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Recommended for You Streaming Platform Recommendation Algorithms and Consumer Rights

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INTRODUCTION: DO YOU WANT TO KNOW A SECRET? (THE BEATLES)

Since 2015, Spotify, the Swedish music-streaming giant, has collated and analysed data to identify annual global music and podcast streaming trends. That same data analysis is provided for individual listeners -- albeit in a more social-media-ready way. Spotify Wrapped -- their candy-coloured year-in-review -- is released each November, to share with individual users their most-streamed artists and tracks over the past year. In 2023, that usage and listening data was packaged in appealing pastel graphics. Spotify Wrapped also placed users in a ‘character archetype’ depending on their use of the streaming platform, and suggested locations in the world where the user was likely to find other users with similar music tastes.¹

In addition to highlighting global listening trends and top artists, Spotify Wrapped also demonstrates the amount of data that the streaming platform maintains on its individual users.² In a sense, Spotify Wrapped reports the data that the platform has collected on their customers back to those customers - and the extent to which they are able to process it to identify personal features of the individual user.³ Much of this data is gathered through the use of recommendation systems that, using artificial intelligence (“AI”) and machine learning (“ML”) technologies, govern the content consumption experience of users on streaming platforms.

Spotify is not atypical in their use of recommendation systems. Many streaming services with significant catalogues, like Netflix, employ ***42** recommendation systems. These algorithms are also used on social media platforms, like Instagram, internet-based platforms, like YouTube, and in other personalized interactions online, like online shopping. As the focus of this paper will be the use of recommendation systems by streaming platforms, Spotify and Netflix will be used as representative examples. Recommendation systems are central to both organisations' business models. Both platforms operate primarily as content streamers, although Netflix has in recent years also turned to producing original content. The use of recommendation systems by these organisations is governed by the platforms' Privacy Policies. They are also organisations of similar scale and influence. Spotify has 602 million users worldwide, about a third of whom subscribe to the ad-free service,⁴ while Netflix enjoys approximately 260 million paying subscribers.⁵

Streaming platforms are becoming increasingly popular with consumers. In Canada, recent studies have suggested that 55% of Canadians use video streaming services, like Netflix, on a daily basis. Similarly, up to 30% stream audio content daily on platforms like Spotify.⁶ The federal government has recognized that the broadening use of these technologies creates new challenges for consumer privacy and has proposed updates to consumer privacy laws in Bill C-27. With the dissolution of the 44th Parliament on March 23, 2025, Bill C-27 died on the roll and will not be adopted. As proposed legislation, Bill C-27 signalled the direction of changes to privacy laws in future parliamentary sessions. As will be discussed, it is not clear that the proposed Bill adequately addressed or responded to the consumer privacy issues raised by recommendation algorithms or the Privacy Policies of streaming services.

Part I will outline the operation of recommendation systems and the underlying technologies. Part II will discuss the legal issues arising from recommendation systems, with consideration of the Terms of Use that govern the interaction between platform and consumer. In Part III, Bill C-27 will be analysed to determine how it responds to the concerns highlighted in Part II. Alterations to Bill C-27 will be suggested to better address the concerns arising from recommendations systems.

***43 I. TECHNICAL BACKGROUND: WHAT DO YOU MEAN? (JUSTIN BIEBER)**

(a) Artificial Intelligence and Machine Learning: Sweet Dreams (Are Made of This) (Eurythmics)

To understand the operation of recommendation systems, a grounding in AI and ML technologies is important. Recommendation systems are increasingly underpinned by AI and ML technologies. Performing separate but related functions, these technologies improve the efficiency and accuracy of content recommendations to users and place recommendation systems at the core of the streaming service business model.

A specialized branch of computer science, AI may be defined as “a diverse set of computational procedures or techniques (such as machine learning algorithms) that, based on data, perform tasks to varying degrees of autonomy that would be considered intelligent if performed by humans.”⁷ ML is a technique which is used in popular AI systems, like ChatGPT, and is foundational to their success. The use of ML techniques means that the system is not constrained by the written code and may develop capabilities beyond those which are concretely coded. An ML system is initially trained on a sample dataset. The program can then be employed to solve problems by making “predictions about the value of some unknown variable based on one or more known variables.”⁸ The training data serves as a basis from which the system can develop a problem-solving hypothesis when new data is introduced.

ML systems operate in relation to a predictive goal. This is an “abstract goal [that has been] translated into a decision about, conceptually, what to predict.”⁹ Predictive goals often take the form of accurately predicting or optimizing a given variable.¹⁰ The predictive goal dictates the variable of interest for the ML system.

