

Privacy Issues in Online & Wireless Advertising & Entertainment: Brave New World or 1984

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The Future Of Advertising



Basic “Old” Privacy Rights

- ❖ Intrusion on solitude or private affairs
- ❖ Public disclosure of embarrassing private facts
- ❖ Publicity placing one in a false light
- ❖ Appropriation of name or likeness for commercial advantage

1988: In the battle to block Robert Bork from the Supreme Court, someone leaked his video rentals. In response, Congress banned video stores from disclosing titles of films people rent.

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1993 New Yorker Cartoon

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On the Internet, nobody knows you're a dog

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Hot “New” Privacy Rights



- ❖ What Information is Collected? From Whom? When? How?
 - Aggregate; Non-Identifiable; Personally Identifiable; Etc.
- ❖ How Will Information Be Maintained? Shared? Used?
- ❖ Who Will Have Access to Information? When? For What?
 - Federal Laws (CAN-SPAM; GLB; HIPAA; etc)
 - State Laws (Privacy; Publicity; Data Breach)
 - Disclosures (Where? When? How?)
 - Consent (Opt Out? Opt In? Assent - eSign)
 - Rights (Revoke; Modify; Parents & Children)
 - Modifications to Policy (Effective Date; Materiality)

2008: A federal judge hearing a \$1 billion copyright complaint by Viacom ordered YouTube to turn over online records (computer addresses) used to watch videos. The judge dismissed privacy concerns as "speculative".

[P.S. The judge graduated law school before the photocopier was invented!]

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Web Technology, GPS, RFID and Mobile Devices Will Increase Privacy Concerns Over Behavioral Advertising

- ❖ User Search & Input
- ❖ Geo Targeting – Location, Location, Location
- ❖ Coupling Location with Context
- ❖ Coupling Location with Behavior
- ❖ Location Sharing Capabilities
 - Among Users
 - Among Devices
- ❖ Social Networking Coupled with Location Sharing
- ❖ Surveillance Capabilities



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Wireless & Mobile

Exacerbates the Issues Further By Increasing Targeted Advertising & Marketing

- User Search & Input
- Geo Targeting – Location, Location, Location
- Coupling Location with Context
- Coupling Location with Behavior
- Location Sharing Capabilities
 - Among Users
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The Internet is a Network of Networks

- The Internet was built in a way that made information available and easily “distributable”
 - At the most basic level it was always easy to pass a link along to anyone
 - The Internet’s infrastructure protocols and coding languages allow information to be delivered, collated, and displayed all in one place
- Hosted information and services solutions are efficient, cost-effective, barrier eliminating, and are the reason for over a decade of digital information innovation
 - In other words, companies outsource much of their advertising and web technology solutions and support
- Every web site is a syndicator of content or services, a beneficiary of syndicated content or services – or both
 - Browser plug-ins can be used to easily see these relationships
 - Examples:
 - www.nytimes.com
 - www.americanexpress.com (Even marketers use and need third-parties)

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With These Connections Come Questions

- Is everything I do online tracked by companies I don't have any relationship with?
 - *Your browser activity across multiple websites can be tracked by ad servers and ad networks without you being "on" their sites*
- How do they know I want to fly to San Francisco?
 - *A company like Orbitz can store small bits of information, including an airport you searched for on its site, in a cookie in a browser; if on another site, one of Orbitz' ads sees that cookie it can dynamically insert information on San Francisco fares into the ad*
- Is my credit card, SSN, etc, safe?
 - *Stealing PII does not occur in an ad; it occurs through viruses, spyware, and other more direct methods like "phishing"*
- Did I get spyware/a virus on my computer through an ad?
 - *Fraudulent ads have been used to trick users into installing programs onto their computers that can then steal PII and other sensitive data*

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Internet Data

Gathering Methods



- There are three ways user data can be gathered via web browsers
 - Internet Infrastructure Information
 - Cookies
 - Logged-in Environments
- Each method has different limitations
- Each method inherently implies different levels of active participation

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Internet Infrastructure Information

