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BLOG

Online Advertising Network Settles "History Sniffing" Charges with FTC

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Epic Marketplace, a digital marketing company, has settled FTC charges about its use of "history sniffing" tools. Epic acts as an intermediary between websites where ads will be published and advertisers who wish to have their ads published. To get ads to online consumers, Epic buys advertising space on almost 45,000 websites, which it calls its "Epic Marketplace Network." Epic gathers information about consumers who visit the network by placing cookies on visitors computers. Epic then uses information it gathers to facilitate the serving of behaviorally-targeted ads. According to the FTC's complaint, Epic merged in 2010 with an entity that owned its own digital marketing subsidiary, Traffic Marketplace. Traffic Marketplace engaged in the practice of history sniffing, i.e., figuring out if a visitor previously visited a website by looking at how a browser displays hyperlinks. Previously-visited sites are purple, non-visited sites are blue. The history-sniffing technology used by Traffic Marketplace looked at whether hyperlinks were purple or blue. Epic continued Traffic Marketplace's history sniffing activities until over a year after the acquisition. Through use of this technology, Epic was able to determine whether consumers had visited sites outside of the Epic Marketplace, and if so, which sites. Epic then assigned consumers to different "interest segments" based on the sites they had visited. Pages sniffed included pages relating to incontinence, credit repair, and other medical and financial areas. According to the FTC, Epic's privacy policy did not disclose that history sniffing was one of the tracking tools used by the company. The policy also indicated that anonymous information was received and recorded "whenever you visit a website which is part of the Epic Marketplace Network," which according to the FTC was either an express or implied statement that information would be gathered *only* when a user visited a website in the network. According to the FTC, the privacy policy was false or misleading, in violation of the FTC Act. The parties settled, but Epic has not been asked to pay any fines. Under the proposed consent agreement, Epic has agreed to delete information gathered using the history sniffing tools, to stop using these tools, and will not make misrepresentations about how it collects, uses, discloses, or shares consumer data. This case was brought to the FTC's attention by the Center for Internet and Society at Stanford Law School, which conducted a study and issued a report about the practice of history sniffing (which it called "history stealing") and its impact on behavioral advertising opt-outs.

TIP: Many tracking tools can be viewed negatively by consumer advocacy groups and the FTC, especially if they are not well-disclosed to consumers. This case is a reminder for companies to make sure they know what tools are being used by them –or on their behalf– and have appropriately described those tools. In addition, when working with vendors who facilitate behavioral advertising, or acquiring new entities, it would be wise to

have these third parties fully describe their activities. These activities can be matched against current disclosures to ensure they are adequate and appropriate.

These tips have been created for information and planning purposes. They are not intended to be, nor should they be substituted for, legal advice, which turns on specific facts.

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