Key approaches to ML include supervised learning, unsupervised learning, and reinforcement learning. In supervised learning, the system learns from labelled training data. Through this training, it develops the ability to predict the label that is appropriately applied to new data.¹¹ In unsupervised learning, by ***44** contrast, the data that is used in system training is not labelled. Rather, the system learns to identify patterns and commonalities in the data. New data is processed in relation to recognized patterns from the training data, to establish ‘clusters’ in data points.¹² A final learning technique is reinforcement learning. In this technique, the system learns actively from experience in the data processing and reinforcement feedback. The system learns to identify which of its actions were responsible for the feedback it received and to alter its actions appropriately to obtain positive feedback.¹³

It is because of the ability to arrive at conclusions independently that ML systems are often referred to as ‘black boxes.’ The processes that the program uses to get to its result are not apparent and cannot be explained because the program has learned and developed independently of the coded algorithms. Only the inputs and resultant outputs can be seen and evaluated.

From the foregoing, it is clear that ML, and by extension AI, are essentially probabilistic and statistical tools. They are particularly useful in the presence of large amounts of data that are complex to characterize manually. Because of this ability to process large amounts of data quickly in relation to a particular goal, ML systems are especially useful in recommendation systems, since they are often used in the context of large catalogues.

(b) The Operation of Recommendation Systems: “What you want, what you really, really want” (The Spice Girls)

The presence of a recommendation system is apparent upon the initial launch of a streaming platform. The user is immediately greeted with suggestions for content that they may be interested in viewing.¹⁴ User interaction with recommendation systems is frequent. For example, Netflix has “boasted that about seventy-five percent of user viewing is attributable to its recommendation

algorithm.”¹⁵ In 2018, about two-thirds of listening time on Spotify was spent on playlists created by the recommendation systems.¹⁶ Recommendation systems on Netflix and Spotify are central to the platforms' success because their catalogues *45 are so large. Netflix's recommendation system allows users to navigate the over 18,000 titles in its catalogue.¹⁷ Similarly, navigation of Spotify's 100 million tracks would be daunting without a method of sorting through them.¹⁸ As a result, recommendation systems hold significant utility for users by curating their interactions with the platform.

The predictive goal of recommendation systems is essentially economic, contributing towards maximizing platform revenue generation through user subscriptions and advertising.¹⁹ The system goal is to optimize the time that the user spends on the platform and to ensure user retention by showing them content that may be of interest. The predictive variable, then, is to accurately predict content that a user will like, and therefore keep them listening, maximizing time spent on the platform. As one commentator notes in respect of Spotify's platform, “Spotify organizes its interface and music recommendations with the singular objective of increasing the amount of attention that users devote to the platform and the amount of harvestable data that they generate and to keep them from leaving for a competing platform.”²⁰

Spotify will be primarily used to examine the mechanics of the recommendation systems. Netflix's recommendation system is understood to be similar to that of Spotify but, in recent years, the specifics of the system have become more opaque and more proprietary than the approach taken by Spotify. The recommendation systems of both Spotify and Netflix operate by combining content-based filtering and collaborative filtering. Both approaches appear to employ supervised, unsupervised, and reinforcement learning techniques.

The content-based filtering component of the recommendation system functions by developing and connecting two sets of data. The first set of data is a data representation of content. The second is a data representation of the user. This ability to build data to quantify both content and user is the ‘backbone’ of the recommendation system.²¹

Data representation of content can be complex. For example, to develop a data representation of a music track on Spotify, the algorithm first analyses the metadata of the track. This supervised learning approach includes analysis of *46 information such as title, featured artists, producers, and ‘tags’ that the artist applies to the track (e.g., genre, mood, style, etc.). The algorithm then seeks to quantify what the track sounds like through an examination of 12 metrics such as ‘danceability,’ and ‘energy,’ as well as the track's audio structure, like verses, choruses, and bridges. Song lyrics may also be analysed.²² On Netflix the content may be characterized by information including “genre, actors, and release date.”²³

To generate the second component, user data is used. Platforms begin to collect user data upon registration. Users initially populate their profile by, for example, selecting content they would listen to, or watch, from a suggested group. The program then uses the data generated through user activity on the platform to build a more detailed profile, and to map users' tastes.²⁴ Using Spotify as an example, this activity could include saving a song to a playlist, skipping a track, the length of the listening session, and repeated listens. The user profile developed includes information on most-played and most-saved tracks, artists, genres, mood, styles, popularity, diversity, and era preferences, as well as use patterns, demographic information and geolocation information.²⁵ Netflix prepares a user profile in a similar manner and gathers information including the time of day that the user watches, the device on which they watch Netflix, and how long they watch content.²⁶ Spotify refers to this as “silent data”: data that informs the listening experience, but which is not shared with the user as the basis for track selection.²⁷

