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2019 Edition

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2019 Edition

Debevoise & Plimpton LLP

Edited by
Jeremy Feigelson
Jim Pastore
Jane Shvets

Practising Law Institute
New York City

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Table of Chapters

Table of Contents

Chapter 2 Privacy Policies

Chapter 3 Children's Privacy

Chapter 4 Financial Privacy

Chapter 5 Medical Privacy

Chapter 6 Mobile Privacy

Chapter 7 Digital Workplace Privacy

Chapter 9 Privacy Enforcement and Litigation

Chapter 10 Global Privacy Laws

Foreword

This edition of *Privacy Law Answer Book* confirms what the first two showed readers: Digital technology and the law of privacy are locked in a never-ending game of leapfrog. Since the last edition of this book, consumer adoption of mobile devices and online tools has shown no signs of slowing. More than three quarters of Americans now own a smartphone, compared to just a third in 2011. Meanwhile, the U.S. Congress has begun what may be its most serious look ever at the regulation of social media; American businesses (and their counterparts around the world) began to wrestle in earnest with the European Union's General Data Protection Regulation (GDPR) as it finally came into effect; and, at press time, it was widely expected that the U.S. Supreme Court would soon take another crack at the law of standing in privacy class actions.

This dizzying pace of change is a constant. When I started my legal career in 2001, a dial-up connection was still the primary method for accessing the Internet, and flip phones with a low-quality camera were on the cutting edge. Today, of course, a website has morphed from a trendy luxury to a must-have for any consumer-facing company, social media has gone from non-existent to mission critical, and countless businesses now offer mobile applications. Now Big Data and artificial intelligence are accelerating businesses' ability to know more about their consumers and their prospects than ever before. And as computing ability improves, the ability to turn the ever-expanding pool of collectible data into business value improves as well.

The law of privacy takes on ever-increasing importance in the face of these changes. The transparency and nature of the collection and use of personal information are under more and more scrutiny and legal regulation. As Director of Privacy at Penguin Random House in the midst of this changing landscape, I have found myself asking questions that companies never encountered in the pre-digital dark ages (i.e., a few years ago): What kind of information do we collect about our consumers? How much of that information does the law call "personal"?

How do we notify consumers of what we collect? How are we permitted to use that information? Where (geographically) can we keep and transfer data? How might the GDPR and other global privacy laws like Brazil's Data Protection Law touch U.S. companies? How have U.S. courts and legislatures reacted to the digital revolution thus far? Where might they take privacy law next?

The 2019 edition of the *Privacy Law Answer Book* provides a reference guide for practitioners asking the same kinds of questions I do. Unlike Europe, the United States has no single, omnibus law on privacy. It is no small task to quickly synthesize the patchwork of privacy laws and regulations that the U.S. federal government and the states impose on business. With this book, attorneys can react quickly as issues arise regarding their clients' evolving collection, use, and storage of personal information.

Providing effective advice on privacy requires attorneys to ask questions as early in the technological development cycle as possible. From the development of internal databases to external marketing applications, key decisions about the collection and use of personal information are made early and often on the business side. *Privacy Law Answer Book* is a tremendous resource for lawyers and other privacy practitioners, allowing them not just to keep pace with the latest developments in privacy, but also to ensure that their clients do not get legally left behind as they work to stay one step ahead of the data privacy challenges of tomorrow.

MIN J. LEE, ESQ.
New York, New York
August 2018

Preface

In a nineteenth-century article still frequently cited as the root of legal privacy rights in the United States, future Supreme Court Justice Louis Brandeis and his co-author Samuel Warren famously argued for a "right to be left alone."[1] More than 100 years later, commenting on privacy in the digital age, a Silicon Valley CEO famously said: "You have zero privacy anyway. Get over it."[2]

Legislatures, regulators, enforcement agencies, and courts in the United States continue to wrestle with the tension reflected in these statements. There continues to be a widely held intuition that the law should place some limits on what one can do with another's private information. Yet technology races ahead, offering more and more benefits in our daily lives—benefits that are widely welcomed and that often depend on the liberal use of personal data by commercial actors.

