

The New Rules Of The Internet For Online Businesses

An Overview For Our Members



March 3, 2015

Hello there!

Hope this finds you doing wonderfully well and as profitable as ever. As you know, we keep a close eye on everything we can that impacts you – our customers. This is the latest update on just some of the unprecedented changes that are going on with government rules that will impact every business online that has US citizens as customers. We will have a further update as soon as the new FCC rules are released as well. Even though they voted on them and passed them down party lines, they have not released them yet, which as far as we know has never happened before. But the preliminary word on them coming from one of the commissioners' that voted against them is not very encouraging. Here is his direct quote.

“Decisions about how the Internet is going to work will now, instead of being made by engineers and technologists, be made by lawyers and bureaucrats. But, first and foremost, consumers are going to see their broadband bills go up. In a couple of months, the FCC is going to tee up a proposal to increase the tax — to impose a tax on broadband. Immediately, though providers are going to see their state and property — state, property, and other taxes go up, and those are going to be imposed on consumers as well. And so, I think the wallet, unfortunately, is going to feel the pinch first.” – FCC Commissioner Ajit Pai

We will do our best to keep you informed as soon as we have concrete information.

The following is a paraphrase of excerpts from an interview with Chip Cooper, Esq., legal counsel; Jones Hailey, PC at Atlanta; and Andrew Anderson of www.MembershipPlatform.com about the new changes in the rules and regulations concerning businesses that have an Internet presence that do business with US citizens. Chip specializes in Internet software, SAS, and is an IE Membership Attorney.

Chip is an intellectual property and protection expert who specializes in NAT licensing and distribution and transactions, website legal compliance, and works with technology mergers and acquisitions. He is also an adjunct professor at Wake Forest Law School.

Chip is one of the sharpest people I know when it comes with Internet compliance on top of being a great guy. He really is one of the good guys out there, which is why so many companies

try and get him to work on their cases and their compliance.

Chip is launching a new website, www.FTCGuardian.com. For our members, if you use the coupon code “easy,” you can save \$25 off any of his Internet compliance packages.

This following is not intended to provide nor be construed as any type of legal or financial advice. Please seek a licensed professional for such advice.

The following is a discussion taken from the full interview pertaining to the new FTC laws for membership sites, SSA (software as a service), testimonial rules, online advertising in general, and marketing disclosures.

We should have the whole transcript available for you in the member’s area in the next 48 hours.

Subject 1: FTC Jurisdiction and how the agency proves piercing of the corporate veil

Generally speaking and in normal business operations, if you operate in an entity such as a corporation or LLC (Limited Liability Company), then you have what is called a shield for your personal and family assets. Generally speaking, if there is any legal issue involved, it is related solely to whatever assets are inside the entity (your business assets). A lot of people think these concepts are generally true with respect to online marketers, but they are not. The Federal Trade Commission (FTC) does not even have to take special steps to “pierce the veil.” As far as they are concerned, the veil does not exist at all. So they do not even have to make arguments in order to be able to reach you personally; they just reach you personally if you are a person either acting as a sole proprietor or as a corporate officer. If you have been involved in the creation and publication and dissemination of deceptive ads, you are involved in it and if you were not directly involved but were a controlling person such as an officer or knew about it, you are on the hook.

The Federal Trade Commission (FTC) has jurisdiction if you sell goods or services to United States consumers (not business-to-business transactions). The definition of consumer also includes people who work from home, even if they may be technically operating a small or Internet online business out of their home. If you sell to United States consumers, the FTC has jurisdiction over you regardless of where you are located. A famous case in point involves Jesse Williams whose home, business, and website server was located in Canada, but he was selling to United States consumers. The FTC nailed him for \$359 million in a big scheme. There are a number of other cases where the individual defendants are in Europe or in various countries. If you are selling to United States consumers, then you are subject to FTC jurisdiction and that is a huge difference from the normal run-of-the-mill civil litigation, so the consequences of making a mistake are severe.

Negative Option Features

The definition of “negative option feature” is taken from the FTC’s Telemarketing Sales Rule (16 C.F.R. 310), under which the term means: “in an offer or agreement to sell or provide any

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goods or services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer." There are many kinds of negative option features, including automatic-renewal service subscriptions (like those offered by the many online services that utilize recurring, month-to-month subscriptions); continuity plans (where the consumer periodically receives a new shipment of goods until they cancel the agreement).

Currently, a hot issue with the FTC involves membership sites also known as subscription sites, software as a service, and negative option plans, where the user logs into a website and there is a continuity billing plan that charges the customer automatically each month (or on some other frequency) until the customer opts out. There is no agreed upon term but rather an automatic indefinite term that continues to bill automatically until the customer opts out. It has been an area of significant abuse and so the feds have legislated these continuity plans through a federal statute known by the acronym ROSCA. The state of California has a statute (SB340) governing these types of plans when sold to any California resident, the violations of which carry significant fines and other remedies that can be imposed. Most of the regulations deal with the placement of disclosures (disclosures would clearly state that what you are offering is a continuity plan). Thus, you will need to be thoughtful in how you design your order form as well as having the disclosures at certain points in the registration sequence for opt in to the continuity plan (e.g., before they click "Add to Cart," and then again before you collect billing information, etc.). The registration sequence is where the consumer selects what they are buying and maybe some options for it, then an agreement is presented that governs the customer relationship, and the last step is typically payment.

