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FORMING ECOMMERCE CONTRACTS WITH 2020 VISION

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Forming eCommerce Contracts with 20/20 Vision

1. Privacy and Security Update: A CCPA Primer
2. Deals We Expect to See: An Integration Infection!
3. 20/20 Market Positions

PRIVACY AND SECURITY UPDATE:

A CCPA PRIMER

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The California Consumer Privacy Act of 2018

- On June 28, 2018, California enacted the California Consumer Privacy Act (CCPA)

- Organizations subject to the CCPA must comply by January 1, 2020
  - Enforcement will begin the **earlier** of six months after AG regulations **or** July 1, 2020
  - July 1, 2020 will be the CCPA enforcement date because that will almost certainly come sooner than 6 months after the date of final regulations

- IAPP estimates that the law will likely affect more than 500,000 US companies doing business in California

OVERVIEW OF CCPA REQUIREMENTS

Businesses Subject to the CCPA

- A "business" subject to the CCPA must be a for-profit organization or legal entity that
  - Does business in California
  - Collects consumers' personal information, either directly or through a third party on its behalf
  - Either alone, or jointly with others, determines the purposes and means of processing of consumers' personal information
  - Business includes an entity that controls or is controlled by a business **if** it shares common branding with the business

Additional Criteria for Businesses

- A business must also satisfy one of three thresholds:
  1) Annual gross revenue in excess of $25 million (does not appear to be limited to California revenues);
  2) Annually buys, receives for the business's commercial purposes, sells, or shares for commercial purposes the personal information of 50,000 or more consumers, households, or devices, alone or in combination; **or**
  3) Derives 50% or more of its annual revenue from selling consumers' personal information
- Applies to brick-and-mortar businesses, not just collection of personal information electronically or over the internet
- Does not apply to nonprofits

Very Broad Definition of "Personal Information"

- Personal information includes any information that "**that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household**."

- Extremely broad definition intended to include the sort of robust consumer profile and preference data collected by social media companies and online advertisers

CCPA Definition of Personal Information

1) Name, address, personal identifier, IP address, email address, account name, Social Security number, driver's license number, or passport number
2) Categories of PI described in California's customer records destruction law
3) Characteristics of protected classifications under CA or federal law
4) Commercial information, including records of personal property; products or services purchased, obtained, or considered; or other purchasing or consuming histories or tendencies
5) Biometric information
6) Geolocation data
7) Internet or other electronic network activity, such as browsing history, search history, and information regarding a consumer's interaction with a website, application, or advertisement
8) Audio, electronic, visual, thermal, olfactory, or similar information
9) Professional or employment-related information
10) Education information that is subject to the Family Educational Rights and Privacy Act
11) Inferences drawn from any of the information listed above to create a profile about a consumer reflecting the consumer's preferences, characteristics, psychological trends, preferences, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes

CCPA Does Not Apply To …

- Medical information and entities subject to HIPAA or the California Confidentiality of Medical Information Act
- Personal information subject to the Gramm-Leach-Bliley (GLBA) or the California Financial Privacy Act
- Sale of personal information to or from a consumer reporting agency
- Personal information subject to the federal Driver's Privacy Protection Act
- Employee data (AB 25)
- B2B transaction data (AB 1355)
- Vehicle information (AB 1146)

[§ 1798.145(c), (e)]

New Statutory Rights

- Right to know the categories of information
- Right of access and data portability
- Right to be forgotten
- Right to opt out of the sale of personal information to third parties
- Right to equal service and price

CCPA New Era in Data Breach Litigation

- No actual harm is required
- Court imposes the **greater** of **statutory or actual damages**
- Statutory damage range
  - Statutory damages are "not less than" $100 and "not greater than" $750 "per consumer per incident"
- Other remedies
  - Injunctive or declaratory relief
  - "Any other relief the court deems proper"

PREPARING FOR JANUARY 1 AND JULY 1, 2020

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Practical CCPA Compliance Steps

- Operational
  - Assess what "personal information" is collected based on the CCPA's broad definition
  - Review and assess "reasonable security procedures" in place to protect personal information
- Websites
  - Review and update privacy policies
  - Plan to update website home pages
  - Plan to prepare consumer notifications
- Commence service provider agreement amendment/contracting process
  - Notifications vs. written amendments

Updating your Privacy Policy for January 1, 2020

- Privacy Policy Disclosures
  - Consumers' rights to know, delete and opt-out of the sale of their information; and
  - How consumers can exercise these rights.
  - Proposed regs confirm that privacy policies must described a business's practices regarding online and offline collection, use, disclosure and sale of personal information
  - Policies must be available in an offline/in-person environment if the business conducts substantial business in such a setting
- Format
  - Plain language, avoiding technical or legal jargon
  - Readable, including on mobile
  - Available in all languages in which business ordinarily communicates with consumers
  - Accessible to those with disabilities
  - Available in print format
  - Conspicuous link using the word "privacy" on the homepage

Updating your Privacy Policy (cont.)

