

Free Cup of Coffee!* FTC Conducts Workshop On Advertising and Privacy Web and Mobile Disclosures

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Last week the Federal Trade Commission (FTC) held an information gathering workshop entitled "[In Short: Advertising and Privacy Disclosures in a Digital World](#)". The purpose of the workshop was to discuss whether there is a need for updated guidance for online and mobile advertisers regarding disclosures and privacy practices, and to update the FTC's "Dot Com Disclosures" Guide, which was published in 2000.

"Universal and Cross-Platform Advertising Disclosures"

Commissioner Maureen Ohlhausen opened the workshop and underscored the technological and communication challenges presented by web and mobile advertising by asking how an advertiser can effectively convey to consumers reading a three-inch screen that the free cup of coffee being offered at select coffee shops requires purchase of a pound of coffee beans and is only available for a limited time. The day's first panel, "Universal and Cross-Platform Advertising Disclosures," which included industry, consumer, academic and law enforcement representatives, responded to these kinds of questions by evaluating a series of hypothetical advertisements to determine the adequacy of sample disclosures. The panel specifically addressed the use of hyperlinks to convey disclosures, including health and safety disclosures, and placement of requests for affirmative acknowledgements prior to purchase. Generally, the panelists agreed that in some instances hyperlinks could be used to indicate disclosures but differed as to the sufficiency of terminology, e.g., whether "Disclosures" alone is sufficient or if more detailed indications of material terms should be used such as "Offer Limitations."

Two themes were prominent in the panel's discussion. First, the panelists supported the application of basic advertising principles to online and mobile advertising, such as clear and conspicuous disclosures, close proximity of the disclosure and the claim, and notice and informed consent. Second, the panel generally encouraged flexibility in the application of disclosure requirements. The Promotional Marketing Association's representative noted the space limitations on mobile platforms and encouraged a hierarchical approach to disclosures, with the most important ones being more prominent, and to the means by which affirmative acknowledgement is obtained. Consumer advocate Sally Greenberg, Executive Director of the National Consumers League, and Paul Singer, Office of the Texas Attorney General, cautioned that the disclosure terminology cannot be so general as to fail to inform consumers as to material terms and conditions associated with the sale of the product.

"Social Media Advertising Disclosures"

The second panel focused on "Social Media Advertising Disclosures." Richard Cleland, Assistant Director of the Division of Advertising Practices at the FTC, opened the discussion by asking the panelists what was the most critical issue regarding social media disclosures. Susan Cooper, Lead Advertising and Product Counsel for Facebook, Inc., stated that the most critical issue was that "social media" is an umbrella term that is difficult to define and, consequently, it is difficult to craft rules for all potential formats and content. Ms. Cooper advocated for flexible standards to accommodate new technologies. At the opposite end of the spectrum, Robert Weissman, President of Public Citizen, stated that advertising must conform to law, not vice versa, and that, if an advertisement cannot be accurately conveyed with appropriate disclosures in the limited space or characters allowed by a particular format, the advertiser should forego advertising in that space.

The panelists also evaluated sample disclosures of material connections on sponsored blog posts. Generally, the panelists agreed that in line disclosures are the preferred and most effective format because they meet the legal standard of disclosing the connection while maintaining the blogger's authenticity. In-line disclosures are those that are incorporated into the text of the blog entry rather than set apart from the main text or indicated with an asterisk. Further, the panelists concurred that in-line disclosures face less risk of being cut off compared to footnote or side note disclosures if the blog is syndicated to other formats or feeds. Likewise, the panelists were skeptical of the effectiveness of separate posts or tweets to convey the necessary disclosures if they cannot fit into an initial post or tweet.

The panelists also discussed alternative ways of indicating sponsorship on a blog or social media site. Generally, the panelists did not believe that indications such as "#spon" or "Ad" at the end of a post was sufficient to clearly convey sponsored content. Stacey Ferguson, Blogger and Chief Curator of Blogalicious Community and Conferences, encouraged social media platforms to consider how technology can support disclosures. For example, Ms. Ferguson suggested that a tweet could be made to change color if it was sponsored or a disclosure could be made to automatically appear if an advertisement is shared. Susan Cooper, of Facebook, cautioned that placing such responsibility on the platform is a very slippery slope. Ms. Cooper countered that the platform is not the advertiser and the duty to accurately convey and disclose the terms of an advertisement rest with the advertiser.

The panel also addressed endorsement issues, specifically the practice of "like-gating" or requiring a consumer to "Like" a brand or product on Facebook in order to participate in a promotion. Malcom Faulds, Senior Vice President of Marketing at BzzAgent, Inc., discouraged like-gating and the use of such restrictions on promotions. Susan Cooper of Facebook reminded the audience that while Facebook tries to discourage the practice of like-gating, ultimately consumers have control in that they can control whether "liking" an item leads to a published story in their settings, and consumers can "unlike" a product or brand once they have learned more about the promotion.

