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FTC: self-regulation guidelines for behavioural advertising

The Federal Trade Commission (FTC) recently published its revised set of recommended guidelines for self-regulation as regards online behavioural advertising. Peter S. Kozinets and Jalayne J. Arias, Attorneys at Steptoe & Johnson LLP, examine the revised principles and questions on whether industry self-policing is effective for regulating behavioural advertising.

'Hello Mr. Yukkamoto and welcome back to the GAP'¹. So says a computerized sign to Tom Cruise's character in the 2002 action movie *Minority Report*, using retinal scanning to identify him and generate advertising tailored to his prior purchases. While retina-based advertising remains a matter of science fiction, online behavioral advertising may be its real, modern-day equivalent. The US Federal Trade Commission ('FTC') defines online behavioral advertising as 'the tracking of a consumer's online activities over time - including the searches the consumer has conducted, the web pages visited, and the content viewed - in order to deliver advertising targeted to the individual consumer's interest'². Online behavioral advertising provides a highly efficient means for delivering customized commercial messages to consumers most interested in receiving them. Yet the idea that one's online activities are being monitored is drawing scrutiny from leading regulators³.

On 12 February, the FTC revised its previously published set of recommended guidelines for self-regulation concerning online behavioral advertising (the 'Principles'). Responding to public comments, the revised Principles attempt to strike the right balance between consumer benefits and

privacy risks⁴. However, the revised Principles have not quelled the unease of many privacy groups, and were accompanied by stern statements from two FTC commissioners (including President Obama's nominee for the FTC Chairmanship) warning industry to adopt a vigorous program of self-enforcement or face a more activist regulatory future⁵.

FTC's role in behavioral advertising

In November 2007, the FTC held a two-day 'Behavioral Advertising Town Hall' to allow interested parties to discuss privacy issues related to behavioral advertising⁶. Following the Town Hall, the FTC released proposed self-regulatory Principles for public comment in December 2007⁷. The agency received sixty-three comments⁸. In February, it released a report discussing the comments and setting forth the revised Principles (the 'Report')⁹. In the Report, the FTC noted that 'invisibility of the practice [of online behavioral advertising] to consumers raises privacy concerns, as does the risk that data collected for advertising - including sensitive data about children, health, or finances - could be misused'¹⁰. The FTC also made clear the revised Principles will not preclude further consideration of these issues, announcing that in the coming year it will 'continue the public dialogue regarding the privacy issues raised by behavioral advertising, evaluate self-regulatory programs and...conduct investigations, where appropriate, to determine whether practices in this industry violate Section 5 of the FTC Act'¹¹.

While the revised Principles (which are not themselves enforceable by the FTC) include stricter privacy guidelines¹², privacy advocates and others have

contended that the Principles remain insufficient¹³. Moreover, President Obama's nominee for chairman of the FTC, Commissioner Jon Leibowitz, has stated that the revisions may reflect industry's 'last clear chance to show that self-regulation can - and will - effectively protect consumers' privacy in a dynamic online marketplace'¹⁴.

The revised Principles

The revised Principles do not apply to two categories of online advertising, 'First Party Advertising' and 'Context Advertising,' that were not seen as giving rise to same kinds of privacy concerns potentially posed by other practices. First Party Advertising occurs where a website collects consumer advertising from a site's user to deliver tailored advertising to that person, but does not share the data with any third parties. Contextual Advertising targets advertisements based on a single visit to a web page or a single search query.

However, the revised Principles continue to apply to both Personally Identifying Information ('PII') and Non-Personally Identifying Information ('non-PII')¹⁵. PII is any information that could identify an individual (e.g., their name, address or social security number). The FTC noted that depending on the way information is collected and stored, non-PII could be merged with PII - enabling a website to link other anonymous tracking data with identifying information that a user provided when registering at the site¹⁶. Moreover, the agency acknowledged that developing technologies may make it easier to identify individual consumers through the use of only non-PII by, for example, linking such data to individual IP addresses or to a particular device associated with a

specific user¹⁷. Furthermore, the agency noted the possibility of companies identifying individuals when certain items of otherwise anonymous information are ‘combined and linked by common identifier,’ like search queries that may reveal where the user lives¹⁸.