The collaborative-filtering component of the recommendation system involves the comparison of individual users' tastes as identified through content-based filtering. On Spotify, the playlists of other users with similar *47 tastes are used to provide suggestions for an individual user.²⁸ Netflix is understood to be more strongly dependent on collaborative filtering mechanisms, using a similarity ranking to suggest content that other users with similar tastes, have viewed.²⁹ Netflix's unsupervised learning algorithm is believed to map about 2000 clusters -- “taste communities”³⁰ -- of consumer preferences, which are then used to make recommendations. The recommendations and connections that the system makes are not always instinctive. For example,

the “smart humour” cluster purportedly connects shows like *Jessica Jones* -- a Marvel production, with a superhero protagonist -- with *Master of None* -- a sitcom about a struggling actor.³¹ To further encourage users to view content, Netflix's also “algorithmically changes the thumbnail art on all its content to tailor it to the specific user” and their viewing preferences.³²

Data from the content-based and collaborative filtering systems are combined to make statistically driven recommendations. For example, the system might seek to quantify questions like “How similar are artists A and B?” and “How much does user X like artist A?” to generate the prediction that user X likes artist A who produces similar sounding songs to artist B.³³ Therefore, user X is also likely to enjoy artist B's work and should be recommended a track by B.

The systems also assess the accuracy of the prediction through the user interaction with the recommended content. For example, on Spotify, a recommendation is successful and accurate when the user streams a recommended song -- that is, listens to it for at least 30 seconds.³⁴ By some estimates, Netflix scrutinizes data from over 30 million plays per day.³⁵ Reinforcement learning protocols appear to be in use in these instances. The *48 more data that the platform collects about users, the more accurate content recommendations become, since the recommendation system is predicated on user data and interactions. As Spotify notes: “it takes a lot of data to make a great recommendation.”³⁶

(c) Platform Privacy Policies: Don't Stop Me Now (Queen)

The relationship between the individual user and the platform is governed by the Terms of Use and Privacy Policy agreements. Although the recommendation systems are central to the operation of both Spotify and Netflix, there is little reference to them in their Privacy Policies. Recommendation systems are not discussed in the Terms of Use agreements for either Spotify or Netflix, except to say that the agreement covers all the services on the platforms including personalized and recommendation services.

Both platforms' Privacy Policies note that they gather usage data on all users. As per the discussion above, this is used to build individual profiles and aids in providing recommendations. Spotify specifically states that the information about a user's activities on Spotify are used to draw “inferences ... of your interests and preferences based on your usage of the Spotify Service.”³⁷ The platform's Privacy Policy characterizes the use of user data to provide recommendations through the recommendation system as a “‘legitimate interest.’”³⁸ The tailoring of advertisements based on usage data is similarly characterized. While Netflix does not specifically state the information is used to draw inferences, they note that the information is used to provide personalized content recommendations “we think will be of interest to you” and to “analyze and understand our audience.”³⁹ They describe an essentially inferential process but stop short of using the word “inference.” Similar to Spotify, Netflix notes that their use of the user information includes use in order to “analyze and understand our audience, improve our service (including our user interface experiences and service performance) and optimize content or ad selection, recommendation algorithms and delivery.”⁴⁰

Technical data, such as cookies -- the data files that uniquely identify a user when online -- is also gathered by both platforms. Both platforms track users' *49 cookies across the web. Spotify notes that a user's usage data is used to “receive inferences from certain advertising or marketing partners. These inferences are the partners' understanding of your interests and preferences. This allows us to deliver more relevant ads and marketing.”⁴¹ Netflix notes that they collect information on users from “other sources,” including advertising and marketing parties. Interestingly, Netflix also notes that these sources could include “online and offline data providers, from which we obtain aggregated demographic, interest based and online advertising related data.”⁴² Neither policy elaborates on which entities are partners.

II. LEGAL ISSUES: WHAT'S LAW GOT TO DO WITH IT? (TINA TURNER-ISH)

(a) Consumer Data Privacy: Gimme! Gimme! Gimme! (ABBA)

The recommendation systems clearly achieve their predictive goal. By making seemingly random -- but, really, carefully controlled -- recommendations that the user would not have arrived at as quickly alone, if at all, the system keeps users on the

platform and interacting with it.⁴³ This recommendation system optimizes the revenue generated by the platform in three ways. First, through maximized advertising revenue; second, by ensuring user retention; and, finally, through the collection of user data for exchange with third party partners. However, in optimizing their economic goal, recommendation systems also have access to large amounts of data about their users. Much of this data does not fall under existing privacy legislation, like the federal *Personal Information Protection and Electronic Documents Act* (“PIPEDA”), which protects data that falls within the definition of personal information, such as name and identifying numbers.⁴⁴ Although a person's musical taste is not typically considered personal data, it remains sensitive. Music choice has aesthetic and emotional components; in aggregate, it can reveal a great deal about the individual listener. For example, one Spotify user characterized their library on Spotify, including recommendations, as something which “represents me very much -- better than my wardrobe.”⁴⁵ The recommendation system is also intended to infer the music tastes of the user, through inevitably personal predictions about the user. The recommendation algorithms are functionally using non-personal data to make inferences that lie closer to personal data. By analysing and gathering data about an individual user, the recommendation system is able to construct a “data portrait” of the individual user, that extends beyond the data that the user initially supplied to the platform. In the case of both Netflix and Spotify, the platforms can also access the individual's browsing history, to build up an even more comprehensive portrait of the user. The user has no awareness of what the platform is inferring or gathering about them. This can lead to users feeling that they are being watched.⁴⁶ While the move to gathering data on entertainment and consumption of content is nothing new, the extent to which these platforms are able to gather and analyze the data of individual users has vastly accelerated.⁴⁷ Box Office sales numbers and Top of the Pops charts are one thing. Systematic and detailed analysis of the individual consumer is quite another.

