

# Are You Behaving Badly?


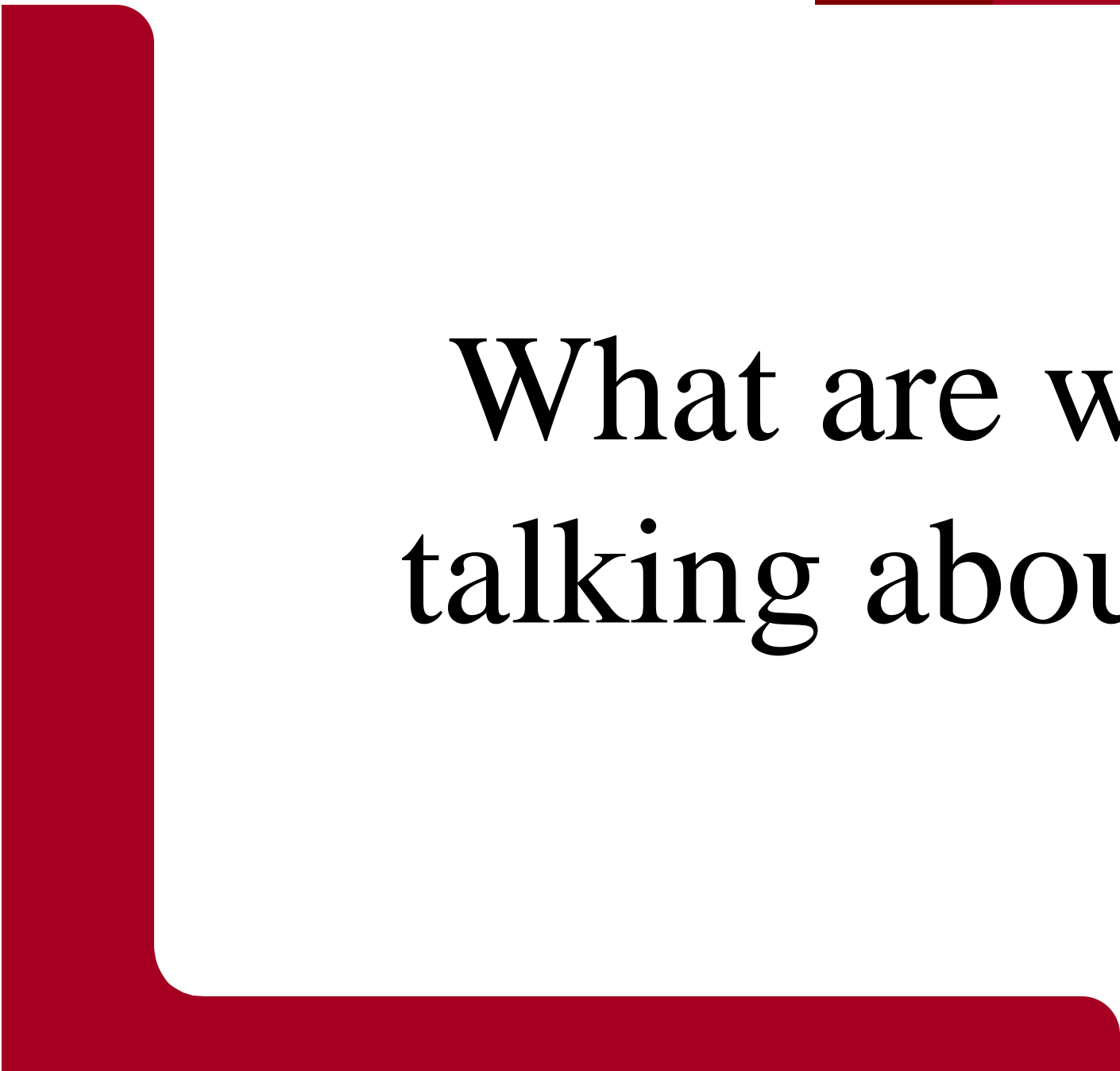
## Global Regulation of Behavioral Marketing

Reed Smith Doing Business Globally Teleseminar Series

Moderator: Douglas J. Wood (New York)

Presenters: Gregor Pryor (London)

Joseph I. Rosenbaum (New York)



What are we  
talking about?

