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Transatlantic Privacy Update: Regulatory and Litigation Primer for In-House Counsel

Association of Corporate Counsel
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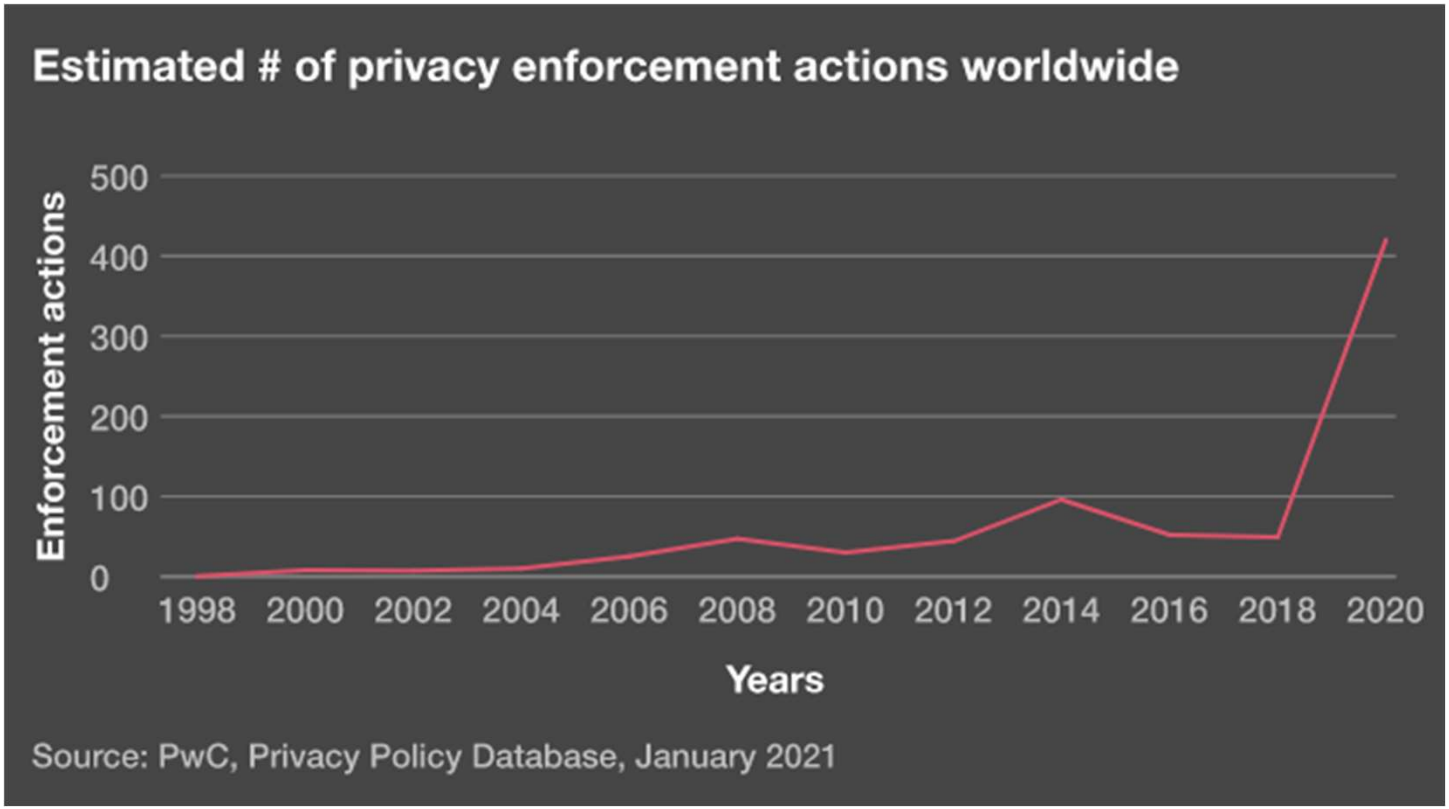
Agenda

- **U.S. Privacy Litigation Trend: Big Data in the Crosshairs**
- **UK/EU Enforcement Trends**
- **Cross-border Enforcement Cooperation**
- **Overview of Claims Asserted: U.S. and California**
- **Status of UK / EU Privacy Class Actions**
- **Key Defenses & Practical Takeaways**

U.S. Privacy Litigation Trends

U.S. Litigation Trend: Increasing Enforcement



Source: https://www.pwc.com/us/en/services/consulting/cybersecurity-risk-regulatory/library/seven-privacy-megatrends/rise-privacy-enforcement.html

Bipartisan Scrutiny of “Big Tech”

“[T]ech firms collect and exploit sensitive personal information -- often threatening national security, harming our emotional health, and discriminating against vulnerable groups.”

