

What Limits For Behavioral Targeting?

By Francoise Gilbert

An individual uses a travel site to check hotels in New York, but does not book any hotel room. Later the individual visits the website of a local newspaper to read about the Chicago Cubs baseball team. While on the newspaper's website, the individual is served an advertisement from an airline featuring flights from Chicago to New York. The method used to develop the consumer's profile – someone interested in travelling to New York from his home base in Chicago – in order to serve target ads is named "behavioral advertising" or "behavioral targeting."

Behavioral targeting is a marketing technique that tracks a user's online activities over time in order to build a profile of that individual and to deliver advertising that is targeted to the assumed interests of this individual. The information about a user is collected through a combination of cookies and pixel tags. It could include what searches were conducted, what pages were visited, how long she stayed on a particular page, on which links or advertisements she clicked. This information may then be combined with other information about that individual, such as her geographic location. It is then shared with advertisement networks, which serve advertisements at websites across the Internet.

Many consumers and advocacy groups are concerned about the privacy issues that are associated with such practices. For example, the manner in which the consumer information is collected is not visible to the consumer. Further, sensitive information regarding health, finances, or children could be used for unanticipated purposes.

The Federal Trade Commission has conducted studies, published reports, and presented testimony before a Committee on Commerce, Science and Transportation in Congress. In December 2007, it published proposed "Online Behavioral Advertising Privacy Principles", indicating that it was seeking comments. In February 2009, the FTC issued a report describing its ongoing examination of online behavioral advertising and setting forth revised proposed

principles to govern self-regulatory efforts in this area. The 2009 Report is available at <http://www.ftc.gov/os/2009/02/P085400behavadreport.pdf>.

The report discusses the privacy concerns raised by behavioral advertising. It notes that companies must still comply with all applicable privacy laws, some of which may impose requirements that are similar to those established by the principles. The report sets forth four revised principles.

- **Transparency and Consumer Control**: Websites are expected to provide clear, concise, consumer-friendly, and prominent notice regarding behavioral advertising, and an easily accessible way for consumers to choose whether to have their information collected for such purpose. The report encourages the development of creative and effective disclosure mechanisms that are separate from their privacy policies.
- **Reasonable Security and Limited Data Retention**: Companies are urged to provide reasonable security for any data they collect for behavioral advertising and to retain data no longer than is needed in order to fulfill a legitimate business or law enforcement need.
- **Affirmative Consent for Material Changes to Existing Privacy Promises**: Before a company can use previously collected data in a manner that is materially different from the promises that the company made when it collected the data, it should obtain affirmative express consent (opt-in consent) from the affected customers.
- **Sensitive Information**: Companies are urged to obtain affirmative express consent before collecting sensitive information for behavioral advertising. While financial information, information about children, health information, and Social Security numbers traditionally have been considered “sensitive information,” the FTC encourages stakeholders to develop more specific standards to address this issue.

Next steps: In its press release accompanying the report, the FTC notes that the February 2009 document is only part of an ongoing process, and that significant work in this area remains. The FTC intends to evaluate self-regulatory programs and to conduct investigations, where appropriate, to determine whether practices violate Section 5 of the FTC Act. In his comments accompanying the updated principles, FTC Commissioner Jon Leibowitz noted 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.... Put simply, this could be the last clear chance to show that self-regulation can – and will – effectively protect consumers’ privacy in a dynamic online marketplace.”

Companies need to pay close attention to behavioral targeting issues and must update their privacy statements in order to reflect their actual practices accurately. To the extent that they do use behavioral advertising techniques and collect information about their user’s behaviors, they should give them the opportunity to choose whether to have their information collected for such purpose.

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REMINDER: The Cyberspace Law Committee will present a new program on behavioral advertising issues at the Section of Business Law’s Spring Meeting. Join us on Saturday from 8:00 AM - 9:30 AM to see “A Business Lawyer’s Review of Online Behavioral Advertising - A Legal Analysis of the New Technologies and Marketing Practices.” Program Chair Elizabeth Bowles is looking forward to seeing you!