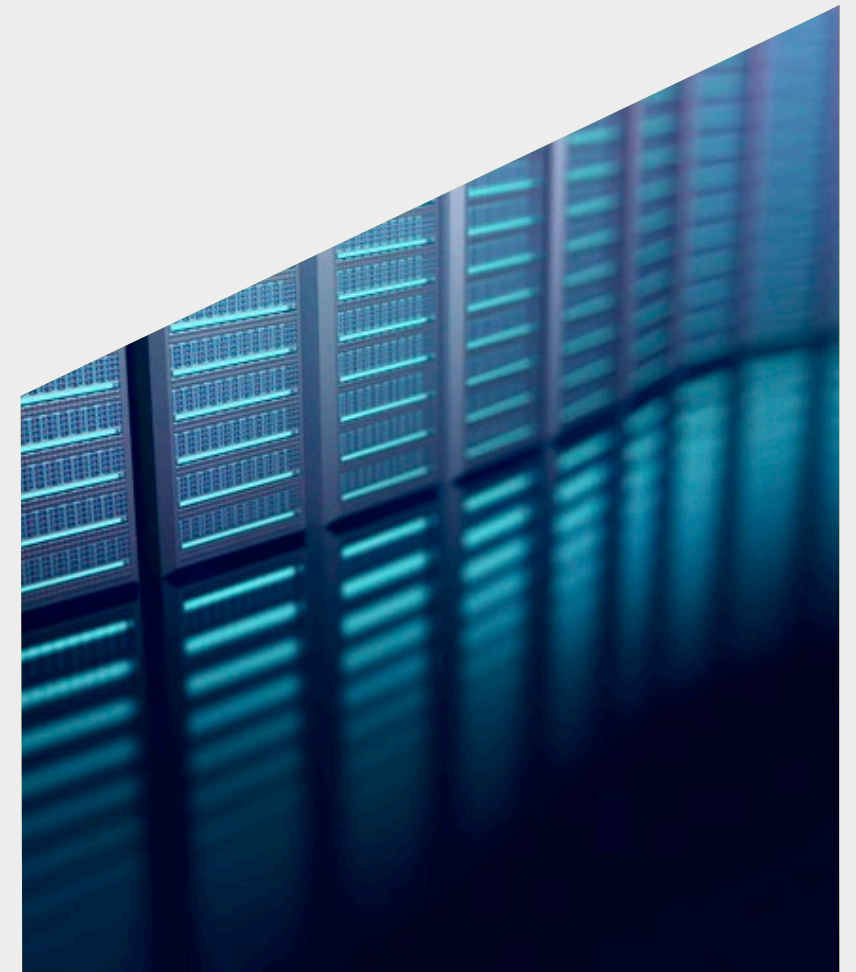# ADTECH PRIVACY

Navigating Emerging Privacy Laws for AdTech Companies, Customers, and Publishers

July 21, 2022

mwe.com

SPEAKERS

AMY PIMENTEL

McDermott Will & Emery

Partner, Boston

AUSTIN MOONEY

McDermott Will & Emery

Associate, Washington, DC

GRANT NELSON

TripleLift

Product Manager, Privacy & Identity

AGENDA

- Why Lawyers Need to Care about AdTech
- AdTech Industry and Players
- Cookies and Historical Regulation of AdTech
- Emerging Laws in the EU and US
- Other Technologies and Trends
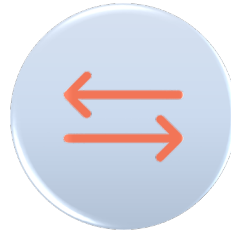- Implementing Consent
- Common Questions

WHY DO LAWYERS NEED TO CARE ABOUT ADTECH?

