Privacy Assessment Overreach?

-- The Ninth Circuit's Recent Opinions Striking Down Requirements for Publishers to Conduct and Make Available Content Harm Assessments Raise Questions About the Viability Of Data Privacy Risk Assessment Requirements Under Consumer Privacy Laws.

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Striking Down Editorial Transparency Laws

The California Age Appropriate Design Code Act[1] ("CAADCA" or "Act") sets numerous requirements for online services to protect the privacy and safety of minors (under the age of 18). However, the Act was enjoined by a federal District Court[2] as likely a violation of publishers' free speech rights under the First Amendment of the U.S. Constitution, applying intermediate scrutiny. Recently, in *Netchoice, LLC v. Bonta* ("Netchoice"), the Ninth Circuit upheld that decision, but only as to requirements for Data Protection Impact Assessments ("DPIAs"),[3] and went further to find that such assessments are subject to strict scrutiny and are facially unconstitutional.[4] The court, however, overruled the District Court as to the injunction of other provisions of CAADCA, such as restrictions on the collection, use, and sale of minor's personal data and how data practices are communicated; and remanded those issues for an as applied analysis. Approximately two weeks later, the same panel of Ninth Circuit judges (Smith, Bennett and Johnstone; Smith authoring both opinions) ruled *in X Corp. v. Bonta* ("X Corp") that a California law requiring large social media companies to file reports detailing whether and how they define hate speech or racism, extremism or radicalization, disinformation, harassment, foreign political interference, and controlled substance distribution, and if and how they moderate such content, was also facially unconstitutional and failed to survive strict scrutiny.[5]

DIPAs in a Consumer Privacy Context

While *Netchoice* and *X Corp* involve editorial transparency requirements that have censorial implications for publishers,[6] the Ninth Circuit's decisions raise questions as to what the decision means for DPIA requirements under consumer privacy laws, which have been passed in 20 states, including the 18 (out of 20) state consumer privacy laws that mandate DPIAs for certain "high risk" processing activities. Also implicated are other provisions of these laws such as limits on targeted advertising to minors (Maryland outright bans use of personal data for targeted advertising and other states require affirmative opt-in by the minor or a parent), and other transparency and choice requirements under these laws, as well as under Washington's and Nevada's consumer health information laws,[7] and recent and proposed legislation and regulations governing AI development and deployment. As with most evolving legal issues, the answer is not clear, but there are things we can learn from the Ninth Circuit's decisions, the

[1] Cal. Civ. Code §§ 1798.99.28–.99.40.
[2] *Netchoice, LLC v. Bonta*, 692 F. Supp. 3d 924 (N.D. Cal. 2023).
[3] Cal. Civ Code §§ 1798.99.31(a)(1)(A) and (B).
[4] *Netchoice, LLC v Bonta,* 113 F.4th 1101 (9th Cir., August 16, 2023).
[5] *X Corp. v. Bonta*, --- F.4th ---, 2024 WL 4033063, at *6–9 (9th Cir. Sept. 4, 2024).
[6] Eric Goldman, *Zauderer and Compelled Editorial Transparency*, 108 IOWA L. REV. ONLINE 80 (2023).
[7] *See* Alan Friel, Kyle Fath, Niloufar Massachi, & Gicel Tomimbang, *Are you Ready for Washington and Nevada's Consumer Health Data Laws?*, PRIVACY WORLD (April 17, 2024) https://www.privacyworld.blog/2024/04/are-you-ready-for-washington-and-nevadas-consumer-health-data-laws/.

cases they rely on, and how other courts have addressed First Amendment challenges to regulation that compels speech.

