
Communications Industry Awaits Government's Answer to Behavioral Advertising

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It's potentially the most successful Internet advertising strategy the web has ever seen. It has caught the attention of tech companies, investors and advertisers alike. And now the regulators are moving in. The focus of this flurry of interest? Behavioral advertising.

"Companies always want to improve the effectiveness of advertising," says Lynn Charytan, a partner in WilmerHale's Regulatory and Government Affairs Department and the chair of the Communications Practice Group. "With behavioral advertising, people can be targeted based on what websites they visit and other online activities. But new ventures like this create new risks. We're helping our clients navigate unknown terrain."

Uncertainty about the regulatory direction the government is likely to take concerning this new technique has created a potential legal minefield for players in the space of online advertising. WilmerHale, with its depth of experience in communications and government affairs, has established a practice group focused on privacy and data security to serve, among others, the many Internet companies, phone companies and wireless and wireline investors who have turned to the firm to make sure they're ready for the regulatory hurdles that might arise in this area. Leading this practice area are Washington partners Charytan, Samir Jain and J. Beckwith Burr.

"Behavioral advertising is potentially so lucrative that there is a strong desire on the part of industry to find some way to make it happen, but that is running up against significant legal uncertainty and risks," agrees Jain.

Defined by the FTC as "the practice of tracking consumers' activities online to target advertising," behavioral advertising involves the collection of information about searches a web user has conducted, pages visited and content viewed. Sophisticated algorithms are then applied to match relevant ads to the individual's consumer profile. A web surfer who has just done some research on home lending, read a couple of articles on the housing market and searched property value records, for example, might be greeted with a real estate or home financing ad when he or she moves on to another online destination, whether or not the next site is real estate-related. By following the consumer around the Internet, advertisers are freed from the constraints of more traditional contextual advertising, gaining the ability to serve consumers with ads relevant to their

interests, even on completely unrelated sites.

But the tracking process and the data it generates are controversial. Privacy watchdogs are advocating that lawmakers outlaw or significantly limit behavioral advertising, due to concerns that the very nature of the tracking process poses a threat to privacy, transparency and consumer autonomy, and that the data gathered may fall into the wrong hands or be used for unanticipated purposes. Proponents defend the practice by pointing out that Web surfers benefit from receiving more relevant ads, as well as content or services that can be provided at lower prices—or even for free—based on subsidization from online advertising.

The push from watchdog groups has led to questions from Capitol Hill surrounding data collection and privacy policies. As is often the case, technology has outpaced the legislative branch; there is currently no broad privacy legislation specifically governing advertising on the Internet, and the applicability of the laws that do exist is fraught with uncertainty. A number of elected officials and other policy makers concede they do not have a clear grasp of what companies are able to do with the data at their disposal and what the law should and should not allow. And, if the view of House Subcommittee on Telecommunication and the Internet Chairman Ed Markey is any indication, what they do know about behavioral advertising, many regard with suspicion. Markey recently likened the technique to the post office opening an individual's mail.

Last month the House Energy and Commerce Committee wrote to executives at many of the country's largest broadband providers and Web companies, including AT&T, Comcast, Google, Microsoft and Yahoo!, asking for information on data collection practices related to “the growing trend of companies tailoring Internet advertising based on consumers' Internet search, surfing or other use.”

“Questions coming from Congress have stopped a lot of folks in their tracks,” says Charytan. “And even without that, there are significant legal questions here that we've urged our clients to consider carefully before jumping into this area.”

Privacy groups have suggested that behavioral advertising may, at least in some circumstances, violate federal and state eavesdropping laws. The Federal Trade Commission is also looking into the practice. Although the Commission at this point has opted to advocate self-regulation for targeted advertising generally, it remains to be seen whether policymakers will conclude that statutory or regulatory restrictions or prohibitions are required.