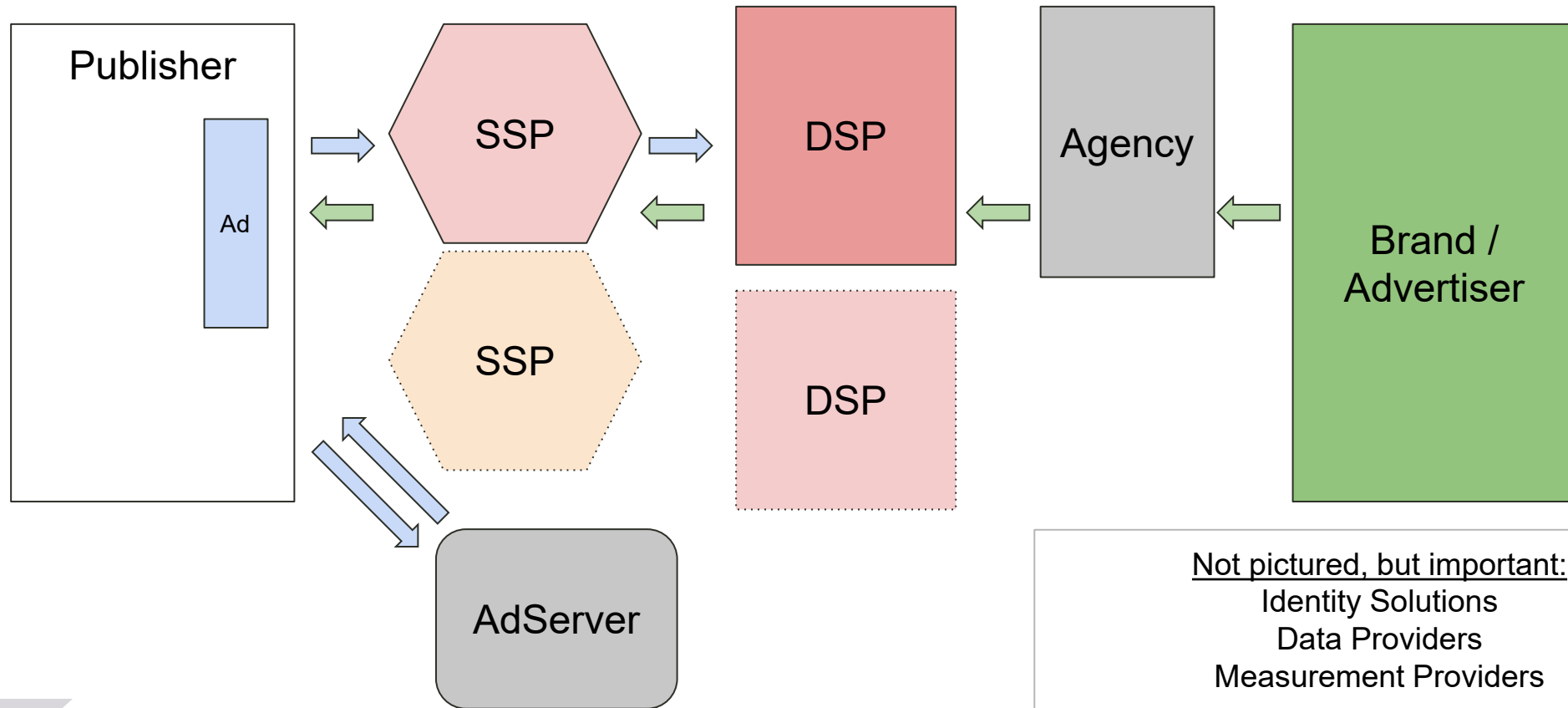REGULATORY & LEGAL SCRUTINY

CONSUMER TRUST & PR

CROSS-INDUSTRY IMPACT

FOCUS IN CORPORATE TRANSACTIONS

CONTRACTING RISK

mwe.com

ADTECH 101: INDUSTRY AND PLAYERS

Online Advertising Supply Chain, simplified:

