Advertising Law @ manatt

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In This Issue

SPECIAL FOCUS: Let the Debate Begin – Privacy Bill Released for Comment

Ending a year of speculation, Rep. Rick Boucher (D-Va.) and Rep. Cliff Stearns (R-Fla.) unveiled a draft of their proposed privacy legislation on May 4, 2010. The bill was released for a comment period before the legislators formally introduce the law to Congress.

"Online advertising supports much of the commercial content, applications and services that are available on the Internet today without charge, and this legislation will not disrupt this well established and successful business model. It simply extends to consumers important baseline privacy protections," Rep. Boucher, Chairman of the Subcommittee on Communications, Technology, and the Internet, said in a statement.

The proposed legislation has several significant elements:

Disclosure of privacy practices. Any company that collects personally identifiable information about individuals would be required to conspicuously display a clearly-written, understandable privacy policy that explains how information about individuals is collected, used, stored and disclosed, and how they can limit or prohibit such use of their information. The policy would also have to include a link or toll-free telephone number for the FTC's Consumer Response Center.

General rule: opt-out consent. Companies may collect information about individuals unless an individual affirmatively opts-out of the

collection, so long as the company has made its privacy policy available and has provided the individuals with the opportunity to decline consent . Opt-out consent would also apply generally to a Web site that relies upon third-party services to effectuate a first-party transaction – such as an ad provider. Consent would not be required to collect and use data for operational or transactional purposes.

'Sensitive data' would require opt-in. Unlike the collection of personally identifiable information, companies would need an individual's express opt-in consent to collect or disclose sensitive information about an individual, which the legislation defines to include medical records, financial accounts, sexual orientation, race, religion and precise geographic location information.

Disclosure of information to unaffiliated parties requires opt-in. Under the proposed law, individuals would have a reasonable expectation that a company would not share their information with unrelated third parties. Therefore, companies would be required to get an individual's affirmative permission to share his or her personally identifiable information with unaffiliated third parties other than for an operational or transactional purpose.

Targeted advertising. Companies could only collect and disclose information about an individual's online activity if they have made their privacy policy available to individuals and obtained their express consent. However, companies that work with third-party networks to create targeted advertising using a profile based on an individual's information and Web-surfing history can rely on opt-out as consent so long as the company provides a readily accessible opt-out mechanism, deletes or renders the profile information anonymous no later than 18 months after it was collected, and prominently places a seal or symbol on its Web site and on or near any targeted advertising. The seal or symbol must link to a description of the company's practices to create preference profiles and permit individuals to review, modify or opt-out of having such a profile. Consumers' opt-in is required for an advertising network to disclose this information to any outside entity.

Offline data collection notice requirements. If a company plans to collect information about individuals offline, it must notify customers in advance using a written privacy notice that details the company's practices, including collection (a description of the information being collected as well as how and why it is being collected), storage (how it is stored and for what duration), consumer access (whether or not individuals are allowed to access their information and if there are limits on their access), disposal

UPCOMING EVENTS

May 19, 2010
Beverly Hills Bar Association Entertainment Law Committee
Topic: "Brand Integration"
Speaker: Jordan Yospe
Beverly Hills, CA
for more information

June 10-12, 2010
Natural MarketPlace 2010
Topic: "The Claim Game- Vegas Edition"
Speaker: Ivan Wasserman
Las Vegas, NV
Las Vegas Convention Center
for more information

June 10-12, 2010
American Advertising Federation
Topic: "Let's Get Digital"
Speaker: Linda Goldstein
Orlando, FL
for more information

June 10-12, 2010
American Advertising Federation
Topic: "Truth in Advertising: Can You Handle It?"
Speaker: Jeff Edelstein
Orlando, FL
for more information

June 15-16, 2010
American Conference Institute

(how the information is disposed of or anonymized), and disclosure (why and to what types of other companies the data might be disclosed, and whether it might be linked or combined with other data about the individual).

Security and data breach notification. Companies must establish reasonable procedures to ensure the accuracy of the information they collect and must also "establish, implement, and maintain appropriate administrative, technical, and physical safeguards" as determined by the FTC.

Enforcement and preemption. Enforcement would be provided by the FTC, which would adopt rules to implement the law, and states, through attorneys general or consumer protection agencies. The bill expressly forbids a private right of action and preempts all state laws that include requirements for collection, use or disclosure of covered information.

