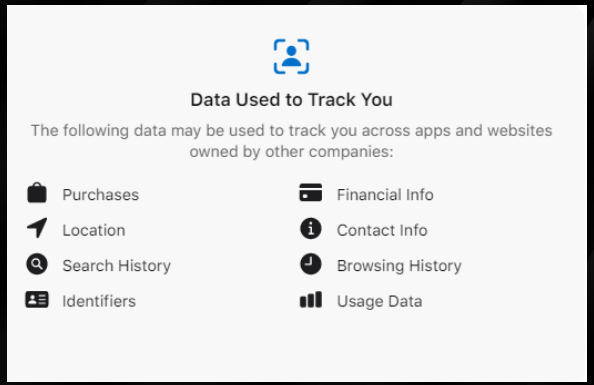

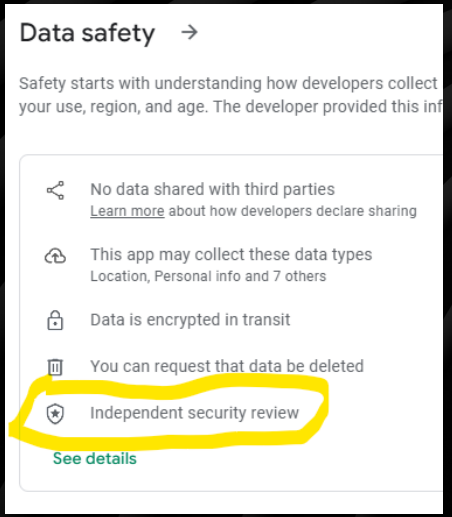

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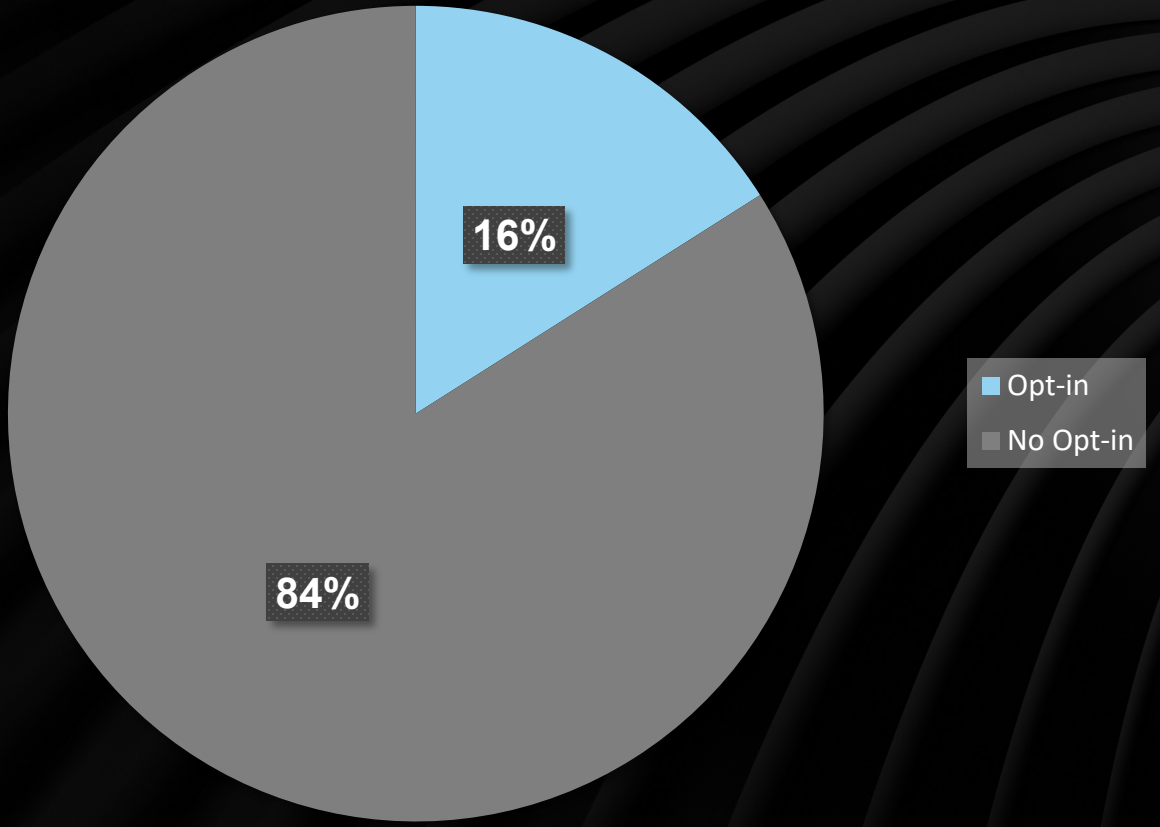
Top 100 Mobile Apps: Apple Sharing Opt-In



