

# Digital Content Next

Legal and Legislative Committee  
September 19, 2017

# Agenda

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- Legal and Legislative Day NYC - November 9
- Review Analysis of Impact of the ePrivacy Regulation on Google and Facebook

## Legal and Legislative Day NYC

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12 Noon to 5 PM

Thursday, November 9

Hearst Building

300 W 57th Street, NYC

- Closed-door, DCN members-only event
- Goal to foster conversation on key policy issues between business executives and lead legal/policy personnel
- RSVP to [chris@digitalcontentnext.org](mailto:chris@digitalcontentnext.org)

# Impact of the ePrivacy Regulation on Facebook and Google

September 19, 2017

# Speakers



***Tanya Forsheit, Esq.,***

Partner

Privacy & Data Security Group,  
Frankfurt Kurnit Klein + Selz PC



***Daniel Goldberg, Esq.,***

Associate

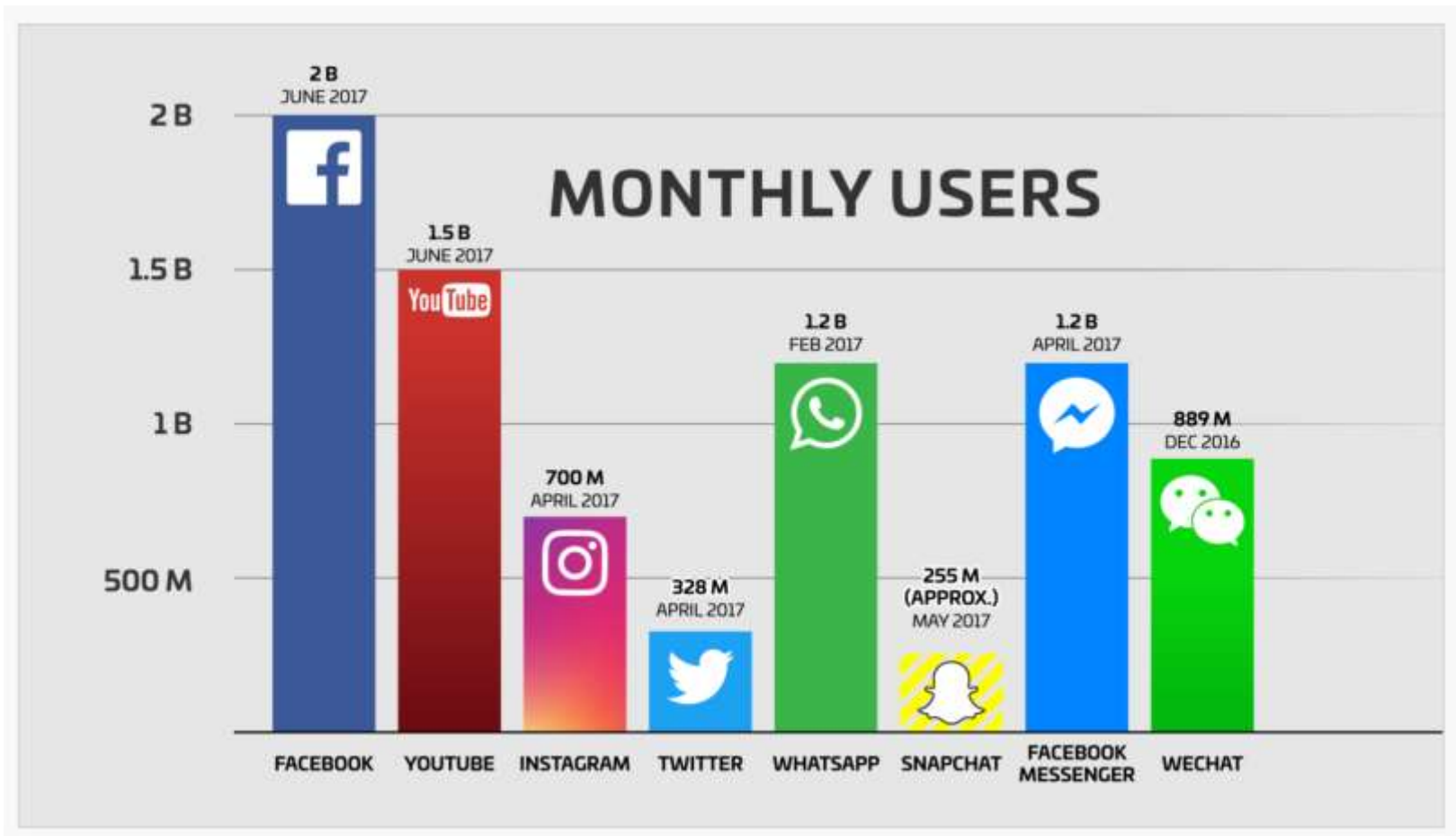
Privacy & Data Security Group,  
Frankfurt Kurnit Klein + Selz PC

