

## HFN Technology & Regulation Client Update

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February 2017

Dear Clients and Friends,

We are pleased to introduce you to our February edition of the Technology & Regulation Client Update, which includes a variety of industry and regulatory developments in the fields of technology compliance, digital advertising, content and information privacy regulations. Amongst other things, you can read about:

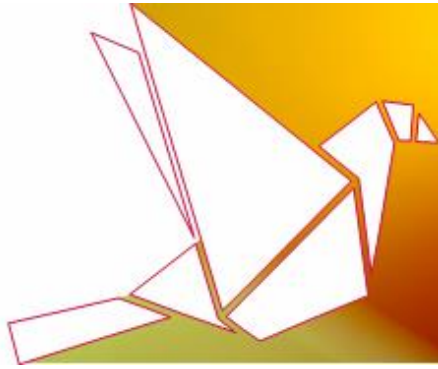
- The growing concerns over **lack of transparency and poor standardization in the media buy industry, which have resulted in a broad review of agency contracts;**
- **Google's enforcement against non-compliant apps lacking sufficient privacy policy and notices;**
- The recent updates to **Facebook's ads policies, enforcing its prohibition against discriminatory practices;**
- The BBB's Online Accountability Unit's action against several companies, which **violated the ad privacy rules and the beginning of enforcement of the cross-device guidance** by its Online Interest-Based Advertising Accountability Program;
- FTC's enforcement action concerning **the protection of consumer information in the smart televisions field;**
- A new court ruling in Canada, which determined that **merely purchasing a competitor's trademark as a keyword is not in itself sufficient to constitute a trademark infringement;** and
- The European Securities and Markets Authority's regulatory report on **distributed ledger technology.**

In addition, for your convenience and ease of reference, beginning with this Client Update, we have added under each headline the main topics addressed within the respective report.

Kind regards,

Ariel Yosefi, Partner  
[Co-Head - Technology & Regulation Department](#)  
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*If you have an important regulatory or industry compliance update you would like to share with the industry, [let us know](#).*



## Lack of Transparency in Media Buy Industry Leading to Contract Review

**TOPICS:** Adtech Industry Compliance, Media Buy Contracts, World Federation of Advertisers

A recent [report](#) released by the World Federation of Advertisers ("WFA") revealed that **90% of marketers are looking to review agency contracts in the hope that it will give rise to greater transparency**. The report highlighted the growing concern of marketers with the lack of transparency and control in the media supply chain.

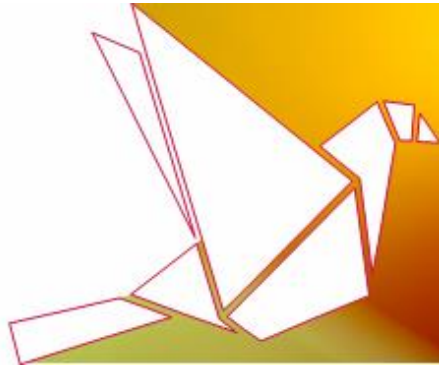
In particular, the report indicated the growing frustration of marketers with Agency Trading Desks ("ATDs"), which are the principle model used by the majority of advertisers. According to the report, although ATDs present certain benefits to marketers (such as better targeting and insights), over two thirds of the marketers are concerned over the lack of transparency offered by ATDs, as well as with the conflicts created by trading through them (given that ATDs act simultaneously as both agent and vendor, thereby incurring conflict of interests, such as by receiving rebates).

In response to the growing concern over the lack of transparency, Procter & Gamble ("P&G") [recently put in place an action plan](#) in an attempt to bring transparency to its dealings with media suppliers and prevent fraud. P&G revealed that the action plan consists of several steps, including **reviewing all of its agency contracts in 2017**, adopting the Media Rating Council's validated and viewable standards (as opposed to accepting multiple viewable metrics from various media suppliers), and other steps.

The findings of the WFA report, together with the recent announcement of P&G, **reflect the rapidly growing concern over the lack of transparency and poor standardization in the media supply chain**, which results in a significant waste of ad budgets and fraud.

**This concern can only be addressed by adopting diligent steps**, including through ongoing robust review of your media-buy contracts, adopting internal standards and policies relating to the viewable measurement and verification of the inventory, putting in place procedures designed to prevent fraud and ensure monitoring, reporting and compliance of your media suppliers, putting in place adequate dispute resolution mechanisms, and more.