“We should have a conversation about what data is appropriate to collect, what limits should be placed on the groups that data is collected on, and restrictions on how that data is sold or transferred to other parties.”

Congressional Scrutiny of Big Tech

Innovation, Data, and Commerce Subcommittee Hearing: "Promoting U.S. innovation and Individual Liberty through a National Standard for Data Privacy" (March 1, 2023)

Cathy McMorris Rodgers (R-WA), House Energy and Commerce Committee Chair

"Americans have no say over whether and where their personal data is sold and shared, they have no guaranteed way to access, delete, or correct their data, and they have no ability to stop the unchecked collection of their sensitive personal information."

"This isn't acceptable. Data brokers and Big Tech's days of operating in the dark should be over."

"People should trust their data is being protected."

Big Data in the Crosshairs

Rise in suits targeting Big Tech

- **Increased litigation targeting not only data *breaches*, but also *collection* and *use* of personally identifying information**

Notable Recent Class Action Settlements

- *In re: Facebook, Inc. Consumer Privacy User Profile Litigation* (N.D. Cal.) - $725m
  - Allegations of granting third parties access to user content and PII without consent
- *In re: T-Mobile Customer Data Security Breach Litigation* (W.D. Mo.) - $350m
  - Allegations of failure to adequately protect consumers' PII from data breach
- *In re: Tiktok Consumer Privacy Litigation* (N.D. Ill.) - $92m
  - Allegations of surreptitious harvesting and profiting from biometric data, geolocation information, other PII, and unpublished digital recordings
- *In re: Zoom Privacy Litigation* (N.D. Cal.) - $85m
  - Allegations of sharing PII with third parties without permission, misrepresenting encryption protocol, failure to prevent "Zoombombing"

Big Data in the Crosshairs

- **Increased litigation targeting not only how data is collected, but also how data is *used***
- **Examples:**
  - Location information
  - Browsing activity
  - “Cookie” tracking
  - App-usage data
  - Biometric data

In re Facebook, Inc. Internet Tracking Litig., 956 F.3d 589 (9th Cir. 2020)

- **Privacy class action alleging:**
  - *Collection*: using cookies to track users' browsing histories when they visited third-party sites after they had logged out of the platform
  - *Use*: compiling information into personal profiles sold to advertisers
- **Asserted claims:**
  - Wiretap Act, Stored Communications Act (SCA), California statutes (California Invasion of Privacy Act; Computer Data Access and Fraud Act), and California common-law claims
- **Post-*In re Facebook*, plaintiffs are increasingly asserting claims based on compilation of data.**

Emerging Trend: Enforcement Targeting Dark Patterns

What are dark patterns?

- "[A] user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice…" Cal. Civ. Code 1798.140; Colo. SB 190 § 6-1-1303 (9)

- **Examples:**
  - Fake countdown timers
  - Misdirection
  - Obscured renewing subscription
  - Fake activity messages
  - Messages indicating low stock or high demand
  - Obstruction—making sign up easy and cancellation hard

Emerging Trend: Enforcement Targeting Dark Patterns

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Samuel Levine, Director, Bureau of Consumer Protection, FTC

The FTC is stepping up enforcement regarding dark patterns.

- Issued an enforcement policy statement (Oct. 28, 2021) regarding disclosures, consent, and cancellation terms
  - "Firms that deploy dark patterns and other dirty tricks should take notice." – Samuel Levine
- Recent enforcement action against Age of Learning, Inc. regarding cancellation terms that resulted in $10 million settlement

Emerging Trend: State Laws Targeting Dark Patterns

State legislators are passing laws regarding dark patterns.

- **AB 390** (October 2021)
  - Strengthens protections under California's Auto Renewal Law by ensuring that consumers can cancel automatic renewal and continuous service subscriptions online.

- **Cal. Consumer Privacy Act (CCPA) regulations** (Cal. Code Regs. Tit 11, Div. 1, Chp. 20, Section 999.315(h))
  - Bans the use of dark patterns to subvert or impair the process for consumers to opt out of the sale of personal information

- **Cal. Privacy Rights Act** (took effect January 1, 2023)
  - "Consent obtained through dark patterns does not constitute consent."

