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Facebook Controversy and FTC Report Reaffirm Need for Clarity and Transparency in Website Terms

by Michael P. Heuga and Anna Park

The uproar last week over Facebook's proposed changes to its terms of service illustrates loudly and clearly that although many people may not read the "fine print" on websites, there are plenty of interested parties who do. Whether your company is engaged in an Internet-based business or simply maintains a web-site as one mechanism for interacting with customers or other members of the public, it is just as important now as it has been since the early days of the Internet to state the privacy and other terms of your online presence with complete transparency, in a clear, concise, and consumer-friendly manner.

A report issued by the Federal Trade Commission (FTC) on February 12, 2009, is the latest guidance from the FTC to drive home these points in the context of online privacy terms.[1]

Officially, the report was published to set forth the FTC's current thinking on consumer privacy issues for companies engaged in "online behavioral advertising"—the practice of tracking consumers' activities online, including searches a consumer has conducted, web pages visited, and content viewed, in order to facilitate advertising targeted at the consumer's interests. This has been the subject of examination by the FTC for nearly a decade.

The FTC acknowledged that the development of best privacy practices in the area of online behavioral advertising is an evolving process, and indicated that it continues to support industry self-regulation in this area. Nevertheless, it is clear that the FTC's patience with this approach is waning. Indeed, it would not be surprising to see increased regulatory and enforcement activity in the future by the FTC and other authorities concerning the online privacy practices of companies in all industries, not just those engaged in online behavioral advertising.

[1] FTC Staff Report: Self-Regulatory Principles For Online Behavioral Advertising, which may be accessed at http://www.ftc.gov/opa/2009/02/behavad.shtm.

In this regard, the FTC's recent report is instructive for all companies because it reaffirms a few long-established privacy standards relevant to companies operating in any capacity online. These standards include:

First, your company's online privacy terms should be stated in a clear, concise, consumer-friendly and easily accessible manner.

Second, your privacy practices should be described with as much transparency as possible. For example, it is critical to describe accurately all of the data about users that you collect online, and to state clearly how that data is stored, protected, used, and (if relevant) shared.

Of note on this point—the FTC's report reflects an evolving decrease in emphasis on whether data can be categorized as so-called personally identifiable information or "PII" (such as a name, email address, or Social Security number) as opposed to "Non-PII" (such as anonymous tracking data). In the FTC's words, so long as the data collected "reasonably could be associated with a particular consumer or with a particular computer or device," disclosure of its collection is favored by the FTC.

Third, special care should be taken when collecting "sensitive" data from consumers. The FTC expressed a preference for companies to collect sensitive data only after obtaining the consumer's affirmative express consent. Although the parameters of what qualifies as "sensitive" remain unsettled, some examples put forth in the FTC report include financial information, information about children, health information, and Social Security numbers.

Fourth, you must have reasonable security measures implemented that are designed to prevent unauthorized disclosures of data collected from consumers. This is one standard that often trips up companies because they typically claim to maintain reasonable security measures, but when a lapse occurs and consumer data is disclosed, the measures in hindsight appear not to have been sufficient.

Fifth, you should retain data collected online only as long as it is necessary to fulfill legitimate business needs or legal requirements. As the recent experience of Facebook demonstrates, drafting an "information retention and license" clause that overreaches legitimate business needs may be unwise, even though there are no legal restrictions per se on doing so.

Finally, and most significantly, it is imperative that you keep all promises expressed in your privacy terms. For example, if your privacy policy states that you will not share collected data with third parties for marketing purposes, then you may not shift course down the road and decide to sell or give such data to third-party marketers. These kinds of broken promises have triggered most of the FTC's privacy enforcement activities over the last decade, yet these scenarios are avoidable through a careful assessment of your privacy practices and a privacy policy crafted to describe these practices as clearly and concisely and with as much transparency as possible.

Many of our attorneys at Pillsbury have significant experience assisting clients with their privacy policies and other online terms in consideration of relevant standards such as those reaffirmed by the FTC's report. If you think it may be time for your company's privacy policy or other online terms to be refreshed, please do not hesitate to contact us.

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