

The Delaney Report “Legal Perspectives”

“Legal Perspectives” is a supplement that appears periodically in *The Delaney Report* to update and inform our readers on the latest legal issues that are of relevance and importance to their industries.

Michael Zweig serves as editor of “Legal Perspectives.” He is a partner in the New York and California law firm of **Loeb & Loeb LLP**, which has an extensive marketing, advertising, media and entertainment law practice. **Terri Seligman**, a partner at the firm, is the author of this article.

Online Targeted Advertising And Privacy

Online targeted advertising is the use of information collected about a consumer's activities online to select ads that are delivered to that particular consumer. This information can include the searches a consumer makes, web pages visited, content viewed and purchases the consumer makes. Search engines have used targeted marketing for many years, displaying ads on the search results page that relate to search terms typed in, and web sites routinely place “cookies” on individual computers that retain information (such as an IP address) and can track where a computer goes online.

The recent appearance of targeted advertising on social networking sites such as **Facebook.com** has generated protests by privacy groups and users of these sites. The primary complaints are that the information collected is more personal than that collected by search engines and cookies, that these sites have not adequately explained the new programs to their users, and that users cannot opt-out of the programs entirely.

These web sites collect vast amounts of information about their members. Some of this information is supplied by the member in the form of his/her user profile which might list his/her name, age, home town, college, marital status, job, hobbies, religious/political affiliation, and other interests. Other information can be obtained by tracking a member's social connections within the site and by tracking the member's online activities anywhere on the internet.

Facebook.com And Targeted Advertising

Facebook.com, one of the most popular social networking sites, announced in November 2007 that it was launching two new targeted advertising programs – Beacon and SocialAds. Advertisers who participated in the SocialAds program could deliver ads to Facebook members that were tailored to information contained in their profiles. The Beacon program collected information about Facebook members' online activity on other participating web sites and sent that information to the members' "friends." For example, when a Facebook member made a purchase or rated a product on one of the participating web sites, a notice appeared telling the member that this information would be transmitted to his or her friends unless the member opted-out. If the member did not opt-out or take action, the information was transmitted to the other Facebook members listed as friends.

Advertisers like Beacon because it provides many of the same benefits of viral marketing. If a user bought a product or a movie ticket, this information was transmitted to the user's friends, which could be seen as an endorsement of the product. In addition, advertisers could display an ad

for that product when the information was transmitted to the member's friends.

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Complaints about Beacon surfaced immediately. Facebook users and privacy groups complained that users were not able to opt-out of Beacon completely; that it was unclear what web sites were participating in the program; that the notice telling a user that the information was about to be transmitted was not clearly visible and did not stay on the screen for enough time; and that Facebook did not adequately explain Beacon to members. In December 2007, Facebook announced changes to Beacon. Information would not be sent to a member's friends unless the member opted-in each time the notice was displayed and the notice would be displayed for a longer period of time.

Regulatory Developments

Generally, the use of targeted ads online doesn't violate privacy laws in the U.S. except in these cases: the collection of personal information about children under 13 years of age without parental consent; the violation of a web site's own privacy promises to its users; or the use of spyware. However, the **Federal Trade Commission** and consumer groups are closely watching this issue.

In December, 2007, the FTC issued proposed privacy guidelines for online targeted advertising (www.ftc.gov/opa/2007/12/principles.shtml), and called for comments from consumer and business groups. The guidelines propose that: 1) every site where data is collected for targeted advertising provides a clear, consumer-friendly, prominent statement that data is being collected to provide targeted ads and give consumers the ability to opt-out; 2) any company that collects or stores consumer data for online targeted advertising provides reasonable security for that data and only retains data as long as is necessary to fulfill a legitimate business or law enforcement need; 3) companies obtain "affirmative express consent" from consumers before using data in a manner materially different from promises the company made when it collected the data (i.e., in its Privacy Policy); 4) companies obtain "affirmative express consent" to collect and use "sensitive data" for purposes of targeting advertising. ("Sensitive data" is not defined in the proposed principles but would include, at a minimum, information about health conditions, sexual orientation and children's online activities.)

Also in 2007, several privacy groups filed a petition with the FTC requesting, among other things, that the FTC consider establishing a "do not track" registry, similar to the federal "do not call" registry that prevents telemarketers from calling phone numbers on that list.

Conclusion

Targeted advertising is very appealing to advertisers because it is designed to ensure that ads will be seen by those most interested in seeing them. But targeted advertising is likely to continue to come under scrutiny unless it incorporates two important elements in U.S. privacy law: notice and choice. Moreover, although the FTC's proposed principles do not have the force of law, they are a clear signal of the FTC's interest in online targeted marketing, and marketers and advertisers would be well-advised to consider the application of the principles to their own practices moving forward. The FTC has made it clear that it will continue to monitor this issue and may bring enforcement actions against companies engaged in online targeted advertising that are violating federal privacy or consumer protection laws.

Editor-in-chief: Thomas F. Delaney. Editor: Michael Zweig. Managing Editor: Julia T. Igoe

25 East 21st Street, New York, NY 10010 (212) 979-7881