First, let's address the future of DPIAs. The Ninth Circuit reached its conclusions in *Netchoice* by initially finding that the "DPIA report requirement clearly compels speech by requiring covered business to opine on potential harm to children . . . [and] it is well established that the forced disclosure of information, even purely commercial information, triggers First Amendment scrutiny.'' This should subject all DIPA requirements to potential First Amendment challenges. It then held that "in every circumstance in which a covered business creates a DPIA report for a particular service, the business must ask whether the new service may lead to children viewing or receiving harmful or potentially harmful materials[,]" justifying a facial rather than as applied challenge, and triggering strict scrutiny rather than a lower review standard. This will not always be the case. DIPAs under state consumer privacy laws are broader in their application and generally more concerned about collection and use of personal data than the evaluation of potential harm from editorial decisions regarding what content is made available for viewing. In looking at government mandated disclosures the Supreme Court has held that a lower review standard should apply where laws regulate commercial speech where the disclosure obligation is part of a larger regulatory scheme regulating commercial conduct, or requires only factual and uncontroversial information about goods and services offered.[8] There are a lot of detailed disclosure requirements that are part of government schemes to regulate certain commercial activities such as food and drug labeling, scientifically established and uncontroversial health warnings, securities risk and management discussion and analysis disclosures in annual reports to the Securities and Exchange Commission, and the Federal Trade Commission's Franchise Disclosure Document—to name a few. However detailed these may be, they tend to inform potential purchasers about relevant product or service information so they can make an informed choice, as opposed to generating information for society about a company's judgment with respect to matters of public concern and how they will design or offer their products or services in response to those concerns. For instance, the D.C. Circuit has upheld country of origin labeling requirements for meat products,[9] but struck down disclosures on websites and in security filings regarding the use of "conflict minerals" from the Congo, because the former was a factual statement on product labeling that left social judgment to the consumer and the later was mandatory disclosure unrelated to advertising or labeling that was essentially a "metaphor" for a company's moral responsibility to which the issuer may not agree.[10] The Ninth Circuit makes similar distinctions in *Netchoice* and *X Corp*.

In analyzing the First Amendment issue, the *Netchoice* court applied strict scrutiny (the standard for restrictions on non-commercial, editorial, and expressive speech), rather than intermediate scrutiny (the standard generally applied to commercial speech and speech that is content and speaker neutral), because "[t]he [disclosure that] children are exposed to harmful content online – regulates more than mere commercial speech," it disfavors speech the government deems harmful and places the burden on publishers to determine what is harmful and pressures them to censor such content. Applying the strict scrutiny requirement that the law be the least restrictive manner of achieving an assumed compelling interest of protecting children from harmful material, the Court held that "a disclosure regime that

[8] *Nat'l Inst. of Fam. and Life Advocas. v. Becerra*, 585 U.S. 755, 766–76, 138 S.Ct 2361, 2371–76 (2018); *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651, 105 S.Ct 2265, 2281–82, (1985). However, it remains unclear if this is a suggestion for something less than intermediate scrutiny for some types of commercial speech other than purely factual disclosures required for advertising materials.

[9] *Am. Meat Inst. v. USDA*, 760 F.3d 18, 21 (D.C. Cir. 2014) (en banc).

[10] *National Ass'n of Mfrs v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015).

requires the forced creation and disclosure of highly subjective opinions about content-related harms to children is unnecessary for fostering a proactive environment in which companies, the State, and the general public work to protect children's safety online. For instance, the State could have developed a disclosure regime that defined data management practices and product design without reference to whether children would be exposed to harmful or potentially harmful content or proxies for content. Instead, the State attempts to indirectly censor the material available to children online . . ., making publishers government proxies for such censorship. Similarly in *X Corp*, the Court found that "compel[ing] every social media company to reveal its policy opinion about contentious issues, such as what constitutes hate speech or misinformation and whether to moderate such expression. . . . likely compel[s] non-commercial speech . . . subject to strict scrutiny, under which [the requirements] do not survive."

So, what then about DPIA requirements regarding data processing activities that do not impact what types of content are restricted or available for viewing via the business? While not directly at issue in either case, in *Netchoice* the Court responded to an argument by an Amicus that "striking down the DPIA report requirements in the CAADCA necessarily threatens the same requirement in the CCPA [California's consumer privacy law] [and other US privacy laws]." After first finding in dicta that the mandatory consumer rights statistics reporting requirement for large volume personal information processing businesses under CCPA regulations is a mere "obligation to collect, retain and disclose purely factual information" and is a "far cry" from the CAADCA's "particular focus on whether [online services] may result in children witnessing harmful or potentially harmful content online, the court referenced Cal. Civ. Code § 1798.185(a)(15)(B), which provides:

