



Advertising and Promotions Law

ALERT
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Online Advertising Goes to Court and U.S. Treasury Dept. Issues Regulations on Internet Gambling

In a clear indication that online privacy concerns are on the rise, a class action complaint has been filed against several companies that use consumer data obtained through “deep packet inspection,” a technology that tracks and consolidates all web-related information for an individual at the ISP level, in order to provide targeted online advertising. The complaint, filed in federal district court in California, alleges that NebuAd, Inc., and its ISP affiliates violated the federal Electronic Communications Privacy Act and Computer Fraud and Abuse Act, and the California Computer Criminal Law and Invasion of Privacy Act, by using deep packet inspection to intentionally intercept the online transmissions of subscribers without notice or consent.

The plaintiffs claim that NebuAd obtained sensitive information and personally identifiable information by tapping directly into consumers’ ISP connection, and then analyzed such information and shared it with its subsidiaries who use it to display ads while consumers use the Internet.

Separately, in December, 2007, the Federal Trade Commission issued proposed guidelines for online behavioral advertising. (We summarized the proposed guidelines in our December client alert.) In July, 2008, Lydia Parnes, Director of the FTC’s Bureau of Consumer Protection, testified before Congress on this issue. She said that “the Commission is cautiously optimistic that the privacy concerns raised by behavioral advertising can be addressed by industry self-regulation,” which “affords the flexibility that is needed as business models continue to evolve.” She also noted, however, that the FTC will continue to monitor

the marketplace closely so it can take appropriate action as needed.

While targeted advertising based on consumers’ online activities potentially allows marketers to reach those consumers most interested in hearing their messages, the practice has raised privacy concerns for consumer groups and regulators, particularly when such advertising is enabled by the use of deep packet inspection or other intrusive techniques. It is likely that regulation and self-regulation will develop to address consumers’ concerns in the coming year.

Regulations Affecting Internet Gambling

On November 12, the U.S. Treasury Department and the Federal Reserve Board issued a new rule implementing the Unlawful Internet Gambling Enforcement Act that was signed into law in October, 2006. The Act prohibits gambling businesses from knowingly accepting payments in connection with unlawful Internet gambling, including payments made through credit cards, electronic funds transfers, and checks.

The new rule requires U.S. financial firms that participate in designated payment systems to establish and implement policies and procedures that are reasonably designed to prevent payments to gambling businesses in connection with unlawful Internet gambling.

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The Act defines unlawful Internet gambling as “to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.”

The Act includes several important exceptions from this definition, which are summarized in our October 2006 Alert.

Compliance with the rule is required by December 1, 2009. The House Financial Services Committee approved a bill to block the Treasury Department from issuing the rule, but the bill was not approved by the full Congress.

For more information on the content of this alert, please contact a member of Loeb & Loeb’s Advertising and Promotions Group.

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