- Right to Know / Right to Delete
  - Explain the consumers' right to request categories/specific pieces of PI the business collects, uses, discloses and sells, and the right to request deletion of their PI
  - List categories of information the business has collected in the preceding 12 months and, for each category, provide the source from which it was collected, the purpose for the collection, and categories of third parties with whom the business shares the PI
  - How to submit verifiable requests, and links to online request forms or a portal for making requests
- Right to Opt Out of Sale
  - Explain the consumers' right to opt out of the sale of PI
  - Include the contents of the right to opt out notice or a link to it via the "Do Not Sell My Personal Information" or "Do Not Sell My Info" link on the website homepage (or app landing page)
- Nondiscrimination
- Authorized Agents

Practical CCPA Compliance Steps (cont.)

- Data mapping and forming a compliance team to resolve practical CCPA compliance issues, such as:
  - Are you engaged in "sales," as broadly defined, triggering the opt-out right?
  - Are your providing "financial incentives" to consumers in exchange for the provision of personal information that would trigger a notice of financial incentives?
  - What methods should you make available for receiving consumer requests?
    - Are toll-free number and website form sufficient, or is another method needed to "reflect the manner in which the business primarily interacts with the consumer"?

CLE

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DEALS WE EXPECT TO SEE:
AN INTEGRATION INFECTION!

ERP/Re-platforming Deals Going Strong

- New or renewed "vanilla" ERP or CMS/Marketplace installations, primarily SaaS based, as smaller and smaller companies are leveraging turnkey technology. Various solutions allow companies of all sizes access to powerful solutions.

- Third Party functionality integrations, both technology based and development based (especially SaaS to SaaS integrations) as more SaaS providers are allowing greater access to and control over, data flows.

New Functionality Integrations

We have been seeing a dramatic increase in deals designed to streamline user interfacing. Examples:

- Artificial Intelligence incorporated onto e-commerce platforms
- Voice Integrations into Ecommerce Platforms
- Natural Language Processing (particularly in customer service and searching)
- User Data Analytics and Prediction
- Honorable Mention: Product return solutions.

Third Party Marketplaces

With Amazon dominating market share in the U.S. (approaching 50%) and overseas (30% in U.K.), we are seeing other ecommerce platforms / sellers are doing deals to include functionality to band together to try to close the gap.

- Marketplaces are looking to leverage traffic by getting third party products to sell in exchange for commissions. Deals range from simple matchmaking to full fulfillment deals.
- Product owners are looking to diversify the number of places you can buy their products, so are trying to push their product catalogues into a variety of online marketplaces. This often requires a lot of "middle man" deals such as automated fulfillment, technology solutions, and data reformatting.

20/20 MARKET POSITIONS

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20/20 Market Positions

- Data Rights and Use
- Limitations of Liability
- Indemnification
- Confidentiality vs. Information Security vs. Data Privacy

…& More

DATA RIGHTS AND USE

Customer Data - Consider the Channels and the Touch Points

Data Ownership and Use

- Types of Data
  - Submitted vs. Generated vs. Collected
- Clearly define scope of Data and Grant of Rights
  - Customer retains ownership
  - Limited license during the term to use as necessary to provide the product/service/platform/etc.
- Aggregated Anonymous Data

Customer Perspective

"**Customer Data**" means any and all data and information:

- of Customer and the Customer Entities and agents and end users of the Customer Entities, including data submitted by or relating to personnel, providers and customers of the Customer Entities;
- submitted by or on behalf of the Customer Entities, stored or inputted into the Platform or processed or generated by the Platform;
- obtained, developed, generated, processed or produced by or on behalf of Vendor or Vendor agents in connection with this Agreement; and/or
- to which Vendor or Vendor agents have access in connection with the provision of the Platform or Services.

What the vendor may ask for rights to …

Performance data

Operational data

Feedback

- ✓ Dedicated vs. leveraged systems/services
- ✓ What functions are impacted
- ✓ How will it be used?
- ✓ Aggregated and de-identified?

Vendor's Perspective

- Vendor will provide to Client the services **("Services") … which include …** data processing, subscription services, data list services, web based services, consulting and other professional services …
- With respect to data processing Services, Vendor will perform the Services on data files provided by Client for processing **("Input Data")**, and deliver the resulting files **("Output Data")** to Client. In certain cases, Vendor may include in the Output Data file additional data that has been appended as a result of the Services or Vendor may deliver a data file or list or otherwise provide access to data through the Services **("Vendor Data")** as more fully described in the particular Order.