> (15) … requiring businesses whose processing of consumers' personal information presents significant risk to consumers' privacy or security, to: … (B) submit to the California Privacy Protection Agency on a regular basis a risk assessment with respect to their processing of personal information, including whether the processing involves sensitive personal information, and identifying and weighing the benefits resulting from the processing to the business, the consumer, other stakeholders, and the public, against the potential risks to the rights of the consumer associated with that processing, with the goal of restricting or prohibiting the processing if the risks to privacy of the consumer outweigh the benefits resulting from processing to the consumer, the business, other stakeholders, and the public….

Again in dicta, the Court wrote, but without direct discussion of the specific requirements of CCPA § 1798.185(a)(15)(B), or the current very complex DPIA requirements in draft implementing regulations:

> A DPIA report requirement that compels businesses to measure and disclose to the government certain types of risks created by their services might not create a problem. The problem here is that the risk that businesses must measure and disclose to the government is the risk that children will be exposed to disfavored speech online. Accordingly, [Amicus's] concern that the district court's ruling necessarily threatens other DPIA schemes throughout the country, is misguided.

However, the Court's *X Corp* decision warned that "[e]ven a pure 'transparency' measure, if it compels non-commercial speech, is subject to strict scrutiny", and then distinguished between requiring reporting subjective beliefs (what content meets what category definitions) and disclosure of resulting standards and policies (requirement of disclosure of content moderation policy "without regard to

particular content categories"). In both decisions, the Ninth Circuit distinguished between compelling disclosure of subjective opinions about aspects of a company's product or service from requiring disclosure of mere product facts. The latter, the court stated ,was subject to a more deferential review[11] and is the basis for upholding a wide variety of government disclosure obligations such as requirements for food and drug labeling requirements and registering securities. In *Netchoice*, the Court specifically addressed the CAADCA's mandate for clear, conspicuous, and easily understandable privacy notice and service terms and policies, finding that mandate to be likely of a purely factual and uncontroversial nature. However, in applying this standard in a food labeling case, the Ninth Circuit has found that even under the lowest level of scrutiny, the disclosure requirements cannot be overly burdensome.[12] The Colorado and proposed California DIPA requirements are so detailed to be subject to an overly burdensome claim, even under the most deferential *Zauderer* review standard.

So then, in the context of privacy DIPAs, where is the line to be drawn between compelled editorial speech requiring disclosure of value judgments (which should receive strict scrutiny), and compelled commercial speech (which will receive either intermediate scrutiny, or in the case of required disclosures in advertising materials of only factual and uncontroversial information about goods and services being offered, rational basis scrutiny)?[13] Looking at the draft California DIPA regulations as an example: draft Section 7157(b)(2) would require businesses to file a summary of its DIPAs that lists the processing activity, the purpose of processing, the categories of personal information processed, whether sensitive personal information is included, and the safeguards implemented to protect against harm to consumers all seem to be factual and a relatively low burden. Whereas the right to inspect very detailed risk benefit analysis provisions called for in those regulations could cross over to compulsion to share opinions of a controversial subject, namely what constitutes privacy harms to consumers, what benefits outweigh those harms, and what safeguards are sufficient to justify the choice of benefits over harms. Similarly, draft Section 7157(b)(1)'s requirements that an executive officer sign and file an attestation that DPIAs were performed, seems less susceptible to constitutional challenge than draft Section 7157(d)'s proposed requirement that the full DIPAs, including the risk benefit analysis, are subject to government inspection on request.[14]

While the Ninth Circuit was careful to restrict its holding to DPIAs that require content evaluation and judgment and encourage censorship of governmentally disfavored content, the door is left open for challenges to more traditional DPIAs to the extent that they require documentation for the government

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[11] *X Corp*, 2024 WL 4033063 (distinguishing Zauderer, 471 U.S. 626 (1985)); but see *infra* at n. 13 and 15 as to the limits of *Zauderer*.