Platforms are able to collect this data because they have obtained the consent of users to do so. Users must consent upon registering with the platform as a condition of use. Once consent is given, the platform is free to collect and disclose data to third parties, as per their Terms of Use and Privacy Policies.⁴⁸ A recent survey in Canada suggests that there are issues with consent on streaming platforms, with at least 40% of survey respondents indicating that they do not believe that they freely consented to the collection of their data by streaming platforms.⁴⁹ A further 27% of respondents were uncertain about what was meant by the notion of ‘consenting freely’.⁵⁰

***51 (b) Consumer Freedom of Expression: I Wanna Dance with Somebody (Whitney Houston)**

The use of consumers' personal data has implications beyond privacy interests. There are also concerns related to the way in which recommendation systems “shape our encounters with information”,⁵¹ on a broader scale, like song and movie suggestions.

As noted above, in making recommendations to users, the recommendation system aims to keep the listener on the platform as long as possible. In order to do so, the system suggests content that is very similar to that which the user is already consuming, an “if you like bread, you'll love toast” approach.⁵² The “sense of validation” that arises from the system recommending a song that the user enjoys, encourages consumers to remain on the platform.⁵³ But as Chayka notes “variety is a difficult concept” for recommendation systems.⁵⁴ There is no statistical metric for recommendation systems to utilize to make a truly ‘new’ recommendation, since outliers are assessed as irrelevant and are ignored.

This creates problems for the way in which the user is exposed to and experiences culture. Smith illustrates this problem through an examination of Spotify:

[A] listener who happens to hear, say, Bjork's 1999 rendition of “Gloomy Sunday” ... will likely only be guided toward other Bjork songs, rather than back into the magnificent history of this work for which she is in fact only serving as a vessel, through Lydia Lunch's 1977 rendition, Mel Tormé's of 1958, Billie Holiday's of 1941, and all the way back to the original 1933 version of Rezos Seress ... the listener will continue to be exposed to mostly mediocre instances of fin-demillénaire industrial goth. Not that there's anything wrong

with this genre, or any other, but it is a fundamental misrepresentation of the life of a pop song to map it only synchronically next to its genre peers ... [T]o be pushed along ... to some other contemporary genre peer or near neighbor, rather than back ... is to be prevented from cultivating *52 an aesthetic sensibility appropriate to the art form one has begun to explore.⁵⁵

The use of consumers' personal data in this way by recommendation platforms has the effect of limiting consumers' freedom of expression, "as it effectively limits the right to receive information" and removes an element of choice in the content that one consumes.⁵⁶ The individual is the sum of their data, thus "it erodes the capacity for subject self-formation".⁵⁷

III. ANALYSING THE CPPA: SOMETHING JUST LIKE THIS (THE CHAINSMOKERS & COLDPLAY)

It is clear that more protections are necessary for consumers' interacting with these algorithms. Beyond leaving entirely, consumers have very little recourse against streaming platforms' collection and use of their personal data. As a result, consumers have reported feeling resigned to the exploitation of data by platforms and view it as part and parcel of their use of the platform, even when the uses to which this data is put is harmful.⁵⁸ For instance, the 2018 Cambridge Analytica scandal did not result in a wave of un-subscriptions from Facebook, despite proven misuse of consumer data.⁵⁹

The federal government has recognised this gap in legislative protections for consumer data and is seeking to address it through the proposed *Consumer Privacy Protection Act* ("CPPA"). A part of the *Digital Charter Implementation Act*, under Bill C-27, the proposed legislation was before a House of Commons committee in its second reading prior to the dissolution of Parliament in January 2025. The proposed Act aims to ensure that "Canadians can benefit from the latest technologies, knowing that their personal information is safe and secure and that companies are acting responsibly".⁶⁰

*53 (a) The Proposed CPPA: Call Me Maybe (Carly Rae Jepsen)

The CPPA is intended to be an update to PIPEDA, and to better reflect the uses of data and information in the modern digital economy. In a similar manner to PIPEDA, and as the name suggests, the CPPA deals primarily with the data of consumers and their interactions with businesses that may give rise to data privacy concerns. The proposed legislation is intended to control the flow of data into AI systems, which will be regulated through proposed companion legislation, the *Artificial Intelligence and Data Act*. Although the legislation does not address streaming platforms specifically, it would likely apply to them. The provisions that would likely have the most significance for streaming platforms are outlined below.

