

November 9, 2023

AdTech in the Privacy Spotlight

*Enforcement, Litigation, and Regulatory
Developments*

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Agenda

AdTech Overview

- Tracking Technologies
- Key Players and Industry Changes

Legal Developments

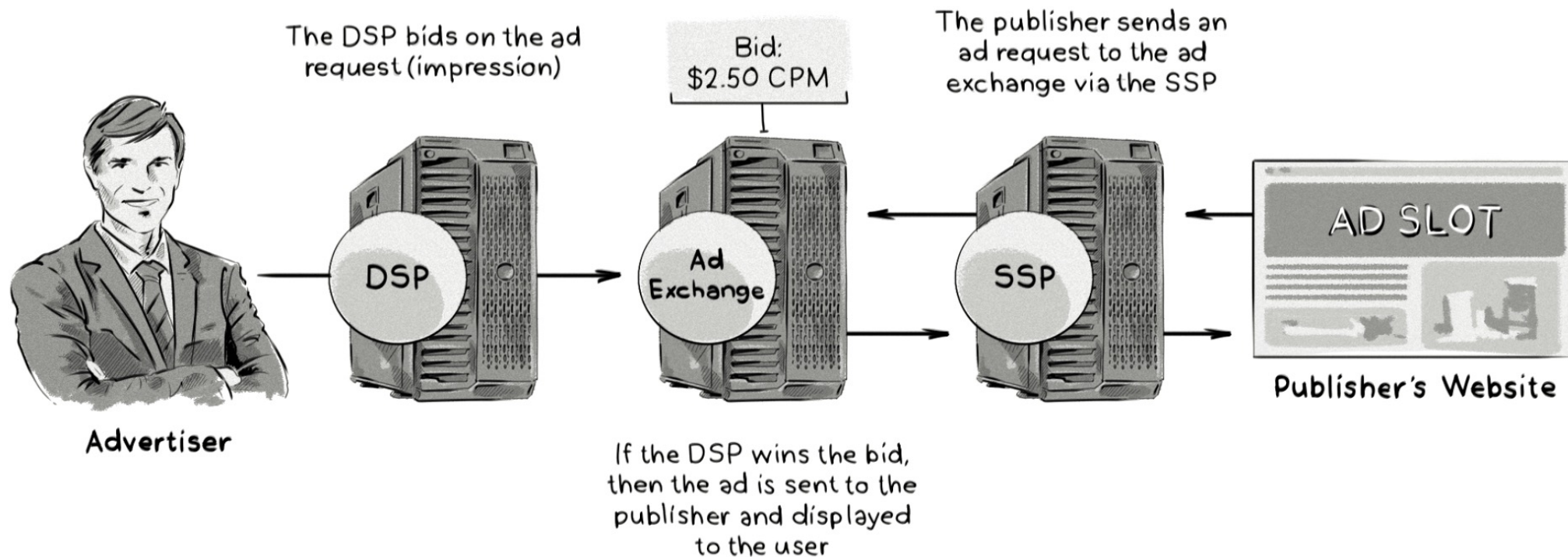
- US State & Federal
- "Sensitive" Data Focus
- Enforcement & Litigation
- AdTech Contracting

Technical & Self Regulatory Solutions

Tracking technology is a script or code on a website or mobile app used to gather information about users as they interact with the website or mobile app (i.e., software programs for mobile devices).

- **Cookies** are files placed on a user's device to customize a user's browsing experience but can also be used to track a user's activities.
- A **web beacon or tracking pixel** is a tiny graphic image (usually 1 pixel) placed on a webpage that allows the website owner or a third party to collect information regarding the use of the webpage that contains the web beacon.
- **Session replay scripts** record a user's activities (*e.g.*, mouse movements, clicks, and typing) when using a webpage or app.
- **Fingerprinting** uses a browser's and/or device's unique configurations and settings to track user activity.
- **Hashed IDs** involve converting PII (email, phone number, etc) into a unique pseudonymized identifier, allowing companies to "match" an individual based on PII without directly sharing PII

AdTech Overview: Key Players



Mobile and other channels increasingly relevant – different technologies (SDKs, device IDs) and compliance solutions than traditional web browsing

Platform policy and technology changes

Increased reliance on **First Party Data** sources

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Retailers are getting into the media and advertising businesses



Sara Fischer, author of [Axios Media Trends](#)



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Kroger Is Bringing Its Retail Media Ad Tech In-House

Jun 28, 2023 — **Kroger** Precision Marketing, the **grocery** chain's retail media arm, will bring its self-serve retail media **ad tech** fully in-house.



- Scaled global audience
- Scaled & varied merchant base
- **Tech-centric core business**