- **Colorado Privacy Act** (takes effect July 1, 2023)
  - No consent obtained through dark patterns.
  - No private right of action; enforcement via state AG and district attorneys

Enforcement trends – UK / EU (1)

- 2022 saw an increase of 50% on the fines issued in 2021.
- To date, Luxembourg has issued the single biggest fine of EUR746m (USD790m/GBP649m) against a US online retailer and e-commerce platform
- Reputational damage with fines, eroding consumer trust.
- Private enforcement through damage claims – soon with collective actions
- Given the extraterritorial scope and the global nature of internet business, US companies are not immune.
- Detailed guidance (Children's code, dark patterns, etc.)

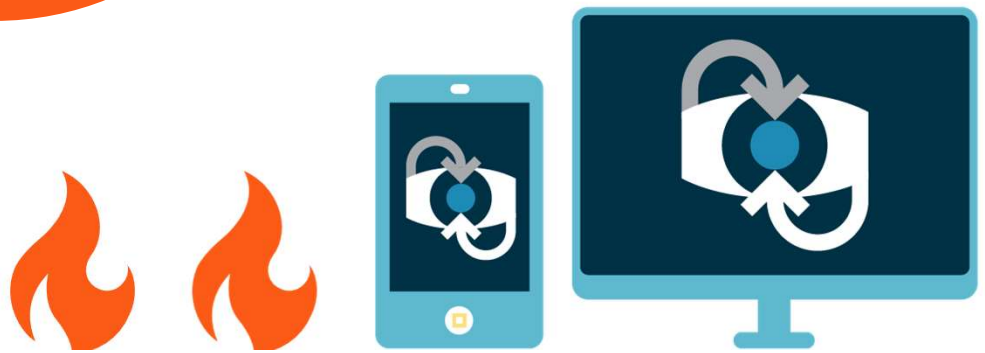
Enforcement trends – UK / EU (2)

Ad-tech under fire

NOYB 101 Auto complaints saw increased regulator action earlier in the year

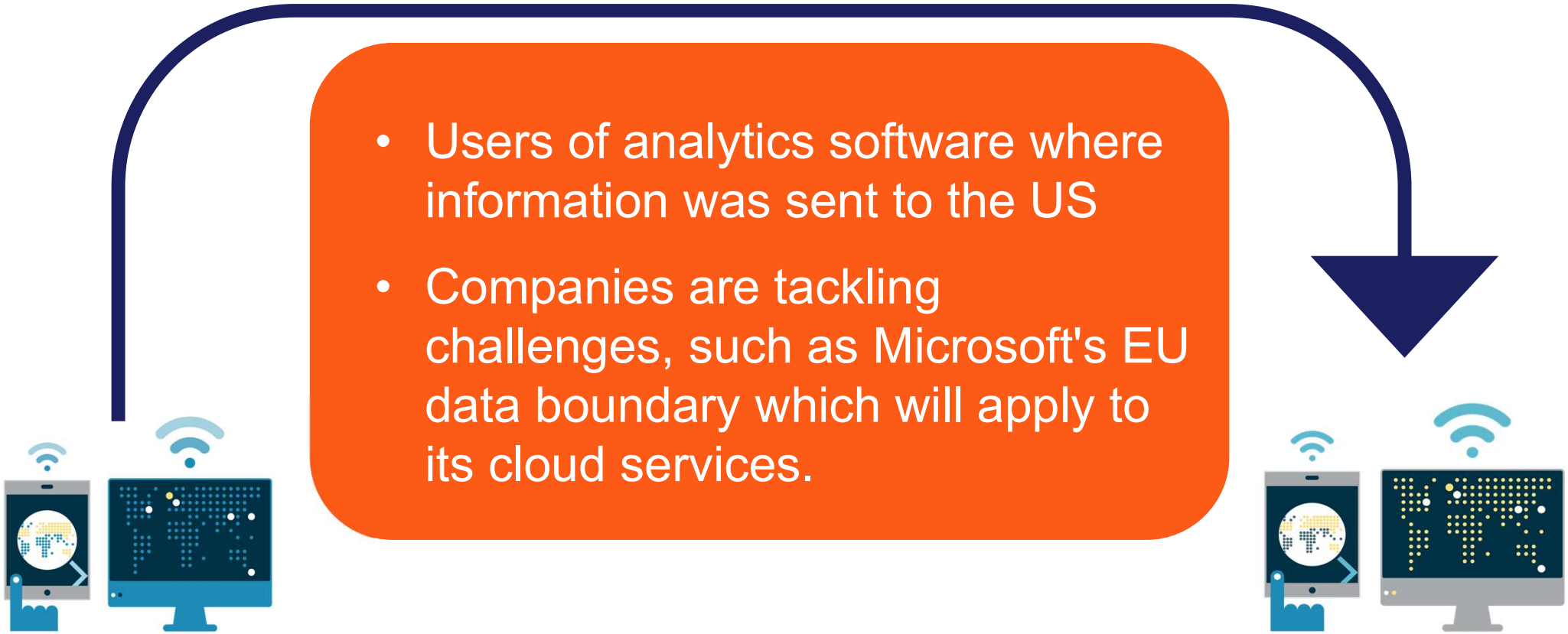
Consent and legal basis for targeted advertising has already lead to substantial fine notices in 2023