In updating PIPEDA, the CPPA recognizes that data is essential to the current economy and frames the collection of data in a largely economic manner. For example, the purpose of the Act is, in part:

To govern the protection of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organisations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.⁶¹

The collection, use and disclosure of personal information is only allowed under the CPPA for purposes that "... a reasonable person would consider appropriate in the circumstances".⁶² Factors provided to help determine whether the circumstance is appropriate include:

- (a) the sensitivity of the personal information;
- (b) whether the purposes represent legitimate business needs of the organisation;
- (c) the effectiveness of the collection, use or disclosure in meeting the organisation's legitimate business needs;
- (d) whether there are less intrusive means of achieving those purposes at a comparable cost and with comparable benefits; and
- (e) whether the individual's loss of privacy is proportionate to the benefits in light of the measures, technical or otherwise, implemented by the *54 organisation to mitigate the impacts of the loss of privacy on the individual.⁶³

Under the proposed Act, the collection, use, and disclosure of consumer data by companies is governed primarily through the mechanism of consent. Consent remains central to the CPPA, as it does in other pieces of privacy legislation. The CPPA would require organisations to obtain “valid” consent prior to collection, use, or disclosure of consumer data by the organisation.⁶⁴ The consent cannot go to collection, use, or disclosure of information beyond what is “necessary to provide the product or service”.⁶⁵ For consent to be valid, the organisation must provide individuals with information on what uses the data will be put to and the foreseeable consequences of that use, including the disclosure of the data to third parties. The proposed Act further stipulates that this information must be provided to the consumer in plain language that an individual “would reasonably be expected to understand”.⁶⁶ Organisations are also required to provide information, in plain language, about the policies and practices that are used to fulfil their obligations under the CPPA.⁶⁷

The CPPA also frames an additional right for consumers: the ability of consumers to withdraw their consent for the organisation to collect, use and disclose their data.⁶⁸

Exceptions to the requirement for organisations to obtain consent are also articulated in the proposed legislation. An organisation can collect information without the knowledge or consent of the consumer if it is “for the purpose of a business activity”⁶⁹ including:

*55 (a) an activity that is necessary to provide a product or service that the individual has requested from the organisation;

(b) an activity that is necessary for the organisation's information, system or network security;

(c) an activity that is necessary for the safety of a product or service that the organisation provides; and

(d) any other prescribed activity.⁷⁰

An exception to consent is also carved out if the organisation has a “legitimate interest” in the collection and use of the data which “outweighs any potential adverse effect on the individual” that could result from the collection and use.⁷¹ This exception stands as long as a reasonable person would expect collection and use for the activity.⁷² If employing this exception to obtaining valid consent, the organisation must conduct an impact assessment to mitigate the risks to the individual's privacy.⁷³ Alternatively, the organisation may use the individual's data without consent if the information has been de-identified, such that the individual cannot be identified directly from it.⁷⁴

The CPPA also stipulates penalties for a failure to comply with the requirements under the legislation. The penalties are largely monetary. The maximum penalty prescribed is \$10M or 3% of the organisation's gross global revenue in the previous financial year.⁷⁵

(b) Critiquing the CPPA: You Can't Always Get What You Want (Rolling Stones)

The CPPA provides some good updates to PIPEDA to respond to issues posed by an increasingly digital economy. For example, it puts more responsibility on companies by requiring organisations to provide privacy *56 policies and terms of use in plain language. This requirement appears to respond to the fact that many consumers do not read privacy statements because they are lengthy, dense, and written largely in legalese. The plain language requirement may increase platform transparency and aid users in understanding what the platforms are doing and to take action if they wish. Additionally, proposed s. 17 provides consumers with a right to withdraw consent to data use and collection. The provision gives consumers a more active role in their relationship with organisations. The proposed legislation also increases the fines to which organisations may be subject if they fail to comply. However, in respect of streaming platform recommendation systems, there are three ways in which the legislation could be improved to address consumer privacy rights, discussed below.

In addition to the three shortcomings outlined below, the legislation is not responsive to concerns arising from consumer interactions with streaming platforms because it does not address freedom of expression concerns. This does not form part of the critique of the CPPA because, to some extent, such a gap in the legislative coverage is to be expected. It is very challenging for governments to legislate a diversity of culture or cultural products. Governmental regulation is largely limited to restrictions.