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# “Online Behavioral Advertising”

(sometimes referred to as online behavioral marketing or targeting)

The collection of information regarding web viewing behaviors **over time** and **across unaffiliated websites** in order to **predict** consumers’ interests and the use of that information to deliver online advertising.

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# “Online Behavioral Advertising”

(sometimes referred to as online behavioral marketing or targeting)

It does not include  
activities of first parties or their agents on a  
website, ad delivery or reporting or contextual  
advertising

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We didn't start the fire ...

Federal Trade Commission

November 2007: “Behavioral Advertising Town Hall”

December 2007: Proposed online behavioral advertising privacy principles

February 2009: Released final self-regulatory principles for online behavioral advertising

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We didn't start the fire ...

Final Principles

meaningful self-regulatory principles to address the  
privacy concerns


and

meaningful enforcement mechanisms

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But the industry is trying to keep it  
under control ...

July 2009: American Association of Advertising  
Agencies, Association of National Advertisers,  
Council of Better Business Bureaus, Direct  
Marketing Association and Interactive Advertising  
Bureau

“Self Regulatory Principles for  
Online Behavioral Advertising”

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**What's the fuss about?**

**Want to stop this  
from happening?**

**Take Action!**

**Replay the movie?**



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# Who are the often unseen players?

## Third Parties

- Organizations that engage in Online Behavioral Advertising on an unaffiliated organization's website;
- Provide a clear and prominent link in their advertisements or on the home page of the website where the advertising is delivered to a notice on their website;

### OR

- Be listed on an industry developed web page that links to notice provided on the website of the third party (if it is not separately listed in the privacy notice of the website where information is collected).
- The notice available on the Third Party's website must provide consumers with choice with respect to the collection and use of information for Online Behavioral Advertising purposes.

# Who are the often unseen players?

## Website Operators

- Websites from which data is being collected by Third Parties for Online Behavioral Advertising purposes are permitted to provide notice with respect to the advertising practices occurring through its website.
- Notice should link to either an industry developed web page or to the website's privacy policy that includes a list of specific Third Parties collecting information through the website.

# Who are the often unseen players?

## Service Providers

- “Service Provider” is defined to mean an Internet service provider, a provider of a desktop application software such as a toolbar, or a provider of Internet browser software that collects data from all or substantially all URLs traversed by a web browser across unaffiliated websites for Online Behavioral Advertising.
- The principles require Service Providers to obtain consent to collect and use data for Online Behavioral Advertising purposes.

## So what's the industry to do?

Taking its cue from regulators, legislators and over 30 years of self-regulation in the traditional advertising space, at the beginning of July 2009, a group of the nation's largest media and marketing trade associations

American Association of Advertising Agencies  
Association of National Advertisers  
Direct Marketing Association  
Interactive Advertising Bureau

released self-regulatory principles to protect consumer privacy in ad-supported interactive media that will require advertisers and websites to clearly inform consumers about data collection practices, and enable them to exercise control over that information.

AND the Council of Better Business Bureaus along with the Direct Marketing Association has agreed to implement accountability programs relative to these principles.

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# Seven Self-Regulatory Principles

- Education
- Transparency
- Consumer Control
- Data Security
- Material Changes
- Sensitive Data
- Accountability

# Education

- Participate in meaningful efforts to educate consumers and businesses about behavioral advertising, the purpose of the Self-Regulatory Online Behavioral Advertising Principles, and the potential benefits and consumer choices that are available when these principles are followed.
- Requires explaining to consumers the means and implications of exercising their rights and the choices they may have.