EDPB cookie banner taskforce



Enforcement trends – UK / EU (3)

International transfers regulator action



- Users of analytics software where information was sent to the US
- Companies are tackling challenges, such as Microsoft's EU data boundary which will apply to its cloud services.

Enforcement trends – UK / EU (4)

Top 10 fines across the EU

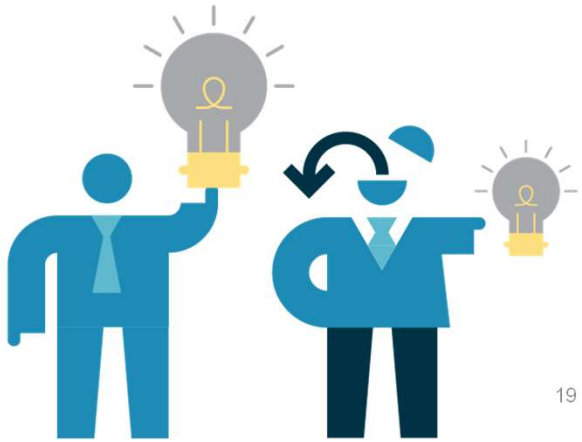
Controller / Processor	Country	Fine (€)	Breach / type of data	Date
Amazon Europe Core S.à r.l.	Luxembourg	746,000,000	Non-compliance with general data processing principles / customer data	July, 16 2021
Meta Platforms Inc (Instagram)	Ireland	405,000,000	Non-compliance with general data processing principles / children's data	September, 5 2022
Meta Platforms Ireland Limited	Ireland	390,000,000	Insufficient legal basis for personalized advertising and violation of transparency obligations.	January 4, 2023
Meta Platforms Ireland Limited	Ireland	265,000,000	Data breach and failure to implement organisational and technical measures.	November 28, 2022
WhatsApp Ireland Ltd.	Ireland	225,000,000	Insufficient fulfilment of information obligations / customer data	August, 20 2021
Google LLC	France	90,000,000	Insufficient legal basis for data processing / cookies	December, 31 2021
Facebook Ireland Ltd.	France	60,000,000	Insufficient legal basis for data processing / cookies	December, 31 2021
Google Ireland Ltd.	France	60,000,000	Insufficient legal basis for data processing / cookies	December, 31 2021
Google LLC	France	50,000,000	Insufficient legal basis for data processing / customer data	January, 21 2021
H&M Hennes & Mauritz Online Shop A.B. & Co. KG	Germany	35,258,708	Insufficient legal basis for data processing / customer data	October, 1 2020

Enforcement trends – UK / EU (5)

- Regulators are not afraid of acting on enforcement around **Artificial Intelligence**. Clearview AI was fined the maximum amount last year from the Italian, Greek and French Authorities (and also received a lower fine from the UK commissioner).

- The Italian regulator has also been active to impose a ban on Open AI's ChatGPT unless they can fulfil certain conditions (developing story…).

- **Serial enforcers** – individuals and organisations have put in place mechanisms to enforce privacy regulations by reporting to regulators or threatening to report to regulators.