While a “law can force a platform to ban problematic content ... it can't make Spotify recommend you a more challenging or creatively interesting playlist of music”.⁷⁶ There is no “right to personal taste”.⁷⁷

(i) Consent Exceptions: Don't Start Now (Dua Lipa)

Consistent with much of privacy legislation, consumer consent is a central pillar of the proposed CPPA, primarily under s. 15. The legislation is realistic about the use of data in modern society, recognizing exceptions to consent for socially beneficial purposes and where it cannot be avoided. However, the legislation then also creates two significant exceptions to the requirement for consent for the collection, use and disclosure, both set out under s. 18, where the organisation has a “legitimate interest” or the in course of “business activity.” These exceptions would functionally give businesses a wide defence to a complaint made under the statute, by claiming that the conduct complained of was the business' legitimate interest or in the course of their activities.⁷⁸ For example, “these exceptions to consent may open the door to all sorts of uses of consumer data for marketing and advertising purposes”,⁷⁹ since these could be framed as business activities. This proposed section would not improve consumer *57 privacy and data protections at all. In fact, it has the potential to broaden the organisational use of consumer data.

To remedy this, proposed s. 18 could be removed in its entirety, or the definitions of what constitutes a “business activity” or “legitimate interests” more closely circumscribed. As a former Privacy Commissioner of Canada notes, if the provisions defining the purposes of the collection, use, or disclosure, “... were to say that only specific and explicit purposes are lawful, then I think that would be a step forward”.⁸⁰ A clear definition of acceptable purposes would functionally establish a “baseline, deviation from which would require” businesses to seek consent.⁸¹

(ii) No Recognition of Privacy as a Right: Bad Blood (Taylor Swift)

Another criticism of the proposed legislation in the context of recommendation algorithms is that the CPPA does not recognize privacy as a fundamental right. Rather, it frames privacy interests as conflicting with economic goals. For example, s. 12 refers to the privacy of individual consumers as something which should be considered in achieving business needs. It situates consumer privacy as a factor to be balanced against the needs of the company. As a result, in the progression towards business needs, “privacy loss is something to be mitigated, where possible, in the pursuit of those goals”.⁸² This adds to the concerns discussed above, since proposed s. 18 merely requires that businesses have a “legitimate interest” to permit use of an individual's data however the business wishes, even if it harms the privacy of the individual consumer.⁸³

The proposed legislation fails to recognize that in many ways “we are our data -- data both documents what we have done and influences what we are able to do, or most likely to do, in the future, oftentimes through algorithmic decisions”.⁸⁴ Because of this reality, as individual consumers “we should have some kind of control over it, and rights to it, that we have over our physical bodies”.⁸⁵ Rather than recognizing the nature of data privacy in the modern *58 economy and framing privacy as a fundamental right, the legislation uses language which is distinctly aimed to enable the organisations who collect the data.

Recent discussions on Parliament Hill seem to suggest that future iterations of the legislation will better acknowledge that privacy is a right, particularly in the preamble and purpose clauses.⁸⁶ However, this will not be helpful unless the text of the legislation is also adjusted throughout, particularly the language of ss. 12 and 18. Data privacy should be acknowledged as a fundamental right for consumers that businesses must take care not to unduly infringe, rather than a factor among many to be considered in pursuit of economic interests.

(iii) No Consideration of Data Processing: Murder on the Dancefloor (Sophie Ellis-Bextor)

The proposed CPPA maintains the same definition of personal information as PIPEDA, tying the personal nature of the data to whether it can be connected to an “identifiable individual”.⁸⁷ “Personal information” has enjoyed a liberal interpretation under PIPEDA. Jurisprudence articulates that this definition includes information “where there is a serious possibility that an individual could be identified through the use of that information, alone or in combination with other available information”.⁸⁸

While this interpretation would presumably extend to the CPPA, the definition is not suited to current data processing capabilities. It does not address the fact that personal data is not as monolithic as it might once have been. The presence of personalized and pervasive online advertising, for example, suggests the protection to be inadequate.

Further, the difference between “personal” and “non-personal” data is becoming increasingly blurred. What constitutes non-personal data, such as how long and on what device a person watched *Stranger Things* on Netflix yesterday, or that someone listened to Taylor Swift's *Blank Space* three times, is actually quite sensitive. While organisations like Netflix and Spotify are careful not to gather personal information like user demographics, “such identities can often be implied from other information about a user”.⁸⁹ In aggregate, non-personal data can be used to infer personal data and construct a ‘data portrait’ as discussed above. As one expert notes:

[...] the data may be anodyne at the beginning, but ... what I buy at Loblaws can be very revealing of my health, if I'm buying lots of potato chips and not a lot of fresh fruit. That can become health information through processing and through the correlation of my data on my shopping habits with large-scale statistical studies.⁹⁰

***59** Further, even if the platforms do not make such inferences about the individual user, there is nothing to stop third parties from doing so. Data collected by streaming platforms mean that many companies across the web can identify “which sites a person visits, where they are located, their demographic profile and their preferences. When combined, this highly revealing data of a person's privacy are used, among other things, to create advertising profiles and suggest content”.⁹¹ Clearly, personal information captured within the meaning of law does not deal with this reality. The proposed CPPA does not address this concern either. It is important to protect what the processing of user's data can reveal about the individual through inferences.