The disclosures must be presented conspicuously. They cannot be buried in fine print. There is a case a couple of years ago called the "Commerce Plan Case" that involved an attorney - not acting as general counsel - but instead was a principal, a corporate officer, who was offering continuity plans. He made a terrible, terrible mistake. He did split testing on where these notices were placed. The more obscure the notice, the higher the conversion rate. Thus, he decided to bury some notices in the fine print below the fold of one of the registration pages. The FTC sued and the attorney in question did not take the settlement offer but instead litigated and got nailed for about \$18 million personally. One of the terrible mistakes was the evidence that came out that he had split-tested the placement of these notices; it was a smoking gun for the FTC.

So equally as important as the content of the disclosure, is its placement (where and how) and the general idea of whether it is conspicuous enough for the average consumer to see and understand it. A lot of people did not know they were in a continuity plan; they just started seeing these charges of \$30 or \$40 a month and did not know why. You are playing with fire if your customer does not know what they were signing up for.

Online Behavioral Ads

Online behavioral advertising (OBA) is the term that the Federal Trade Commission uses for advertising that is based off consumers' past Internet behavior. These ads are distinctly different

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from contextual ads. An example of the difference between OBA and contextual advertising is illustrated in the following example: if you go to a fly-fishing website, you would expect to see ads consistent with the context of fly-fishing (rods, reels, etc.) – that is a contextual ad. OBA, on the other hand, might offer you a doll on that same fly-fishing website because three days before you went to the fly-fishing website, you did a little research to buy a really nice doll for your daughter. The reason you see the doll ad on the fly-fishing website is because your browsing behavior over the last few days has been tracked over four or five websites for dolls. Over time and over different websites, your browsing behavior has been tracked so that you are now served a doll totally out of context on a fly-fishing website. Studies have shown that conversion rates are significantly higher for OBA rather than contextual ads, so OBAs are popular and effective.

The Federal Trade Commission is ambivalent and torn on the subject of OBAs. Some consumers like them because they appeal to their interests, whereas other people are terribly distressed and concerned about being tracked and view it as a serious privacy violation. Since the FTC is tasked with a responsibility of protecting consumers, it is thus torn with half of consumers liking OBAs and the other half thinking they are a terrible privacy violation. The FTC cannot outlaw OBAs and so they regulate them. If you are engaged with OBAs, you need to have certain disclosures on your privacy policy or you can get in trouble with the FTC. Lack of these disclosures can also get you banned by the platform that is serving the ad, such as Google and Facebook. Online marketers, thus, need to be very careful in their privacy policies that need to have those notices and disclosures, or they run the risk of a double whammy: banned from participating in some very high converting ads with Google, Facebook, and other platforms, while simultaneously, subject to the FTC coming down on them.

Who does the FTC go after?

The Federal Trade Commission is actually driven in that they rely on consumer complaints. If you were to Google the term “FTC complaint,” you will see the number one hit is a link to an FTC complaint form on their website. It is very comprehensive and asks for a lot of information. There is even a video that encourages people to fill out the form. When the FTC starts to get a lot of customer complaints, it catches their attention, especially if it is in an area in which they have high interest, such as the continuity plans.

If the FTC decides based upon their review to bring an action, they say the damage has already happened and then file a lawsuit and basically request a grant of temporary injunctive relief (a temporary restraining order). They basically go to the court and say, “Look, there is a lot of consumer injury here and we need to stop these guys in their tracks, so let us do a temporary restraining order (TRO) and get them in court.” The court in most cases agrees to the TRO, and once that’s issued, you are pretty much out of business. The TRO almost always ask for an asset freeze, which includes all bank accounts and other assets, and in most cases they have receivership to take over your business. The FTC will typically come to you with a non-negotiable settlement offer. It might be a hundred thousand or couple hundred thousand dollars. It is recommended that you do not litigate with the FTC, because chances are - and the court cases prove this point - if you litigate with them, you are going to end up a lot worse than

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whatever their offer was. The offer is not pleasant but it is not as bad as litigating and then losing. This process is very different from normal civil litigation because you are basically out of business as soon as that TRO is issued.

Steps you can take to protect your company online from violating FTC laws

Broadly speaking, there are a couple of things you can do to protect your company from the FTC. Firstly, your website will need some documents such as terms of use, a privacy policy (if you collect any personal information, and if you are selling anything, you would be because of credit card payments), an earning disclaimer (if applicable), and a customer agreement. If you are selling something, you need to bind your customers, generally speaking, with some kind of click-through document that also establishes your right to get paid for what you are offering. A lot of online marketers think that all they need are those key documents, but this is not true. 80 or 90 percent of protecting yourself as an online marketer is not the documents but “the rules of the road” or certain things you need to know to operate your business.

We should have the whole transcript available for you in the member’s area in the next 48 hours.

If you have any questions, please let me know. Chip has agreed to do a live Webinar on the impact of a couple of these items and to do a Q and A to help answer your questions. We will post a sign up notification in the member’s area and send out an email. You do not want to miss this! This is important as anything you have going on with your site as you really do not want to mess with the feds or the state because with very, very rare exceptions, you lose no matter what the outcome is.

Doing business on the Internet has just changed drastically, especially for those of us that have membership and continuity programs.

Just a reminder, we have notifications built into your control panel. Please make sure you make use of the built-in notification process during sign up. We do not want you to become another test case because I can guarantee it will ruin your year.

Have a profitable day!

Cheers,
Andrew
www.MembershipPlatform.com

PS Thanks to Sheila Ingram over at www.GetAGripOnAccounting.com for helping put this together. She was one of our earliest beta testers and has continued to help improve our client experience ever since!

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