Common Causes of Action: U.S. and California

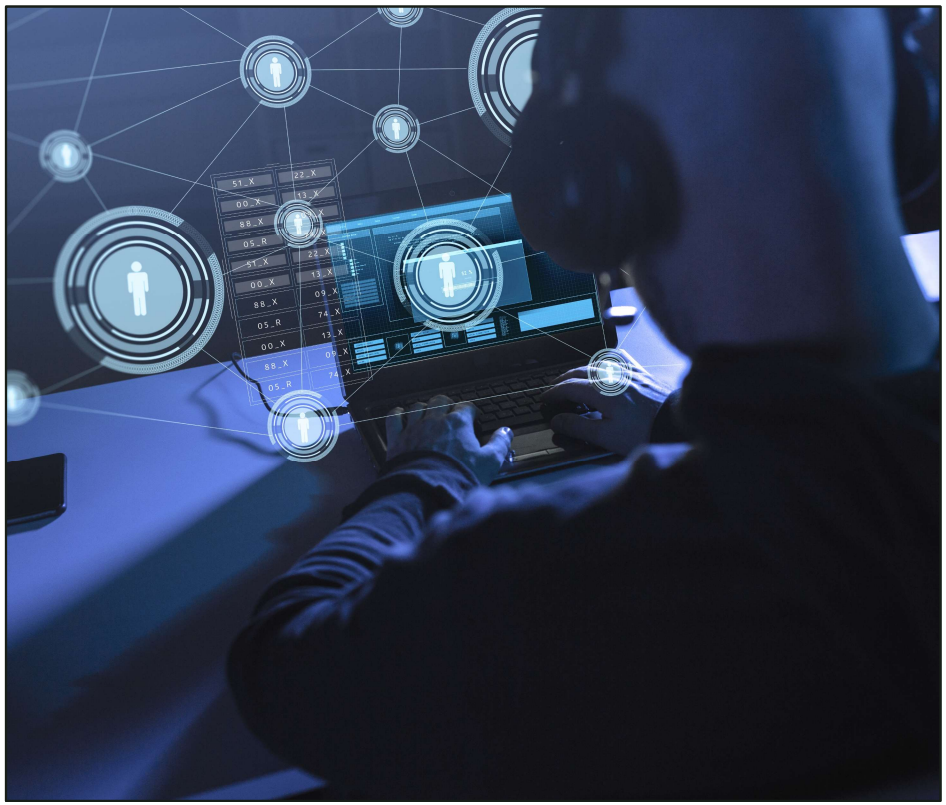
Common Causes of Action: U.S. and California

- **Common-Law Privacy Claims**
  - Intrusion Upon Seclusion, California Constitutional Right to Privacy
- **Statutory Privacy and Wiretapping Claims**
  - Wiretap Act, Stored Communications Act, & Computer Fraud and Abuse Act
  - California Invasion of Privacy Act (CIPA) and Consumer Privacy Act (CCPA)
- **Consumer Claims**
  - Unfair Competition Law, Consumer Legal Remedies Act, Common-Law Fraud, Breach of Contract, Unjust Enrichment

Claim Spotlight: California Invasion of Privacy Act

- **CIPA is a criminal statute that provides for civil penalties.**
  - $5000 statutory damage penalty *per violation*.
- **CIPA is decades-old and addressed older wiretapping, eavesdropping, and surveillance technologies.**
  - The core provisions were enacted in 1967, with additional provisions added over time.
- **Plaintiffs have attempted to wield CIPA in privacy litigation addressing new technologies.**

Claim Spotlight: California Invasion of Privacy Act



- **CIPA claims alleging wiretapping:**
  - Cal. Penal Code § 631 punishes a person who, "willfully and without the consent of all parties to the communication," attempts to read or learn "the **contents** or meaning of any message, report, or communication" in transit over a wire.

Claim Spotlight: California Invasion of Privacy Act

- ***McCoy v. Google* (N.D. Cal.):**
  - Plaintiff asserted that the defendant violated § 631 by collecting data about how often and for how long he used third-party apps.
- **The court dismissed plaintiff's CIPA claim because it was premised on the alleged collection of "record information."**
- ***Hammerling v. Google* (N.D. Cal.):**
  - Plaintiffs asserted that the defendant violated § 631 by collecting data about their activity on third-party apps.
- **The court dismissed plaintiffs' CIPA claim because it failed to allege that the defendant intercepted contents while "in transit" and within the state of California.**

Claim Spotlight: California Invasion of Privacy Act

- **CIPA claims targeting collection of geolocation information:**
  - California Penal Code § 637.7 prohibits "us[ing] an electronic tracking device to determine the location or movement of a person."
  - An "electronic tracking device" is defined as "any device attached to a vehicle or other movable thing that reveals its location by the transmission of electronic signals."

Claim Spotlight: California Invasion of Privacy Act

- ***In re Google Location History Litigation* (N.D. Cal.):**
  - Plaintiffs asserted § 637.7 claim, alleging that the defendant used their mobile devices to determine their location.
- **The court dismissed plaintiffs' CIPA claim under a plain-language reading of the statute.**
  - The defendant's *software* services did not constitute a "device." Nor did the hardware components of plaintiffs' phones, which could not track location on their own.
  - Plaintiffs failed to plead that an "electronic tracking device" was "attached" to a "vehicle or other movable thing."