[12] *Am. Beverage Ass'n v. City and Cnty. of San Francisco*, 916 F.3d 749, 753 (9th Cir. 2019) (en banc) (requirement that warning label occupy at least 20% of label or ad is unjustified and unduly burdensome when record showed effectiveness of smaller warnings).

[13] The *Netchoice* court suggested *Zauderer* rational basis scrutiny might be appropriate for privacy policies and other non-editorial privacy transparency requirements. However, as the DC Circuit has held, and Professor Eric Goldman has opined, "*Zaudderer* is confined to advertising." *Nat'l. Ass'n of Mfrs.* 800 F.3d at 522; Goldman, *supra* at n. 6.

[14] Such inspections also raise serious questions about attorney-client and work product privilege. While twelve states statutorily provide that inspection is not a waiver of privilege this begs the question as to what the purpose of the inspection is, if not for law enforcement. Further, California and the other five states do not expressly statutorily preserve privilege over assessments, even if many of those promise confidentiality or exempt assessments from public records access requests. To ensure privileged, attorney-client communications and work product that is associated with it, legal assessments should be labeled as such and segregated (redacted) from what is maintained for inspection.

of an evaluation of high risk data processing activities based on subjective (and amorphous) risk, harm and data subject impact conclusions, and opinions of contravening benefits and offsetting safeguards, to reach a decision on how to appropriately design and offer a product or service. Even if doing so does not trigger strict scrutiny as the Ninth Circuit applied to the editorial transparency cases, doing so calls for requirements for creation and dissemination of information, unrelated to factual disclosures in advertising or labeling.[15] In applying intermediate scrutiny to SEC disclosure obligations, the D.C. Circuit applied multiple Supreme Court precedents to hold that "the SEC had the burden of demonstrating that the [disclosure obligations] would 'in fact alleviate' the harms [for which the government had an interest in preventing] 'to a material degree.'"[16] "Under the First Amendment, in commercial speech cases the government cannot rest on 'speculation or conjecture.'" While the Ninth Circuit has suggested that privacy DIPAs "might not be a problem," that issue is left to be resolved should the aspects of privacy DIPA disclosure requirements be challenged.

In the meantime, 18 of the 20 state consumer privacy laws (all but Iowa and Utah) require completing DPIAs of "high risk" data practices to be made available for inspection, with some sort of yet to be determined filing system to be required in California. Colorado has complex and detailed mandates for how DIPAs must be conducted and documented, and California draft regulations go even further. Minnesota requires not only DIPAs but that conducting them be part of a written comprehensive privacy program designed to ensure compliance with all aspects of its privacy law and documentation of data inventories. The future will tell the extent to which these types of compelled speech may be challenged, and whether such challenges might find some level of success. In a 2019 report to Congress, the Congressional Research Office analyzed trends in judicial review of commercial disclosure requirements under the First Amendment and warned law makers that the courts are "more closely reviewing commercial disclosure requirements, perhaps moving away from more deferential treatment of such provisions."[17] What is clear is that regulatory mandates to compel use of DPIAs as a compliance assurance and monitoring measure face potential First Amendment challenges that are not relevant in Europe where DIPAs originated and there is no First Amendment equivalent, and will need to be narrowly crafted and supported by a record that quantifies the benefits of the forced disclosure regime and that no less burdensome means of achieving those purposes is readily available. Most of these state privacy laws have savings clauses for conflicts with protected free speech rights, but where that line will be drawn remains subject to further development of First Amendment jurisprudence. An alternative approach less vulnerable to challenge would be shielding the DIPA risk analysis from compelled disclosure, and requiring only reporting on a factual description of the processing activities—the data elements, sources, recipients and subjects, the processing purposes, and safeguards employed––much as California is considering requiring for the filing of DIPA summaries. Details for conducting DIPAs could be mere best practices guidance.

Beyond DIPAs, what about other state consumer privacy law requirements? Privacy policy and pre-collection data practices notice requirements are a form of compelled speech. If these can fit into advertising and labeling disclosure regimes, any challenges to such requirements would likely be subject to rational basis analysis, as largely factual and non-expressive, non-controversial speech. Even under

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[15] *See Nat'l Ass'n of Mfrs.*, 800 F.3d at 522 (while *Zauderer* deferential scrutiny is not limited to the purposes of preventing deception, it is confined to advertising and labeling disclosures and not to other compelled speech such as SEC reporting and disclosures).

