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# State AGs And Online Privacy: Trends We Saw In 2013

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U.S. online sales reached almost $2 billion on Dec. 2, 2013, during this year's "Cyber Monday" sales,[1] and in the third quarter of 2013, e-commerce sales accounted for almost 6 percent of total sales.[2] The growing Internet economy offers convenience to consumers and allows businesses to reach new markets, but with this opportunity comes privacy risks to both customers and corporations.

As new technologies emerge, federal privacy laws such as the Electronic Communications Privacy Act have become increasingly outdated. With federal laws slow to change, state attorneys general have taken the lead on online data privacy protection. Indeed, the former director of the Federal Trade Commission's Bureau of Consumer Protection, David Vladeck, went so far as to encourage state AGs to remain active in enforcing privacy protections under both state and federal laws because federal regulators such as the FTC have limited resources.[3]

Recognizing that online data protection will be one of the most important consumer protection issues in future years, AGs gave online privacy protection increasing attention in 2013. This article provides an overview of three major trends from 2013: (1) mounting pressure from AGs to expand privacy protections; (2) a rising number of enforcement actions; and (3) increased coordination among AGs.

**Pressure From AGs to Expand Privacy Protections**

With rapidly changing technologies there is much debate as to the best way to protect consumer's privacy online. While many industry groups prefer self-regulation, many state regulators believe that more direct intervention is needed, and AGs have used the bully pulpit to push for protections beyond existing law. For instance, as part of the Vermont Cybersecurity Project that was created in 2012, Vermont AG William Sorrell has held privacy and data security roundtables with stakeholders to determine what legislation would best protect Vermont consumers and businesses online.[4]

No AG has been as aggressive in advocating for online privacy as California AG Kamala Harris. In January, Harris issued a guidance document titled "Privacy on the Go" with recommendations for mobile application developers to safeguard consumer privacy. According to Harris, the overarching goal of the recommendations is "surprise minimization" by reducing instances where users of mobile applications are subject to unexpected data collection.[5]

While such recommendations are nonbinding, Harris used the power of her office to pressure companies to adopt best practices that offer greater privacy protections than what is currently provided

under existing law. In addition to having the nation's largest economy, California also has the most extensive online privacy requirement of any U.S. state. Any businesses with a nationwide audience will likely want to design their mobile apps to comply with the California recommendations. As such, the California recommendations have the potential to become a national standard, and in all likelihood, California will continue to lead the charge in 2014 in pressuring all the players in the "mobile ecosystem" to develop more robust privacy policies.

**Rising Number of Enforcement Actions**

Not only has California AG Harris provided guidance to recommendations for mobile app developers, but she has also drawn national attention by filing the first ever enforcement action for a violation of the California Online Privacy Protection Act (CalOPPA).[6] In 2012, Harris' office sent letters to nearly 100 developers of mobile app developers, informing them that they had 30 days to post a privacy policy informing users of what personal information they were collecting.[7] The AG warned that companies could face fines of up to $2,500 each time a consumer downloads a noncompliant app.

When Delta Airlines failed to post a privacy policy on its mobile application, Harris sued the company for failing to comply with CalOPPA. In May, a California Superior Court judge dismissed the lawsuit after concluding that the Airline Deregulation Act (ADA) preempted the state's claims. While this was a minor setback for Harris, she has vowed to appeal the ruling, and the suit is likely the first of many for violations of CalOPPA.

While Harris has been a national leader in the online privacy sphere, other AGs have also been active in the space. In July, New Jersey's acting AG John Jay Hoffman announced a settlement with the online advertising company PulsePoint.[8] The company was accused of using a hidden JavaScript code to bypass the privacy settings and install cookies on the Web browser enabling advertisers to target the consumers with ads tailored to preferences demonstrated by their online activities.

Using unauthorized cookies enabled the company to place as many as 215 million targeted ads on Web browsers used by New Jersey consumers between June 2009 and February 2012. In November, Acting AG Hoffman entered into a $1 million settlement with online video gaming company E-Sports Entertainment.[9] The settlement resolved allegations that E-Sports had infected thousands of computers with malware that allowed E-Sports to monitor users' activity and illegally mine the virtual currency Bitcoin. According to Hoffman's office, in just a two-week period, E-Sports took control of approximately 14,000 computers and generated approximately $3,500 by mining for Bitcoins.

The rise in enforcement actions is likely to continue as AGs develop the internal capacity to actively enforce privacy protections under both state and federal laws, including the Fair Credit Reporting Act and the Children's Online Privacy Protection Act. Over the past few years, AGs have been creating units, offices and task forces dedicated to the enforcement of privacy statutes.

In 2009, Indiana passed legislation that created an identity theft unit within the AG's office. Among its responsibilities, the unit is empowered to investigate data breaches for compliance with the state's disclosure law and may take enforcement action if a violation is discovered.

In 2011, Connecticut created a task force focused on Internet and data privacy, and in 2012, California created a privacy and protection unit. In 2013, Maryland joined the fold with the creation of an Internet privacy unit tasked with ensuring that companies are in compliance with federal and state privacy laws.[10] As more such units are created, and as AG offices develop experience and expertise in data

privacy issues, the number of enforcement actions will likely continue to rise in 2014 and for years to come.

**Increased Coordination Among State AGs**

When Maryland AG Doug Gansler was elected as president of the National Association of Attorneys General in June 2012, he announced that his year-long presidential initiative would focus on "Privacy in the Digital Age."[11] Gansler's focus on online privacy highlighted the importance of collaboration among AGs to aggressively protect online privacy. The challenges posed by the digital economy oftentimes necessitate a coordinated response.