Collective Actions & Damages in Europe

Privacy class actions – UK

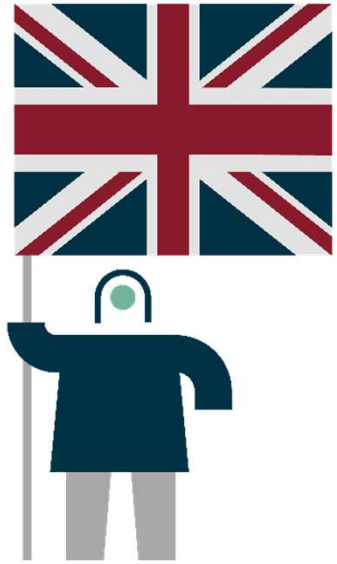
Still no direct equivalent in the UK for US-style data privacy class actions

- The UK Supreme Court decision in *Lloyd v Google* stopped the sudden surge in representative actions – most have since been discontinued.

- Created difficulties for claimants in proving '*same interest'*, calculating measure of damages and establishing a high de minimus threshold. Data claims are now unlikely to be group actions.

- Also led to challenges to data protection actions brought through other collective mechanisms (particularly group litigation orders, previously used to bring claims against British Airways, Ticketmaster and Marriott).

- '*Misuse of private information*' tort as an alternative means of redress – *Andrew Prismall v Google and DeepMind.*



Privacy class actions – EU

Not yet a direct equivalent in the EU for US-style data privacy class actions

- In April 2022, the Court of Justice of the EU (CJEU) ruled that the GDPR does not preclude national legislation enabling consumer protection associations a right to pursue data protection claims on a representative basis

- Last year's Christmas present: The **Representative Actions Directive** was to be implemented by 25 December 2022, including injunctions and collective redress – including the GDPR. Most member states have some delay…

- While only qualified non-profits can be plaintiffs, individuals can easily opt in (in some places, like the Netherlands and Spain, it's even opt-out) and damage amounts can (therefore) surpass even the GDPR fines

CJEU: Österreichische Post (C-300/21), 5/4/2023

The court does not really answer the key question…

- GDPR breach does not automatically result in damage claim
- But where does "hurt feelings" end and "damage" begin?
  Remains up to Member State law for now.
- No minimum threshold of seriousness…
- …and "effective compensation"…
- …but no punitive damages

