

Advertising Industry Collaboration Releases Self- Regulatory Online Behavioral Advertising Principles

BY JOSEPH I. ROSENBAUM

Joseph I. Rosenbaum (JRosenbaum@ReedSmith.com) is based in New York City and chairs the Advertising Technology & Media Law Practice at Reed Smith LLP. Assisting in the development of this article were Stacy Marcus and Anthony S. Traymore.

Introduction

A group of the nation's largest media and marketing trade associations recently 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.

In an extraordinary show of industry cooperation and collaboration, the American Association of Advertising Agencies, the Association of National Advertisers, the Direct Marketing Association, and the Interactive Advertising Bureau last week released a series of self-regulatory principles, intended to be implemented by 2010 and designed to protect consumer privacy in advertising-supported interactive media. As part of the announcement, the Council of Better Business Bureaus along with the DMA, has agreed to implement accountability programs relative to these principles.

These self-regulatory guidelines come on the heels of a recently released study commissioned by the IAB entitled "Economic Value of the Ad-

vertising-Supported Internet Ecosystem," which reported that the advertising-supported Internet represents 2.1 percent of the total U.S. gross domestic product (GDP), contributing \$300 billion to the economy, and has created 3.1 million U.S. jobs.

"Guided by the seven Principles we have announced today, the advertising community is developing one of the most comprehensive self-regulatory programs ever undertaken by the business community. The fast-changing online marketing environment is best addressed by a self-regulatory framework that is transparent, flexible and accountable to consumers' needs and concerns. On behalf of our 360 members, who collectively invest more than \$200 billion annually in marketing communications, we look forward to jointly developing a comprehensive business system that respects and honors these Principles," said Bob Liodice, President and CEO, (ANA).

"This historic collaboration represents businesses and trade associations working together to advance the public interest," said Randall Rothenberg, President and CEO, IAB. "Although consumers have registered few if any complaints about Internet privacy, surveys show they are concerned about their privacy. We are acting early and aggressively on their concerns, to reinforce their trust in this vital medium that contributes so significantly to the U.S. economy."

The seven Principles designed to address consumer concerns about use of personal information without wreaking havoc to advertising that subsidizes and supports the vast array of free on-line content relate to:

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

Self-Regulatory Online Behavioral Advertising Principle No. 1: Education

The Education principle requires everyone in the online behavioral environment to 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, and to explain to consumers the means and implications of exercising their rights and the choices they may have.

While the specifics of all of the proposed educational outreach are yet to be established within the framework of the industry groups that have formulated these principles, the one thing that was agreed on as a tangible, quantitative objective is that through industry-developed website(s) and a major online education campaign, the initial educational outreach would be developed to achieve at least 500,000,000 (yes, that's five hundred million) impressions over the next 18 months.

Self-Regulatory Online Behavioral Advertising Principle No. 2: Transparency

The Transparency principle seeks clear and accessible consumer disclosures regarding the type of data collected and how the data will be used to conduct behavioral advertising. Because behavioral advertising is often conducted by third-party advertising networks that lease space on a website, the principle applies to both third-party entities collecting and/or using the data, and the websites from which such data is being collected.

Under this principle, these parties would provide "enhanced notice" on the page where data is collected through links embedded in or around advertisements, or on the web page itself. Customers will have the ability to read these notices and use the information to enable themselves to take control over the use of their personal information, choosing whether they would like to per-

mit their information to be used for online behavioral advertising purposes.

Self-Regulatory Online Behavioral Advertising Principle No. 3: Consumer Control

The Consumer Control principle relates to the practice recommended by the report of providing consumers with additional control over whether data is collected about them and whether it is shared with others. The principle applies to third parties that collect or use behavioral advertising data and the websites from which the data is collected. The principle also applies to "service providers" (i.e., parties that provide Internet access services, toolbars, Internet browsers or comparable services, and who are engaged in online behavioral advertising).