For example, a data breach of a company's computer network could include the sensitive personal information for consumers across the country. Likewise, a company's misuse of information could affect multiple jurisdictions. For instance, in March, a coalition of AGs for 38 states and the District of Columbia announced a $7 million settlement with Google after finding that the company's street view vehicles had collected private data from home and business networks.[12]

Google was again the target of a coordinated effort in November when the company entered into a $17 million settlement with AGs for 36 states and the District of Columbia to resolve allegations that the company had circumvented default privacy settings pertaining to cookie blocking in Apple's Safari web browser.[13] Announcing the settlement, New York AG Schneiderman explained that consumers "should be able to know whether there are other eyes surfing the web with them. By tracking millions of people without their knowledge, Google violated not only their privacy, but also their trust."[14]

The states alleged that from June 1, 2011, until Feb. 15, 2012, Google enabled advertisers to set third-party cookies on users' browsers which allowed advertisers to secretly track consumers' activities in contradiction to Google's earlier assurance that Safari's default privacy settings would block such third-party cookies.

The AGs alleged that Google had broken state consumer protection and computer privacy laws in addition to the terms set forth in a 2012 consent agreement with the FTC. Among the terms of the settlement with the AGs, Google is prohibited from overriding a browser's cookie-blocking settings without the consumer's consent. Furthermore, Google must provide consolidated information about cookies and how they are used for the next five years.

The success of the latest Google settlement suggests that AGs will be even more active in bringing online privacy-related litigation in the future. A July letter to Google from a group of 23 AGs included a promise to "continue to closely monitor Google's activities related to consumer privacy."[15] Given the increased coordination among AGs in the privacy sphere, the November settlement with Google will likely not be the last time that AGs band together to pressure companies to strengthen their consumer privacy policies.

—By Jason M. Crawford

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[1] Danielle Kucera, Cyber Monday Sales Reach Record as Shoppers Snub Stores for Web, Bloomberg, Dec. 4, 2013, available at http://www.bloomberg.com/news/2013-12-03/cyber-monday-sales-soar-to-online-shopping-record-comscore-says.html.

[2] Census Bureau of the Department of Commerce, Quarterly Retail E-Commerce Sales, Nov. 22, 2013, available at http://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf.

[3] Doug Gansler, NAAG Summit Highlights Critical Role of Attorneys General in Protecting Privacy Online, NAAGazette, May 22, 2013, available at http://www.naag.org/naag-summit-highlights-critical-role-of-attorneys-general-in-protecting-privacy-online.php.

[4] Vermont Office of the Attorney General, Privacy and Data Security, http://www.atg.state.vt.us/issues/consumer-protection/privacy-and-data-security.php.

[5] California Dep't of Justice, Privacy on the Go: Recommendations for the Mobile Ecosystem, Jan. 10, 2013, available at http://oag.ca.gov/sites/all/files/pdfs/privacy/privacy_on_the_go.pdf.

[6] California Dep't of Justice, Attorney General Kamala D. Harris Files Suit Against Delta Airlines for Failure to Comply with California Privacy Law, Dec. 6, 2012, available at http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-files-suit-against-delta-airlines-failure.

[7] California Dep't of Justice, Attorney General Kamala D. Harris Notifies Mobile App Developers of Non-Compliance with California Privacy Law, Oct. 30, 2012, available at https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-notifies-mobile-app-developers-non-compliance.

[8] New Jersey Dep't of Law & Public Safety, New Jersey Division of Consumer Affairs Obtains Million-Dollar Settlement With Online Advertising Company Accused of Overriding Consumers' Privacy Settings without Consent, Jul. 25, 2013, available at http://nj.gov/oag/newsreleases13/pr20130725a.html.

[9] New Jersey Dep't of Law & Public Safety, Acting Attorney General Announces $1 Million Settlement Resolving Consumer Fraud, Unlawful Access Claims Against Online Gaming Company, Nov. 19, 2013, available at http://nj.gov/oag/newsreleases13/pr20131119a.html.

[10] Maryland Attorney General, Attorney General Gansler Forms Internet Privacy Unit, Jan. 28, 2013, available at http://www.oag.state.md.us/Press/2013/012813.html.

[11] See New NAAG President Is Maryland Attorney General, NAAG News, Jun. 22, 2012, available at http://www.naag.org/new-naag-president-is-maryland-attorney-general.php.

[12] Alyssa Newcomb, Google to Pay $7 Million Fine for Street View Privacy Breach, ABC News, Mar. 13, 2013, available at http://abcnews.go.com/Technology/google-hit-million-fine-street-view-privacy-breach/story?id=18717950.

[13] In the Matter of Google Inc., Assurance of Voluntary Compliance, Nov. 18, 2013, available at, http://ag.nv.gov/uploadedFiles/agnvgov/Content/News/PR/PR_Docs/2013/Google_AVC.pdf.

[14] New York State Office of the Attorney General, A.G. Schneiderman Announces $17 Million Multistate Settlement with Google Over Tracking Of Consumers, Nov. 18, 2013, available at http://www.ag.ny.gov/press-release/ag-schneiderman-announces-17-million-multistate-settlement-google-over-tracking.

[15] Letter to Google from 23 state AGs, Jul. 3, 2013, available at, http://www.oag.state.md.us/Press/Google_Improving_Privacy_Controls.pdf

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