

# Privacy, Data Collection, and Behavioral Targeting – a Legal Update

P2P Media Summit LA

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# Current Focus of Regulators is Primarily Behavioral Targeting (“BT”)

- What is BT?
  - User is “profiled” based on prior habits
  - Not the same as purely “contextual” or geographic targeting
- Who is engaged in BT?
  - Two categories getting most attention:
    1. Actual BT by web ad networks (e.g., Google, Yahoo, AOL)
    2. Potential BT by ISPs (via a third party e.g., Phorm, NebuAd)
  - Other businesses (even offline) could have data to build individual profiles

# 2008 – Public Reaction to British Telecom Trials of Phorm

- BT had not (allegedly) given customers advance notice of the trial
- Media coverage/public reaction largely negative, e.g.:
  - “illegal advertising wiretap”
  - “Creator of World Wide Web opposes Phorm”
  - “It’s mine [the data] . . . You have to ask first . . . And tell me what I get in return”
- UK Govt. investigates, but has not (yet) blocked the service

## U.S. Reaction – Regulators Take Note

- Negative reaction to Phorm spills over to U.S. ISPs for even considering the notion
- August 2008 -- House Committee sent inquiries to ISPs and major ad networks asking about behavioral targeting practices
  - Responses online at:  
[http://energycommerce.house.gov/Press\\_110/080108.ResponsesDataCollectionLetter.shtml](http://energycommerce.house.gov/Press_110/080108.ResponsesDataCollectionLetter.shtml)
- FTC also holds public workshops
- Industry pushes for self-regulation

# FTC Proceedings

- December 2008: FTC declined to issue regulations
  - States that it wants to give self-regulation a chance
  - But takes comments from industry and advocacy groups
- February 2009: FTC restates its four principles on privacy to account for BT:
  1. Notice and customer control (opt out)
  2. Reasonable security and limited data retention
  3. Affirmative consent to material retroactive changes
  4. Affirmative consent before using “sensitive” data

# FTC's First Principle: Transparency and Consumer Control

- Must tell users what's happening with their data
  - This suggests that a privacy policy is required, not optional
  - If data is collected outside of typical website context, FTC suggests a similar, easy to find, conspicuous disclosure
- Users should be able to opt out of the BT
  - Method should be clear, prominent, and easy to use
  - Could provide websites , linked to prominently
- Ad networks have stepped up efforts to notify consumers and publicize opt out availability
  - Ex: AOL's Mr. Penguin campaign:  
<http://corp.aol.com/o/mr-penguin/>

# FTC's Second Principle: Reasonable Security and Limited Data Retention

- No bright line tests:
  - Level of security required depends on:
    1. The sensitivity of the data to the user
    2. The particular risks to the company
- No set time for data retention
  - FTC will look more favorably on shorter periods
    - Six months is often mentioned
  - Data should be purged when the business need has expired

## FTC's Third Principle:

### Affirmative Consent to Material Retroactive Changes

- What's "material"? FTC gave two examples:
  - New use of data not described in privacy policy
  - Change in the type of third parties to whom data is disclosed
- "Affirmative" consent means requiring a user to take action
  - Pre-checked boxes, or notice with opt out, are not sufficient
  - Note: such means may be okay for prospective changes, just not retroactive changes
- Accepting EULA may not be good enough
  - Other notice may still be needed



## FTC's Fourth Principle: Affirmative Express Consent to Use of "Sensitive" Data

- Can also be satisfied by committing *not* to use "sensitive" data for BT (or other purposes beyond that for which it was provided)
- No agreement on what is "sensitive," but some indications:
  - Health information
  - Information about children
  - Financial information (e.g., credit cards, bank account numbers)
  - Social security numbers
  - Users "precise geographic location" (?)

# Where do we go from here?

- FTC's principles are non-binding, yet . . .
  - Still may be indications of "unfair" trade practice
  - Widespread non-compliance will lead to regulation
- Industry groups are proposing in voluntary guidelines
  - Joint effort of American Association of Advertising Agencies (4A's), the Association of National Advertisers (ANA), the Direct Marketing Association (DMA), and the Interactive Advertising Bureau (IAB) and the Council of Better Business Bureaus (BBB).
- Congress isn't done
  - House committee had hearings on April 23, may be draft bill in the works

# Things to Do:

- Join the industry discussions on voluntary guidelines:
  - Look for distinctions ,if any, between network operators, ad networks, and distributed application owners
- As application providers , expect tighter scrutiny
  - It is critical not to be deemed “spyware”
  - Emphatically apply the “notice” and “opt out” principles
- Focus on “sensitive” individualized data
  - Distinctions between PII and non-PII, and fact of anonymization, are less meaningful under FTC Principles

# Questions?

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