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FTC Continues To Support Self-Regulation Of Behavioral Marketing

The Federal Trade Commission announced what appears to be a welcome decision for marketers in February, when it confirmed that it will allow industry self-regulation of behavioral marketing to continue.

In a 48-page staff report entitled Self-Regulatory Principles for Online Behavioral Advertising, the FTC endorsed self-regulation and outlined guidelines for handling issues raised by behavioral advertising. The FTC also narrowed the scope of advertising subject to the self-regulatory principles. It said Web sites that deliver ads through contextual targeting – such as a travel site featuring travel ads – comport with consumer expectations and are not covered by the principles. It also said the principles applied only to shared information, and not a site’s own “first-party” activities, including the creation of behavioral profiles of its users.

Nevertheless, questions are being raised about the implementation and enforcement of the principles outlined in the report, as well as precisely what will be required of media sellers and marketers. At issue is language that requires “every website” gathering data for behavioral marketing to provide a privacy policy and give consumers a choice to opt out of tracking. Additionally, industry observers say the agency’s treatment of what constitutes sensitive information was somewhat ambiguous, and its trigger on notice was unclear. The agency said the old opt-out standard – when



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New York, NY

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April 2-3, 2009

PLI's Information Technology Law Institute 2009: Web 2.0 and the

information was personally identifiable – was outdated and that sites should give consumers the chance to opt out if the information can reasonably be tracked back to individual consumers or Web sites.

The report also came out before President Obama's selection of Jon Leibowitz as the new FTC Chair, so it is possible that it could be revisited at a later date. Indeed, in separate concurring statements, Leibowitz, as well as Commissioner Pamela Jones Harbour, appeared to be open to revisiting the scope of industry self-regulation in the future. Harbour questioned using self-regulation to deal with behavioral targeting issues, noting that "[t]he circumstances supporting appropriate and effective self-regulation are not present here." Leibowitz said that "almost all of us want to see self-regulation succeed in the online arena, but the jury is still out about whether it alone will effectively balance companies' marketing and data collection practices with consumers' privacy interests."

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Iconic Obama Image Spurs Lawsuit

The ubiquitous image of now President Barack Obama that appeared on posters, stickers, and T-shirts during his election campaign is the subject of a lawsuit between the artist who created the image and the news agency that owns the photograph upon which the image is based.

In February, Shepard Fairey sued the Associated Press in federal court in Manhattan, seeking a declaratory judgment that he is protected against copyright infringement claims in his use of the photo. Fairey filed the lawsuit in response to demands from the AP that he pay it for using the photo and give it a percentage of any money he earns from its use.

Fairey's image of Obama appeared on posters and stickers that were widely distributed through a grassroots effort during Obama's campaign. The photo, by a freelance photographer, Mannie Garcia, was taken when Obama was at the National Press Club in April 2006.

In his lawsuit, Fairey argues that his work is protected under fair-use exceptions to copyright law, which permit the limited use of copyrighted material for purposes such as comment or criticism. He contends that he used the photo solely as a reference and transformed it into a "stunning, abstracted and idealized visual

**Future of Mobile Computing:
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PLI California Center
San Francisco, CA

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**Food and Drug Law Institute 52d
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L'Enfant Plaza Hotel
Washington, DC

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April 29, 2009

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Topic:

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Speaker: [Jeff Edelstein](#)

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June 4-6, 2009

**American Advertising Federation
National Conference 2009**

image that created powerful new meaning and conveys a radically different message" from that of the photo.

Fairey decided to create the image before contacting the Obama campaign, which welcomed it but never officially adopted it because of copyright concerns. Prior to the campaign, Fairey was best known for his fake-advertising stickers and posters, which he posted in cities across the country, of an abstract image of the wrestler Andre the Giant with the word "Obey."

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R.I.P. Bud.TV

Anheuser-Busch has shuttered Bud.TV, its pricey two-year venture into online branded entertainment.

Users who click onto Bud.TV now get a message stating "Bud.TV is no longer available. We'd like to thank millions of viewers from over 200 countries for visiting us over the past couple of years." Visitors are asked to visit Budweiser.com or budlight.com.

A-B launched Bud.TV after the 2007 Super Bowl, spending \$15 million to get the site up and running. At the time, A-B executives said they aimed for two million unique visitors a month to the site, featuring a variety of original and unbranded content, including humor, sports, and reality programming.