# Education

Industry groups have already agreed on a tangible, quantitative objectives:

- Create industry-developed websites;
- A major online education campaign; and
- Achieve at least 500,000,000 (five hundred million) impressions over the next 18 months.

# Transparency

- Clear and accessible consumer disclosures regarding the type of data collected and how the data will be used to conduct behavioral advertising.
- Principle applies to both third-party entities collecting and/or using the data and the websites from which such data is being collected.
- Parties should provide “enhanced notice” on the page where data is collected through links embedded in or around advertisements or on the web page itself.
- Customers should have the ability to read notices and use the information to control the use of their personal information and choose whether they permit their information to be used for online behavioral advertising purposes.



# Consumer Control

- Applies to third parties that collect or use behavioral advertising data and the websites from which the data is collected and also applies to service providers;
- Consumers should be able to opt-out of having data collected or shared with non-affiliate websites;
- Consumers must opt-in to data collection for online behavioral advertising purposes by a service provider ; and
- Even after consent is given, service providers must provide a means for the consumer to withdraw consent.

# Data Security

Parties involved in online behavioral marketing:

- Must provide reasonable security for, and limited retention of, data collected and used for online behavioral advertising purposes;
- Must maintain appropriate physical, electronic and administrative safeguards based upon the sensitivity of the data; and
- May not retain or use such data any longer than necessary to fulfill a legitimate business need (e.g., testing and auditing) or as required by law.

# Data Security

Service providers (e.g., entities that provide Internet service, toolbars, web browsers or comparable desktop applications) must:

- Take steps (e.g., alteration, anonymization or randomization - hashing) to protect personally identifiable information;
- Provide enhanced notice and disclosure at the time the data is collected and for the non-identifiable nature of data shared with non-affiliates.

# Material Changes

- Obtain consent before applying any material changes to existing online behavioral advertising policies and practices – specifically, to the data collection-and-use policies and practices that apply to data collected prior to the effective date of any material change to these policies and practices.
- A change in policy or practice that would result in less data collection or more restrictive use of the data (i.e., less use or more restrictive use of the data) is NOT a material change that would require prior consent.

# Material Changes

- This is not intended to give consumers an absolute right to consent or to reject any and all changes, but only those that would broaden, deepen or alter, in an expansive or materially different manner, the existing collection-and-use practices.
- If a change would result in less data being collected or more constrained use of the data being collected, it may make sense or even be contractually required that a consumer be notified of the change, but consent would not be required.



# Sensitive Data

Two basic categories:

- Personal information of children under the age of 13; and
- Financial and health-related information, regardless of the age of the individual.

## Children Under the Age of 13

- If you have actual knowledge that any of the information being collected is from individuals under the age of 13, or if your website is targeted at children under the age of 13, do not collect any personal information from (or be engaged in any online behavioral advertising with regard to) any child unless you comply with the Children's Online Privacy Protection Act (COPPA) and only as specifically allowed by COPPA.
- COPPA requires you to have "verifiable parental consent" prior to collecting any personal data from children under the age of 13.

## Children Under the Age of 13

- The Federal Trade Commission routinely enforces COPPA, and violations may carry fines in excess of \$1 million, in addition to the damage to goodwill and public image that can result.
- Compliance with the provisions of COPPA is tricky.
- Will not belabor ambiguities already reported on what constitutes verifiable parental consent.
- When dealing with children under the age of 13, exercise considerable caution in connection with online marketing efforts – behavioral or otherwise – and consult legal counsel well-versed in guiding you through the compliance maze.



# Sensitive Data

## Financial and Health-Related Information (All Ages)

- Age irrelevant;
- Obtain the consent of the individual if you are collecting the information online and you intend to use it.
- One can affirmatively obtain an individual's consent in advance –during the process of registration, through formal acceptance of terms of use that clearly solicit consent or through any other means.
- Must disclose plans to share information with third parties in connection with online behavioral marketing efforts and should always provide the individual with the right and an option, at any time, to opt-out of the use of his or her information for such purposes.