Government authorities try to balance these competing concerns through information privacy law. This answer book focuses on the laws that govern how private-sector entities handle personal information in commercial settings. Although personal information is collected and stored in multiple ways, including old-fashioned paper records, this book focuses on electronic data. In particular, this book addresses online privacy policies, the Children's Online Privacy and Protection Act (COPPA), mobile device privacy, financial privacy, medical privacy, workplace privacy, online behavioral advertising and tracking, and privacy enforcement and litigation. The book concludes with a brief survey of global privacy issues for U.S. lawyers. These are currently among the most discussed and developed topics in privacy law.

In addressing these topics, this answer book aims to address the practical daily needs of both expert privacy attorneys and those

1. Brandeis & Warren, *The Right to Privacy*, 4 HARVARD L. REV. 193 (1899).
2. Polly Springer, *Sun on Privacy*, "*Get Over It*," WIRED (Jan. 26, 1999) (quoting Sun-Microsystems CEO Scott McNealy).

attorneys who encounter privacy topics in their practice but who may not specialize in these areas of the law. The book is also intended to serve as a useful reference for non-lawyers who may encounter privacy-related issues in their everyday business affairs. Our team hopes that we have met those goals. We welcome feedback from readers to let us know if we have.

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Table of Abbreviations

Acronyms, initialisms, and abbreviations used in this book:

AG	attorney general
ALJ	administrative law judge
ATDS	automatic telephone dialing system
BCRs	binding corporate rules
CalOPPA	California Online Privacy Protection Act
CDT	Center for Democracy and Technology
CFAA	Computer Fraud and Abuse Act
CFPB	Consumer Financial Protection Bureau
CFTC	Commodity Futures Trading Commission
CGL	commercial general liability
CID	civil investigative demand
CJEU	Court of Justice of the European Union
CMS	Centers for Medicare and Medicaid Services
CNP	card-not-present (transaction)
COPPA	Children's Online Privacy Protection Act
CPBRA	Consumer Privacy Bill of Rights Act of 2015
CPNI	customer proprietary network information
CRA	credit reporting agency
CTIA	Cellular Telecommunications Industry Association
CVV2	card verification value 2
DAA	Digital Advertising Alliance
DPA	data protection authority
DPO	data protection officer
DTA	data transfer agreement
ECPA	Electronic Communications Privacy Act of 1986

Acronyms, initialisms, and abbreviations used in this book:

EEA	European Economic Area
FAQ	frequently asked question
FCC	Federal Communications Commission
FCRA	Fair Credit Reporting Act of 1970
FCTA	Fair and Accurate Credit Transactions Act of 2003
FDIC	Federal Deposit Insurance Corporation
FERPA	Family Educational Rights and Privacy Act
FFIEC	Federal Financial Institutions Examination Council
FMVPI	face match to verified photo identification
FTC	Federal Trade Commission
GDPR	(European Union) General Data Protection Regulation
GLBA	Gramm-Leach-Bliley Act
HHS	U.S. Department of Health and Human Services
HIPAA	Health Insurance Portability and Accountability Act
IBIPA	Illinois Biometric Information Privacy Act
IFA	Apple Identifier for Advertisers
IFV	Apple Identifier for Vendors
IP	Internet Protocol
ISP	Internet service provider
IMEI	international mobile equipment identity
MAC	media access control
NAI	Network Advertising Initiative
NCUA	National Credit Union Association
NDNCR	national do-not-call registry
NPI	nonpublic personal information
NTIA	National Telecommunications and Information Administration (U.S. Department of Commerce)
OBA	online behavioral advertising

Acronyms, initialisms, and abbreviations used in this book:

OCC	Office of Comptroller of the Currency
OTRI	Office of Technology Research and Investigation
OTS	Office of Thrift Supervision
PA-DSS	Payment Application Data Security Standard
PCI	payment card industry
PCI DSS	Payment Card Industry Data Security Standards
PII	personally identifiable information
SB1	California Financial Information Privacy Act
SCA	Stored Communications Act
TCPA	Telephone Consumer Protection Act of 1991
UDAP	unfair and deceptive acts and practices
UDID	unique device identifier
UNHRC	United Nations Human Rights Council
UUID	unique user identifier
VPAA	Video Privacy Protection Act