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insights

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NOW WHAT, AFTER GDPR? CALIFORNIA!

New State Privacy Law Set to Impact Businesses Across the U.S.

By Jason M. Koransky

Just as businesses are trying to comply with the European Union's new GDPR data privacy regulation implemented in May, the newly passed California Consumer Privacy Act is set to have potentially significant impacts on how U.S. companies collect, use, store, and destroy their customers' personal data. The law attempts to provide transparency to how businesses use their customers' personal information, and to give customers control over how businesses use and maintain this information. And the legal compliance ramifications for businesses could be daunting.

Signed into law by Gov. Jerry Brown on June 28, 2018, and set to go into effect on January 1, 2020, the Act applies to a company "which does business in the State of California" and meets one of three criteria: (1) gross revenues of more than \$25 million; (2) annually buys, receives for commercial purposes, sells, or shares personal information of 50,000 or more consumers, households, or devices; or (3) earns 50 percent or more of its annual revenue from selling consumers' personal information.

The law applies only to residents of the state of California. Yet because it has the largest economy and largest population in the U.S., California's adoption of the most sweeping state law to address data privacy likely will have a nationwide impact. In fact, one article published shortly after the bill was signed estimated that more than 500,000 U.S. businesses would be affected. Simply put, if a company meets one of the three criteria above and collects personal information from even a single California resident, the law would apply to it. In addition, because a company may not want to or be able to have separate data privacy practices for its California-based customers and customers outside of the state, a company may decide to use the California statute as the baseline for how it collects, uses, stores, and destroys personal data.

As has become common for California regarding privacy legislation – such as its law that allows minors to request removal of information posted online or the law that requires businesses, upon a customer's request, to disclose the third parties to which they have provided the customer's information for marketing purposes – the new law stands at the vanguard of privacy legislation in the U.S.



1. See Rita Heimes and Sam Pfeifle, "New California privacy law to affect more than half a million US companies," July 2, 2018, available at <https://iapp.org/news/a/new-california-privacy-law-to-affect-more-than-half-a-million-us-companies>,
2. California's Privacy Rights for California Minors in the Digital World Act, Calif. Bus. & Prof. Code §§ 22580-22582 (2015).
3. California's "Shine the Light" Law, Cal. Civ. Code § 1798.83 (2003).

“WHILE IMPLEMENTATION OF THE CALIFORNIA CONSUMER PRIVACY ACT IS STILL ABOUT A YEAR-AND-A-HALF AWAY, BECAUSE OF ITS SWEEPING RAMIFICATIONS, BUSINESSES SHOULD START REVIEWING THE LAW NOW, CONSIDER IF AND HOW IT WILL IMPACT THEM, AND START PLANNING FOR COMPLIANCE.”

4. California Assembly Bill No. 375, Section 2.
5. California Assembly Bill No. 375; Cal. Civ. Code § 1798.140 (2018).
6. *Id.*
7. *Id.* at § 1798.100.
8. *Id.* at § 1798.105.
9. *Id.* at §§ 1798.110, 1798.115.
10. *Id.* at § 1798.120.
11. *Id.* at § 1798.125.
12. *Id.* at § 1798.135.
13. California Assembly Bill No. 375; Cal. Civ. Code § 1798.140 (2018).
14. *Id.*

In its preamble, the bill enunciates five pillars upon which it was drafted:

- (1) The right of Californians to know what personal information is being collected about them.
- (2) The right of Californians to know whether their personal information is sold or disclosed and to whom.
- (3) The right of Californians to say no to the sale of personal information.
- (4) The right of Californians to access their personal information.
- (5) The right of Californians to equal service and price, even if they exercise their privacy rights.

To help provide these rights to California residents, the law sets forth a broad definition of “personal information,” which includes “identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household.” It lists information typically considered personal information, and also specifically mentions categories such as Internet or electric network activity such as browsing history, biometric information, geolocation data, and a broad catch-all that appears to relate to activities like those by Cambridge Analytica with Facebook user data, namely, “Inferences drawn from any of the information identified in this subdivision to create a profile about a consumer reflecting the consumer’s preferences, characteristics, psychological trends, preferences, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes.”

While the new law has numerous provisions that businesses whose practices arguably fall under its scope should review, in general, it provides consumers the following rights:

- To request, twice a year, that a business disclose the categories and specific personal information it has collected.
- To request that a business delete a consumer’s personal information that it has collected.
- To request that a business disclose the business or commercial purposes for the personal information it has collected or sold, and the categories of third parties with whom the business shares or sells this personal information.
- To opt out of a company selling his or her personal information.
- Not be discriminated against because of exercising his or her rights under the law.

The law also establishes methods that businesses must implement to allow consumers to submit requests for information and for them to communicate with consumers and comply with the law. For example, a business must provide a conspicuous link on the home page of its website titled “Do Not Sell My Personal Information,” which allows a consumer to opt out of the sale of his or her personal information.