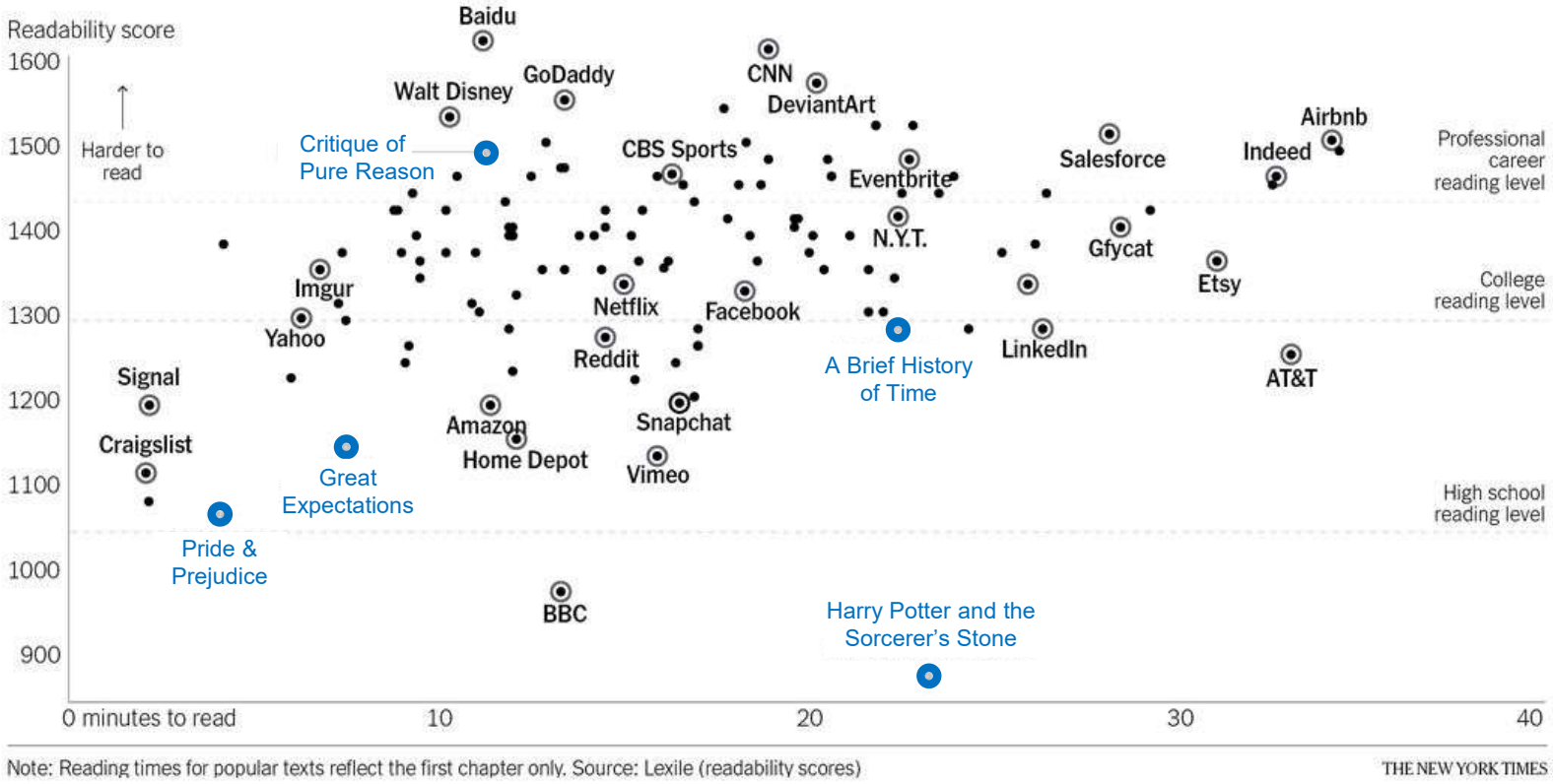
Key Defenses & Practical Takeaways

Terms of Service & Privacy Policies

Front line of defense

- **Relevant to consent and disclosure-based defenses**
- **Disclosures can be used to defeat elements of common claims (*e.g.*, expectation of privacy, reliance) at the pleadings stage and at class certification**
  - *E.g.*, *In re Google Inc. Gmail Litig.*, No. 13-MD-02430-LHK, 2014 WL 1102660 (N.D. Cal. Mar. 18, 2014) (declining to certify class alleging Wiretap Act violations because of the "panoply of sources from which email users could have learned of," and thus impliedly consented to, the alleged interceptions)
- **Broad and clear disclosures in plain English are the most defensible**
- **Online contract formation**

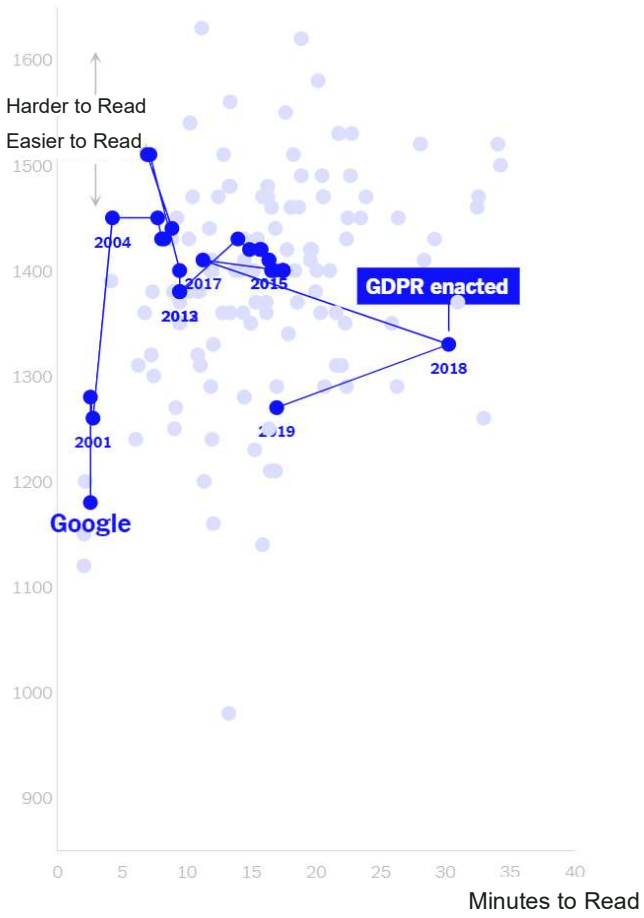
Terms of Service & Privacy Policies



"We Read 150 Privacy Policies. They Were an Incomprehensible Disaster."

