

A large, brown bear is shown from the chest up, holding a baby in its arms. The bear's fur is thick and textured, and its eyes are closed in a gentle expression. The baby is looking up at the bear with a curious expression. The background is solid black, which makes the bear and baby stand out.

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Deep Packet Inspection and The Privacy Debate

Ronald W. Del Sesto, Jr.

Partner

Bingham McCutchen, LLP

r.delsesto@bingham.com

(202) 373-6023

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Overview

- Background
- Recent Events
- Examination of the Federal Trade Commission's Staff Report Released in February, 2009
- Deep Packet Inspection
- Conclusion: The Future of Online and Behavioral Advertising

Background

- Definitions:
 - Contextual Advertising;
 - Behavioral Advertising; and
 - Deep Packet Inspection (DPI)
- The Role of Congress and the Federal Trade Commission (FTC)
- The FTC's Regulatory "Light Touch"

Background (cont'd)

- FTC 1998 Report
- FTC Recommends “Self-Regulation”
- Network Advertising Initiative (NAI) Formed in 1999
- NAI Adopts Self-Regulatory Principles in 2000

Background (cont'd)

- FTC Released a Series of Reports to Congress
- FTC “Tech-ade” Event 2006 and Town Hall in 2007
- FTC Issues its *Staff Statement* on Behavioral Advertising in 2007

Recent Events

- U.S. House Sends Letter to Cable Company Regarding DPI
- Senate Commerce Committee Holds Hearing on DPI
- House Commerce Subcommittee on Telecommunications and Internet Holds Hearing on DPI
- House Subcommittee Send Letters to Numerous Companies

Recent Events (cont'd)

- U.S. House Sends Letter to Cable Company Regarding DPI
- Center for Democracy and Technology Releases the *Wiretap Report*
- Senate Commerce Committee Holds Hearing on DPI

Recent Events (cont'd)

- House Commerce Subcommittee on Telecommunications and Internet Holds Hearing on DPI
- House Subcommittee Send Letters to Numerous Companies
- NAI Releases 2008 NAI Principles
- FTC Staff Report: Self-Regulatory Principles for Online Behavioral Advertising Released February, 2009

2008 NAI Principles

- Personally Identifiable Information (PII) versus Non-Personally Identifiable Information
- Notice
- Choice
- Security
- Retention

2009 FTC Staff Report

- PII & Non-PII
- Different types of online advertising
 - "First Party" or "Intra-site" Online Behavioral Advertising
 - "Contextual" Advertising
 - Online Behavioral Advertising Subject to the Principles

2009 FTC Staff Report (cont'd)

- “First party” or “intra-site” online behavioral advertising is the practice by which a consumer’s activities are not tracked across different websites but rather a consumer is targeted based on his or her current purchase or browsing activity on one website.
 - Example: A consumer visits the Banana Republic website to purchase a new spring business suit. After she has put the suit in her “shopping cart,” along the side of the checkout screen Banana Republic offers suggestions for a matching blouse, shoes and handbag that the consumer may also be interested in purchasing.
 - Examples: Product recommendations, tailored content, shopping cart services, website design and optimization, fraud detection, and security.

2009 FTC Staff Report (cont'd)

- “Contextual” advertising is advertising based the content of a particular website or search query, rather than on information about the consumer collected over time and involves no retention of data about the consumer’s online activities beyond that which is necessary for the immediate delivery of an ad or search result.
 - Example: A consumer is shown an advertisement for tennis rackets solely because he is visiting a tennis-focused website or has used a search engine to find stores that sell tennis rackets.
- Contextual advertising very narrowly defined under the FTC guidelines. If a practice involves the collection and retention of consumer data for future purposes other than the immediate delivery of an ad or search results, the practice falls beyond the scope of contextual advertising and within the scope of the Principles.

2009 FTC Staff Report (cont'd)

- Online Behavioral Advertising Subject to the Principles
- Online behavioral advertising involves the tracking of consumers' online activities in order to deliver tailored advertising.
- Include within the Principles' scope any data collected for online behavioral advertising that "reasonably could be associated" with a particular consumer or with a particular computer or device.
- "Cookies" are often used to track consumers' activities and associate those activities with a particular computer or device.
- Example: A consumer visits a travel website and searches for airline flights to New York City. The consumer does not purchase any tickets, but later visits the website of a local newspaper to read about the Syracuse University basketball team. While on the newspaper's website, the consumer receives an advertisement from an airline featuring flights from Syracuse to New York City.

2009 FTC Staff Report (cont'd)

- **Transparency and Consumer Control**
 - Websites should prominently note their behavioral advertising practices and give consumers an accessible way to opt out of such programs. Companies are encouraged to make these notifications separate from general privacy policies. Additionally, companies that collect information through mobile devices or other means should ensure they have sufficient disclosure mechanisms.
- **Reasonable Security and Limited Data Retention for Consumer Data**
 - Companies are encouraged to maintain reasonable security and retention practices with respect to the data they collect.

2009 FTC Staff Report (cont'd)

- **Affirmative Express Consent for Material Changes to Existing Privacy Promises**
 - Companies are encouraged to inform consumers of retroactive material changes to their data collection policies.
- **Affirmative Express Consent to (or Prohibition Against) Using Sensitive Data for Behavioral Advertising**
 - Companies are encouraged to receive express consent from consumers before collecting "sensitive data," such as information about children, health information, and Social Security numbers.

Interesting Issues

- DoubleClick: Website has entered into agreement with DoubleClick. Who has the duty to provide notice?
- Standards for notice
 - Privacy Policy
 - FTC does not give clear guidance but encourages businesses to design innovative ways to provide disclosures and choice options to consumers

Deep Packet Inspection

- NebuAd Litigation
- Recent Developments Related to Phorm

Conclusion: The Future of Online and Behavioral Advertising

- Continue in the Online Space
- “Data Rich” Advertising on Cable Television
- The Privacy Debate Continues

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