# Current State of EU Regulatory Affairs

- Data Protection Directive
- ePrivacy Directive
- Member State Laws
- GDPR – effective May 2018

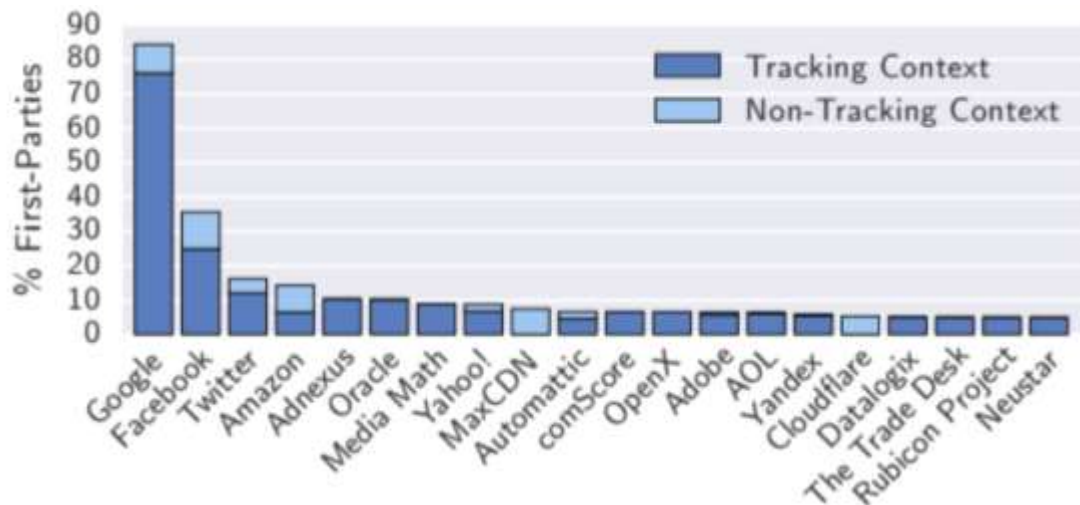
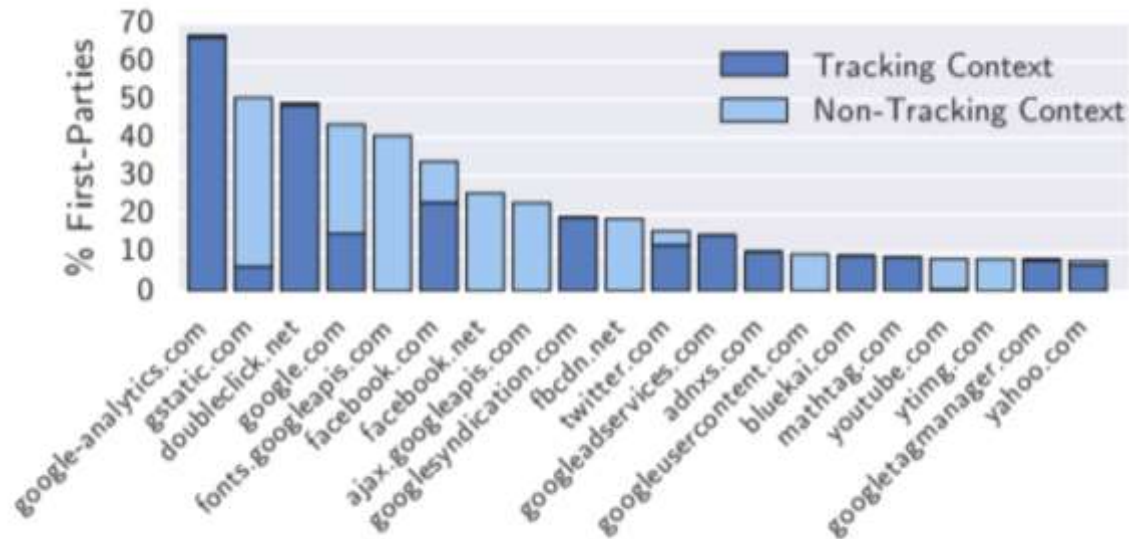


# Current State of Online Advertising



Josh Constine, "Facebook now has 2 billion monthly users... and responsibility," TechCrunch, June 27, 2017, available at <https://techcrunch.com/2017/06/27/facebook-2-billion-users/>.