Aggregated Anonymous Data

- Vendor favorable:
  - "…aggregate anonymous data relating to Customer's use of the Services shall not be considered Client Data and Vendor shall be entitled to use all such data for providing support, maintaining and improving the Services and its other business purposes…"
- Customer favorable:
  - "Data that (a) relates directly to the performance of the Services, (b) is collected by Vendor across all users of the Services, (c) is aggregated and anonymous and (d) does not, directly or indirectly, identify Customer, its affiliates or their respective end-users or allow the identity of Customer, its affiliates or their respective end-users to be ascertained ("**Platform Usage Data**") is not considered Client Data and may be used by Vendor for maintaining and improving the Services. For clarity, in no event will PII or PHI be considered Platform Usage Data."

Aggregated Anonymous Data – Industry Specific Value

"**Aggregated Anonymous Usage Data**" means data collected by Vendor relating to Customer's or its Authorized Users' usage of the Platform that meets all of the following requirements:

(a) such data does not specifically identify any individual, entity, website or webpage;

(b) such data does not identify or otherwise relate to Customer's or its Affiliates', or any of their respective third party customers' or partners' (the "**Customer Entities**"), products or any other products displayed on the any website, webpage, mobile site or mobile application operated by or on behalf of any of the Customer Entities (the "**Customer Sites**");

(c) such data neither identifies, nor is it directly or indirectly capable of identifying, the source of the data as coming from the Customer Entities or any of the Customer Sites;

(d) such data is limited to the type collected generally across Vendor's entire customer base;

(e) such data is aggregated with all other data Vendor creates in connection with its performance of Vendor's services generally across Vendor's entire customer base; and

(f) such data is not related to, targeted at or used in connection with any particular industry or member of an industry by reason of the data being derived from the Customer Entities or Customer Sites and/or the Customer Entities'' involvement in the relevant industry.

LIMITATIONS OF LIABILITY

Limitations of Liability

- Liability Cap Amounts
- Liability Cap Exclusions
  - Unlimited Liability
  - Secondary Liability Caps ("Super Caps")
- Disclaimer of Damages
  - Exclusions
  - Specified "Direct" Damages

INDEMNIFICATION

Indemnities

Vendor IP infringement

- Software
- Documentation
- Other resources
- Services themselves
- Use of the services?
- Data?

Customer IP Infringement

- Unauthorized Use
- Software / Systems
- Documentation
- Other resources
- Data

Example – IP Infringement Indemnity

... that the Services, Customer Entities' use of the Services or the Vendor Property or use thereof infringe, misappropriate, violate or cause the infringement, misappropriation or violation of any rights of a third party, except to the extent such infringement, misappropriation or violation is a result of: (a) use of the Vendor Property by Customer Entities in contravention of the Documentation or license granted to Customer Entities under **Article XX**; (b) modifications made by Customer Entities or an Authorized User other than at the direction of Vendor; (c) Vendor or its employees or contractors complying with written instructions or designs required or provided by Customer Entities where such compliance gives rise to such infringement, misappropriation or violation; (d) combination of the Vendor Property by Customer Entities or an Authorized User with products or systems other than those specifically approved or endorsed by Vendor in the Documentation or otherwise reasonably anticipated to be used in combination with such Vendor Property; or (e) any resources or items provided by the Customer Entities or Authorized Users;

CONFIDENTIALITY VS. INFORMATION SECURITY VS. DATA PRIVACY

Confidentiality vs. Information Security vs. Data Privacy

- "…shall ensure the confidentiality and security of all Confidential Information, and shall not use any Confidential Information or disclose or provide access to any Confidential Information to any third party except as expressly permitted under this Agreement…"
- "…shall implement and maintain information security controls, policies and procedures that include administrative, physical, and technical safeguards [designed] to protect Customer Data from unauthorized access, acquisition, or disclosure, destruction, alteration, accidental loss, misuse, or damage that are no less rigorous than accepted industry practices [(including the National Institute of Standards and Technology (NIST) Cybersecurity Framework, PCI/DSS/PABP/EMV, CISP, SDP, DISC, DSOP and any bank, payment card brand and other similar rules and guidelines or other applicable industry standards for information security)],…"
- "…in the event that we Process the Personal Data of Authorised Users or otherwise in connection with our provision of the Services or exercise of our rights or performance of our obligations under this Agreement, we shall comply with all Data Protection Legislation…"

20/20 MARKET POSITIONS

QUESTIONS?