- In order to get data from A to B, certain fundamental information is included in every internet data packet
 - Browsers cannot alter this information
- A standard browser request includes:
 - IP Address of user's ISP or computer
 - File requested (images, webpage, web services, etc)
 - Webpage that requested the file (if any)
 - Type of program requesting the file (browser, bot, etc)
- This can tell an ad server or web server a lot about an IP address, but rarely can anything but an physical address be tied to an individual
 - Vast majority of IP addresses are “gateway” based, meaning ISP entry-points or businesses; very few individuals have an exposed, permanent IP address

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Cookies

- Cookies can only be set and read by the same domain
 - A cookie set on mail.yahoo.com can be read by my.yahoo.com
 - A cookie set on yahoo.com cannot be read by washingtonpost.com
- Web coding language (HTML) allows for multiple domains to be shown in a browser on a single webpage
 - An ad is usually served on a primary site by a hosted third-party provider, such as Atlas or DoubleClick
 - This ad gets shown on a site like nytimes.com through a seamless “window” that is actually a view into an Atlas/DoubleClick “webpage”
 - Other than ads, content from third parties, including news wires, widgets, stock information, etc, can be displayed in the same way
 - When the third-party ad/content shows up in the browser, the third-party domain can read its own cookies, even though the browser location bar says the webpage being visited is another domain

(<http://www.washingtonpost.com>

vs. <http://www.doubleclick.net>)

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Cookies

“Holes” in the washingtonpost.com are filled with ads. These ads are actually on other “sites” and that is how cookies from other sites can be set/read on the washingtonpost.com



DoubleClick.net

Diageo.com

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Cookies

- Common Third Parties and Domain Examples
 - Agency and Publisher Ad Servers
 - Atlas (atldmt.com)
 - DoubleClick (DoubleClick.net & 2mdn.net)
 - Ad Networks
 - Platform-A (Advertising.com)
 - ValueClick (ValueClick.net)
 - Tacoda (Tacoda.net)
 - Revenue Science (Revsci.net)
 - Analytics
 - Omniture
 - WebTrends
 - Google (googleanalytics.com)
 - Quantcast (Quantserve.net)

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Logged-In

Environments

- Sites that require logins, including web mail, news content, banking, etc, can track almost all user activity and link it directly to any user-entered profile data
- Some sites use cookies but most secure sites that hold personal information use server-based login software
- This software cannot be stopped from tracking user activity by having the browser block cookies
- Data collected by logged-in environments cannot be shared with other domains through a browser

Hotels.com Multi Channel

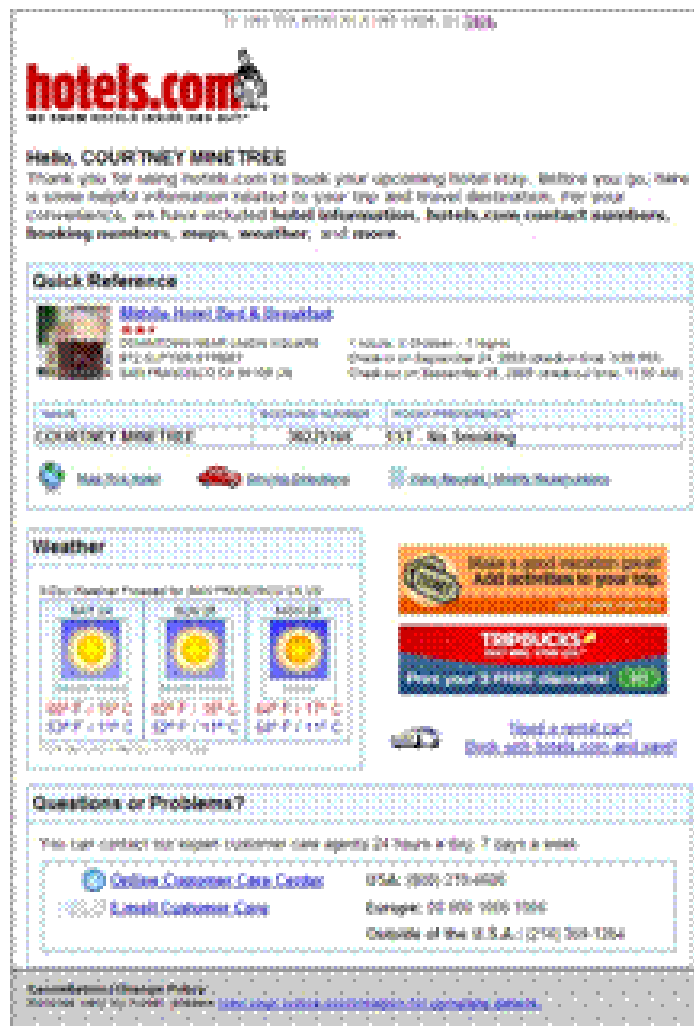
A key element of their program includes a **unique phone number tied directly to specific emails...**

When someone clicks a link in the email, the phone number that appears at the top of all subsequent web pages on the site is this special call center number that is specific to the email.