# Accountability

Monitoring: Both random and systematic, depending on the circumstances;

Transparency: Widely available, easy to use tools and channels so the public, competitors and government agencies can file complaints;

Reporting: Violators publicly reported, including the reason for a finding of violation, description of the violation and actions taken; and

Compliance: The establishment of mechanisms and procedures to bring any publicly-reported entity into compliance or, if necessary, refer the violation to the appropriate government agency.

# Accountability

- Coordination and consistency among programs is required to promote efficiencies and avoid multiple enforcement actions against the same entity for the same violation.
- The Direct Marketing Association (“DMA”) and National Advertising Review Council of the Council of Better Business Bureaus (“CBBB”), have agreed to collaborate, with the stated goal of having something in place by early 2010.

A long time ago in a galaxy far

Having put together these self-regulatory guidelines, with the FTC's blessing, with all of the major participants in the advertising industry collaborating and even positive reviews from Europe and the rest of the world . . . . .

Perhaps inter-galactic war could be avoided with such A New Hope . . .

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But alas . . . Quickly the Empire Strikes Back releasing a new call for further and increased regulation of online behavioral marketing. . .

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# Consumer & Privacy Advocates Unhappy!

In early September, a coalition of 10 consumer and privacy advocacy groups:

Center for Digital Democracy  
Consumer Federation of America  
Consumers Union  
Consumer Watchdog  
Electronic Frontier Foundation  
Privacy Lives  
Privacy Rights Clearinghouse  
Privacy Times  
U.S. Public Interest Research Group  
The World Privacy Forum,

released a draft of their own principles, in the form of a Legislative Primer, entitled Online Behavioral Tracking and Targeting Concerns and Solutions.

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# The Coalition Wants More Legislative Consumer Privacy Guarantees

- “Developments in the digital age urgently require the application of Fair Information Practices to new business practices.”
- “Today, electronic information from consumers is collected, compiled, and sold; all done without reasonable safeguards.”
- Noted that for the past four decades the foundation of U.S. privacy policies has been based on Fair Information Practices: collection limitation, data quality, purpose specification, use limitation, security safeguards, openness, individual participation, and accountability.
- Called on Congress to apply those principles in legislation to protect consumer information and privacy.



# The Coalition Wants More Legislative Consumer Privacy Guarantees

Behavioral advertising, where a user's online activity is tracked so that ads can be served based on the user's behavior, was cited as a particular concern.

“Tracking people's every move online is an invasion of privacy. Online behavioral tracking is even more distressing when consumers aren't aware who is tracking them, that it's happening, or how the information will be used. Often consumers are not asked for their consent and have no meaningful control over the collection and use of their information, often by third parties with which they have no relationships.”

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# The Coalition Wants More Legislative Consumer Privacy Guarantees

- Sensitive information should not be collected or used for behavioral tracking or targeting.
- No behavioral data should be collected or used from anyone under age 18 to the extent that age can be inferred.
- Web sites and ad networks shouldn't be able to collect or use behavioral data for more than 24 hours without getting the individual's affirmative consent.
- Behavioral data shouldn't be used to unfairly discriminate against people or in any way that would affect an individual's credit, education, employment, insurance, or access to government benefits.

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# And the battle continues ...

## Industry Response to Coalition

A spokesperson for the Progress & Freedom Foundation has called the coalition members anti-consumer elitists, who presume consumers are too stupid or lazy to make their own decisions about privacy and ignore benefits to consumers, such as more relevant advertising, more and better content.

# And the battle continues ...

## Industry Response to Coalition

- Advertising industry and network providers cite increased consumer costs for content and functionality would result from legislative and regulatory changes making requirements beyond those embodied in the self-regulatory principles more costly, less efficient and potentially harmful to consumers preferences and pocketbooks.
- Industry proponents point out, regulatory advocates haven't demonstrated any harm to consumers that would justify the type of broad and sweeping preemptive regulation the coalition wants.