Further, while the law primarily contemplates the California Attorney General bringing civil enforcement actions for violations of the law, it also provides a private right of action for people whose data is stolen or accessed without authorization “as a result of the business’ violation of the duty to implement and maintain reasonable security procedures and practices appropriate to the nature of the information to protect the personal information.” In a private cause of action, damages are set between \$100 and \$750 per consumer per incident, or actual damages, whichever is greater. While there is no mention of attorneys’ fees in the statute, this private right of action could likely become a new source of class action privacy litigation.

Overall, while implementation of the California Consumer Privacy Act is still about a year-and-a-half away, because of its sweeping ramifications, businesses should start reviewing the law now, consider if and how it will impact them, and start planning for compliance. ■

NEW ASSOCIATE

■ Sarah E. Ligon



We are pleased to announce that Sarah E. Ligon has joined the firm as an associate. Sarah received her J.D. from Chicago-Kent College of Law in 2014, with a certificate in Intellectual Property. Sarah was also awarded the prestigious Dolores K. Hanna Trademark Prize.

Sarah's experience includes trademark prosecution and litigation in addition to copyright, right of publicity, and sweepstakes law. While in law school, Sarah worked as a law clerk at the Tribune Company, where she handled a variety of intellectual property law matters, as well as worked on issues involving marketing and advertising, media, internet, sweepstakes, and privacy law. Prior to that, Sarah worked in the Branded Entertainment industry as a group marketing manager, where she managed numerous entertainment marketing and promotional campaigns on behalf of national and international brands.

ABA ANNUAL MEETING

■ Pattishall to Host ABA Program

Pattishall will be sponsoring and hosting a panel discussion entitled "NEW HORIZONS: The Future of Trademark Disputes at the TTAB and the Courts" during the ABA Annual Meeting in Chicago on August 2. The panelists will be our own **Thad Chaloeontiarana**, Gerard F. Rogers, Chief Administrative Trademark Judge of the Trademark Trial and Appeal Board, Ryan Hinshaw, Associate General Counsel for Blue Cross Blue Shield, Jessica Bahr, Associate General Counsel for Constellation Brands, Inc. and Mark McKenna, John P. Murphy Foundation Professor of Law, Notre Dame Law School. The panel will discuss the issues that trademark owners need to consider when deciding to institute opposition or cancellation proceedings before the Trademark Trial and Appeal Board (TTAB) and/or trademark infringement, unfair competition, counterfeiting and dilution actions in federal courts.

PRESENTATIONS

■ Thad Chaloeontiarana



Thad will serve as a moderator of the earlier-referenced panel discussion entitled "NEW HORIZONS: The Future of Trademark Disputes at the TTAB and the Courts" during the ABA Annual Meeting in Chicago on August 2.

■ Robert W. Sacoff



Bob is serving on the Program Committee for the IPO Annual Meeting in Chicago on September 23-25, and will be serving as Chair of the Session on the "Registrability of 3D trademarks" Study Question at the AIPPI World Congress in Cancun on September 26.

■ Belinda J. Scrimenti

Belinda spoke at two events at the DC Bar, "Lunch with a Lawyer with the DC Bar Intellectual Property Law Community" on May 31, and "The Increasing Importance of Non-Traditional Marks and How Best to Protect Them" on June 5.

PUBLICATIONS

■ Jonathan S. Jennings



Jonathan wrote an article examining the Morehouse Defense that was published in the May edition of the Pharmaceutical Trade Marks Group's publication *Law Lore & Practice*.

Best Lawyers® 2018

Robert M. Newbury and **David C. Hilliard** have been recognized in the fields of Litigation - Intellectual Property, and Trademark Law in Illinois.

Expert Guides – Trade Mark 2018

Robert W. Sacoff and **Joseph N. Welch II** have been recognized as leading practitioners in Trade Mark.

IP Stars, Managing Intellectual Property Magazine

Pattishall McAuliffe has been nationally recognized in Trade Mark Contentious, Trade Mark Prosecution and Copyright, and “Highly recommended” in Illinois. **Brett A. August**, **Bradley L. Cohn**, **David C. Hilliard** and **Jonathan S. Jennings** have been selected as “IP Stars” in Illinois.

The Legal 500 United States

“Considered by one client to be ‘as good as it gets in this area’, Chicago-based boutique **Pattishall, McAuliffe, Newbury, Hilliard & Geraldson LLP** has experience handling litigation for clients in the automobile, consumer products, pharmaceuticals and technology sectors, among others.”

Who’s Who Legal: Trademarks 2018

David C. Hilliard, **Janet A. Marvel**, **Demetra Merikas**, **Robert W. Sacoff**, **Belinda J. Scrimenti** and **Joseph N. Welch II** have been recognized as being among the world’s leading trademark lawyers.