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In this Issue:

In the Marketplace

- **Industry Launches Self-Regulatory Program for Online Behavioral Advertising**

Heard on the Hill

- **The House Continues Focus on Internet Privacy Practices**
- **Congress Considers Online Gambling Legislation**
- **Obama Signs the Twenty-First Century Communications and Video Accessibility Act into Law**
- **Senator Leahy Introduces the Combating Online Infringement and Counterfeits Act**
- **House Passes Bill Targeting Organized Retail Crime**

Around the Agencies

- **Federal Trade Commission Privacy Report Expected in November**
- **White House Announces Launch of Subcommittee on Privacy & Internet Policy**
- **Department of Commerce Issues NOI on Copyright**

In the Marketplace

Industry Launches Self-Regulatory Program for Online Behavioral Advertising



On October 4, 2010, leading marketing and advertising trade associations launched a robust self-regulatory program for online behavioral advertising. This program builds upon the Self-Regulatory Principles for Online Behavioral Advertising ("Principles") to help implement consumer-friendly standards for online behavioral advertising ("OBA") practices. The program will give consumers enhanced control over the collection and use of data regarding their Web viewing for OBA.

OBA is defined as the practice of collecting “data from a particular computer or device regarding Web viewing behaviors over time and across non-Affiliate Web sites for the purpose of using such data to predict user preferences or interests to deliver advertising to that computer or device based on the preferences or interests inferred from such Web viewing behaviors.”¹ The purpose of OBA is to deliver relevant advertising to specific computers or devices in ways that enrich the consumer online experience.

The industry-wide effort to develop and implement standards for OBA activities across the Internet was led by a coalition of trade associations, including the American Association of Advertising Agencies, the American Advertising Federation, the Association of National Advertisers, the Direct Marketing Association, and the Interactive Advertising Bureau, and supported by the Council of Better Business Bureaus. This unprecedented collaboration responds to the Federal Trade Commission’s call to the advertising and media industry to develop self-regulatory principles and practices for OBA.

Ad Choices 
Interest Based Ads 
Why did I get this ad? 

The program promotes the use of the “Advertising Option Icon” and accompanying language (depicted left), to be displayed within or near

online advertisements or on Web pages where data is collected and used for behavioral advertising. The Advertising Option Icon indicates a company’s use of OBA and adherence to the Principles guiding the program. By clicking on the icon, consumers will be able to link to a clear disclosure statement regarding the company’s online behavioral advertising data collection and use practices as well as an easy-to-use opt-out option.

Companies interested in participating in the program can visit www.aboutads.info to register to use the Advertising Option Icon, request to participate in the in the easy-to-use consumer opt-out mechanism, and obtain information about joining the Principles & Communications Advisory Committee. The Committee will develop educational efforts around the program and new Principles.

Heard on the Hill

The House Continues Focus on Internet Privacy Practices

Two of the leading privacy advocates in Congress and co-chairs of the Congressional Caucus on Privacy, Representatives Edward Markey (D-MA) and Joe Barton (R-TX) sent a letter to Facebook on October 18, 2010 to inquire into a recently reported data breach of the company’s social media platform. The Wall Street Journal reported that certain data of Facebook users had been revealed through third party applications at use on the site.

The House Letter poses 18 questions to Facebook seeking information about the breach, including the number of affected users, when Facebook became aware of the breach, and what changes Facebook plans to undertake to address the problem. The letter also requests copies of

¹ Self-Regulatory Principles for Online Behavioral Advertising, Definitions G. p. 9 (2009), at available at <http://www.aboutads.info/principles/>.

Facebook's agreements with third party app developers and information on the financial remuneration paid to Facebook as a result of the information sharing.

This letter follows a series of other letters from Representatives Markey and Barton to other online companies. On October 8th, Rep. Markey and Rep. Barton released responses to letters they had sent to 15 companies that had been identified in a media report as maintaining websites that installed tracking technology on the computers of visitors to their websites. The media report revealed that each of the top 50 most popular U.S. websites installed an average of 64 tracking tools on visitors' computers, some by outside vendors, but others by the websites themselves. The letters requested information on the websites' privacy practices and the tracking technologies installed by third parties. The letters also requested information on the technologies used for tracking and the types of data collected, including whether consumers were targeted based on health or financial data.