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Biography

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Don represents clients in global outsourcing, commercial contracts, and licensing matters, with a particular focus on the e-commerce and electronics entertainment industries. Don assists in the negotiation of commercial transactions for domestic and international manufacturers, technology innovators, and retailers, and counsels clients in the e-commerce and electronics entertainment industries on consumer licensing and virtual property matters.

Don regularly assists clients in a wide spectrum of technology and data acquisition, implementation, and service agreements, including enterprise resource planning (ERP) implementation, licensing, software as a service (SaaS), information as a service (IaaS), data acquisition and services, cloud computing, and mobility agreements. He has particular experience in the alternative energy, specialized manufacturing, and consumer products industries, both in the United States and abroad.

Don also has a background in the electronics entertainment industry; with a particular focus on consumer licensing and virtual property matters. He has assisted both developers and publishers in the electronics entertainment industry at all stages of development and has assisted clients in such matters in the United States, Japan, and South Korea.

Biography

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Eric focuses his practice on representing clients in commercial contracts, technology and other intellectual property licensing and transfer, and outsourcing matters, with a particular focus on the e-commerce and retail industries. As part of his practice, he regularly provides counsel on issues involving software licensing; cloud computing; intellectual property rights, protections and commercialization strategies; information security; and development, manufacturing, sale and procurement of goods.

Eric also advises a broad client base, which includes startup and growth stage technology companies as well as multinational e-commerce and traditional retailers, on legal issues that arise in connection with the design, implementation, maintenance, and operation of their end-to-end online presence, including issues related to terms of use, service or membership, privacy policies, information security, third-party license compliance and data collection. In addition to his practice involving commercial and technology transactions and online presence management, Eric also counsels clients on business process and information technology outsourcing transactions and general corporate matters.

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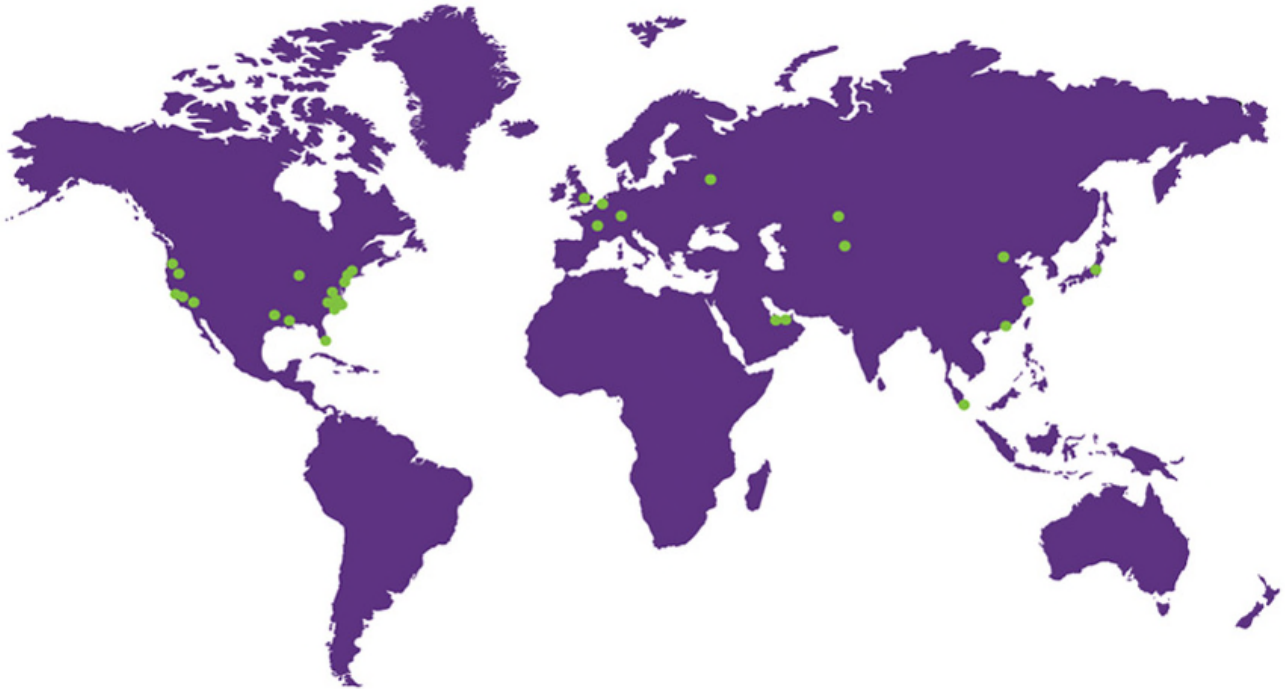

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