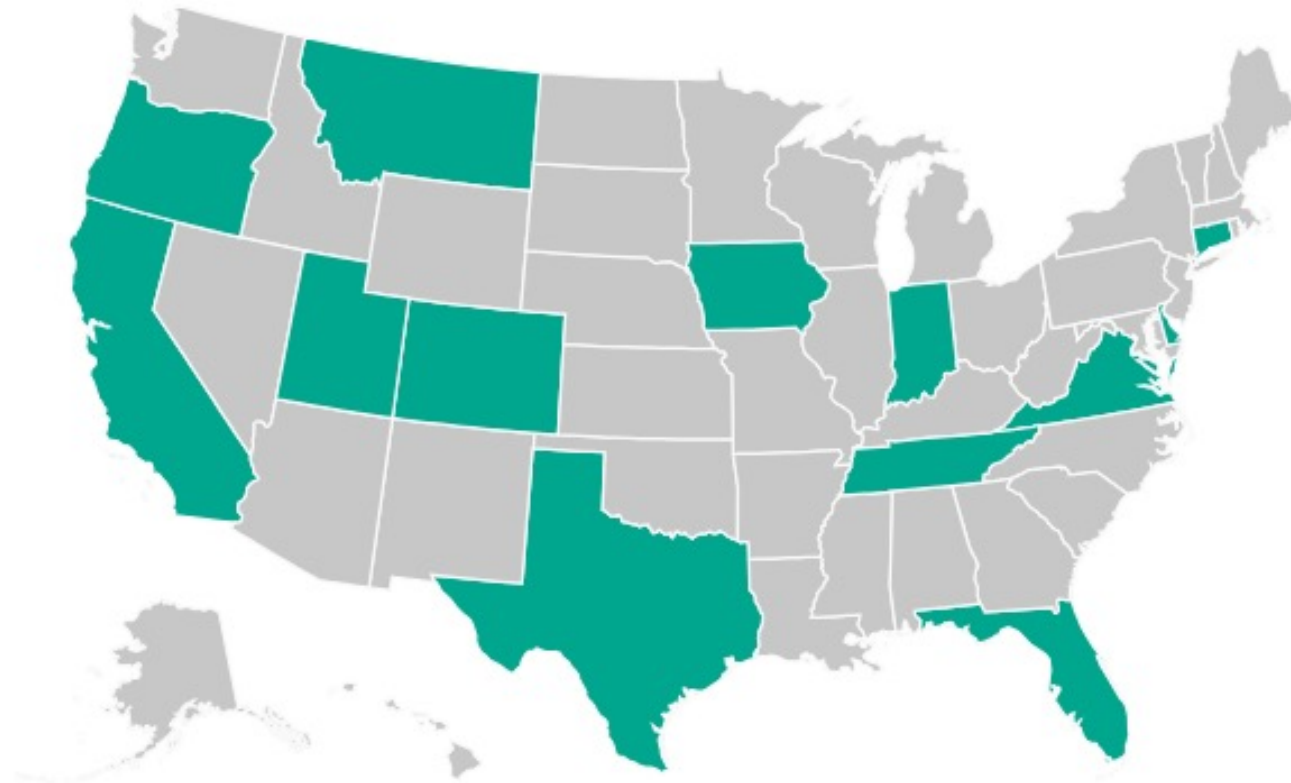


Utilize partners to:

- Extend reach (consumers & brands)
- Manage performance
- Onboard / connect data
- Measure / attribute

Legal Developments: State Laws

MAPPING CONSUMER PRIVACY



All “comprehensive” state privacy laws now require an **Opt Out**

- “Sale” vs “Share” vs “Targeted advertising”
- (Likely) not covered:
 - First party targeting and personalization (contrast with EU)
 - Conversion tracking, other measurement/fraud/uses that aren’t ad delivery
- Compliance solutions:
 - Cookie banners/Consent Management Platform
 - Downstream signals (IAB)
 - “Universal” opt outs (GPC) – California, Colorado, Connecticut

Renewed focus on AdTech from **Federal Regulators**

- **FTC** historically interested: guidance on location data, mobile, cross device tracking
 - New focus: “sensitive” data and tracking in a “Confidential Context”: geolocation, health information and contexts, tax preparation
- FTC **Health Breach Notification Rule** – “unauthorized acquisition” includes AdTech without consent?
- **HHS** Bulletin: “Use of Online Tracking Technologies by HIPAA Covered Entities and Business Associates”
 - Upshot: don’t run AdTech on “post-auth” patient portals
 - Analytics trackers – need a BAA

Legal Developments: “Consumer Health” Laws



Washington, Nevada, and Connecticut recently passed laws governing broadly-defined “consumer health data”

- All 3 laws require **opt in consent** for health data “sales” (defined similar to CCPA/other states)
- Washington and Nevada require written “valid authorization” – burdensome and **likely impossible** in most AdTech contexts
 - Cannot “sell or offer to sell” health data without authorization... but authorization must include specific “name and contact information of the person purchasing” data?

AdTech relevance:

- Retargeting around health-related goods and services
- Health-related interest segments

Washington – private right of action

CA **Sephora** case: Alleged violation of CCPA resulted in \$1.2 million settlement, requirement to send regular compliance reports to AG

- Failed to (i) inform consumers it sold data collected via its website; and (ii) honor opt-out requests (including via GPC)

Session replay **Wiretap Litigation**

- CA CIPA and PA WESCA cases – demand letters seeking settlements
 - Many potential defenses, but making it past motions to dismiss in some cases
- Chatbots

FTC Enforcement & Warning Letters

Colorado and **California** Enforcement Sweeps

GDPR **Controller/Processor** distinction – how to map to AdTech?

- CA: **Businesses/Service Providers/Contractors/Third Parties**

Industry approaches vary, including across major publishers/tech cos

CPRA – excluded targeted advertising from permitted “business purposes” for service providers

- Must use required “sale” or “sharing” contract terms instead

Standardized industry solutions

- IAB Multi-State Privacy Agreement – multiparty approach
- NAI State Law Processing Addendum - bilateral

Thank You

Questions?