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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.

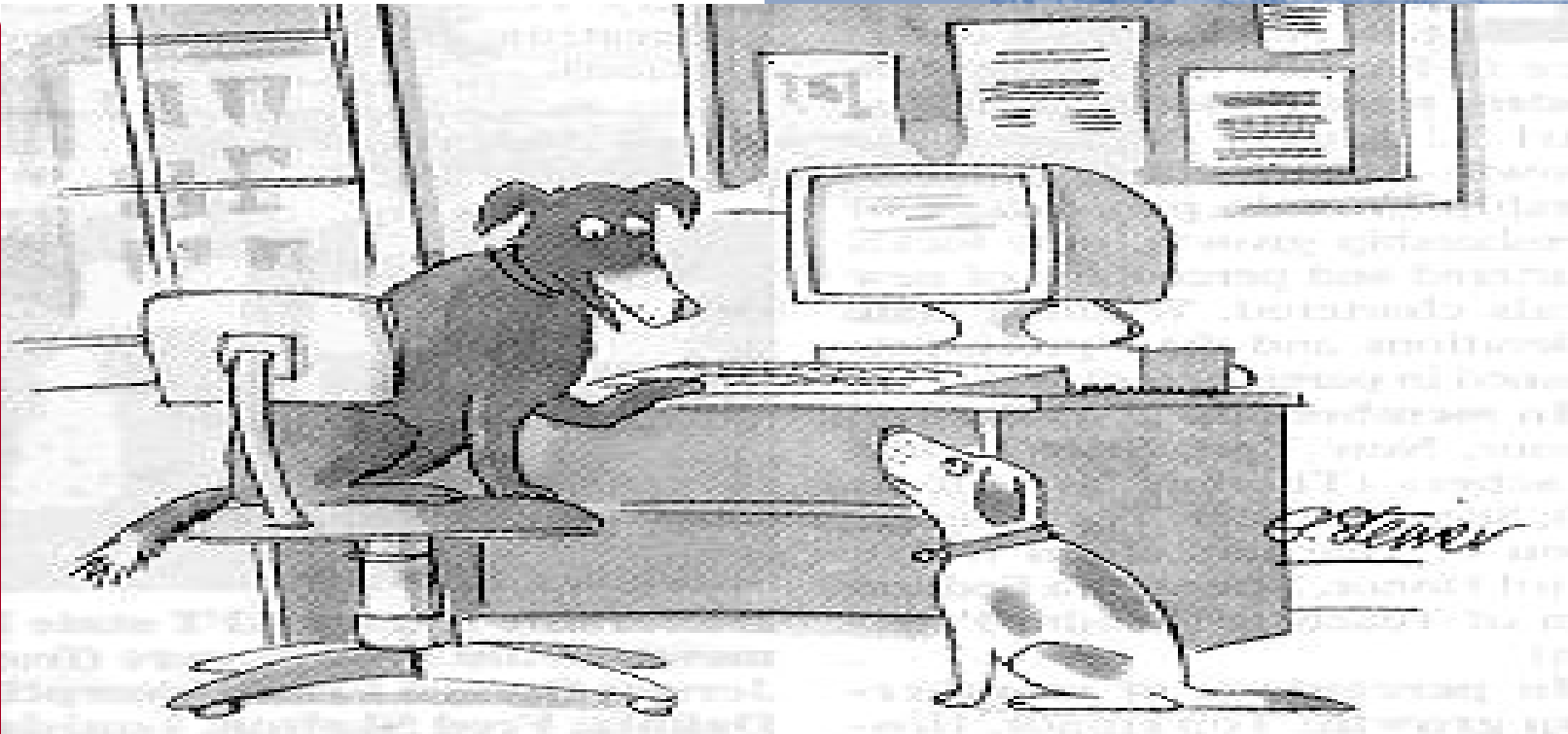
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2010 Updated Version

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On the Internet, everybody knows you're a male beagle who prefers dry dog food, sneaks into the master's bedroom to lie on the bed watching cable all day and who wears a specially designed, blue flea collar.