The revised Principles promote the following four core goals:

Transparency and consumer control

This principle instructs websites collecting data for behavioral advertising to provide;

- ‘a clear, concise, consumer-friendly, and prominent statement’ advising consumers that information about their online activities is being collected at the site for use in providing advertising tailored to their individual interests; and
- a clear, easy-to-use and accessible method to choose whether or not to have the user’s information collected for this purpose.

New language in the revised Principles encourages websites collecting data ‘outside the traditional website context’ to develop alternative methods to disclose the collection and provide consumers with the choice¹⁹.

Reasonable security, and limited data retention, for consumer data

This principle encourages companies to ensure that any collected data is stored securely. It states that any company that collects or stores consumer data for behavioral advertising ‘should provide reasonable security for that data.’ These protections ‘should be based on the sensitivity of the data, the nature of the company’s business operations, the types of risks a company faces, and the reasonable protections available to the company’. New language states that consumer data should be

While it is too soon to tell whether these efforts will succeed, they may indeed be the industry’s ‘last clear chance’ to forestall federal regulation

retained ‘only as long as is necessary to fulfill a legitimate business or law enforcement need’²⁰.

Affirmative express consent for material changes to existing privacy promises

This principle encourages companies to obtain affirmative, express consent from consumers for using any previously collected data in a manner that is materially different from the uses to which the consumer originally consented.

Affirmative express consent to (or prohibiting) using sensitive data for behavioral advertising

This principle states that companies should collect ‘sensitive data’ only after they receive express consent for collecting it from the consumer²¹. Sensitive data includes information related to children, health and finances²².

Disclosure and consent

The revised Principles’ focus on disclosure and consent raises the practical question of how websites can provide effective disclosures and obtain meaningful consumer consent without creating unduly burdensome procedures. Commissioner Harbour framed the issue as follows: ‘Informed consent should not be assumed based on consumers’ willingness to click through cryptic disclosures as licenses’²³.

The FTC Report notes that a website’s privacy disclosures are typically made in online privacy policies that may be hard to find, lengthy or difficult to understand²⁴. The FTC suggests three potential improvements:

- ‘providing ‘just-in-time’ notice at the point at which a consumer’s action triggers data collection;
- placing a text prompt next to, or imbedded in, the advertisement; and

- placing a prominent disclosure on the website that links to the relevant area within the site’s privacy policy, for a more detailed description²⁵.

Ultimately, however, the agency’s Report (which accompanied the revised Principles) simply encourages websites to be innovative²⁶.

Self-regulation: up to the task?

While the FTC commissioners voted 4-0 to approve the revised Principles and Report, two commissioners issued concurring statements that included some pointed criticisms of the self-regulatory model. While noting that self-regulation allows for flexibility for developing technologies, Commissioner Harbour argued in her concurring statement that ‘articulated meaningful standards’ and a ‘workable enforcement mechanism’ are necessary for self-regulation to be successful²⁷. While finding that ‘[a] legislative approach to behavioral advertising is not prudent at this time’ because ‘there are still more questions than answers’, she also wrote that ‘[s]elf-regulation has not yet been proven sufficient to fully protect the interests of consumers with respect to behavioral advertising specifically, or privacy generally’²⁸. For his part, Commissioner Leibowitz warned that: ‘Industry needs to do a better job of meaningful, rigorous self-regulation or it will certainly invite legislation by Congress and a more regulatory approach by our Commission’²⁹.

After the FTC released its Report, four leading marketing and advertising industry associations announced a ‘joint industry task force’ to develop a broad set of privacy principles for online advertising ‘to respond to the

challenge issued today by the Federal Trade Commission for comprehensive industry regulation³⁰. While it is too soon to tell whether these efforts will succeed, they may indeed be the industry's 'last clear chance' to forestall federal regulation.