But the site's cumbersome age verification process impeded traffic, which dropped by 40%, to just 153,000 visitors, in its second month online. A group of state attorneys general nevertheless criticized A-B for not doing enough to keep underage consumers off the site, which placed even more limits on the company. The site also appeared just as the Internet was being transformed from a group of destinations to a distributed content system. Sites like YouTube allowed users to embed their video players wherever they liked, whereas, in contrast, Bud.TV locked down its content on the site.

By mid-2007, traffic was so light that the measurement service used by the company to measure traffic could not, and A-B eventually began replacing original content with ads, one of which, "Swear Jar," became the site's biggest viral hit.

An A-B spokesman said that the effort was not wasted, as the company learned a number of critical lessons about marketing online. He said that in the future the company would shift its

Speaker: [Jeff Edelstein](#)

Crystal Gateway Marriott
Arlington, VA
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NEWSLETTER EDITORS

[Jeffrey S. Edelstein](#)

Partner

jedelstein@manatt.com

212.790.4533

[Linda A. Goldstein](#)

Partner

lgoldstein@manatt.com

212.790.4544

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online video efforts to Hulu, Yahoo!, Facebook, and other sites.

Nonetheless, Bud.TV served as an online model for other brands such as Callaway Golf, Chivas Regal, and Adidas. Adidas is currently preparing to launch Adidas.TV, with content that is easily portable to blogs and social networks.

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Rhode Island Considers Placing Ads on School Buses

Rhode Island is the most recent state to contemplate advertising on school buses, a practice that some observers criticize as inappropriate but others contend will help alleviate public school budget crunches.

In January, a bill was introduced in the Rhode Island state legislature that would generate revenues by placing ads on the sides of school buses. If the bill becomes law, Rhode Island will join states such as Arizona and Colorado in permitting ads on school buses. Media Advertising in Motion, a Scottsdale, Ariz., firm that serves as the liaison between school districts seeking advertisers and companies such as Geico and State Farm, has generated more than \$3 million for school districts through school bus ads, according to company president Jim O'Connell.

Josh Golin, associate director of the Boston-based Campaign for a Commercial-Free Childhood, an organization which believes such advertising is inappropriate, said he anticipates that, as state budgets get tighter, more school districts will consider such ads.

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Norway Shelves Consumer Complaint Against Apple

Norway has abandoned a complaint against Apple Inc. after the company announced that music sold on iTunes would no longer be compatible with just the iPod and the iPhone, but could also be played on all MP3 players.

At the Macworld Expo on January 6, Apple announced that as of April it would be making all of the music in its online iTunes Store free of digital rights management (DRM) software that prevents songs from being copied and limits their use to Apple-made music

players.

Back in November, Norway's consumer mediator Bjoern Erik Thon said he would take Apple before a Norwegian government agency called the Market Council for making its music incompatible with music players other than the iPod and iPhone. The Market Council is a kind of consumer court that has the authority to fine companies and order them to amend practices.

In light of Apple's new policy, Thon said, "We have no reason to pursue them anymore."

Apple did not say that its decision to go DRM-free was made in response to complaints by Norway and other European countries, and in fact, the move brings Apple in line with rivals like Amazon and RealNetworks, which have been selling DRM-free music for some time.

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Court: Betcha.com Is Not Gambling

A Washington state appeals court has found that the website Betcha.com did not break state gambling laws, because users were permitted to renege on bets without paying.

"Because Betcha.com customers agreed in advance that participants were not required to pay their losses, Betcha.com was not engaged in 'gambling,'" the court wrote.

The Web site, which was shut down shortly after its launch, allowed users to bet each other on things like election outcomes and sports games. Although, under its terms of service, "bettors are not obliged to pay when they lose," the site also permitted users to rate each other based on whether they made good on their bets.

Just a few weeks after its debut in 2007, the Washington State Gambling Commission ordered founder Nicholas Jenkins to shut down Betcha.com. Jenkins sued in state court, requesting that the court rule that the site was lawful. The trial court ruled against Jenkins, but the appellate court reversed the ruling.

A spokesperson for the State Gambling Commission said it plans to appeal the decision to the Washington Supreme Court.

While the Washington case was pending, Jenkins was extradited to

Louisiana on criminal computer gambling charges stemming from Betcha.com. That case was dismissed in October.

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