



PROGRAM MATERIALS
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Cookies under the New GDPR Guidance and the CCPA

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The Cookie – A Short Explanation

- “Cookies are small text files that collect certain pieces of information about online users. Each time a user visits a new website, cookies are created by the Internet browser and saved onto the user's computer.”
 - Cookies are stored on the user's computer
 - May be browser specific
 - Cookies are usually domain specific (theoretically one advertiser cannot read another advertiser's data) but there are workarounds
 - Cookies may be deleted or controlled by the user, there are lots of tools for this
- Cookies in practice
 - The browser (Explorer/Firefox/Chrome) requests a certain page from the server, aka the website you want, but all the cookies “in scope” will also be included with that request.
 - The server then generates the page you want to go to. It can access all cookies sent on the request and can add a cookie of its own to be included on future requests.
 - The page loads in the browser, where JavaScript can use all the original cookies, plus any new ones added by the server.



A General Summary of the Technology (Regulator/Lawyer Version)

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Types of Cookies (1st and 3rd Parties)

- Regulators See “First and Third Party Cookies”
 - A first party cookie is a cookie you (the website operator) deploy, data stays with you
 - Third party cookie is a cookie deployed on your website by a third party (data may stay with you or leave)
 - Third party cookie+ is a cookie deployed on your website by a third party advertising network (data leaves immediately)
 - Facebook pixels, ad fraud detectors, digital objects, etc.
 - AdWords, Google (YouTube), Microsoft Bing, Facebook, LinkedIn, Twitter (set by third parties, for third parties)
 - Enables auctions, RTB, targeted advertising

Cookie Overview (Types of Cookies)

- Three basic types of cookies (there are more and there are nuances, but we are thinking like regulators):
 - Session, necessary, functionality cookies
 - Cookies that help pages load, that manage shopping carts, remember preferences, passwords, and that basically do stuff you need
 - Essentially always allowed otherwise the internet is an awful, annoying place (browse in incognito in the EU)
 - Analytics Cookies
 - Provide the operator (or a third party) information about how the site is used
 - Some examples: Google Analytics, HotJar, etc.
 - Behavioral advertising/marketing/tracking Cookies
 - This is the area of prime concern
 - Tracks users across time, across sites, shares data with multiple entities and networks



Cookies under Attack (By Users and Regulators)

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Where We Are

- Researchers at the University of Michigan/Ruhr-Universität Bochum conducted a study concerning cookie banners
 - 80% of websites offered “no options other than a confirmation button **that does not do anything**”
 - 21% of websites listed the actual data recipients (*i.e.* had a cookie policy or privacy policy addressing cookies specifically)
 - 50.8% of mobile users were likely to click an “accept” button; 26.9% of desktop users were likely to click an “accept” button
 - Multiple consent, highly visible, granular cookie banners saw the acceptance rate go down to 5%
- According to a recent AdExchanger survey, 87% of users will press the “Do Not Sell” button if they see it.

Cookies Under Attack

- Cookies are getting easier to block
 - Click and Clean Extensions (Chrome and Firefox)
 - Ghostery and related apps
 - Settings configuration
 - Mobile
- Regulatory Issues Arise
 - CNIL and ICO guidance in July of this year
 - CCPA and the problem of “sales”
 - IAB Framework
- Problematic responses from regulators in the US and the EU
 - End of advertising?
 - End of free internet?



GDPR and Cookies

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Consent . . . Consent . . . Consent

- After some equivocation, guidance from the ICO (British Regulator) and the CNIL (French Regulator) leaves no doubt . . .
- Consent is needed for analytics cookies and behavioral advertising cookies
 - Re third party cookies, ICO writes “Obviously, the process of getting consent for third-party cookies is more complex and everyone has a part to play in making sure that the user is aware of what is being collected and by whom.”
 - Analytics cookies are not exempt: “Analytics cookies do not fall within the ‘strictly necessary’ exemption. This means you need to tell people about analytics cookies and gain consent for their use.”