Some of these issues might be alleviated if the platforms were prevented from tracking the individual user across the internet. This would mean that less data was being collected about the individual, and that therefore, there would be less data to draw from in making inferences. The “data portrait’ would be less detailed and afford the consumer some improved privacy protections. In the current landscape, the individual consumer must actively “deploy digital self-defence techniques, such as blocking browser cookies”.⁹² Many internet users are unaware of these techniques, and even when used, blocking cookies does not provide complete anonymization of one's internet activities. The inclusion in the CPPA of a method by which consumers can refuse tracking with which platforms must mandatorily comply, could improve matters. For example, consumer advocates suggest the requirement that businesses “comply with a ‘Do Not Track’ signal embedded in the browser”.⁹³ This inclusion would also serve to further bolster the consent provisions discussed earlier. A “Do Not Track” mechanism would be similar to the “right to object”⁹⁴ under the European *General Data Protection Regulation* (“GDPR”), since it would allow users to “choose to no longer be tracked” such that “a user need not experience any algorithmic action unless they consent to it”.⁹⁵

***60 (iv) Data Governance as Solution: R.E.S.P.E.C.T. (Aretha Franklin)**

While the changes proposed above would improve the way in which the CPPA responds to the concerns raised by recommendation algorithms, examination of the Bill discloses further issues with the way in which privacy legislation approaches data processing. Currently, privacy laws are procedural, requiring companies to document data uses and have checks in place, but otherwise do not ask much of organisations. As a result, legislation:

[D]oes not contain definitive, substantive positions, and so can plausibly be articulated as legitimizing a sweep of data processing activities. This means that before enforcement action is taken -- and survives judicial review -- business practices that most see as objectionable and in contradiction with data protection

legislation are speeding ahead in full steam, coated in the veneer of legality gifted by proceduralized privacy law.⁹⁶

This is made particularly apparent in the use of consumer consent as the method governing the interaction between consumer and organisation. Consent is quite a narrow construct, and has long been recognized as problematic, in “shrink-wrap,” “click-wrap,” and “browse-wrap” contracts, where the individual has no choice but to accept the contractual terms if they wish to use the product.⁹⁷ As was noted in testimony before the Standing Committee on Industry and Technology:

An organisation is not supposed to be able to refuse to provide the good or service just because you refuse to provide consent. However, they all do, and that hasn't been challenged and hasn't been enforced ... We don't have a choice right now. It's all or nothing, a Faustian bargain. If you want to use this website, if you want to get a car loan online, if you want to do anything online, yes, you're supposed to read the privacy policy ... organisations -- that acknowledge that no one reads their privacy policies and that, yet, still collect the personal information without now, admittedly, having received informed consent--are collecting personal information in violation of *PIPEDA* and the other laws. No one's ever challenged that.⁹⁸

The issues with consent are further complicated because users do not understand the privacy policies -- even if they are in plain language as the CPPA would require. As scholars note

***61** ... [p]articularly when it comes to how data is processed or the uses to which it is put, technology companies use generalised language even where it is clear that there are implications for the relationship between the user and the platform. This observation raises issues around whether a user is genuinely consenting to the digital platform's terms.⁹⁹

Consent may also be unfeasible because of informational overload.¹⁰⁰ Since the introduction of the GDPR in Europe in 2018, with its sweeping overhaul of data protection, a feeling of “consent fatigue” has been noted. This concept alludes to the idea that given the high frequency of interactions with organisations requesting consent, consumers consent without true understanding simply because they are asked so frequently.¹⁰¹ The notion and requirement that consent be “informed” is thus undercut and made redundant.

Ultimately, the power still lies with platforms, and all the burden rests squarely on the consumer. Users are required to take tangible action in order to protect their privacy rights and interests, while the platforms try to counter user desire to take action. The platforms still have control mechanisms, for example, in the way in which websites present the tracking agreement to users: “[t]he [tracking] opt-in button is often darker and more prominent than the opt-out”,¹⁰² making users more likely to click to accept tracking. As Chayka notes, “it's in the companies' best interests to make choosing to be tracked as seamless and passive as possible”.¹⁰³ These platforms run on data; it is a necessity. They could not operate as effectively and profitably as they currently do if not for the data capture and processing: “self-disclosure is the trade-off we make for automated efficiency”.¹⁰⁴ And the systems are seductively useful. Some users may prefer to disclose their data in order to get a good country music song recommendation. As Chayka suggests, the recommendation system is “so compelling and convenient that most Internet users struggle to give it up”.¹⁰⁵

*62 All this points to the fact that users have very limited agency or power in these interactions. Users are entirely dictated to by the structure of the platform and the way in which the platform has elected to administer privacy requirements. The individualistic approach to privacy protections is not effective. A move away from individualistic data privacy protections is increasingly important as AI and ML technologies are increasingly integrated into consumer-facing systems, like recommendation systems. The use of AI and ML “really change what we are talking about when we talk about privacy”.¹⁰⁶ The black box effect of these technologies in analysing huge quantities of information to arrive at their decisions makes it “impossible for an individual to anticipate what kinds of data warrant protection”.¹⁰⁷ It highlights the extent to which consent alone is no longer a workable mechanism for governing consumer-organisation relationships.