**Our Technology & Regulation Team at HFN has acquired extensive experience in assisting our clients in safeguarding their interests in the media supply chain, by adopting the necessary steps in order to secure additional transparency and adequate controls. We encourage our clients and friends to approach us in order to better understand their role and responsibility in the often complicated media supply chain, and review their ongoing practices, with the objective of improving performance and obtaining more value from their digital media spend.**



## Google to Purge Millions of Apps Lacking a Privacy Policy from the Play Store

**TOPICS:** App Industry Compliance, Privacy, Google Play

As part of various significant updates which were implemented by Google in its Play Store policies for app developers (see our related update [here](#)), the new policies [require](#) app developers to add a privacy policy to the store listing, as well as in-app privacy disclosures.

In order to provide information as to its enforcement intentions with respect to the updated policies, the company has recently started sending out notices to developers worldwide, whose **apps in the Play Store do not have a privacy policy, warning that their apps might eventually be removed if no action is taken.**

According to the new enforcement initiative, app developers have until **15 March 2017 to comply with the updated requirements.** In this regard, they either have to include a link to a **valid privacy policy** on the Play Store listing and within the app, or remove any requests for **sensitive information or user data.** Otherwise, the company warns in its notices that **administrative action will be taken to limit the visibility of the app, up to and including removal from the Play Store.**

This action demonstrates Google's ongoing enforcement policy against non-compliant apps, and calls upon developers to review their app listings and data collection practices, in order that they do not violate any of the new policies. We would be happy to provide further advice and recommendations concerning the required steps, to ensure compliance with the applicable obligations and their scope.

## Facebook Updated its Ads Policies to Protect Against Discriminatory Practices

**TOPICS:** Adtech Industry Compliance, Facebook

Facebook [announced](#) in November last year that it would be making several changes to help prevent future cases of **discrimination** on its platform (e.g., it would stop advertisers from targeting users by race for ads that focused on housing, employment, and credit opportunities). Earlier this month, the company [followed up](#) with more updates to its **ads policies** and **enforcement tools** to further address the issue. In this regard, some key elements of the social network's recent update are as follows:

- **Advertising Policies Update:** Facebook updated its [policies](#) to strengthen its existing prohibition against discrimination. The company makes it clear that **advertisers may not discriminate against people based on personal attributes** such as race, ethnicity, color, national origin, religion, age, sex, sexual orientation, gender identity, family status, disability, and medical or genetic condition.
- **Advertiser Education:** Facebook created a [new section](#) linked from the Advertising Policies, which provides additional information about its anti-discrimination policy as well as educational resources from government agencies and civil rights groups that specialize in fighting discrimination.
- **Rigid Enforcement Tools:** the company has also started testing a new technology that leverages



machine learning to assist in **identifying ads that offer housing, employment or credit opportunities**. This will allow Facebook to **provide notices and educational information to advertisers**, as well as **respond to violations of its policy faster**. Specifically, Facebook made the following changes:

- **Disapproved Ads:** Facebook will not approve ads offering housing, employment or credit opportunities **and either include or exclude its multicultural advertising segments** (which consist of persons interested in seeing content related to the African-American, Asian American and U.S. Hispanic communities).
- **Self-Certification:** advertisers who are posting ads for housing, employment or credit opportunity, but **are targeting other audience segments** on Facebook, will also **be prompted to certify that they are complying with the updated anti-discrimination policy and with applicable anti-discrimination laws**.

We will be happy to provide further advice and recommendations concerning the required steps to ensure compliance with the applicable obligations and their scope.

### Triple A, Anheuser-Busch and Wayfair Violated BBB's Ad Privacy Rules

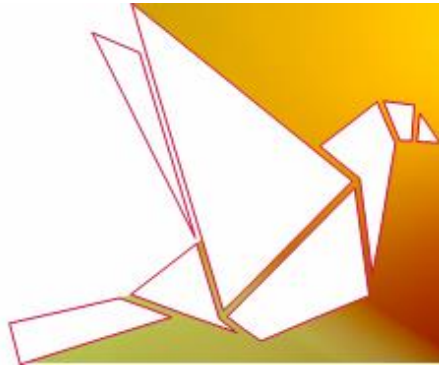
**TOPICS:** Adtech Industry Compliance, Self-Regulation Program, Privacy, Better Business Bureau

According to a report on [MediaPost](#), The Better Business Bureau's ("**BBB**") Online Accountability Unit has recently found that Triple A, Anheuser-Busch and Wayfair **failed to comply with the ad industry's privacy code**.