Pinterest, a site that has taken even the social media world by storm, was also discussed. Stacey Ferguson of Blogalicious pointed out the Pinterest has a comment box next to postings/pins, where users can indicate sponsored content. She recommended using the disclosure box or indicating sponsorship as a comment to the pinned item. For future handling of these and other issues, Malcolm Faulds reminded the audience that the Word of Mouth Marketing Association, WOMMA, plans to have its updated guide available for comment this Summer.

"Mobile Advertising Disclosures"

"Mobile Advertising Disclosures" were the topic of discussion for the day's third panel. This panel expressed similar positions to the day's first panel, the topic for which was "Universal and Cross-Platform Advertising Disclosures." Generally, the panel agreed that basic advertising principles regarding proximate notice and disclosure through hyperlinks apply in a mobile environment, even though consumers use mobile technology different than desktop technology. Anna Bager, Vice President and General Manager for the Mobile Marketing Center of Excellence Interactive Advertising Bureau, pointed out that mobile technology is far more integrated in consumers' lives than desktops and that consumer use of mobile is constantly changing. Ms. Bager encouraged software developers to consider designing for mobile platforms first before web-based platforms if they have that flexibility. David Schellhase, General Counsel for Groupon, Inc., conceded that proximity and priority of disclosures are still very important as are the context and timing of such disclosures. Paul Singer, from the Office of the Texas Attorney General, agreed that proximity of disclosures and the labeling of any hyperlinks used to clearly convey any terms or limits are key to ensuring that consumers see and understand an offer. Mr. Singer also encouraged advertisers to consider consumer expectations when determining reasonable disclosures on a location-based ad.

"Usability Research" and "Mobile Privacy Disclosures"

"Usability Research" and "Mobile Privacy Disclosures" were the first and final topics of the day respectively. Although they book-ended the workshop, both sessions focused on site design to encourage consumers to notice sites' privacy policies and terms and conditions. Jennifer King, Ph.D. Candidate at the University of California, Berkeley School of Information, presented research indicating that consumers tend to be goal-oriented when they view webpages. They search for specific information in predictable patterns and tend not to notice other information. Privacy policies and website terms tend to be lengthy, dense, organized in a non-hierarchical fashion, and not proximate to a "call to action," and for these reasons, consumers tend not to notice or read them.

The last panel of the day addressed similar issues and potential remedies. The panel began with a demonstration regarding how a mobile application is downloaded on an Apple and Android device. Ilana Westerman, Principal of Create with Context, Inc., explained that consumers have relatively low expectations that their data is being stored or shared with third parties but they want to feel that they have options as to whether or not that is the case. This is consistent with the research of panelist Lorrie Faith Cranor of Carnegie Mellon University, whose research suggests that consumers do not understand privacy permissions communicated in an Android environment. Ms. Westerman demonstrated a prototype of an on-screen icon that flashes when the viewed site is downloading personal information. She conceded that application testing has produced mixed results regarding whether consumers noticed the icon, remembered which sites they were visiting when the icon flashed, or continued to notice the icon after repeated use.

Other panelists also introduced iconography and design elements intended to encourage consumer friendly privacy notification practices. Jim Brock, Founder of Privacy Choice, introduced a wizard that assists developers in creating privacy policies and uses icons to help direct consumers to relevant portions of the policy. Kevin Trilli, Vice President of Truste, also introduced Truste's short notice privacy policy that is intended for mobile environments. The short notice policy incorporates layered design that is intended to allow the consumer to read the policy in just a few seconds.

Pam Dixon, Executive Director of the World Privacy Forum, suggested some practical steps that businesses can take to advise consumers about privacy practices. First, she notes that timing of the disclosures is important. Providing them at the initial download may not be the point at which most consumers are likely to read them. Further, privacy should be considered holistically both in design

and the user experience on- and off-line. Disclosures should be prominent and clear, not "coy," and placed where consumers can see them. Advertisers also should consider how long information is stored and how and when it is destroyed. Finally, Ms. Dixon encouraged advertisers to consider multiple means of communicating privacy practices, such as through applications for disclosures, and via email to customers.

Mary Engle, Associate Director for the Division of Advertising Practices at the FTC, gave closing remarks and indicated that the comment period on the issues discussed in the workshop and the updates to the Dot.com guide is open through July 11, 2012. There is no firm deadline for the update, however the Commission is targeting this Fall for the update issuance.

Kelley Drye & Warren LLP

The attorneys in Kelley Drye & Warren's [Advertising and Marketing practice group](#) have broad experience at the FTC, the offices of state attorneys general, the National Advertising Division (NAD), and the networks; substantive expertise in the areas of advertising, promotion marketing and privacy law, as well as consumer class action defense; and a national reputation for excellence in advertising litigation and NAD proceedings. We are available to assist clients with developing strategies to address issues contained in this Advisory.

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