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Privacy and Data Rights in an Information Economy

Golden Gate University IP Law Conference
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What is Privacy?

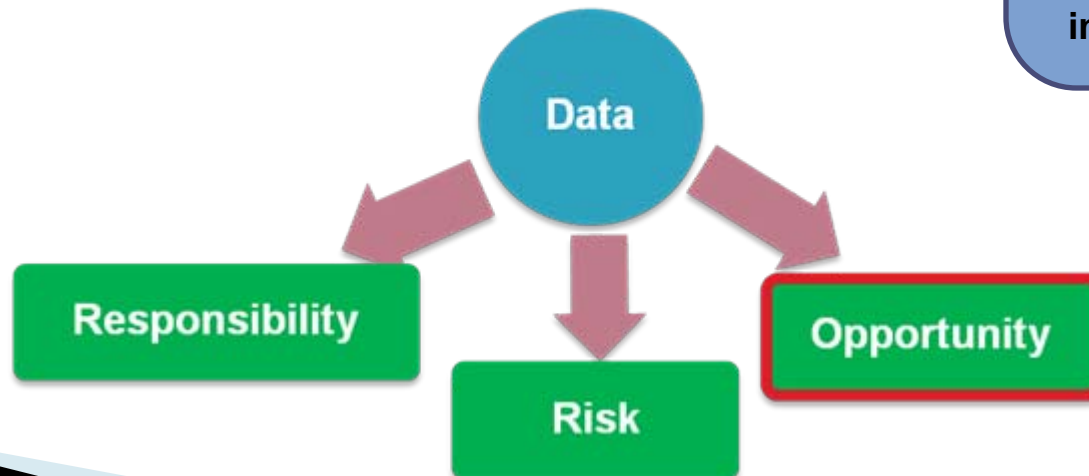
Privacy is the subjective condition people enjoy when they have power to control information about themselves and when they exercise that power consistent with their interests and values.

Privacy is concerned with:

- How information is collected, stored, protected, used, shared, and destroyed
- Who is accountable

Can you spot the IP connection?

Many companies have begun to see and treat personal information as IP...



Legal Landscape

Basis for Privacy Lawsuits / Enforcement Actions

- ▶ Brought using deceptive trade practice allegations (FTC Act, state DPTA, Lanham Act)
 - Alleging deception *or*
 - Eli Lilly (FTC): You said you wouldn't share and you did, first privacy case, no damages
 - CollegeNET v XAP: you said you would only share with permission (\$4.5 million jury verdict)
 - Alleging unfairness
 - Choice Point: It was fundamentally unfair to let an ID thief get credit report information (\$15 million)
- ▶ Who brings: FTC, State AGs, plaintiffs class action attorneys, competitors, HHS, OCR, etc.

Basis for Privacy Lawsuits / Enforcement Actions (cont.)

- ▶ Can't forget Tort
 - False Light
 - Publication of Private Facts
 - What is the “expectation of privacy”
- ▶ Trespass (really a tort too...)
 - Trespass to Chattels
 - CFAA/ECPA
- ▶ Constitutional Considerations
 - California State Constitution

2012 US Privacy law updates

- ▶ US Privacy Bill of Rights
 - Administration proposal
 - Privacy by Design
 - Simplified Consumer Choice
 - NTIA Multi-Stakeholder Process – Code of Conduct
 - APEC Integration
- ▶ CA adds a Privacy Enforcement Division to OAG
- ▶ NAAG launches Privacy Initiative
- ▶ Do Not Track/Behavioral Advertising
 - MSFT at odds with ad industry
- ▶ COPPA Rule Updates
 - Changes to definitions and knowledge triggers

2012 US Privacy law updates (cont.)

- ▶ COPPA Enforcement Action
 - RockYou (Mobile Platform) – \$250,000 penalty
- ▶ HIPAA: Enforce, Wait, Wait some more
 - Blue Cross Blue Shield – \$1.5MM
 - Self Reported Violation of stolen hard drives
 - HHS/KPMG audit program
 - Still waiting for the Final Rule
- ▶ APEC Cross Border Privacy Rule Participation
- ▶ EU Data Protection Reform
 - Lions, tigers, and fines... Oh My!
 - UK ICO fines consumer lending firm
 - loss of backup tapes (£150,000)
 - CNIL fines private company
 - refusal of access to employee data (€10,000)

Where Privacy
is headed...

New Approach – PII as IP

▶ Business Value

- Information Economy
 - Information = Value
- Service Delivery
 - what is the “secret sauce”?
- Customer Retention

▶ Business Growth

- Innovation in technology, services & service delivery
 - New product development
- 

New(er) Approach – Integrate Privacy Into Business Operations

- ▶ “Privacy by Design”
- ▶ Think about privacy throughout the business (when collect, use, disclose, etc.)
 - Google settlement
 - Alleged not to have given consumers an effective option to get out of information sharing with Google Buzz
 - Required to create and maintain a "comprehensive privacy program"
- ▶ Designate one person or group to be in charge
 - Twitter settlement
 - Allegedly failed to provide adequate protections
 - Required to designate one person in charge of security program
 - Google settlement also required to have one person in charge of privacy program
- ▶ FTC– Extend protection to all types of information not just PII
 - Google settlement included as covered information
 - "Persistent identifiers, such as IP address"
 - Physical location
 - Other information about the consumer that is combined with any other type of identifier (the two above, or more traditional types)

New Approach – Rethink Notice

- ▶ FTC: ‘Privacy policies don't work’
 - Industry response:
 - Not true that policies are categorically too long
 - If unbundle disclosures into separate documents, into copy, will make it even more confusing
 - Could be especially overwhelming since companies may have state-level disclosure obligations as well
 - Google case: FTC looked not just at the privacy policy to determine deception, but also the on-screen representations
 - "Turn off Buzz" and "check it out" both on-screen copy
- ▶ Class action lawsuits over lack of knowledge
 - Quantcast: Flash cookies fundamentally unfair because unclear how to turn them off, deceptive because might think are turning them off when turn off browser cookies
- ▶ EU Cookie Directive?

New Approach – Rethink Consent

- ▶ FTC: ‘Opt-in for practices that are not "commonly accepted“’
 - Many industry concerns:
 - How can FTC define what is commonly accepted?
 - Needs to be specific to industry
 - Can't have "by design" if everyone is adopting standard policy
 - Could make it more expensive for consumers if increase opt-ins
 - Google settlement: required to get consent before sharing with third parties
- ▶ DNT
 - How do you do it? Opt out of use by third parties for OBA or marketing

New Approach– Behavioral Advertising

- ▶ **FTC not happy with self-regulation**
 - Proposed "Do-Not-Track" as a potential solution
 - Industry response: again, haven't given current approach a chance
- ▶ **Kerry/Mc Bill – opt out of OBA, no do-not-track**
- ▶ **FTC v. Chitika**
 - Chitika places brands' ads on third party websites using behavioral tracking techniques
 - Privacy policy said could opt-out, but it didn't work
 - Consent: make it work, opt-out must last five years (no \$\$)

Questions?



Thank you!



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