According to the BBB's Online Accountability Unit, the non-profit American Automobile Association, Triple A, of Northern California, Nevada and Utah **allegedly allowed ad networks and other third-parties to collect data regarding online visitors, without offering a valid opt-out mechanism on its website**. Although the privacy policy on Triple A's website contained an opt-out link, clicking on it takes visitors to a webpage where **they could opt-out of data collection by only certain of the tracking companies, and not all** of them.

In addition, the brewing company, Anheuser-Busch, and the e-commerce company, Wayfair, **allegedly failed to provide an "enhanced" notice, explaining online behavioral targeting. Providing such an "enhanced" notice requires adding a separate link that takes visitors directly to an opt-out website. The separate link is supposed to be displayed on every page where data about visitors is set out.**

These three new cases of the BBB's Online Accountability Unit come a few years after it warned publishers **to provide clear, meaningful and prominent links on all pages** where third-parties (e.g., ad networks and exchanges) obtain data about visitors in order to serve them with targeted ads.



It should be noted that Triple A, Anheuser-Busch and Wayfair have revised their websites and are now in compliance with the ad industry's privacy code, according to the BBB'S Online Accountability Unit.

## The Online Interest-Based Advertising Program Enforcing Cross-Device Privacy

**TOPICS:** Adtech Industry Compliance, Self-Regulation Program, Cross-Device Advertising, Better Business Bureau, Digital Advertising Alliance

The investigative unit of the Better Business Bureau, the Online Interest-Based Advertising Accountability Program has recently [issued](#) a notice to all first and third-parties stating that **commencing 1 February 2017, the Accountability Program is enforcing the Cross-Device Guidance, titled [Application of the Self-Regulatory Principles of Transparency and Control to Data Used Across Devices](#)** (see also our previous related [report](#)).

The Cross-Device Guidance, which was released in November of 2015 (see our related [report](#)), clarifies how companies which try to reach consumers across their various computers and mobile devices, should **provide them with prior notice and choice regarding interest-based advertising**.

**In practical terms, this requires both the first-parties (e.g., websites and mobile apps) and third-parties (e.g., advertising technology companies) to disclose cross-device tracking practices in their privacy policies, as well as to provide “enhanced notice” of such practices through clear, meaningful, and noticeable links outside of the privacy policy. The Cross-Device Guidance also requires that the opt-out choices made available to consumers for interest-based advertising are required to also cease cross-device targeting on the device from which the consumer has opted-out.**

Accordingly, companies that engage in cross-device tracking and targeting should ensure that they comply with the Cross-Device Guidance. **Failure to comply with the Guidance could result in an [Accountability Program](#) enforcement action.**

**We will be happy to provide further advice and recommendations concerning the required steps to ensure compliance with the applicable obligations and their scope.**

## VIZIO Settled Charges over Collecting Viewing Histories on Smart TVs

**TOPICS:** Adtech Regulatory Enforcement, Privacy, Smart TV Advertising, Cross-Device Advertising, Federal Trade Commission, United States

VIZIO, Inc., one of the world's biggest manufacturers and sellers of internet-connected smart televisions, has recently agreed to **pay \$2.2 million** to [settle](#) charges imposed by the US Federal Trade Commission ("FTC") and the Office of the New Jersey Attorney General, which alleged that it **installed a software intended to collect viewing data, on 11 million of its smart TVs, without informing consumers or seeking their consent.**





According to the agencies' [complaint](#), commencing in February 2014, VIZIO manufactured VIZIO **smart TVs which capture second-by-second information about video displayed on the smart TV**, such as video from consumer cable, broadband, set-top box, DVD, over-the-air broadcasts, and streaming devices.

The agencies also claimed that VIZIO **facilitated appending specific demographic information to the viewing data, including sex, age, income, marital status, household size, education level, home ownership, and household value**. According to the agencies' complaint, **VIZIO sold the information to third-parties, who used it for various purposes, including targeting advertising to consumers across a variety of devices**.

Additionally, the agencies alleged that VIZIO touted its "Smart Interactivity" feature, which enables program offers and suggestions, **but failed to inform consumers that the settings also enabled the collection of consumers' viewing data. VIZIO's data tracking – which occurred without obtaining the viewers' informed consent – was unfair and deceptive**, and in violation of the FTC Act and New Jersey consumer protection laws.