Why it matters: If passed, the proposed bill would create a comprehensive federal approach to privacy for businesses both on and offline, with several important changes to current industry standards and law. The bill, as currently drafted, expands the common definition of personally identifiable information to include an IP address, a pseudonym or other "unique identifiers." It also establishes that opt-out consent would be the general rule for the collection of personally identifiable information, but opt-in consent would be required for sharing such information and for collecting sensitive information. For ad networks, the new behavioral advertising icon will come in handy, as the current bill allows for opt-out consent if the network provides prominent notice through use of an icon, and allows people to access and edit their profiles. Otherwise, consumers must opt-in for ad networks to track and collect their information.

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IAB Votes To Establish Code Of Conduct Enforceable By Feds

The Interactive Advertising Bureau is establishing a code of conduct that would make it easier for the government to enforce the organization's privacy guidelines. This move was made in anticipation of the newly-released privacy legislation from Representative Boucher.

Once the code is adopted, members of the organization will be obligated to abide by it. If a member fails to comply with the rules, then the FTC could take action against the company.

Mike Zaneis, Vice President of public policy for the IAB, said the code is intended "to create a federal law enforcement hook."

Litigating and Resolving Advertising Disputes

Topic: "The Realities of Bringing and Defending a Lanham Act case in Federal Court Part 2: Litigating and Proving the Case"

Speaker: Tom Morrison

New York, NY

The Helmsley Park Lane Hotel

for more information

June 15-16, 2010

American Conference Institute

Litigating and Resolving Advertising Disputes

Topic: "Pushing the Envelope: Case Studies Examining Advertising that has been the Focus of Recent Adversarial Proceedings"

Speaker: Linda Goldstein

New York, NY

The Helmsley Park Lane Hotel

for more information

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"The key is that we know for the principles to be successful, it has to be a partnership with the Federal Trade Commission," said Zaneis. "It's not necessarily out of the ordinary. . . . It's a major commitment."

The code will be based on the Self-Regulatory Principles for Online Behavioral Advertising issued last July by the IAB in conjunction with other industry trade groups.

Zaneis said the code, which is being written over the next few months, will be "an evolving document."

The IAB will work in conjunction with the Council of Better Business Bureaus to monitor its members.

Why it matters: The code is currently being drafted and a final vote of approval is necessary before it can be established. Although the enforcement mechanism of the new code is intended to ward off the continued threat of increased regulation, it may be too late as the new Boucher privacy bill, if passed, could have serious effects on online advertising.

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Twitter News: Tweets To Be Archived and Promoted Tweets Program Launched

Twitter made its own headlines recently when the Library of Congress announced plans to digitally archive every public tweet since the microblog's inception in March 2006.

Fittingly, the Library of Congress tweeted its announcement: "Library acquires ENTIRE Twitter archive. ALL tweets."

Currently, Twitter processes more than 50 million tweets each day, which means billions of tweets will be archived. Direct messages will not be included.

The Library said it would emphasize tweets with "scholarly and research implications," such as President Barack Obama's tweet about winning the 2008 election.

Tweets that won't make the cut include the newly launched Promoted Tweets platform, which allows companies to send information to their followers in a way that clearly identifies the tweet as advertising. Twitter describes the program as "ordinary Tweets that businesses and organizations want to highlight to a wider group of users."

Promoted Tweets will disclose that a tweet is promoted by the advertiser and will be classified distinctly when a Twitter user searches for a keyword term. For example, if a user performs a search for a term that an advertiser has purchased, the promoted message – even if sent earlier – will appear at the top of the result list. However, only one

Promoted Tweet will be displayed on the search results page.

The platform will also allow advertisers to purchase keywords that will link to their ads.

Functionally, the Promoted Tweets will be identical to other messages, including the option to reply, retweet, and favorite.

Twitter has indicated that Promoted Tweets are simply the first phase of a larger plan, and it is looking for consumer feedback about the value of the service.

Promoted Tweets "must meet a higher bar – they must resonate with users," cofounder Biz Stone wrote on his blog about the program's launch. "That means if users don't interact with a Promoted Tweet to allow us to know that the Promoted Tweet is resonating with them, such as replying to it, favoriting it, or Retweeting it, the Promoted Tweet will disappear."

The possibility that ads will disappear is built into the platform's pricing model.

To see an example of the Promoted Tweets platform on Twitter's blog, click here.

Why it matters: The new Promoted Tweets platform will provide advertisers with many new opportunities to take advantage of reaching consumers on Twitter. However, legal issues remain. While a Promoted Tweet discloses that it was "promoted by" the advertiser, those who purchase ads must still comply with traditional advertising laws, even within the 140-character limit of Twitter. In addition, trademark owners may face a challenge similar to that posed by Google, with competitors trying to make use of their marks as keyword search terms.