# Current State of Online Advertising



Steven Englehardt & Arvind Narayanan, Princeton University, "Online Tracking: A 1-million-site Measurement and Analysis," available at [http://randomwalker.info/publications/OpenWP\\_M\\_1\\_million\\_site\\_tracking\\_measurement.pdf](http://randomwalker.info/publications/OpenWP_M_1_million_site_tracking_measurement.pdf).



# Facebook and Google – Big Data

- 1<sup>st</sup> party and 3<sup>rd</sup> party touchpoints
- Consent through broad clickwrap and privacy policy
- Limited penalties

# *Facebook Gets Slap on the Wrist From 2 European Privacy Regulators*



Mark Scott, “Facebook Gets Slap on the Wrist From 2 European Privacy Regulators,” New York Times, May 16, 2017, available at <https://www.nytimes.com/2017/05/16/technology/facebook-privacy-france-netherlands.html?mcubz=0>.

The French regulator, the Commission Nationale de l’Informatique et des Libertés, or CNIL, said that it had fined Facebook 150,000 euros, or about \$164,000, for failing to meet [France’s](#) data protection rules. The CNIL chairwoman, Isabelle Falque-Pierrotin, also leads a Pan-European group of privacy officials. The fine represents a relatively small amount for Facebook, which generates tens of billions of dollars a year in online advertising. The Dutch authority, which could still reach a settlement with Facebook, did not impose a financial penalty.

# ePrivacy Regulation

- Proposed Jan. 2017, Revised Sept. 2017
- "particularise and complement" GDPR
- Governs processing of electronic communications data (ECD) and user device data
- Fines up to 4% of total annual turnover of preceding fiscal year

# General Prohibition on Processing Absent Exception

- May not process ECD
  - ECD – data relating to an electronic communications service such as email, messaging, or VoIP
  - Includes content (ECD) and metadata (ECM)
- May not collect or access user device data
- Must erase or anonymize
  - Content after receipt
  - Metadata when no longer needed for purpose of the transmission

# Consent is Only Relevant Exception

- No other exception allows for processing for online behavioral or targeted advertising (OBA) purposes.
- May process content for OBA purposes if
  - Consent from all users concerned for the specified purpose
  - Purpose could not be fulfilled by anonymous data
  - Previously consulted with supervisory authority
- May process metadata for OBA purposes if
  - Consent from the user for the specified processing
  - Purpose could not be fulfilled by anonymous data
- BUT no consent exception for combined content and metadata

# Consent is Only Relevant Exception (Cont.)

- May collect or access data on a user's device for OBA purposes if
  - Consent from the user for the collection
- May collect data emitted by user device to enable it to connect to another device or network equipment for OBA purposes if
  - Consent from the user for the collection
  - Clear and prominent notice of the collection along with choice
  - Security measures appropriate to the risks

# Consent is a High Standard

- “conditions for consent provided for” in the GDPR.
- Clear affirmative act establishing a freely given, specific, informed, and unambiguous indication of the user’s agreement to the processing
- Cannot bundle in a clickwrap
- User has right to refuse or withdraw consent at any time
- Must provide a reminder at least once every 12 months of right to withdraw consent

# What does this mean for Facebook and Google?

- Could not rely on any prior consent and would need to get new consent for use of their current data for OBA purposes
- Absent consent, could not process any metadata within Messenger, Gmail, likes, posts, etc., for OBA purposes
- Even with consent, could not process content within Messenger, Gmail, likes, posts, etc. for OBA purposes
- Absent consent, could not collect or access data on user devices for OBA purposes; no retargeted ads or custom matching
- Could no longer bundle consent and would need to offer service to users who decline to opt-in to OBA
- Would need to provide consent withdrawal options and reminders





# Google Will No Longer Scan Gmail for Ad Targeting

By DAISUKE WAKABAYASHI JUNE 23, 2017



Google said it plans to carry out the changes to the Gmail ad policy “later this year.”  
Matt Rourke/Associated Press

SAN FRANCISCO — Google plans to abandon its longstanding practice of scanning user email in its Gmail service to serve targeted advertising.

Daisuke Wakabayashi,  
“Google Will No Longer  
Scan Gmail for Ad  
Targeting,” New York  
Times, June 23, 2017,  
available at

<https://www.nytimes.com/2017/06/23/technology/gmail-ads.html?mcubz=0>.

# What if Facebook and Google violate the ePrivacy Regulation?

- Facebook – \$1.07 billion fine  
(based on last year)
- Google – \$3.58 billion fine  
(based on last year)

# How does the ePrivacy Regulation differ from the GDPR?

- Consent is the only possible basis for processing for OBA purposes
- Governs data beyond personal data
- No references to pseudonymized data

# Questions?

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