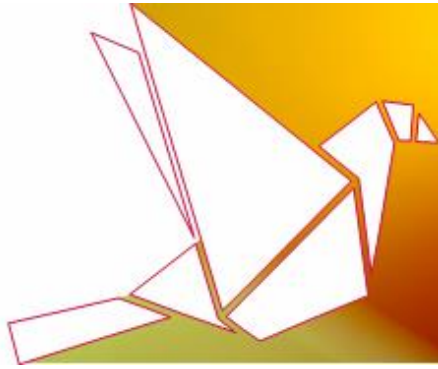
The [stipulated federal court order](#) requires VIZIO **to prominently reveal and obtain affirmative express consent for its data collection and sharing practices**, as well as forbids misrepresentations regarding the privacy, security, or confidentiality of consumer information obtained by it. The order also requires VIZIO **to delete data collected before 1 March 2016, and to implement a comprehensive data privacy program and biennial assessments for that program**.

## **New Canadian Court Ruling on Purchasing Competitor's Trademark as a Keyword**

**TOPICS:** Court Ruling, Keyword Advertising, Trademark, Canada

In August 2015, the British Columbia Supreme Court ("**BCSC**") [held](#) that purchasing a competitor's trademark as a keyword for search engines (e.g., Google) is not in itself sufficient to constitute infringement of a common law trademark. Additionally, the BCSC determined that the time to make the assessment as to whether the defendant's activity is likely to cause consumer confusion, is not when the consumer reviews the initial results page created by the search engine, but rather once the consumer reached the defendant's actual website.

The plaintiff, Vancouver Community College, claimed that the defendant, Vancouver Career College, misrepresented its educational services as being those of the plaintiff, inter alia, via keyword advertising. The plaintiff argued for common law trademark rights in the term "VCC" as a short form of its name. In a decision issued in January 2016, the British Columbia Court of Appeal ("**BCCA**") [overturned](#) **the above decision of the BCSC**. The BCCA reversed the ultimate outcome of the action as well as some of the legal points set out by the BCSC concerning **keyword advertising** (the BCCA determined that a misrepresentation by the defendant had taken place and that the defendant was therefore liable for trademark infringement).



In addition, the BCCA affirmed the BCSC's finding that **solely purchasing a competitor's trademark as a keyword is not in itself sufficient to constitute a trademark infringement**. What matters is **the nature and content of the sponsored link, which appears as a result of the keyword and the message it conveys to the consumer**. The BCCA also held that **the appropriate time to consider confusion is when the consumer views the search engine results page**, and not subsequently, when the consumer reaches the defendant's actual website.

We strongly recommend companies that purchase competitors' keywords as part of their advertising and search engine optimization strategy **to ensure that they comply with the various applicable legal rules**.

## **EU Securities and Markets Authority announced that it is premature to Regulate Blockchain**

**TOPICS:** Regulatory Report, Blockchain, Financial Markets, European Union

The European Securities and Markets Authority ("**ESMA**") has recently [released](#) a [report](#) on Distributed Ledger Technology ("**DLT**", also known as **blockchain**). The report outlines ESMA's view on DLT, its possible applications, benefits, risks and how it maps existing EU regulation. **ESMA's position is that regulatory action is premature at this level, considering that the technology is still at an early stage.**

ESMA believes that DLT could generate benefits for financial markets, including increased efficiency, enhanced reporting capabilities and reduced costs. ESMA stated that it expects the initial applications of DLT to focus on improving the work of existing trading infrastructure. ESMA added that the likely initial areas of use might consist of the less automated processes in low volume market segments and processes, having minimum dependency on the existing legal framework.

Additionally, ESMA points out several challenges to the implementation of DLT, **including concerns regarding interoperability, governance and privacy issues, and risks creation**. The European regulator notes that these challenges will require **further attention** before any large-scale use of DLT across the financial services sector will be initiated.

ESMA also emphasizes that the development of a new technology, such as DLT, **does not free up providers from complying with the existing regulatory framework**, which provides important safeguards to ensure the stability and orderly functioning of the financial markets.

Finally, ESMA concludes **that regulators should continue to monitor the DLT's development and that this should be coordinated at an international level** in order to ensure that DLT does not create unintended risks and that its benefits are not hindered by undue obstacles.