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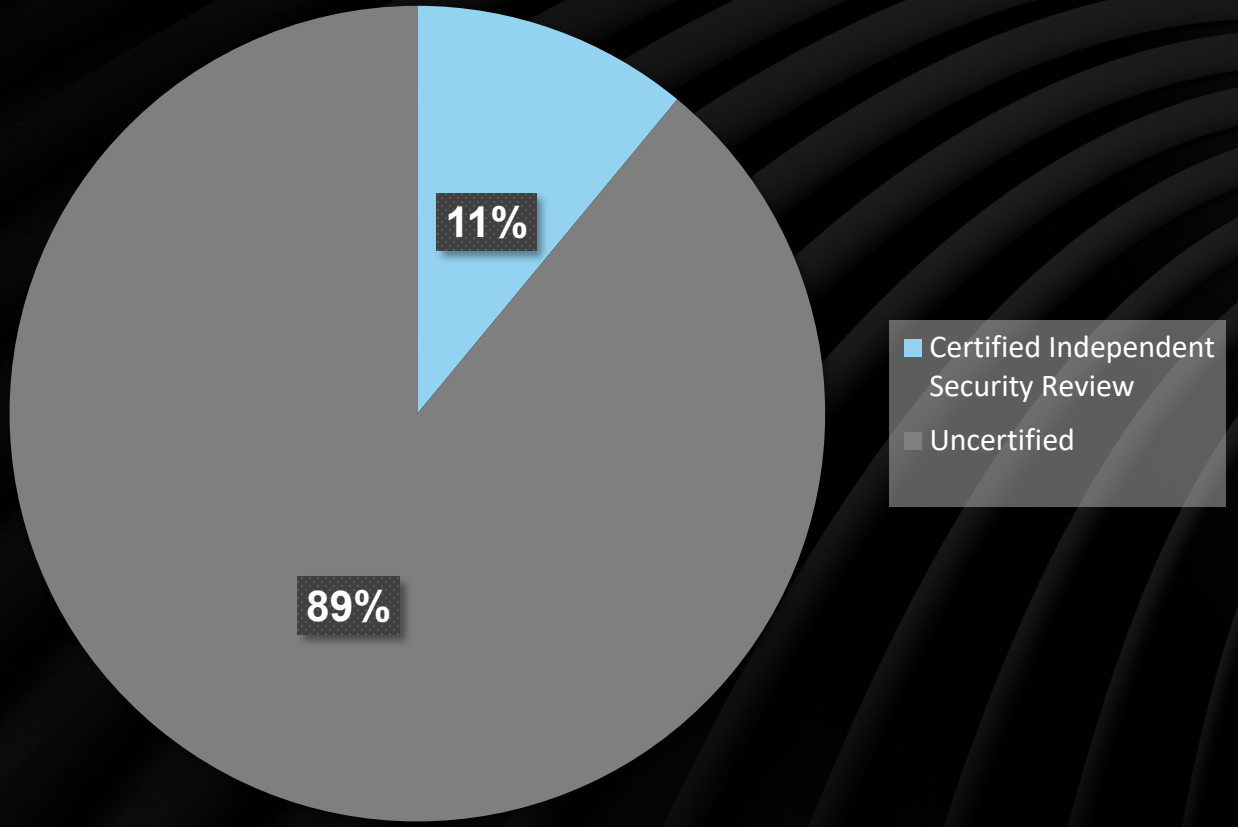
Top 100 Mobile Apps: Independent Security Review



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Scenario 6: Digital Accessibility Claim

You receive a demand letter alleging that your website is inaccessible to users who need assistive technology.

You're surprised because your company pays for an accessibility overlay widget which adds controls to your site that the overlay provider says makes it fully compliant.