[16] *Id*. at 527.

[17] VALERIE BRANNON, CONG. RSCH. SERV., R45700, ASSESSING COMMERCIAL DISCLOSURE REQUIREMENTS UNDER THE FIRST AMENDMENT 31 (2019).

more exacting intermediary scrutiny, such requirements may well pass Constitutional muster. More interesting are provisions in privacy laws that outright prohibit the collection and use of particular personal data (e.g., minors) for sale of targeted online advertising, or require prior express, affirmative consent, sometimes subject to burdensome consent requirements (e.g., sensitive personal data, such as consumer health data). A key case to consider in these regards, and one which the Ninth Circuit applied in *Netchoice*, is the 2011 Supreme Court decision in *Sorrell v. IMS Health*.[18] As noted by the Ninth Circuit in *Netchoice*, *Sorrell* stands for the proposition that "the creation and dissemination of information [including personal data] are speech within the meaning of the First Amendment." However, *Sorrell* stands for much more that impacts the restrictions of privacy laws on personal data sales, and its use for targeted advertising. The majority (Kennedy authoring the opinion) held that a Vermont law prohibiting pharma companies and data brokers from most sales of pharmacy record prescriber data (i.e., what doctors prescribed what drugs), and its use for marketing purposes, was unconstitutional. While it suggested that strict scrutiny should be applied since the restrictions were both content-based and speaker-based, the Court found that the Vermont law could not withstand even intermediate scrutiny. The *Sorrell* decision opens the door a bit wider for publishers, retailers, advertisers and data brokers whose data practices enable the sending of more effective, relevant, targeted messages to consumers, or otherwise commercialize their data, to challenge consumer privacy laws that curtail their data use and distribution.

Assuming even intermediate scrutiny, privacy compliance regimes that outright ban certain categories of personal data sales or use for targeted advertising, or mandate opt-in (especially those where the method of opt-in required is very burdensome such as is the case with the Washington and Neveda consumer health data laws), as opposed to opt-out, could be challenged as requiring burdens on speech no less effective than the lesser burdensome opt-out alternative, which has proven effective for other contexts of data dissemination and use, including targeted advertising. However, a detailed record to establish that will be necessary. The dissenters in *Sorrell* (Breyer, Ginsburg, and Kagan) opined that the Vermont law should survive intermediate scrutiny because the record was devoid of similar effective more limited restrictions. Post-*Sorrell*, federal courts have continued to apply intermediate scrutiny to commercial speech cases even if content-based and/or speaker-focused. [19] One such District Court, in applying intermediate scrutiny to a Florida text-and-tele-marketing law, held that opt-in to auto-dialed telemarketing calls was sufficiently narrowly tailored because it was not an outright ban and leaves open alternatives: live and consented-to calls (and texts), unsolicited emails (which are opt-out rather than opt-in) and direct, postal solicitations. Again, there did not seem to be a record about the effectiveness of opt-out and the greater burdens of opt-in.

Privacy Regulation Must Mind Free Speech Limitations on Government Control

With the current regulatory disfavor of data-driven, tailored, personalized advertising, and other personal data commercialization, publishers, retailers and advertisers, and their trade organizations, will need to carefully pick what consumer data practices to challenge on First Amendment grounds and to be strategic in developing a record that will support their position if left with intermediate scrutiny. Regulators should consider what are better suited to be recommended best practices as opposed to

[18] 564 U.S. 552, 131 S.Ct 2653 (2011).

[19] *See, e.g., Ocheese Creamery LLC v. Putnam*, 851 F.3d 1228, 1235 n.7 (11th Cir. 2017) (citing *Wollschlager v. Governor of Fla.*, 848 F.3d 1293, 1306-17 (11th Cir. 2017)); relied upon by *Turizo v. Subway*, 603 F. Supp. 3d 1334, 1348 (S.D. Fla. 2022).

legal mandates, and be prepared to defend the purposes and means and methods of regulations that compel speech or restrict the commercialization of information, including personal data.

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