mwe.com

ADTECH 101: LEGAL REQUIREMENTS & OVERVIEW

- AdTech laws have general applicability
- Compliance variables:
  - What role within industry?
  - What technology used?
- Controllers vs. Processors?
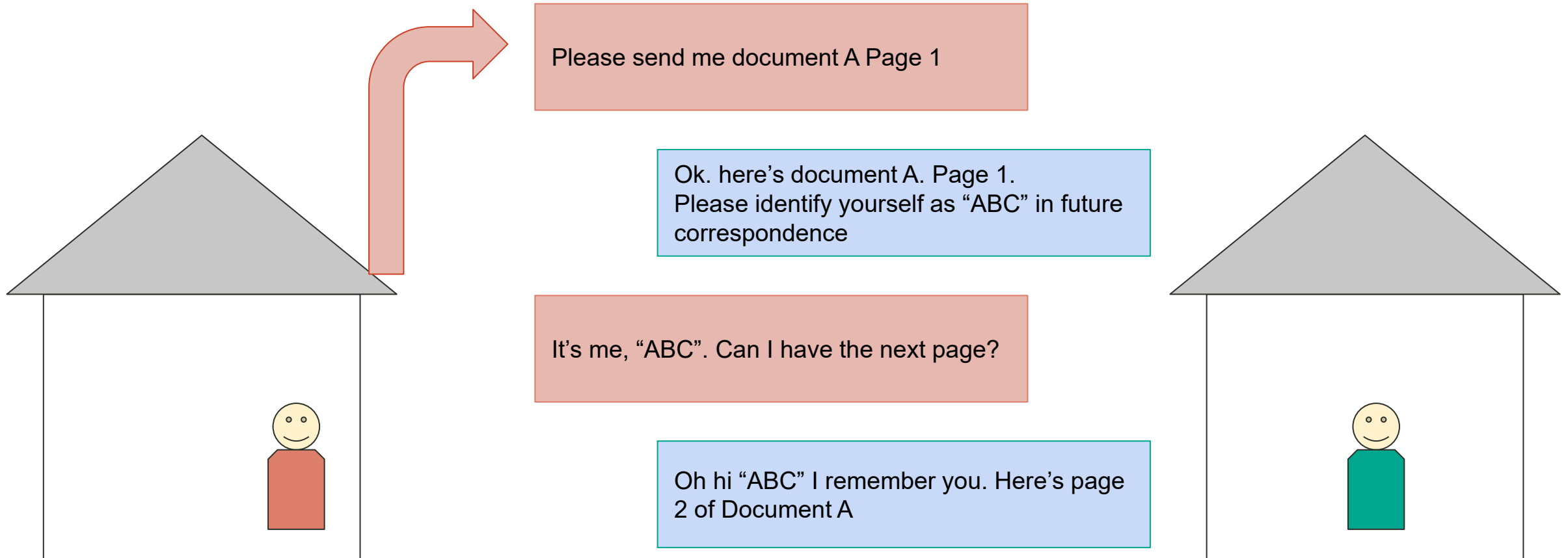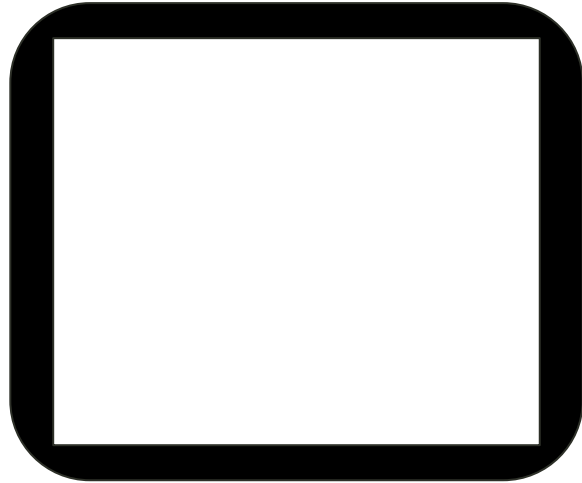- Industry self-regulation and platform mandates
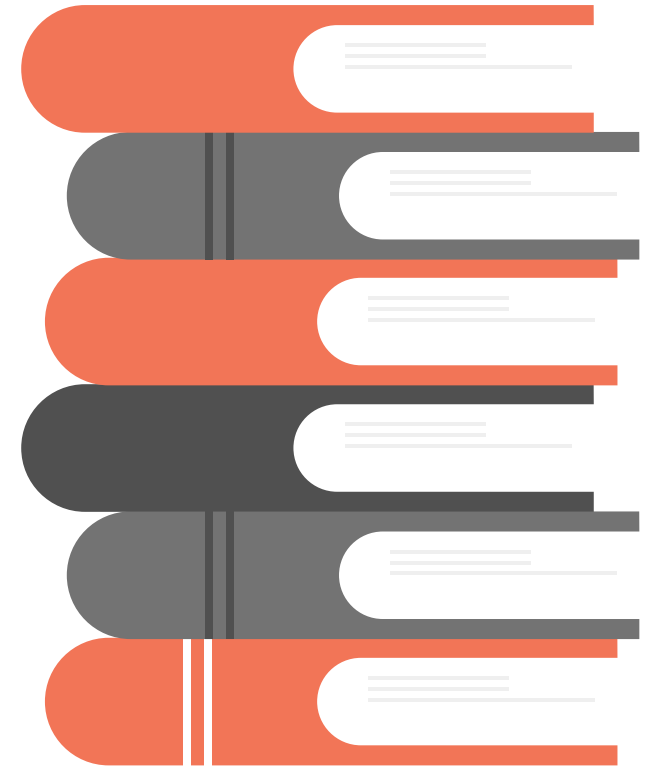
KEY CONCEPT: WEB REQUESTS ARE STATELESS