State legislatures and private litigants

In the meantime, industry may face other efforts to regulate online behavioral advertising. For example, New York and Connecticut introduced their own legislation to regulate behavioral advertising in 2008³¹. New York's proposed law seeks 'adequate notice of how third-party advertisers operate' and a 'clear and conspicuous online advertising opt out mechanism'³². Connecticut's proposed statute would require certain information to be given to consumers upon request³³. Such legislation, if passed, could impose inconsistent requirements on internet advertising companies.

Relying on existing federal and state privacy laws, consumers may also turn to litigation if they believe their privacy rights are violated as a result of the improper handling of their information. In November 2008, for example, several consumers filed a putative class action lawsuit in California federal court against NebuAd, Inc. and other defendants for their alleged involvement in so-called 'deep packet inspection' of consumers' online activities without notice or consent³⁴. The plaintiffs alleged that deep packet inspection looks at the actual content of internet communications, enabling the defendants to access, use and disclose intercepted communications to facilitate online advertising³⁵. The Complaint includes claims under the federal wiretapping statute and

California privacy law. The case is in its early stages and is the subject of motions to dismiss. The lawsuit followed an inquiry into NebuAd's practices by the House Energy and Commerce Committee last summer³⁶.

Conclusion

The FTC's online behavioral advertising Report and revised Principles were released in early February 2009, just shortly after President Obama was sworn into office, and they may not reflect the new administration's position³⁷. The success with which Obama's campaign harnessed the internet for fundraising and grass-roots organizing and the tech-savvy nature of the new administration have contributed to speculation that the President may be sympathetic to internet companies³⁸. However, his recent nomination of Commissioner Leibowitz to Chairman of the FTC has raised expectations among some privacy advocates that the FTC will take significant regulatory action³⁹. Regardless of how the administration approaches these issues, the debate about how to best facilitate the growth of online commerce while protecting personal privacy likely will not end anytime soon⁴⁰.

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1. <http://www.imdb.com/title/tt0181689/quotes> (Memorable quotes from Minority Report, 2002) (last visited 6 March).
2. Federal Trade Commission, FTC Staff Report: Self Regulatory Principles for Online Behavioral Advertising 46 (February) ('Report').
3. <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/03>.
4. Report at 1, 7-8.
5. <http://newsvote.bbc.co.uk/mpapps/>.
6. Report at 9.
7. Id. at 11.
8. Id. at 18.
9. Id.

10. Id. at 10.
11. See <http://www.ftc.gov/opa/2009/02/behavad.shtm> (last visited 6 March).
12. Section 5 of the Federal Trade Commission Act ('FTC Act'), 15 U.S.C. § 45(a)(1), states that 'Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful'.
13. See <http://www.nytimes.com/2009/02/13/technology/internet/13privacy.html>.
14. See <http://cdt.org/press/200902012press.php>.
15. See <http://newsvote.bbc.co.uk/mpapps/>.
16. Report, Comm'r Jon Leibowitz Concurring Statement at 1.
17. Report at 45-46.
18. Id. at 22.
19. Id.
20. Report at 34-35.
21. Id. at 46-67.
22. Id. at 47.
23. Id.
24. Report, Comm'r Pamela Jones Harbour Concurring Statement at 2.
25. Report at 35.
26. Report at 33.
27. Report, Comm'r Pamela Jones Harbour Concurring Statement at 2-3 (February).
28. Id. at 2.
29. Report, Comm'r Jon Leibowitz Concurring Statement at 1.
30. See http://www.iab.net/about/the_iab/recent_press_releases.
31. See <http://www.govtech.com/gt/articles/277442>.
32. Id.
33. Id.
34. Complaint at 2, *Valentine v. NebuAd, Inc.*, No. CV 008 5113 (N.D. Cal. 10 November 2008).
35. Id.
36. See <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/03/AR2008090303566.html>.
37. See <http://www.rcrwireless.com>.
38. See http://www.mediaweek.com/mw/content_display/news/digital-downloads/broadband/e3iecb44179b8d6b3116137a966471b823.
39. See <http://www.clickz.com/3632974>.
40. Indeed, consumer attitudes may be evolving towards acceptance of sacrificing a degree of personal privacy in return for receiving the benefits of customized, relevant online advertising. See <http://www.msnbc.msn.com/id/29507265/>.



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