Strategic Cookie Management: Tracking Technology Compliance, Challenges and Strategies

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State Privacy and Online Safety

- Opt-out of Sale / Share / Targeting
  - Categorize based role as supported by contracts and ensure proper contract terms
    - Be prepared to show the contracts to regulators
  - Separate or unified online/offline opt-outs? It depends.
  - CA confirm opt out (1/1/26)
- MD, VT and CT (CPLs) and NE, NY, SC (Kids laws) no targeted advertising to, or sale of PD (except SC & NE, but purpose limit) of, minors. OR (CPL-S/TA) U16; AR (kids-TA) U17. Many opt-in at various ages. No SM TA U16 GA and LA (enjoined). CA Companion Chatbots U18 only contextual allowed.

- Browser Global Privacy Controls
  - 12 now + 2 effective in 2027
  - CA confirm opt out (1/1/26)
- CCPA Regs: links not required if OOPS is frictionless and compliant
- OOPS controls if conflict (frictionless) or consumer clarifies (friction)

- Precise Location
  - Sensitive Personal Data (Opt-in or Limit)
  - App Store / Platform rules
  - OR, VA, CT (p. loc.) and MD and NJ (any sensitive) ban on sales
    - VA is $ consideration for sale, but OR, NJ, CT and MD are "any valuable consideration" CPLs
  - MD and DE "strictly necessary" purpose limitation challenges
  - See also FTC and other unfairness cases (lack of effective notice)

- Mobile Apps
  - SDKs rather than cookies
  - CCPA Regulations - updates on in-app notice
- Opt-in Alternative
- Symmetry of Choice
- Cookie Management and Compliance Monitoring
- Deceptive configurations / dark patterns

- Notable California enforcement actions:
  - Sephora (8/22): $1.2 M
  - Healthline (7/25): $1.2 M
  - Todd Snyder (5/25): $345,178
  - Tractor Supply (9/25): $1.35 M
  - SlingTV/Dish (10/25): $530,000
  - Honda (3/25): $632,500
  - Ford (3/26): $375,703
  - PlayOn Sports (3/26): $1.1M
  - Disney/ABC (2/26): $2.75M

Wiretapping

California Invasion of Privacy Act (CIPA)
- CA Penal Code § 631(a): Interception of a communication in transit. Since one party cannot intercept its own communication, the theory is a publisher aids and abets its vendors' and partners' interception
- CA Penal Code § 632: Clandestine recording of a "confidential communication" without consent of all parties.
- CA Penal Code § 632.7: Clandestine Recording of cellular or cordless calls, including by a party to the call.
- CA Penal Code § 638.51: Prohibits warrantless use of a pen register (trap and trace) to record routing and signal information, as opposed to the communication content itself. [SB 690 bars PRoA retro to 1/1/25, effective 1/1/27][more reform to come? (HR 10263)]
- Compare PA (WESCA) and FL (FSCA); Not WPA (WA SCt. 10/26)

Electronic Communication Privacy Act (ECPA)
- Crime/Tort exception overcomes 1 party consent defense
  - Criminal violation (HIPAA, GLBA, Bulk Data Rule, PADFAA)

- Claims and Penalties -- PRoA
  - CA Penal Code § 637.2
    - $5,000 per violation, or 3x damages
  - ECPA: $100 a day / $10,000
  - The arbitration dilemma

- Defenses
  - Substantive (e.g., not a communication / call, not a third party (i.e., agent / service provider))
  - Consent

- Notice and Consent Banner Challenges
  - Timing of display and cookie fires
  - CPL symmetry of choice
  - Deceptive suggestions / statements
  - Compatibility with screen readers (disability access)

- Beware new "Shine the Light" request traps

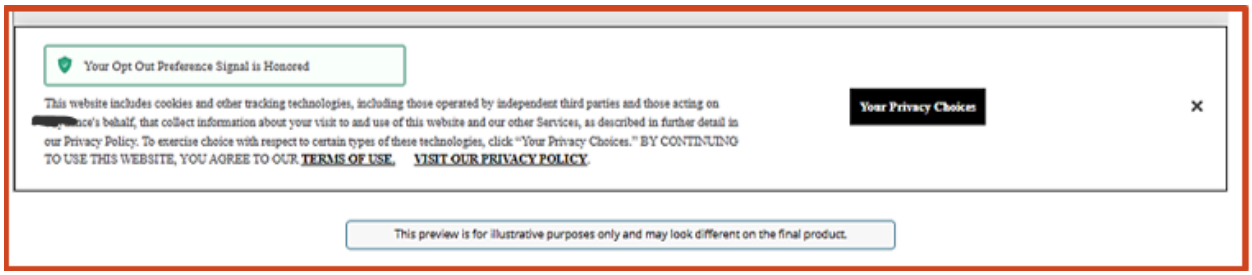
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Example Cookie Banners - US

Our website uses cookies and other tracking technology to enhance functionality, improve experience, analyze usage, and enable targeted advertising. To learn more, please review our Privacy Policy.

Notice only (above); notice + CPL mechanism and Terms link (below).



CMPs

- Things to consider when configuring the CMP:
  - Fire banner before cookies
  - Use banner for notice not choice
  - Tie to "Your Privacy Choices" and opt-outs
  - Explain do not sale / share / target and any other choices
  - Link to non-cookie opt-out
  - Beware server-side tracking
  - Consider as method to disclose third party recipients
  - Avoid GDPR language like "strictly necessary" as opposed to "required" and "optional"
  - Apply GPC and display GPC status
  - Monitor new cookies and proper functionality

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