Rep. Markey states that these responses "raise a number of concerns, including whether consumers are able to effectively shield their personal Internet habits and private information from the prying eyes of online data gatherers."² He also said that while these websites cited to privacy policies, many of the privacy policies are "complicated and laborious to navigate" and that consumers were kept "in the dark" by websites that did not make the identities of their third party affiliates readily accessible.³

Congress Considers Online Gambling Legislation

Since passage of the Unlawful Internet Gambling Enforcement Act ("UIGEA") in 2006, which made it illegal for a person "in the business of betting or wagering" to receive money in connection with unlawful internet gambling, a number of legislative initiatives have been introduced that propose an alternative regulatory framework for online gambling, including licensing, taxing, and regulating different forms of online gambling. Until recently, the United States' largest casino operations largely opposed these proposals due to concerns that legalized online gaming could erode in-person casino attendance. However, in the spring of 2010, the American Gaming Association, the trade association that represents many of the major casinos, issued a statement acknowledging "that a properly regulated legal framework for Internet gambling is the best way to protect consumers."⁴

In July 2010, the House Financial Services Committee approved H.R. 2267, the Internet Gambling Regulation, Consumer Protection, and Enforcement Act, which was introduced by Representative Barney Frank (D-MA). The bill would create a licensing and enforcement regime overseen by the Secretary of the Treasury for all types of Internet gambling except sports wagering, and sets forth stringent suitability criteria for licensees.

² Press Release, Markey, Barton Release Responses from Web Sites on Their Tracking of Consumer Behavior (October 8, 2010).

³ *Id.*

⁴ American Gaming Association Fact Sheet: Internet Gambling, *available at* http://www.americangaming.org/industry/factsheets/issues_detail.cfv?id=17.

⁵ Cameron Kerry and Christopher Schroeder, *White House Council Launches Interagency Subcommittee on Privacy & Internet Policy* (October 24, 2010), *available at* <http://www.whitehouse.gov/blog/2010/10/24/white-house-council-launches-interagency-subcommittee-privacy-internet-policy>.

⁶ *Id.*

⁷ Notice of Inquiry, Copyright Policy, Creativity, and Innovation in the Internet Economy, 75 Fed. Reg. 61419 (Oct. 5, 2010).

⁸ Press Release, Commerce Department Seeks Comment on Protecting Copyrighted Works on the Internet (Oct. 5, 2010).

Treasury would collect a user fee from licensees. A companion bill, S. 1597 Internet Poker and Game of Skill Regulation, Consumer Protection, and Enforcement Act, would establish a 5% federal tax on gambling deposits. Under the Frank bill, banks would also be provided with a safe harbor for engaging in financial activities and transactions on behalf of a licensee, as long as those activities comply with federal and state law. Given the limited time remaining in 2010, it is not likely that any major legislation on online gaming will pass Congress this session. Instead, these recent developments will further the policy debate for 2011.

Obama Signs the Twenty-First Century Communications and Video Accessibility Act into Law

On October 8, 2010, twenty years after the passage of the Americans with Disabilities Act (“ADA”), President Obama signed the Twenty-First Century Communications and Video Accessibility Act (“Act”), S. 3304, into law as Public Law No. 111-260. Senator Pryor (D-AR) was instrumental in gaining support for the bill in the Senate and Representative Markey (D-MA) authored similar legislation in the House. The stated purpose of the law is to increase the access of persons with disabilities to modern communications, and provisions of the law touch upon communications, television, and the Internet. Entities operating in these areas will want to be aware of forthcoming Federal Communications Commission (“FCC” or “Commission”) rulemakings that are included in the law to spell out many of the details of how such accessibility will be accomplished. Highlights from the new law follow below:

- Require mobile phone Internet browsers, where achievable, to be accessible and usable by blind persons.
- Require video programming guides and menus provided on navigation devices (*e.g.*, converter boxes, equipment used to access multichannel video programming), where achievable, to be audibly accessible to blind individuals and provide built-in closed captioning capability that can be accessed through a mechanism comparable to a button, key, or icon.
- Make “advanced communications services” (*e.g.*, interconnected VoIP service, non-interconnected VoIP service, electronic messaging service, and interoperable video conferencing service), where achievable, more accessible and usable by persons with disabilities.
- Require certain apparatuses used to receive or play back video programming transmitted simultaneously with sound, where technically feasible, to integrate closed caption ability, the ability to deliver and transmit video description services, and the ability to deliver emergency information that is accessible to blind persons.

Senator Leahy Introduces the Combating Online Infringement and Counterfeits Act

On September 20, 2010, Chairman of the Senate Judiciary Committee Leahy (D-VT) introduced bipartisan legislation, S. 3804, the Combating Online Infringement and Counterfeits Act, with a stated purpose of combating online copyright infringement and piracy. Since its introduction, an amendment in the nature of a substitute has been circulated that would remove from the original bill a provision that would

have granted authority to the Attorney General to create a blacklist of sites believed by the Department of Justice (“DOJ”) to be “dedicated to infringing activities.” Although neither the bill nor the amendment was considered by the Senate Judiciary Committee before Congress recessed at the end of September, the bill has been placed on the Committee’s business meeting agenda for consideration when Congress returns after the mid-term elections. This bill would:

- Provide the U.S. Attorney General with new enforcement tools (e.g., injunctive relief and authority to bring *in rem* suits) to take action against these so-called rogue sites that are operated to traffic in pirated goods and services.
- Require registrars, registries, ad networks, ISPs, and payment system providers to carry out any orders issued by the federal courts against a rogue site.
- Require the Intellectual Property Enforcement Coordinator, who is located in an office at the Office of Management and Budget, to publicly post the names of the domain names determined to be used by sites dedicated to infringing activities.