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Online Behavioral Advertising

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

Does include third parties such as advertising networks, service providers and technology providers.

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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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Final Principles

meaningful self-regulatory principles to
address the privacy concerns
and
meaningful enforcement mechanisms

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Can industry keep it under control?



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 for Online Behavioral Advertising”

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

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Education

Meaningful efforts to educate consumers and businesses about behavioral advertising and the potential benefits and consumer choices that are available when these principles are followed.

Explain to consumers the means and implications of exercising their rights and the choices they have.

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 ensuing 18 months.

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Transparency

- Clear consumer disclosures regarding the collection and use of data;
- Applies to both third-parties and the websites from which data is collected.
- Provide “enhanced notice” on the page where data is collected through links in or around ads or on the web page itself.
- Customers should have the ability to use the information to control use of their personal information and choose whether they permit their information to be used for online behavioral advertising purposes.

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Consumer Control

- 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.

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Data Security

- Provide reasonable security for, and limited retention of, data collected and used for online behavioral advertising purposes;
 - Maintain physical, electronic and administrative safeguards based upon the sensitivity of the data; and
 - Do not retain or use data any longer than necessary to fulfill a legitimate business need (e.g., testing and auditing) or as required by law.
-
- 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; and
 - Provide enhanced notice and disclosure at the time the data is collected.

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Material Changes

- Obtain consent before applying 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.

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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.

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Children Under 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 "verifiable parental consent" prior to collecting any personal data from children under 13.

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Children Under 13

- The FTC 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 is tricky.
- Ambiguities 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 knowledgeable legal counsel.

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Financial and Health-Related Information (All Ages)



Age irrelevant;

Obtain consent of the individual if collecting information online and intend to use it.

One can obtain an individual's consent in advance – during 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 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.

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Accountability



Monitoring: random and systematic, depending on the circumstances;

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

Reporting: violators publicly reported, including reasons for a finding of violation, description and actions taken; and

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

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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 Future of Online
Behavioral Advertising



**Want to stop this
from happening?**

Take Action!

Replay the movie?



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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The battle continues



A spokesperson for the Progress & Freedom Foundation called 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.

Advertising industry and network providers cite increased 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 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.

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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Congress Poised to Act

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



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Resources for you

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*Serving Clients in
a Digital World*

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Legal Bytes

Advertisers Online and on the Frontline

New York's Attorney General has just settled actions against Priceline, Travelocity and Cingular Wireless for promoting products and services using "adware"—the first time a law enforcement agency has held an advertiser responsible for ads displayed through adware.

These settlements require the advertisers (and affiliates—presumably sales agents and promotional partners) to give consumers full disclosure of any adware (including adware bundled in other software); ensure advertising has a conspicuous, identifiable brand; obtain consent from the consumer to download and allow the adware to operate on the computer; and make it reasonably simple for a consumer

Light Bytes

"To laugh often and much, to win
the respect of intelligent people

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Adlaw News

[Group Releases Report on TV Violence; Urges Advertisers To Weigh In](#)
January 29, 2007 - The advertising industry—which regularly takes a beating from consumer groups for a whole host of reasons—is now being prodded to go beyond focusing on the content of commercials to take the lead in curbing violent television programming.

Adlaw Features

[Douglas Wood, Lead Negotiator for the Joint Policy Committee on Broadcast Union Talent Relations chairs panel on the 2006 SAG/AFTRA/UPC Extension Agreement](#)
January 30, 2007 - At the 3rd annual ANA Advertising Law & Business Affairs Conference in New York City on January 18, Douglas Wood, General Counsel to the ANA and the advertising industry's Lead Negotiator opposite the unions representing actors, outlined the provisions of the

Adlaw Forum

[The Prozac Case](#)
by Gerhard W. Volz
[Read more](#)


Ratiopharm España, a Spanish manufacturer of generic pharmaceuticals, challenged

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Privacy in the Age of Social Media

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Thank you

Time for Your Questions



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