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Fox Rothschild Podcast

Featuring Litigation Partner John Gotaskie in Pittsburgh

We are talking today with John Gotaskie on Fox Rothschild Podcast. John is a partner and litigator with Fox Rothschild in Pittsburgh. He represents franchisors in diverse legal matters, including social media counseling as well as complex commercial litigation, creditor's rights and franchising issues. John, good morning.

John Gotaskie: Thank you. Good morning.

***Question:** One of the top issues franchisors are wrestling with today is the whole balance between how they collect user information online but also respecting the privacy of the users? What do franchisors need to know?*

John Gotaskie: There is great concern regarding privacy in the online world. In fact, the latest version of the most-used web browser, Microsoft's Internet Explorer 9, contains features that allow consumers to opt-in to protection from tracking, which is the ability of a company to follow a consumer as he or she surfs the web and collect and store that information. Once certain opt-in features are enabled, the new Internet Explorer software will allow consumers to request that tracking sites not "follow" them as they surf the Internet. Other web browsers are developing tracking protection, and there are third-party software programs that also offer varying levels of blocking protection.

***Question:** John, why is blocking software so important?*

John Gotaskie: It's simple. Many consumers do not like tracking and worry about what companies and other "aggregators" of information are doing with the information that they collect on the web. As *The Wall Street Journal* and *Time Magazine* have both recently noted, the amount of information being collected is astounding, and it is not limited to when you visit a site. Many firms now have sophisticated tracking software that follows you *over time* as a consumer moves along on the web. Such tracking permits companies to develop a composite picture of who you are, what you like and, theoretically, what you are likely to purchase. The FTC has come to call this type of online advertising "online behavioral advertising," and in 2009 the FTC issued a staff report regarding "Self-Regulatory Principles for Online Behavioral Advertising."

***Question:** Can you give us some examples?*

John Gotaskie: Recently, the blogosphere has been all "atwitter" regarding the fact that, unbeknownst to the consumer, Apple Computer has been capturing locational data from its iPhones and iPads – meaning, if your employees and customers have these devices, Apple knows precisely where they have been. The captured locational data is stored on an iPhone or iPad for up to one year and is uploaded to Apple's servers every time a user syncs the PDA with iTunes.

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Apple has come in for considerable criticism regarding this practice both in the media as well as in Congress. It has become something of an embarrassment for Apple as well, which is considered one of the leading online companies and is now working to revise its tracking practices.

Question: So what went wrong and what are the lessons for other companies?

John Gotaskie: Companies need to make sure they have taken every reasonable step to protect their organization with regard to online tracking and collection activities. If not, the risks of having incomplete policies and noncompliant practices could be substantial, including a loss of consumer confidence in your brand, investigations from state and federal authorities — which could include Congressional subpoenas, one of the broadest possible law enforcement tools — and lawsuits from those aggrieved. Sony, for example, was recently forced to shut down its Play Station online gaming network for several weeks and respond to inquiries from Congress due to breaches of its security systems, including those that retain sensitive consumer data collected online. Some analysts have estimated Sony's direct economic losses from the security breach at approximately \$1 billion, but the loss of consumer loyalty might cost Sony many more times down the road due to lost future business.

Question: What would you say was the essential issue with Apple?

John Gotaskie: Apple was capturing and storing data from users' devices without receiving prior consent or at a minimum, informing users of this practice. In today's online advertising and social media world, consumers are often willing to allow the capture and use of locational information or other personal information if the data collection efforts and how such data will be used are disclosed. In this instance, Apple failed its consumers on both counts. Perhaps because many of Apple's users expect locational information will be used in order to enhance their online experience, most consumers do not seem to be as bothered as one might expect of this "Big Brother" experience. In particular, social "apps" such as Twitter, Foursquare, Living Social and Groupon all use the locational features of devices like Apple's iPhone to provide a richer consumer experience.

Question: John, is there, beyond this, a larger issue at work?

John Gotaskie: There is. The larger issue is what happens with such stored personal information once it is available in the public sphere. Within the last month, not just Apple, but Google and Sony have also come under fire for the capture, and occasional disclosure, of sensitive personal information. A huge concern is that such events provide impetus for the Federal Trade Commission's efforts to regulate online advertising and for Congress to consider additional laws.

Question: What form might these laws take?