Consent in Practice

- Granulated cookie banners
- Independent opt-outs for analytics and behavioral advertising cookies
- Documentation of consent
- Renewal of consent
- Look at ICO website (<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/>)

Planet49 ECJ Decision

- (To my knowledge) first ECJ decision directly addressing cookies
- Presages more direct enforcement?
- Not brought by a supervisory authority, and indeed we are unaware of any enforcement actions against any controllers for bad cookie banners
- Largely reiterated guidance, but some interesting nuggets

Planet49 ECJ Decision Holdings

- No pre-checked boxes
- Convergence of ePrivacy Directive and GDPR
 - Not really surprising given ICO/CNIL guidance
 - No more legitimate interest arguments for non “personal data” cookies
- Applicability of GDPR
 - ECJ held that the cookie banner violated GDPR
 - Seems to run against EDPB, Opinion 5/2019, which suggests ePrivacy Directive takes precedence when it imparts a specific rule (cookie enforcement seeking GDPR penalties??)
- Duration, duration, duration
 - New idea/requirement that controllers disclose duration of advertising cookies (very challenging)

Lloyd v. Google [2019] EWCA Civ 1599

- Suit sought class damages for users' loss of control resulting from a Safari cookie workaround circa 2011-2012
- Apple made certain technical exceptions to its Safari cookie blocker and Google allegedly exploited these exceptions to drop its DoubleClick cookie on users' terminals without knowledge or consent
- Most important paragraphs ultimately may be paragraphs 46 and 47:
 - A person's control over data or over their BGI [Browser Generated Information] "does have a value, so that the loss of that control must also have a value."
 - Does unconsented collection give rise to a class action and damages?
 - Paragraph 66: "the loss of control damages claimed by the represented claimants are properly to be regarded as compensatory in nature."



CCPA and Cookies

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California Consumer Privacy Act in a Nutshell

- Applies to “personal information” of California residents
- The CCPA was drafted in 7 days.
- It contains a large number of errors, and the drafters arguably had little idea of the practical impact that it would have on various industries.
- Law goes into effect on January 1, 2020.
- The Attorney General can’t enforce it until July 1, 2020.
- Until the CCPA, US-based based companies operating exclusively in the United States did not have to worry about cookies.
- CCPA changes this, in particular by making cookies “personal information” in some circumstances.
- This can lead to some strange results and lead to cookie banners.

Everything Is For A Sale

- Definition of a sale: selling 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.***
- ***But there are exceptions . . .***

Sales in the Context of Behavioral Advertising Networks

- IP addresses are tracked, IP addresses are personal information
- IP addresses are provided to behavioral networks (i.e., transmitting or making available to a third party)
- Website owner benefits from participation in the behavioral network (e.g., higher consideration for targeted ads) and thus behavioral cookies may constitute a “sale” under CCPA

Two Approaches in Response

- Approach 1: Disclose and Opt-Out
 - Appears to be the IAB approach
 - Display “opt-out” through “Do Not Sell” button
 - Honor opt-outs . . . Somehow
- Approach 2: GDPR Redux
 - Cookie banners may be coming to the US
 - Exemption from definition of sale where: “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.***”

Cookie Banners/Audits

- Crafting cookie banner and cookie policy depends on a number of factors
 - CCPA, GDPR or both?
 - Behavioral Advertising or Not
 - Can we STOP them? Issue in the UK/EU right now regarding the effect of a banner.
 - What about true third party pixels/digital objects?
- Next Steps
 - Cookie Audit
 - Answer questions above
 - Coordinate with Marketing
 - Engage counsel that understands these issues
 - Settle on language and deployment strategy (get technical input early)

IAB and Other Frameworks

- One-Click Opt-Out (geo-fencing is a must)
 - Otherwise, consumers across the country will “smash” the button (remember the 90% rule)
 - Downstream parties converted to “service provider” status
- Practical problems
 - What about advertiser sales to publishers
 - What about non-IAB network participants
 - Can service providers meet this definition
- Laudable but incomplete, how will the market respond?
 - Technical specifications forthcoming
 - Contract to be published



Thank you.

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