- Each page request, click, or new page visited by a user, by default, looks like a totally new request in isolation to the website and there's no way to tell it's the same device or browser. This naturally presented some problems leading to the creation of cookies

*Like all starting points, this oversimplifies for clarity

mwe.com

IF WEBSITES AND COMPUTERS WERE (TERRIBLE) PEN PALS

Please send me document A Page 1

Ok. here's document A. Page 1.
Please identify yourself as "ABC" in future correspondence

It's me, "ABC". Can I have the next page?

Oh hi "ABC" I remember you. Here's page 2 of Document A

mwe.com

Please add "Drain cleaner" to cart

Ok. added. Please save "CartID=1234" in your cookies so I know which cart is yours

It's me, CartID=1234. Can I see www.retailer.com/mycart please?

Oh hey, here's the page with your cart, and I'm showing you the Drain cleaner you added since you are Cart 1234
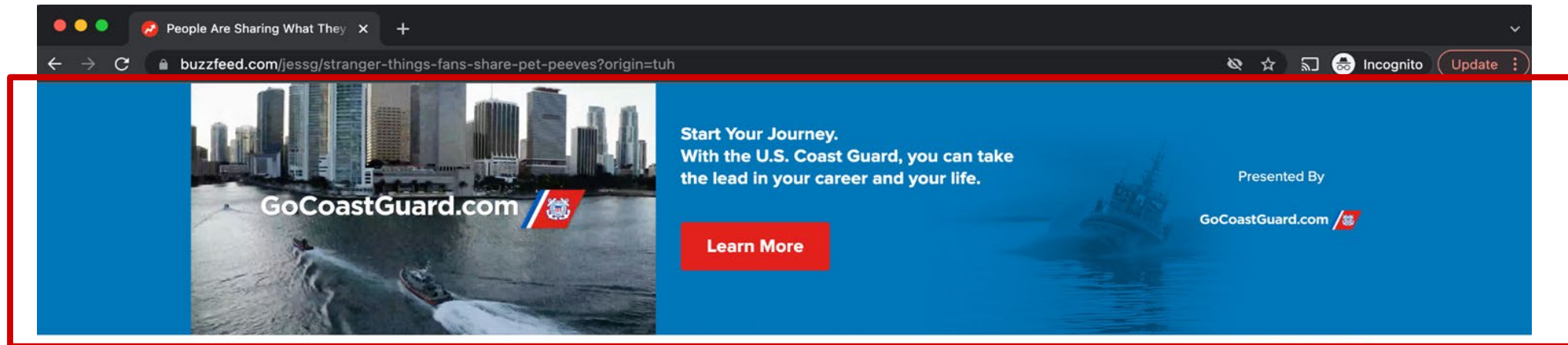
Key Concept 1: Web requests are *Stateless*
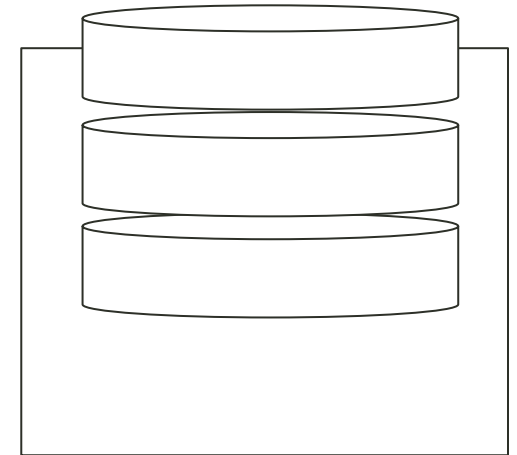
Cookies introduce some *state*

KEY CONCEPT: WEB SITES ARE MADE OF COMPONENTS FROM DIFFERENT SERVERS

- Each website you load, like buzzfeed.com, loads pieces from buzzfeed.com's server, and at the direction of buzzfeed's server, requests some content from other servers, such as images hosted by an image service, or a consent banner from a consent banner company. Some are first parties; some are third parties, and both can set cookies

mwe.com

3P

3P Request

1P

Websites are made of components

mwe.com

Webpage	Browser Cookie list		
	adserver.com Cookie = "browserid=404"	browserid=404	Adserver.com server
	Buzzfeed.com Cookie = "userid=123"	usered=123	Buzzfeed server
	Bank.com Cookie = "encrypted_token=eyuiop"		

