Marketing & Advertising Privacy

Morris, Manning & Martin, LLP | www.mmmlaw.com

Moderator/Speaker:

Michael Young, Partner
Morris Manning & Martin, LLP

Speakers:

Jodi Daniels, CEO & Privacy Consultant
Red Clover Advisors

John Story, General Counsel and Chief Data Ethics Officer
Acoustic

Presented to the Privacy and Technology Law Forum

March 29, 2022

Agenda

- Email
- SMS / Text
- Analytics / Cookies
- Risky Business: Sensitive Data, Children's Data, Data Sales, Employee Advertising, Data Enrichment
- Developing US Issues
- Developing EU Issues

Email Marketing (US)

CAN-SPAM basics:

- Transactional v. Non-transactional
- Opt-out standard, *but*
- Opt-in recommended to avoid marking requirement
- Consent may cover third parties

Email Marketing (US)

- List sale or rental currently possible, *but note*
  - Shine-the-Light disclosure
  - Enabling privacy notice
  - Data broker registration (CA / VT)
  - Customer / reputational issues?

Email Marketing (EU/UK)

- Interplay between GDPR and ePrivacy Directive
- Opt-In standard (Art. 13, ePrivacy Directive)
  - Unsolicited marketing communications not permitted
  - Need prior consent
  - More rigorous standards in some locales (e.g. double opt-in)
  - Limited exception for email to direct customers
    - Collected in context of sale
    - Opportunity to object at time of collection and in each message
- What about acquiring/purchasing email lists

SMS / TEXT (US)

- Historically, substantial class action risk ($500 - $1500 per violation)
- Is legally possible, but note:
  - Consent requirements
  - Limitation on timing, frequency

- Avoid 'autodialers' (*Facebook, Inc. v. Duguid, et al*)
  - Facebook sent automated texts to numbers stored in its database and did not use a random or sequential number generator. The Court held that Facebook did not use an autodialer under the TCPA.

SMS / TEXT (EU / UK)

- No SMS/Text specific legislation
- ePrivacy Directive extends to SMS
- Opt-In standard
  - Unsolicited marketing communications via SMS not permitted
  - Need prior consent
  - Limited exception for email to direct customers (same as email)
  - Practical differences from email consent
- Draft ePrivacy Regulation

Analytics & Cookies

- What is considered personal information?
- Opt-in v. Opt-out practices
- Cookie manager
- Notice considerations
- Sale v. Sharing of Data

Types of data

Cookie Practices

If you are using a new digital identifier, it could be considered a “sale or share” of data under the CCPA. Companies need to provide the right opt-out options.

Do you have a banner for EU residents? US residents? Will you take a global or regional approach?

Cookies and banner notices are not all created equal.

Selling vs sharing

Selling	Sharing
"any arrangement involving an exchange of value ("consideration") between the business and a third party or another company for the personal information. These include the act of disclosing or making available personal information for monetary or other valuable consideration."	"**sharing**, 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 a third party for cross-context behavioral advertising, whether or **not for monetary** or other valuable consideration, including transactions between a business and a third party for **cross-context behavioral advertising** for the benefit of a business in which **no money is exchanged.**"

Do not sell my personal information

- Selling defined as “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”
- Hidden places where data may be “sold”
  - Advertising & Analytics pixels
  - Sponsored events
  - Joint promotions
  - Sharing with third parties that are not appropriately classified as “service providers”

Analytics & Cookies (EU / UK)

- ePrivacy Directive and GDPR
  - Art 5(3) ePrivacy: Clear notice and right to refuse
  - Article 6 GDPR: Lawful basis for processing
  - Article 7 GDPR: Conditions for Consent
- ICO Guidance
  - Consent in practice
  - Settings-led consent and features-lead consent
  - Cookie walls
  - Third party cookies
- Developments: CNIL fines Google & Facebook, Belgian Decision

Risky Business (EU & US)

- Risky data
- Risky practices
- Risky target markets
- Risky data transfers
- EU v. US cultural expectations re: privacy

Developing Legal Issues (US)

- Limit data use as “necessary and proportionate” / no secondary use
- Expressly limit data retention
- Express consent for sensitive information (e.g., VA)
- Right to restrict sensitive data processing (e.g., CA)
- Express rights to opt out of analytics / behavioral tracking (e.g., CA, VA)

Developing Legal Issues (EU / UK)

- Schrems II: Transfer of data to third countries
- Brexit: Continued EU and UK harmonization
- ePrivacy Regulation
- Is anti-trust a more effective regulatory tool?

Thank you!

Michael Young
myoung@mmmlaw.com

Jodi Daniels
jodi@redcloveradvisors.com

John Story
john.story@acoustic.com

Legal Appendix / References

Laws and materials referenced in the discussion are indicated below.

- CAN-SPAM: 15 USC 7701, et seq.
- Shine-the-Light
- General Data Protection Regulation
- ePrivacy Directive (Directive 2002/58/EC)
- ePrivacy Regulation (draft text)
- Privacy and Electronic Communications Regulations (UK)
- Facebook, Inc. v Duguid et al
- California Consumer Privacy Act
- Belgian Decision on Complaint re: Transparency and Control Framework (English translation)
- California Privacy Rights Act (text of the ballot initiative; text of the CCPA as amended by the CPRA)
- Virginia Consumer Data Protection Act
- Colorado Privacy Act
- ICO Guidance: How do we comply with the Cookie Rules?