Through notices that are described under the Transparency principle, with respect to third parties and websites, consumers should be able to control the use and collection of their personally identifiable information by opting-out of having data collected or shared with non-affiliate websites. With respect to service providers, because they potentially can, by the nature of the services they provide, gain access to all or substantially all online behavioral data of a particular user when that user is online with or through the service provider, the Consumer Control principle requires industry participants to follow practices that require consumers to opt-in to data collection for online behavioral advertising purposes by the service provider. Further, even after consent is given, service providers must provide a means for the consumer to withdraw her or his consent.

Self-Regulatory Online Behavioral Advertising Principle No. 4: Data Security

The Data Security principle requires entities to provide reasonable security for, and limited retention of, data collected and used for online behavioral advertising purposes. Consistent with the FTC standard, entities must maintain ap-

appropriate physical, electronic and administrative safeguards based upon the sensitivity of the data. Further, data collected and used may not be retained any longer than necessary to fulfill a legitimate business need (e.g., testing and auditing) or as required by law. In addition, the principle sets forth the steps that service providers (e.g., entities that provide Internet service, toolbars, web browsers or comparable desktop applications) must take in connection with data collection and use, including alteration, anonymization or randomization (e.g., hashing) of personally identifiable information; enhanced notice and disclosure at the time the data is collected; and the protection of the non-identifiable nature of data shared with non-affiliates. Under the Data Security principle, service providers will be held accountable for compliance with these principles in connection with their collection and use of data for online behavioral advertising purposes.

Self-Regulatory Online Behavioral Advertising Principle No. 5: Material Changes

The Material Changes principle requires an organization engaged in behavioral advertising to obtain consent before applying any material changes to its 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.

This principle also makes it clear that a change in policy or practice that would result in less data collection or more restrictive use of the data (i.e., less or more restrictive use of the data than existing usage) is *not* a material change that would require prior consent. This makes sense considering that the purpose of the principle, when coupled with Transparency and Consumer Control, is not to merely 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 of the organization. If a change would result in less data being

collected or more constrained use of the data being collected, a consumer would likely be notified of the change, but consent would not be required.

Self-Regulatory Online Behavioral Advertising Principle No. 6: Sensitive Data

The Sensitive Data principle segments sensitive data into 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.

With respect to the collection and use of data for online behavioral marketing purposes, 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, the Sensitive Data principle states you should not be collecting any personal information from or be engaged in any online behavioral advertising with regard to that individual, unless you comply with the Children's Online Privacy Protection Act (COPPA), and then, only to the extent 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. 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. While this post will not belabor the ambiguities that have already been reported about what constitutes “verifiable parental consent”, suffice it to say that when dealing with children under the age of 13, it is best to exercise considerable caution in connection with online marketing efforts – behavioral or otherwise – and to always consult an attorney well-versed in guiding you through the compliance maze.

With respect to personal information related to an individual's financial or health status, age is not relevant to this sixth principle. What is relevant is the requirement that you obtain the consent of the individual if you are collecting the information online and you intend to use it. Prudent practice would indicate you should affirmatively ob-

tain the individual's consent in advance – whether during the process of registration, through formal acceptance of terms of use that clearly solicit consent, or through any other means. Clearly, if you plan to share this information with third parties in connection with online behavioral marketing efforts, you should indicate that to the individual. In all cases, the principle notes that you 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.

Self-Regulatory Online Behavioral Advertising Principle No. 7: Accountability

The Accountability principle is the one concerned with the “effect,” rather than the “cause,” and calls upon the industry to establish and implement programs to monitor its online behavioral advertising activities and take steps to ensure compliance with the principles within a self-regulatory framework. In the context of the self-regulatory principles, Accountability means – monitoring, transparency, reporting and compliance:

- **Monitoring:** Both random and systematic, depending on the circumstances;
- **Transparency:** Widely available, easy to use communication tools and channels so that the public, competitors and government agencies can file complaints when the Principles are violated;
- **Reporting:** Violators will be publicly reported, including the reason for a finding of violation, a description of the violation, and the actions taken in response to, and to correct, the non-compliance; and
- **Compliance:** The establishment of mechanisms and procedures to bring any publicly-reported entity into compliance with the principles, or, if necessary, to refer the violation to the appropriate government agency.