Cookies are scoped to the server that set them

Multiple servers collaborate to compose any given page

The URL in your browser bar is the First Party at the moment

mwe.com

US FEDERAL LAW

Section 5 of the Federal Trade Commission (FTC) Act

- Prohibits "unfair or deceptive acts or practices" – enforced by FTC

- Used to enforce inaccurate/incomplete privacy disclosures (deceptive); unexpected or sensitive data practices without notice/consent (unfair)

- Potentially requires individual consent: precise geolocation, sensitive health info, smart TV tracking, cross-device tracking (?)

Children's Online Privacy Protection Act (COPPA)

- Applies to for-profit entities that target their online services to children under 13 or knowingly collect information from children under 13

- Requires enhanced notice and parental consent

- In practice: restricts the use of AdTech on sites/apps intended for kids

- Enforced by the FTC and seen as an enforcement priority – recent actions

EU LANDSCAPE: GDPR AND EPRIVACY

- GDPR Recital 30: Cookies are generally personal data if they can be used to identify users

- ePrivacy Directive: Consent unless strictly necessary

- Harmonizing requirements of GDPR and the ePrivacy Directive mean:

    – Disclose what data each cookie tracks and the purpose

    – Obtain consent before most cookies are used

    – Document and store consent

    – Allow users access even if consent is denied

    – Provide an easy method to withdraw consent

mwe.com

EU LANDSCAPE: *SCHREMS II*, EDPB AND DPAS

- Layer on Schrems II and DPA actions – Magnifying glass on cross-border data transfers

- Heed DPA actions – Starting in Jan 2022, several DPAs (and the EDPS) decided/indicated that Google Analytics is incompatible with GDPR / CNIL and others enforcement of strict cookie rules

- Keep watch on privacy advocates – Hundreds of draft complaints claiming unlawful cookie banners

- Prepare for the ePrivacy Regulation – If trilogue is completed in 2022, the ePR would apply in 2024 after a 24-month grace period

mwe.com

US STATE OPT OUT REQUIREMENTS

California

- **<u>Selling</u>**: Selling, renting, releasing, disclosing, disseminating, making available or transferring PI to a third party for monetary or *other valuable consideration*.
- **<u>Sharing</u>**: Sharing, renting, releasing, disclosing, disseminating, making available or transferring PI to a third party *for cross-context behavioral advertising*, regardless of monetary or other valuable consideration.

Virginia and Connecticut

- **<u>Sale</u>**: The exchange of PI *for monetary consideration* by the controller to a third party. Several exemptions, including disclosures:
  - to a processor;
  - for purposes of fulfilling a consumer request for a product or service;
  - to a controller's affiliate;
  - as an asset that is part of a business acquisition
- Opt out for *targeted advertising*

Colorado

- **<u>Sale</u>**: The exchange of PI *for monetary or other valuable consideration* by the controller to a third party. Several exemptions, including disclosures:
  - to a processor;
  - for purposes of fulfilling a consumer request for a product or service;
  - to a controller's affiliate;
  - as an asset that is part of a business acquisition
- Opt out for *targeted advertising*

Utah

- **<u>Sale</u>**: The exchange of PI *for monetary consideration* by the controller to a third party. Several exemptions, including disclosures:
  - to a processor;
  - for purposes of fulfilling a consumer request for a product or service;
  - to a controller's affiliate;
  - as an asset that is part of a business acquisition
- Opt out for *targeted advertising*

mwe.com

OTHER TECHNOLOGIES:
COOKIES, PIXELS, FINGERPRINTING, HASHED EMAILS

Cookies

- Set by the server, stored and sent by the browser

- Simple text, often encrypted and only decodable by the setter (server)

Pixels

- Example: A web request to www.pixel.com/counter/123 to increment counter ID 123

- Used to count # of pings, "check ins" etc.

