



David W. Zesiger Senior Vice President Regulatory Policy & External Affairs

July 21, 2008

The Honorable John D. Dingell, Chairman Committee on Energy and Commerce 2125 Rayburn House Office Building Washington, DC 20515

The Honorable Joe Barton, Ranking Member Committee on Energy and Commerce 2322A Rayburn House Office Building Washington, DC 20515

The Honorable Edward J. Markey, Chairman Committee on Telecommunications and the Internet 316 Ford House Office Building Washington, DC 20515

Dear Chairman Dingell, Ranking Member Barton and Chairman Markey:

This will respond on behalf of Embarq to your letter of July 14, 2008, regarding online customer preference advertising. Embarq appreciates the opportunity to provide the Committee with information on this topic.

Introduction

Online customer preference advertising, sometimes called contextual or behavioral advertising, is a multifaceted industry developed around a simple principle: empowering individual and business internet users by making their experience more accessible and relevant. The customized experience made possible by customer preference advertising is based on the opportunity for online users to receive relevant and often localized messages instead of random, generic and often irrelevant or distracting advertisements that customers otherwise experience online

Contrary to much of the discussion surrounding this issue, customer preference advertising, at least as briefly tested by Embarq, does not involve keeping "profiles" on customers, reading the contents of their confidential communications, or utilizing any personally

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identifying information about a customer. In addition, customer preference advertising supports the provision of services to online customers at free or reduced rates, much as television or print advertising helps to support the provision of those services to the public.

Test: Brief and Small Scale

While the customer benefits from online customer preference advertising, different companies use different technologies to provide this service. As you know, and as Embarq has previously noted in media statements, Embarq conducted a brief, small-scale test of customer preference advertising utilizing a new technology. The test, which ended early this year, was designed with customer privacy in mind. None of the anonymous coded data regarding customer preferences from the test still exists, and Embarq has no plans for more tests or for general deployment of this technology, until such time as the privacy questions that have been raised recently have been addressed.

Data: Anonymous Only and None Retained

Embarq put in place a number of clear protections around its test. No raw or identifiable customer data was ever collected or utilized during the test; in fact, the only data utilized during the test consisted of codes representing categories of interest that were derived anonymously. No data, even in coded or anonymous form, was collected or utilized regarding sensitive categories, as that term is generally understood in privacy circles. Further, the codes that represented categories of interest were never seen by humans; they were interpreted, and related advertising was derived, via software.

Each category of interest had a short pre-programmed lifespan, some as brief as 48 hours. Once the pre-programmed lifespan was reached, the data was deleted automatically. When the test was complete, anonymous coded data for which the pre-programmed lifespan had not yet expired was destroyed.

Notice and Opt-Out Consent: Complied with Industry Practices and Proposed FTC Principles

In advance of the commencement of the test, following the practice then utilized industry-wide, Embarq posted a notice in the Privacy Policy that appeared on Embarq's website of the possible use of online customer preference advertising, with clear directions on how to opt out. The notice appeared more than two weeks before the initiation of the test, and was placed under an 18-point typeface header reading "USE OF PERSONAL INFORMATION." The notice read as follows:

<u>Preference Advertising</u>. Embarq may use information such as the websites you visit or online searches that you conduct to deliver or facilitate the delivery of targeted advertisements. The delivery of these advertisements will be based on anonymous surfing behavior and will not include users' names, email addresses, telephone numbers, or any other Personally Identifiable Information.

You may choose to opt out of this preference advertising service. By opting out, you will continue to receive advertisements as normal, but these advertisements will be less relevant and less useful to you. If you would like to opt out, click here. (embarq.com/adsoptions)

Embarq followed the industry practices of the most similar business model, that of online advertising networks, which also collect anonymous information across multiple unrelated websites and use it to serve personalized display advertisments, using this same mechanism for providing notice and choice. Advertising networks are operated by units or subsidiaries of America's leading high tech companies.

Embarq's approach to notice-and-choice for the brief test also was consistent with the framework outlined by the Federal Trade Commission ("FTC"), first in its long standing 1998 Privacy Principles (encompassing Notice, Choice, Access, and Security) and then in its subsequently issued 2007 Proposed Self-Regulatory Principles for Online Behavioral Advertising ("FTC Proposed Principles"). Noting that innovation in consumer products and services in the online environment has "significantly enhanced consumers' use of the Web," the FTC Proposed Principles seek "to balance support for such innovation with the need to protect against harms to consumers' privacy." The FTC Proposed Principles were developed after "dozens of meetings with consumer representatives, industry members, academics, technologists, and others," the submission of numerous comments, three days of hearings, and a "town hall" meeting open to all interested parties.

The FTC Proposed Principles were designed to apply to a broad range of online behavioral advertising, defined as "the tracking of a consumer's activities online – including the searches the consumer has conducted, the web pages visited, and the content reviewed – in order to deliver advertising targeted to the individual consumer's interests." In summary, the FTC Proposed Principles include:

- 1. That every company collecting data for behavioral advertising should provide a clear, concise, consumer-friendly, and prominent statement on its website that (1) data about consumers' activities online is being collected to provide advertising about products and services tailored to individual consumers' interests, and (2) consumers can choose whether or not to have their information collected for such purpose.
- 2. That any company that collects and/or stores consumer data for behavioral advertising should provide reasonable security for that data.

4 <u>Id</u>.

Id.

¹ See Privacy Online, A Report to Congress, FTC (June 1998).

² FTC Report, *Online Behavioral Advertising: Moving the Discussion Forward to Possible Self-Regulatory Principles*, at 1 (Dec. 2007).

³ Id.

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- 3. That companies should retain data only as long as is necessary to fulfill a legitimate business or law enforcement need.
- 4. That, before a company can use data in a manner materially different than represented when it collected the data, it should obtain affirmative express consent from affected consumers.
- 5. That companies should only collect sensitive data for behavioral advertising if they obtain affirmative express consent from the consumer to receive such advertising.⁶

Embarq's practices with respect to its brief customer preference advertising test fully complied with these principles.

As a result, Embarq believes that the notice provided to customers in connection with the test was appropriate, fully consistent with industry standards, and that an opt-in mechanism of consent was not required.

We are unable to disclose information that is protected by the attorney-client privilege, but our legal staff was involved in the decisions surrounding the test, and considered applicable laws and regulations. It has always been Embarq's belief, as evidenced by its compliance with existing and the subsequently issued proposed FTC guidelines, that its conduct of the test was lawful and otherwise permissible.

Conclusion

It appears that industry standards in this area are evolving rapidly toward a more robust form of notice and choice. Embarq has a 100 plus year record of protecting its customers' privacy interests, and not only welcomes, but fully intends to apply any such evolved standards.

Thank you for the opportunity to present this information to the Committee.

Sincerely,

David W. Zesiger

Senior Vice President, Regulatory Policy and External Affairs

cc: Honorable Cliff Stearns, Ranking Member

⁶ <u>Id</u>. at 3-6.