Internet tracking, direct marketing in the news

Manatt Phelps & Phillips LLP

USA
August 18 2010

A recent series of articles in the Wall Street Journal about direct marketing and the use of tracking technology on the Internet have the industry on the defensive and privacy advocates calling for legislation to be passed next term. The series, called "What They Know," told readers that "Marketers are spying on Internet users – observing and remembering people's clicks, and building and selling detailed dossiers of their activities and interests."

The publication looked at the top 50 Web sites in the United States and found that the sites dropped an average of 64 pieces of tracking technology – like cookies – onto users' computers. The tracking technology allows companies to follow users around the Internet and create a marketing profile based on the sites they visit, allowing for targeted direct marketing of particular goods.

In another article, the WSJ profiled data aggregator [x+1], which is used by companies to help target credit card offers to consumers. Yet another story included a 17-year-old, worried that she was 15 pounds overweight who often does online research about weight loss. Every time she goes online, she sees weight-loss ads, which make her "start thinking about" her weight, making her self-conscious.

The articles spawned a controversy across the country, from a California paper proposing the state adopt its own privacy law in the absence of federal regulation to counterpoint opinion pieces in USA Today about the pros and cons of federal privacy legislation. While the paper's editorial board wrote in favor of a law – "Better to erect some legal guardrails before the road toward decreasing privacy becomes too slippery" – president and CEO of the Interactive Advertising Bureau Randall Rothenberg provided the counterpoint. "Federal regulation of the Internet is one more Big Government idea that's inimical to consumer choice, the First Amendment, communications diversity and economic growth," he wrote.

In an op-ed piece in the WSJ, Jim Harper, director of information policy studies at the **Cato Institute**, responded to the series by noting that if "Web users supply less information to the Web, the Web will supply less information to them."

"Some legislators, privacy advocates and technologists want very badly to protect consumers, but much 'consumer protection' actually invites consumers to abandon personal responsibility. The caveat emptor rule requires people to stay on their toes, learn about the products they use, and hold businesses' feet to the fire. People rise or fall to meet expectations, and consumer advocates who assume incompetence on the part of the public may have a hand in producing it, making consumers worse off," he wrote.