# And the battle continues ...

## Industry Response to Coalition

Since technology, advertising media and the environment continue to dynamically evolve, wouldn't policy-makers be better off focusing on educating consumers and empowering them by promoting development of better privacy-management tools?

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# And the battle continues ...

## Industry Response to Coalition

That said, some observers note that current administration is much more regulation and consumer-regulation friendly and although there are some who are growing weary of Congress invading every single industry with yet a fresh set of regulatory guidelines, many believe that only aggressive and proactive adoption of some of the measures the privacy groups are suggesting, in the spirit of compromise and consistent with many of the principles already proposed can avoid some regulation. Absent some clear action and enforcement mechanisms, sticking to arguments that self-regulation is sufficient or that regulation is bad for business or that consumers don't really care, may not be enough. Then again, perhaps, the principles, coupled with prompt adoption of strong enforcement and accountability measures by the industry, may be.

# Congress is Poised to Act: Phantom Menace or Clone Wars?

Self-regulation is to be commended, BUT Congress still believes voluntary principles do NOT:

- go far enough
- guarantee every company will abide by them

Thus, Congress is proceeding with draft legislation (not released yet) to develop additional statutory privacy protections in the areas of:

Disclosure • Collection • Use

and

will include Safe Harbor protections for companies that adhere to the statutory requirements

FTC will be given the authority to enforce the legislation

AND

develop and define the specific policies and practices that would qualify for safe harbor protection

THE  
PHANTOM  
MENACE



Rep. Rick Boucher (D-Va.)  
Chairman of the Subcommittee on  
Communications, Technology and the Internet.

# And the battle continues globally...

## Case study from Europe

- Phorm behavioural targeting service investigated by UK Information Commissioner and given a (provisionally) clean bill of health.
- Negative press reports prompt second investigation.
- Open Rights Group, an Internet consumer pressure group, writes to major Internet companies and asks them to boycott Phorm technology.
- European Commission steps in and brings a case against the UK Government regarding its implementation of data protection Directives.
- Classic example of consumer pressure inciting regulatory intervention. EC case ongoing, Phorm now dead in the water.

## Changing the Tires on a Moving Car?

- While one is always careful to ensure that at some point governmental intervention may be necessary to protect consumers from those who abuse the system or violate the law, the question is whether a concretized and codified piece of legislation is likely to remain relevant or even defensible in the face of innovation and technology which could not be predicted 5 years ago and will remain unpredictable in the future.
- Development, display and distribution mechanism will evolve dynamically as technology and innovation continue.



## Changing the Tires on a Moving Car?

- Notions of consumer privacy and data protection will continue to evolve and be difficult to harmonize across nations, across cultural and local boundaries and because privacy is and has always been context specific, in time and space.
- Even the role of government in protecting one's right to privacy and the use of information about oneself, is ever changing.
- Advertising models and economics will continue to change, with metrics and quantification methodologies being sparred and argued over, recognizing that even the roles of advertisers, agencies, media buyers, broadcast and publishing networks as well as ISPs, search engine, browser and web hosting companies – the technology players – will also continue to change.

## Changing the Tires on a Moving Car?

- Wireless and mobile devices will continue to expand the domain of advertising and challenge our ability to capture consumers' interest on tiny mobile screens, while the opposite is taking place in our living rooms – with the separation of desktop or laptop computing and home television and entertainment centers being increasingly irrelevant (and screens becoming larger).
- Online gaming and the interplay between gaming console, entertainment and product placement, virtual worlds and display advertising are all blurring (pardon the pun) right before our eyes?
- Under these circumstances, traditional regulation as we knew it, may not make sense.



“Now this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning.”

Sir Winston Churchill

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# Questions



**Thank You !**

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