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FTC Closes Investigation Into Violation Of New Guides

The Federal Trade Commission announced that it closed an investigation under the new FTC guides into whether Ann Taylor stores violated the Federal Trade Commission Act when the company provided gifts to bloggers whom the company expected would blog about the company's LOFT division.

Last December, the FTC's newly revised Guides Concerning the Use of Endorsements and Testimonials in Advertising took effect. The new guides apply to social media, word-of-mouth marketing, and other promotions and advertising in which consumers or celebrities speak on behalf of companies.

One of the new requirements is that bloggers must disclose whether they receive gifts from a company, or have any other "material

connection." A company can be held liable if a blogger fails to make the required disclosures.

In a letter sent to Ann Taylor's counsel by Associate Director Mary K. Engle, the FTC expressed its concern with the company's failure to comply with such required disclosures.

In January, the company held a preview show of its LOFT Summer 2010 collection and bloggers who attended the event were provided with gifts.

The agency said that it determined not to recommend an enforcement action for three reasons. First, the preview show in January was the first – and only to date –preview event. Second, the FTC said that only a "very small number" of bloggers posted content about the preview and some of those bloggers actually did disclose that they had received gifts.

Finally, the agency said that LOFT adopted a written policy in February stating that it "would not issue any gift to any blogger without first telling the blogger that the blogger must disclose the gift in his or her blog."

The letter also noted that LOFT had actually posted a sign at the preview telling bloggers that they should disclose the gifts if they posted comments about the event. "It is not clear, however, how many bloggers actually saw that sign," the agency said.

Going forward, the FTC said it expects that LOFT will honor its written policy and "take reasonable steps to monitor bloggers' compliance with the obligation to disclose gifts they receive from LOFT."

Why it matters: While the FTC determined not to initiate an enforcement action, the letter demonstrates how serious the agency is about enforcing the new guides. The rules only went into effect December 1, and the agency is clearly paying close attention to whether or not companies and bloggers are following the rules. The letter also makes clear that the FTC expects companies to make a concerted effort to monitor bloggers. Even though LOFT posted a sign at the preview informing bloggers of the disclosure rule, the agency determined that was insufficient.

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FCC Rules In Telemarketing Case

In a decision, the Federal Communications Commission determined that unsolicited telemarketing calls to a consumer did not violate the Telephone Consumer Protection Act because the messages were intended for current customers – not as solicitations to obtain new customers.

Russ Smith, a New Jersey resident, subscribed to Verizon local service

and asked to be placed on the company's internal do-not-call list.

But he filed a formal complaint against Verizon after receiving multiple telephone solicitations. The calls were recorded messages regarding promotions the company was running for Verizon's long distance service. For example, one message began, "Hello. This is Verizon Long Distance calling with a special reminder for valued customers like you. Don't forget that you'll receive 60 free domestic long distance minutes on Sunday, July Fourth."

Smith claimed that the company violated multiple provisions of the TCPA by making the calls and by failing to properly record his requests to be placed on the company's internal do-not-call list.

Verizon argued that the messages did not constitute "telephone solicitations" under the Act because they were sent to current Verizon customers as a form of goodwill and that Smith received the calls in error.

The Commission agreed.

"Section 227(a)(3) defines a 'telephone solicitation' as 'the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.' Verizon denies that its purpose was to encourage the purchase of services, arguing that the messages at issue were intended to be sent only to current Verizon customers. The specific language used in the messages is consistent with that explanation. For instance, the . . . message refers to 'a special reminder for valued customers like you,' 'your account,' and '[t]hanks again for your business,' language that appears to be directed to current Verizon Long Distance customers rather than the general public or potential new customers. . . . Moreover, nothing in the messages expressly encourages the purchase of any services. The fact that the messages contain no information about how to contact Verizon to take advantage of the offer further suggests that they were not intended as solicitations," the Commission said.

The FCC determined that Verizon did violate the rules by failing to record Smith's company-specific do-not-call request, and it declined to award him any damages.

Smith failed to demonstrate that he received any unlawful telephone solicitations resulting from the violation, the Commission said, and an award of damages would essentially be an award of attorneys' fees and costs, which the Commission's rules do not allow.

Why it matters: The FCC does not decide many formal complaints, so the decision is a rare one from the Commission. The FCC's view of what constitutes a "telephone solicitation" will make it harder for a complainant to prove a violation, depending on the language used in

the solicitation message. In the *Smith* case, the Commission relied heavily upon the text of Verizon's message, which it found to be nonactionable because although the call was unsolicited, the consumer failed to show that the purpose of the call was to encourage the purchase of goods or services.

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