One method of addressing this issue is the incorporation of data governance principles into the proposed CPPA. Data governance is a “legal regime that governs how data about people is collected, processed, and used”.¹⁰⁸ Unlike current legal regimes, data governance can be used “to develop the institutional responses necessary to represent (and adjudicate among) the relevant population-level interests at stake in data production”.¹⁰⁹ Data governance principles recognize that the individual has very little control over their own data and that this is a problem for the “population-level interests in the digital economy”.¹¹⁰ For example, as seen in the use of collaborative-filtering above, ‘recommendations for you’ come in part from ‘recommendations for others.’ The inferences are used to create ‘data portraits’ about groups and populations. The current individualistic approach is “structurally incapable of representing the interests and effects of data production’s population-level aims”.¹¹¹ Data governance principles recognize that data flows are relational, but that a substantial power imbalance exists in that relationship.

Using data governance to introduce, under the CPPA, a data fiduciary role for organisation that collect, and process data could go some way to addressing this imbalance. The more relational approach under data governance principles *63 would allow individuals to reassert control over their data by putting more responsibility on the companies. A fiduciary relationship would put more onus on companies to ensure that they had some additional responsibilities to ensure that their customers’ data was protected. Since data collectors “determine how hard or easy it is to compile information” through platform security approaches, third party partner deals, and more, such an approach makes sense.¹¹² Under a ‘data fiduciary’ requirement, for instance, “the collector must ensure that ‘privacy protections run with the data’, whether subsequent processing occurs inside or outside of the collecting organisation”.¹¹³ Similarly, the imposition of a fiduciary duty would require firms to be more protective of data that they gather, not just in their use of it. It could, for example, require that firms enforce their privacy policies with third party partners. This would require organisations to “specify the minimum standard that platforms that collect data must follow when enforcing their own terms of service, thereby creating a floor below which acceptable business practices should not fall”.¹¹⁴ Users have more guarantees of the protection of their data.

Data governance also has the potential to address the effects recommendation systems have on freedom of expression. By changing how the platforms are able to dictate content through data, there is necessarily some change in the way in which the individual experiences the platform.¹¹⁵ The increased agency given to users through the incorporation of data governance principles would transform “the passive relationship [with the platform into] a more active one as we begin to figure out our own preferences and shape our digital lives to follow our own tastes”.¹¹⁶

A data governance approach should also be complemented with technical innovations in data privacy space. Such an approach could see Canadian governmental support for applications like the open-source project Solid. The software project would create a “personal online data store” for individual consumers. The consumer can grant access to select organisations, for a specified purpose and period. The technique is currently being piloted with some success in Europe for healthcare and employment purposes.¹¹⁷

***64 CONCLUSION: YOU NEED TO CALM DOWN (TAYLOR SWIFT)**

In sum, recommendation systems on streaming platforms, such as Netflix and Spotify, are increasingly powerful technologies which govern how users interact with the platform. The predictive goal of the systems is to keep the user interacting with the platform as long as possible, to create the greatest economic reward for the organisations. To make a ‘good’ recommendation, the systems gather large amounts of data on their users, which they use to make inferences about their viewing preferences and other information. The Privacy Policies of both Netflix and Spotify are clear that this data does not stay ‘in house.’ It is shared with third party partners. This creates legal implications for the consumer, particularly concerns around privacy and freedom of expression.

The federal government has recognized the changing landscape of consumer relationships with organisations in terms of data collection. The proposed CPPA seeks to upgrade existing privacy legislation for the modern context. However, in the context of recommendation systems, the legislation falls short in three ways. First, the legislation creates wide exception to the requirement for organisations to obtain consumer consent. Further, the current CPPA does not recognize privacy as a fundamental right. It is also concerning, particularly with respect to recommendation systems, that the legislation does not address concerns relating to data processing. The incorporation of data governance principles into the legislation may be effective in providing greater consumer controls over data. Data governance would allow for a more relational conception of privacy, which is essential particularly as AI and ML adoption increases. The introduction of a fiduciary data relationship on organisations and increasing mechanisms for consumer control may assist in improving the protection of consumer privacy and freedom of expression rights in the context of these new technologies. Agency for consumers should the “watchword”¹¹⁸ for the implementation and updates to privacy legislation as governments seek to address the new risks arising from the increasing application of AI and ML technologies in consumer platforms.

Footnotes

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