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Web Advertisers Told to Protect Privacy – Or Else

Federal Trade Commission Chairman Jon Leibowitz has warned the Internet advertising industry that it basically has one last opportunity to prove that it can – and will – protect consumer privacy before the Commission will step in.

"From my perspective, the industry is pretty close to its last clear chance to demonstrate" that it can regulate itself, Chairman Jon Leibowitz said at the Reuters Global Financial Regulation Summit.

Leibowitz’s comments are similar to those he made in February, when the agency issued proposed guidelines for behavioral tracking, which involves tracking the surfing patterns of Internet users and then sending them targeted ads based on visited sites. FTC Commissioner Pamela Harbour also queried whether the Internet ad industry could effectively police itself.

Internet privacy is also on the congressional agenda. Representative Rick Boucher (D-Va.) recently said he intends to introduce an online privacy bill later this year. Congress has made several unsuccessful attempts to pass laws regulating Internet privacy in the past. Despite the failure of Congress or the FTC to regulate the adware industry, enforcement actions by state attorneys general and the FTC, combined with market forces, forced all four major adware companies – Claria, WhenU, Direct



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Revenue, and Zango – to shutter operations.

The recent emergence of a new adware business model, in which ISPs sell customer data to behavioral ad firms, could push Congress to act. Last year, when it emerged that that ISPs were working with a company called NebuAd on such a business model, some lawmakers suggested that such ad targeting requires opt-in consent from consumers, NebuAd shelved its plans. AT&T, Time Warner, and Verizon also argue that all behavioral targeting firms should seek user consent.

Why it Matters: It remains to be seen whether Congress will pass laws regulating the online ad industry, but it appears that, in the meantime, FTC Chairman Leibowitz is prepared to step in with enforcement actions against behavioral ad companies for any violations of existing consumer protection laws.

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Privacy Class Action Against Blockbuster Advances

A court has denied a motion by Blockbuster to dismiss a possible class action lawsuit over its participation in Facebook's Beacon ad program, which alerted members to their Facebook friends' online retail activity.

The federal district court in Dallas ruled that the lawsuit against the movie rental chain could go forward, rejecting a claim by Blockbuster that its user contract required disputes to be arbitrated, and waived users' rights to file a class action lawsuit. The court found the agreement was "illusory" because it authorized Blockbuster to change the terms and conditions at any time.

The decision paves the way for the plaintiffs' attorneys to argue that the case should proceed as a class action including all consumers affected by Blockbuster's participation in Beacon. It also has potentially broader repercussions for any company that reserves the right to unilaterally make changes to its terms of service in its agreement with consumers.

The complaint against Blockbuster alleges that the company violated the federal Videotape Privacy Protection Act by providing

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Facebook with information about users' film rentals and purchases without first obtaining written consent. It demands at least \$2,500 for each violation of the law, which Congress passed in 1988 after a newspaper obtained the video rental records of U.S. Supreme Court nominee Robert Bork.

When Facebook launched Beacon in November 2007, the program operated automatically, meaning that Facebook collected and stored user data from Blockbuster and its other partners, then shared it with friends of users. A month later Facebook changed the program to allow members to opt out, so that Facebook would not store or share their information even if it was sent to Facebook by its partners.

Why it Matters: This decision will likely be tested on appeal, but it speaks to the broader debate over the enforceability of online agreements that purport to bind users who cannot negotiate terms and may be unaware of the existence of a contract. Many judges are plainly uncomfortable strictly enforcing user agreements where there is a lack of bargaining power or insufficient notice. Businesses should consider carefully how they draft user agreements and communicate terms to their users, and whether they need to take additional steps to ensure the agreement constitutes a binding, enforceable contract.

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Gaming Group Challenges Minnesota's Anti-Gambling Campaign

The Interactive Media Entertainment & Gaming Association has charged the state of Minnesota with illegally ordering Internet service providers to prevent state residents from accessing Internet betting sites.

John Willems, director of the Alcohol and Gambling Enforcement Division of Minnesota's Department of Public Safety, recently requested that 11 ISPs block access by state residents to approximately 200 gambling-related sites.