John Gotaskie: In 2009, the FTC issued "Principles for Online Behavioral Advertising." Online Behavioral Advertising is to be distinguished from "First Party Behavioral Advertising" and "Contextual Advertising."



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Question: So that we can separate this into its pieces, what is First-Party Behavioral Advertising all about?

John Gotaskie: It is advertising by an entity and at a single web site. In other words, this is the banner or pop-up advertisement seen by an individual at a particular web site. Because this advertising does not involve tracking, the FTC has concluded that it is likely to be consistent with what the consumer expects at that web site, and thus less likely to lead to consumer harm than Online Behavioral Advertising.

Question: So then what about Contextual Advertising?

John Gotaskie: Contextual Advertising also is distinguished from Online Behavioral Advertising. Contextual Advertising is advertising based on a consumer's visit to a single web page or in response to a single search query that involves no retention of data about the consumer's online activities other than those necessary for the immediate delivery of an advertisement. Here, a perfect example is to think of the paid links at the top of a Google search result. Because of limited concerns regarding consumer tracking from such Contextual Advertising, the FTC concluded that its principles did not need to cover contextual advertising.

Question: So then what are the FTC's principles governing Online Behavioral Advertising?

John Gotaskie: The FTC's principles that were published in 2009 resulted from work that the FTC began in 1995, when the Internet was in its infancy. It involved a number of interim reports, studies, a two-day town hall meeting held in November 2007 and comments from 63 different stakeholders. These stakeholders included private companies, business advocacy groups such as the Chamber of Commerce, academics, consumer and privacy advocates and individual consumers. From the meetings and discussions coordinated by the FTC, four principles emerged: First, transparency and consumer control. Second, reasonable security and limited data retention for customer data. Third, affirmative express consent for material changes to existing privacy promises; and, fourth, affirmative express consent to using sensitive data for behavioral advertising. The main points here involve transparency — that is, making sure that a consumer understands his or her agreement to tracking of their online activities through apps or other tools — along with affirmative express consent — that is, the FTC wants consumers to be able to “opt-in” to tracking services.

Question: What is the industry doing on this issue?

John Gotaskie: The advertising, Internet and computer industries have taken a slightly different approach than the FTC. In response to the publication of the FTC principles, a group of five different industry groups issued its own set of self-regulatory principles for Online Behavioral Advertising. The industry group identified seven principles: education; transparency; consumer control; data security; notice of material changes; sensitive data protection; and accountability. The most significant difference between the FTC and industry approaches is that the third and fourth FTC principles, affirmative consent, are notably absent from the industry regime. The industry regime, in other words, contemplates full disclosure just like the FTC, but wants consumers to “opt-out” from tracking.



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Question: So what does all this actually mean?

John Gotaskie: At this time, the FTC continues to closely monitor online tracking and data retention activities. That includes not only traditional web-based advertising and searching, but also apps and what companies such as Apple, Google and Foursquare are doing with location-based services. Additionally, especially in light of the Apple and Sony experiences of the last several months, both houses of Congress have announced committee investigations and will hold hearings regarding online privacy concerns this summer. Given this challenging regulatory and possibly changing legal environment, along with the coming presidential and congressional election cycle, companies need to be especially cautious.

Question: What is the single most important thing that franchisors and companies at large can do today?

John Gotaskie: The most important thing franchisors and other companies can do to protect themselves is to review their online data tracking and retention policies to ensure that they are fully disclosing all of the types of data they are collecting, telling consumers what they are doing with such data and ensuring that the data is protected as carefully as possible. While this seems like common sense, the recent experience of Sony demonstrates just how challenging and damaging this situation can be for companies and how such experiences can lead to fertile ground for new laws and regulations that could further suppress innovation on the web.

Question: How can companies and franchisors learn more?

John Gotaskie: Listeners may be interested in a white paper I've co-authored regarding franchising and social media. It covers social media platforms, the laws governing the use of social media in advertising and privacy concerns. It also highlights best practices in dealing with brand crises, legal limitations on controlling these crises, recruitment of franchisees via social media and development of a comprehensive social media policy.

Narrator: Well thank you John. To receive a copy of John's white paper, or to discuss any aspect of social media administration, please contact John at 412-394-5528 or at jgotaskie – that's J-G-O-T-A-S-K-I-E – at foxrothschild.com.

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