--Kevin Litman-Navarro, *The New York Times*

Terms of Service & Privacy Policies



2010:

- **Location data** – Google offers location-enabled services, such as Google Maps and Latitude. If you use those services, Google may receive information about your actual location (such as GPS signals sent by a mobile device) or information that can be used to approximate a location (such as a cell ID).

2019:

Your location information

We collect information about your location when you use our services, which helps us offer features like driving directions for your weekend getaway or showtimes for movies playing near you.

Your location can be determined with varying degrees of accuracy by:

- GPS
- IP address
- Sensor data from your device
- Information about things near your device, such as Wi-Fi access points, cell towers, and Bluetooth-enabled devices

The types of location data we collect depend in part on your device and account settings. For example, you can turn your Android device's location on or off using the device's settings app. You can also turn on Location History if you want to create a private map of where you go with your signed-in devices.

Terms of Service & Privacy Policies

A word of caution:

- **Courts have increasingly looked at statements made *outside of* Terms of Service and Privacy Policies that might give rise to a reasonable expectation of privacy**
  - Ads
  - Device pop-ups
  - Help center / support pages
    - *See, e.g.*, *In re Facebook*, 956 F.3d at 602 (finding that a Help Center page created an expectation of privacy)

Article III Standing

***TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021)**

- Follows *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), which held that procedural violations of the Fair Credit Reporting Act, without concrete harm, cannot satisfy the injury-in-fact requirement of Article III.

- Courts have been resistant to *Spokeo*-type standing arguments in the context of traditional privacy claims.
  - *Transunion* recognized "**disclosure of private information**" and "**intrusion upon seclusion**" as "intangible harms" that have been "traditionally recognized as providing a basis for lawsuits in American courts." 141 S. Ct. at 2204 (2021).

- But under the right circumstances, courts may be receptive.
  - *E.g.*, *Abdulaziz v. Twitter, Inc.*, No. 19-CV-06694-LB, 2020 WL 6947929 (N.D. Cal. Aug. 12, 2020)

Practical takeaways (1)

Top tips

Educate

Understand your data sets (e.g. where are they from) and ensure that the relevant individuals know what to do if the worst happens.

International Transfers

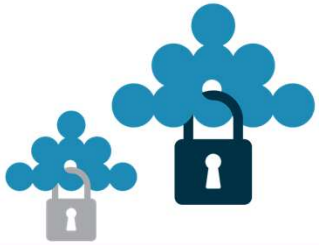
Keep using those model clauses (Standard Contractual Clauses); and identify any contracts using old SCCs.

Review

Ensure to review the latest guidance and enforcement activity. New legislation is being developed internationally affecting different jurisdictions.

Practical takeaways (2)

Top tips



Cyber Risks

Cyber attacks put companies at risk of monetary loss and data breaches. Your organisation needs security plans for employees working at home and in the office.

Company wide engagement

Compliance involves commitment and culture change- senior management need to be engaged, but technical and legal teams also need to communicate.

Ongoing compliance

Carry out a data protection audit/gap analysis to any gaps that need to be addressed – set reminders to repeat the exercise. New processes and products need assessment.

Questions?

Presenter Bios

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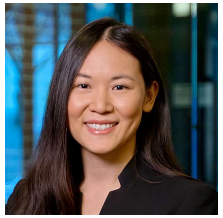
Tom's practice focuses on high-stakes litigation for a variety of technology clients, including Google, Waymo, Lyft, Kitty Hawk, and Taiwan Semiconductor Manufacturing Company. He is representing Google in multiple nationwide privacy class actions regarding its Android operating system, including *In re Google Location History Litigation* and *McCoy v. Google*. For several years Tom has successfully defended challenges to Major League Baseball's exemption to U.S. antitrust laws.



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Christina represents clients in high-stakes commercial disputes, including in privacy and patent litigation. She is representing Google in several nationwide privacy class actions. She was a member of the firm's trial team that obtained a judgment of over $80 million in a post-merger dispute that was unanimously affirmed by the Delaware Supreme Court. She previously served as a law clerk to Judge Milan D. Smith, Jr. of the U.S. Court of Appeals for the Ninth Circuit and to Judge Gonzalo P. Curiel of the U.S. District Court for the Southern District of California.

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Felix is a technology and video games lawyer with a focus on helping North American companies expand and succeed abroad. Felix advises innovative software and technology companies as well as online retailers and digital platforms on license, development and SaaS contracts, AR/VR, and digital regulation as well as standard terms for B2B and B2C transactions, manages international expansion projects and complex contract negotiations, and advises on e-commerce, consumer protection and digital regulation. He is also regularly involved in technology driven transactions.

Thank you!