House Passes Bill Targeting Organized Retail Crime

On September 28, 2010, the House passed H.R. 5932, the Organized Retail Theft Investigation and Prosecution Act. The bill, which is sponsored by Rep. Bobby Scott (D-VA), seeks to combat organized retail theft, which is defined as the obtaining of (or aiding or abetting in the commission of) retail merchandise by illegal means for the purpose of reselling of otherwise placing such merchandise back into the stream of commerce.

The bill would establish an Organized Retail Theft Investigation and Prosecution Unit in the Department of Justice to investigate instances of organized retail theft, assist state and local enforcement in combating such theft, and consult with stakeholders, such as online marketplace and retailers, to obtain information about this issue. H.R. 5932 has now advanced to the Senate. With limited time left in the congressional calendar, it remains to be seen how far the bill will progress in 111th Congress.

Around the Agencies

Federal Trade Commission Privacy Report Expected in November

The Federal Trade Commission (“Commission”) is expected to release a report recommending new privacy principles for online and offline data collection and use for marketing and advertising purposes. This report follows a series of roundtable discussions held by the Commission to explore new approaches to consumer privacy. The first roundtable, held in December 2009, considered online behavioral advertising, consumer expectations, practices of information brokers, and existing regulatory frameworks. A second roundtable was held in January 2010. This roundtable focused on the benefits and risks created by technology and privacy considerations associated with social networking, cloud computing, and mobile marketing. The third roundtable was hosted in March 2010 and covered the collection and use of health data and other forms of sensitive consumer information.

The report is expected to build upon the themes explored during the series of privacy roundtables and will likely address the following broad topics:

- **Privacy by design.** The report may touch upon the value of building privacy and security from the inception into companies' procedures, systems, products, services, and technologies.
- **Increased transparency with timely short form disclosures.** The report may call for privacy notices that are more standard and consistent with respect to size and format. The report may also recommend the use of short form notices that include material terms.
- **Simple consumer choice.** The report may suggest streamlining choices for consumers so that they may focus on uses of data they would not normally expect instead of common practices.
- **Consumer and business education.** The report may address means to promote business and consumer education to increase consumers' understanding of data collection and use, and the steps that they can take to preserve privacy.

The report may also address the notion of a "Do Not Track" registry. During a July Senate Commerce Committee hearing, FTC Chairman Jon Leibowitz noted that the Commission was evaluating the concept of a Do Not Track List, which would enable consumers to opt-out of having their Internet activities tracked for advertising purposes.

White House Announces Launch of Subcommittee on Privacy & Internet Policy

On October 24, 2010, the White House announced the launch of the Subcommittee on Privacy & Internet Policy. This new Subcommittee, which is part of the National Science and Technology Council, will develop principles and policy for the purpose of "fostering consensus in legislative, regulatory, and international Internet policy realms."⁵ The announcement indicated that the new Subcommittee is "part of the Obama Administration's commitment to promoting the vast economic opportunity of the Internet and protecting individual privacy."⁶ The Subcommittee will consider ways to promote online innovation while protecting consumers. In addition, the Subcommittee will coordinate matters of privacy for the U.S. Government and lead discussions on promoting global privacy with the country's international trade partners.

The Subcommittee will include representatives from federal agencies and organizations in the Executive Office of the President. In addition, the Federal Trade Commission and the Federal Communications Commission are expected to be invited to participate.

Department of Commerce Issues NOI on Copyright

Since April of this year, the Department of Commerce's Internet Policy Task Force has been examining the intersection between privacy, copyright, global free flow of information, cybersecurity, and innovation in the Internet economy by holding various symposia and public meetings on such topics and issuing a numbers of Notices of Inquiry ("NOI"). The findings from this review are expected to inform a report that the Internet Policy Task Force will issue, and which is intended to contribute to the

Administration's policy on online privacy, copyright, and innovation. This report will also likely play into the dialogue on such topics already underway in Congress and at the Federal Trade Commission.

Most recently as part of this initiative, the Internet Policy Task Force on October 5, 2010 published a NOI requesting comments on the relationship between the availability and protection of online copyrighted materials and innovation in the Internet economy.⁷ Commerce Department Secretary Locke highlighted some of the complexities in this area when he stated upon the release of the NOI, "Our ongoing challenge and commitment is to align the flexibility needed for innovation in the Internet economy with effective means of protecting copyrighted works that are accessible online."⁸

The NOI generally seeks comments directed at rights holders, Internet intermediaries, and Internet users. More specifically, the NOI asks stakeholders to comment upon such topics as: (1) how policy and intellectual property laws should best be structured to promote legitimate businesses and address online infringement; (2) what the role and responsibilities of Internet intermediaries should be in taking actions against purported infringing material; and (3) how Internet users can be better informed about legitimate sources of access to online copyrighted works. Comments are due November 19, 2010.

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