- Sets cookies, enabling cookie reading/writing

- Important for things like reporting to your adtech platform that a user bought something: www.adtech.com/report_purchase?advertiser_id=1&amount=4500

- Nicknamed "Pixel" because they are often requests for blank images of a single pixel

mwe.com

OTHER TECHNOLOGIES:
COOKIES, PIXELS, FINGERPRINTING, HASHED EMAILS

Fingerprinting

- Poorly defined, but generally, observing all of the combinations of attributes to determine uniqueness

- *e.g.* device that supports the font "Cereal" is one in 100k. Device that supports the font "YouTube Sans" is one in 100. Devices that support both; much more rare!

- Generally frowned upon - some companies will not work with partners that use some fingerprinting strategies

Hashed Emails

- Hashing: one-way transformation. IF you know the input, the output is trivial to determine. If you only know the output, reversing the input is extremely hard

- Enables parties to match the hash rather than share PII

- Advertisers expect to be able to buy ads based on customer emails, *e.g.* "show ads about the new Xbox 2 to this list of people that purchased Xbox 1"

mwe.com

IMPLEMENTING CONSENT
FOR CUSTOMERS / PUBLISHERS

1. Inventory Vendors

Identify AdTech vendors – work with engineering, marketing, and web teams

2. Implement Opt-In/Opt-Out
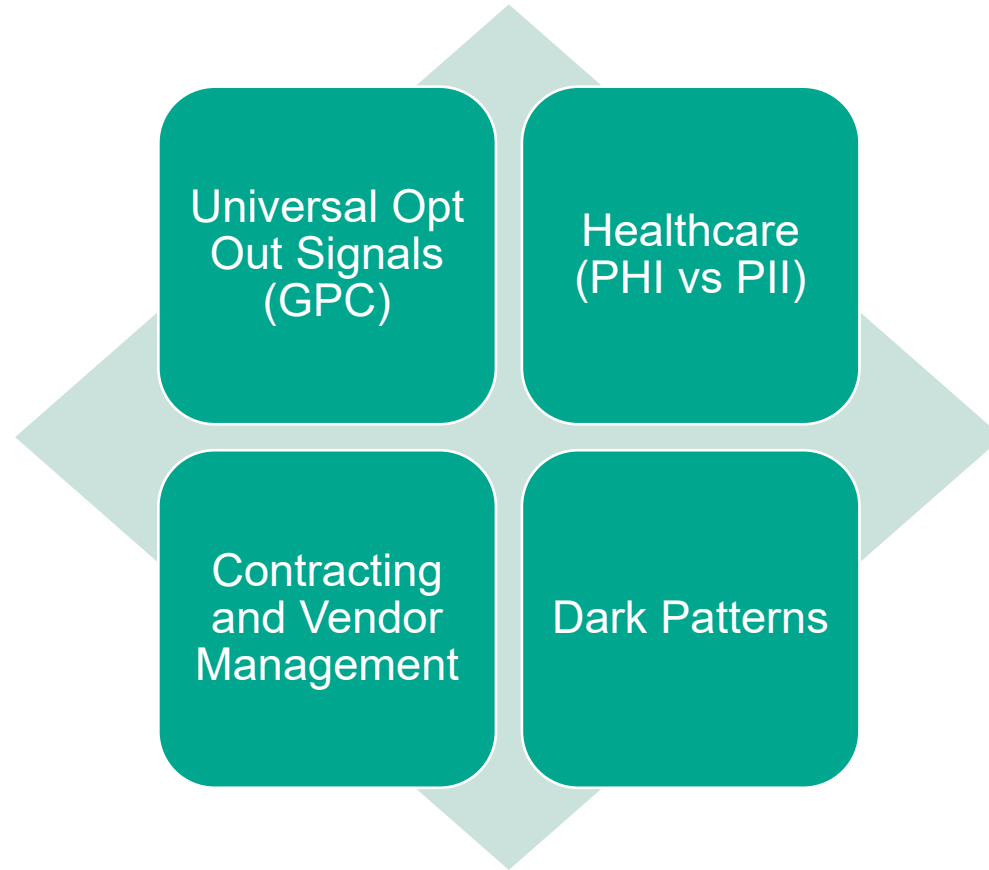
| Implement Vendor-Specific Signals | - OR - | Consent Management Platform (CMP) |

3. Test & Refine

Test consent to ensure operating correctly, align language with applicable law

mwe.com

TAKING A CLOSER LOOK AT COMMON CLIENT QUESTIONS

Universal Opt Out Signals (GPC)

Healthcare (PHI vs PII)

Contracting and Vendor Management

Dark Patterns

mwe.com

THANK YOU!