The Accountability principle also notes the importance of coordination and consistency among programs to promote efficiencies in implementa-

tion, so as to avoid multiple enforcement actions against the same entity for the same violation.

While the blueprint for the specifics surrounding the proposed monitoring, transparency, reporting and compliance initiatives under this principle are yet to be drawn, the Direct Marketing Association (“DMA”) and National Advertising Review Council of the Council of Better Business Bureaus (“CBBB”), have agreed to cooperate and collaborate, with the stated goal of having something in place by early 2010. Both the DMA and the CBBB were called upon to provide leadership in this area because of their widely respected existing self-regulatory accountability programs. The DMA also has agreed to integrate the principles into its longstanding DMA Self-Regulatory and Compliance Tools.

Conclusion

In a speech in November of 1942, Sir Winston Churchill remarked, “Now this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning.” The “Self-Regulatory Principles for Online Behavioral Advertising,” consistent with the Federal Trade Commission’s support of industry self-regulation, are patterned after the highly successful record of the Council of Better Business Bureaus in regulating the traditional advertising industry for over 30 years – a record that includes industry collaboration, self-regulatory principles and monitoring and close collaboration with the Federal Trade Commission over the years as the industry and advertising models evolved.

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 to ask is whether and to what extent new or different regulation is required. That is certainly a question being asked (and being answered) by a coalition of 10 consumer advocacy and privacy groups in its recently released report “Online Behavioral Tracking and Targeting Concerns and Solutions” [<http://www.legalbytes.com/2009/09/articles/social-media-1/privacy-and-consumer-groups-want-more-than-just-selfregulation/>] in

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response to the industry principles. More importantly, one may ask 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 five years ago and, I believe, will remain relatively unpredictable in the future.

That said, there are some aspects of advertising that are predictable. Development, display and distribution mechanism will evolve dynamically as technology and innovation continue. 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. What might have been considered private in 16th century France is very different from the concept of privacy that permeates the hearts and minds of citizens of Japan or Brazil today. Indeed, even the role of government in protecting one's right to privacy and the use of information about oneself, is an ever-changing one.

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 – is and will continue to change. 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). Oh, and did we forget to mention how 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?

So if you have ever attempted to change a tire on a moving automobile, you have a vision of what the 'industry' is and will look like in the future. Under these circumstances, traditional regulation

as we knew it, may not make sense. What might make sense is a more dynamic system of regulation. One that is more flexible, more adaptable and more capable of interacting and reacting to changing circumstances, mechanisms, technology and the environment. Perhaps allowing the industry and the Federal Trade Commission, in conjunction with other agencies already tasked with the mission of protecting consumers within their particular areas of authority (e.g., FDA [<http://www.fda.gov/>], FCC [<http://www.fcc.gov/>], FAA [<http://www.faa.gov/>] and the list goes on) to develop self-regulatory enforcement mechanisms, referral mechanisms and a track record may be the best way to determine what, where and when regulation may be needed.

Litigation

BY ZACHARY LEVINE*

Zachary Levine currently works for a Century City, CA law firm. He recently graduated from Southwestern Law School where he was a member of the Moot Court Honors Program and participant in the John Marshall Information Technology and Privacy Law Competition.

Transfers of License by Operation of Law: A Corporation by Any Other Name is a Breach of Contract

Citation: *Cincom Sys., Inc. v. Novelis Corp.*, No. 07-4142 (6th Cir. Sept. 25, 2009).

Plaintiff Cincom Systems, Inc. ("Cincom") licensed two pieces of proprietary software to Alcon Rolled Products Division ("Alcon Ohio"), a