In a complaint filed with a Minnesota federal district court, the Association argues that the move is unconstitutional. The gaming organization's contention that the request is illegal is based on several grounds. First, the group argues, it is technologically impossible to prevent only Minnesota residents from accessing the sites. The group also contends that multiple sites may use the

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same Internet protocol address, making it impossible to bar access to some gaming sites without also blocking non-gambling sites.

The Association also argues that the order violates the constitutional free-speech rights of the targeted sites and state residents, noting that some of the sites carry clearly legal content, such as a history of casino gambling on the Wild Jack Casino site. "Blocking all Minnesotans' access to those sites would prevent Minnesotans from accessing indisputably legal material that is of public concern and that is protected by the First Amendment," the complaint states.

"We simply want Minnesota to rescind the order," said Association Chairman Joe Brennan. He noted that only 44 sites on the list – or 22% – accept gambling money in U.S. currency. The remaining 78% just provide information in the United States.

Minnesota has based its request on a federal statute permitting law enforcement officials to order common carriers to cease transmitting gambling information. The gambling association contends that ISPs are not considered "common carriers."

Why it Matters: The Gaming Association appears to have a strong argument that Minnesota's antigambling gambit is indeed unconstitutional. In the 2005 decision *Brand X v. FCC*, the Supreme Court ruled that broadband providers are not common carriers, and subsequent FCC decisions support that finding.

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Obama Boosts CPSC Budget by 71 Percent

President Barack Obama has allocated \$107 million to the Consumer Product Safety Commission in his 2009 budget, representing a 71% increase over fiscal 2007, which ended on September 30, 2007, according to the White House.

"This is almost three-quarters of the way to meeting the president's goal of doubling CPSC's funding," the White House said in a statement.

In an effort to "revitalize the agency," Obama plans to increase the number of commissioners from three to five in the coming months, the statement said. For the past 15 years, the CPSC has had only three commissioners.

"It is a top priority of my administration to ensure that the

products the American people depend on are safe. We must do more to protect the American public – especially our nation's children – from being harmed by unsafe products," Obama said in the statement. "I am confident this new leadership at the CPSC will revitalize the agency and achieve the high standard of product safety that the American people deserve."

President Obama nominated former South Carolina school superintendent Inez Moore Tenenbaum, an early political supporter, to head the CPSC. Tenenbaum, who co-chaired Obama's South Carolina campaign, ran unsuccessfully as the Democratic candidate against Senator Jim DeMint in 2004. She is currently special counsel at the McNair law firm.

Last year, after a spate of product recalls, many involving lead-laced toys made in China, Congress passed the first overhaul of consumer protection laws in close to 20 years. The new law toughened the standard for products containing lead, boosting fines to as much as \$15 million, and expanding its reach to all products aimed at kids 12 and under.

Acting Chairwoman Nancy Nord, who was appointed by former President George W. Bush in 2005, has been running the Commission until now. Democratic lawmakers have urged Obama to replace Nord over alleged delays in promulgating regulations under the new law.

Bush requested \$63 million for the CPSC in 2007. In 2008 the budget was boosted to \$80 million, and the spending measure the Democratic majority sent to Obama for 2009 increased CPSC funding to \$105 million.

Obama nominated Robert Adler, a professor of legal studies at the University of North Carolina, to fill one of the new CPSC commission seats. Adler, who served on Obama's presidential transition team, coauthored a CPSC agency review for the new administration. His research and teaching focus on consumer protection, product liability, ethics, regulation, and negotiation, the White House said.

Why it Matters: Virtually everyone agrees that the CPSC is underfunded and understaffed, and even many industry groups regard the budget boost as a welcome development. The Commission has jurisdiction over more than 15,000 types of products, including toys, power tools, and kitchen appliances. It now has about 400 staffers, fewer than half the number when the

agency was established in 1973. Still, it is not at all clear how much difference the budget boost or the selection of Tenenbaum – clearly a political appointee – will make in the CPSC’s ability to ferret out unsafe goods, in particular those that are manufactured in China.

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