Plaintiff's counsel is asking for $50k to settle. The overlay widget provider isn't responding to your emails, and their contract says they will only indemnify you from damages resulting from a final judgment.

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Digital Accessibility Claim: What Now?

- Another nuisance suit, with typical settlement values from $15k-$60k
- Typical settlement includes not only compensation, but also commitments to:
  - Remove overlay widget
  - Comply with the Web Content Accessibility Guidelines (WCAG)
  - Institute external and internal accessibility policies, training
  - Conduct professional monitoring

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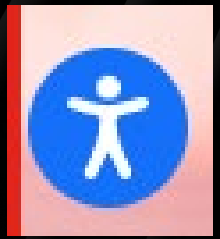
Digital Accessibility Claim: Prevention and Mitigation

- Remove Overlays: Data suggests overlay widgets *increase* your likelihood of suit.
  - They also are under attack by accessibility advocates for making websites less accessible.
- Comply with WCAG 2.1 AA
  - This standard is also required by the Colorado Privacy Act.
- Add accessibility policies, both internal and external.
- Improve your terms of use.



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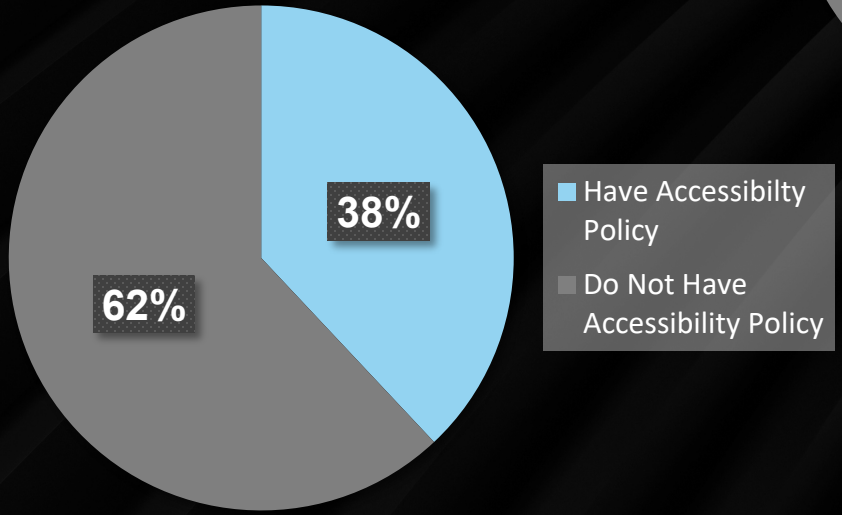
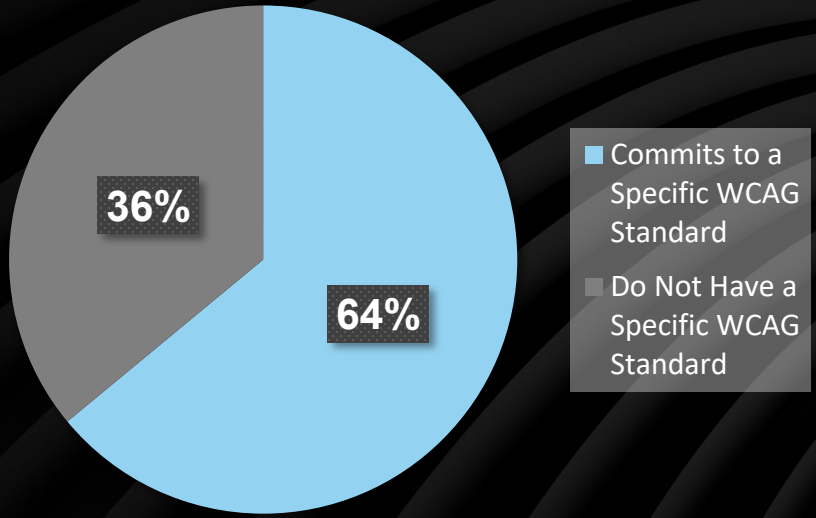
Fortune 500 Accessibility Policies





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More Information

Tyler Thompson
Denver
303.685.7437
ThompsonTy@gtlaw.com

www.linkedin.com/in/tylerjthompson

GT's Data Privacy Dish

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

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