The Digital Marketing Ecosystem: Trends, Risks and Obligations

Teena H. Lee, Vice President, Privacy and E-commerce Counsel
The Estée Lauder Companies Inc.

Bridget C. Treacy, Partner, Hunton & Williams
Overview

- Understand role of key participants in omnichannel marketing programs
- Identify key challenges for businesses seeking to implement omnichannel marketing programs worldwide
- Estee Lauder case study
- Practical tips and take-aways
Beware of Pitfalls

- Ever-increasing focus on privacy, around the globe
- Must understand your data flows and uses
- Legal risk exists throughout the digital marketing ecosystem . . .
  . . . but reputational risk can be greater
Information Collection

• Evaluate the information you collect
  – Legal pitfalls at every step in the data lifecycle

• Ask yourself these five questions:
  – Who are you collecting the information from?
  – What information are you collecting?
  – Where are you collecting information from and sending to?
  – Why are you collecting the information?
  – How are you collecting the information?
Meeting your Notice Obligations

- What is the scope of your notice?
  - Online only? Online and offline?
  - Single channel? Omnichannel?

- Balance legal considerations and customer expectations
  - U.S. legal obligations (for most):
    - Emanate from California
    - And apply only to information collected through the web or other online services
  - International legal obligations
    - Notice is important but not the only consideration e.g., EU e-privacy laws
  - Regulatory Guidance
    - FTC Report; Art.29 Working Party guidance; DPA guidance
  - Customer expectations
    - It’s all about the brand
    - In retail, customers may view the brand and retailer as one
The POS Channel: Collection Pitfalls

- Emerging issue regarding collection at the Point-of-Sale
  - Recent ruling in case against *Michaels* in MA
    - Potentially wide-ranging impact
  - First significant POS collection case outside of California
    - In CA, a string of cases have upheld onerous restrictions
    - CA was thought to be unique among the states prior to *Michaels* ruling
The FTC recently issued a report on mobile transparency.

- The FTC recommends that app developers:
  - Maintain a clear, easily accessible privacy policy
  - Ensure it is available through the platform’s app store
  - Provide just-in-time disclosures
  - Obtain express consent before collecting or sharing sensitive information
  - Accurately describe the app’s information practices
    - Including with respect to advertising

- California AG Kamala Harris has been active at the state level

- Art. 29 Working Party opinion on apps (WP202)
Mobile Notice Content

• Provide information on practices that are most important to consumers
  – Transparency and purpose limitation
• Optimize the notice for the mobile context
  – Obtain consent where required
• Provide the highlights of the company’s privacy practices
  – Provide consumers with the ability to find more detailed information i.e., layered approach, icons, images
• Stay abreast of policy developments
  – NTIA has initiated a process to develop a code of conduct on mobile app transparency
  – FTC will view compliance favorably in its Section 5 enforcement
Requirement to Provide Customer Choice

• No legal requirement of general application to provide choice in the U.S.
• Exceptions in specific contexts, such as:
  • CAN-SPAM
  • GLB Privacy Rule and State Financial Privacy Laws
  • FCRA Affiliate Sharing Provisions
  • FACTA Affiliate Marketing Rule
  – Many laws of general application outside the U.S. require choice, including in EU
2012 Report provides guidance
Choice is not required for practices consistent with the context of the transaction
  - Cross-channel marketing is okay in the first-party context
  - Choice is appropriate for practices inconsistent with the context of the interaction
  - “Just in time” notice
Affirmative express consent required prior to:
  - Making material retroactive changes
  - Using sensitive information for marketing purposes
    - Such as health or children’s information
EU Perspective: Guidance on Choice

- EU framework differs
- General EU prohibition on unsolicited electronic direct marketing to individuals (2002/58/EC as amended by 2009/136/EC)
  - Consent required
  - “soft” opt-in exemption may be available
- Use of cookies, beacons etc. for marketing typically requires consent
- Under 95/46/EC, a legal basis is required for the processing of personal data, which may consist of consent
The Social Media Channel: Privacy Considerations

• Key privacy considerations
  – FTC regulation of unfair or deceptive trade practices
  • FTC Guidelines concerning the use of endorsements and testimonials
  • Privacy watchdogs are increasingly alerting the FTC to misrepresentations
    – E.g., EPIC recently complained to the FTC about Snapchat’s practices
  – Social media platform terms and conditions
  – Global promotions require careful consideration of applicable local laws
FTC Endorsement Guidelines

• Apply to “endorsements”
  – Broad definition
• Endorsements must reflect the honest opinions, findings, beliefs or experiences of the endorser
  – If the endorser is being paid, that must be disclosed
• 2009 changes intended to address emergence of social media
  – Unexpected connections between advertisers and endorsers must be disclosed
    • Influencer blogs must reveal that they are receiving free products from the advertiser
    • Employees of the company must reveal their connection to the company if giving an endorsement on Facebook
Social Media Enforcement & Litigation

- **Facebook Beacon**
  - Class action
  - Alleging information from users’ interactions on other sites was posted on Facebook
  - For ad purposes without user consent

- **Google Buzz**
  - Class action and a settlement with the FTC in March 2011
  - Allegedly resulted in the publication of Gmail subscribers’ contact lists without their consent

- **FTC enforcement actions against:**
  - Path – settled February 2013
  - MySpace – settled May 2012
  - Facebook – settled November 2011
  - Twitter – settled June 2010
Online Behavioral Advertising: Overview

- Tracks a variety of activity across websites
- Utilizes cookies and other tracking technologies
- Resulting data used for marketing and advertising purposes
- Spending on digital ads has continued to increase
  - Helps advertisers deal with an increasingly fragmented media market
  - Marketers will pay more for targeted ads, which yield a higher ROI
- But there has been pushback
Regulatory & Industry Responses to OBA

• FTC Staff Report highlights four principles:
  – Transparency and control
  – Reasonable security and limited data retention
  – Affirmative express consent to material retrospective privacy changes
  – Affirmative express consent to collection of sensitive data

• Industry Efforts:
  – January 201: US Ad industry introduced icon
  – November 2011: DAA released its own self-regulatory principles
  – W3C Working Draft on Do-Not-Track mechanism posted 28 January 2014
  – NAI’s Code of Conduct
  – EU initiatives: IAB and EASA
Legislative Efforts

• Numerous bills proposed to regulate OBA
  – Grant individuals the right to opt out of OBA
  – Direct the FTC to promulgate standards for a do-not-track mechanism
  – Include a private right of action
  – Proposed broader privacy regulations

• CA OPPA disclosure requirements regarding:
  – Site’s response to browser “do not track” signals
  – Whether parties other than site owner may collect PII of user’s online activities
International Issues

• World is small for digital marketers
• EU DP Directive imposes onerous requirements on collection and use of “personal data”
• EU “Cookie” Directive exceptionally broad
  – Art. 29 WP clarified that users must give “informed consent” prior to any tracking
  – Complete pan-EU compliance with the Cookie Directive is a challenge
• Art. 29 WP 208 guidance on obtaining pan-EU cookie consent
  – Specific information
  – Prior consent
  – User’s active behavior
  – Freely given
• Art. 29 WP 203 states that opt-in consent is almost always required for OBA
Legislative proposal is not yet agreed but the following outcomes are likely, based on existing texts

• Consent – likely explicit, specific and distinguishable; controller to bear burden of proof
• Definition of “profiling”, and restrictions on conduct of profiling (not yet settled)
• Extraterritorial application – where non-EU business offers goods or services to, or monitors behavior of, EU individuals
• General tightening of provisions, including legitimate basis for processing, and purpose limitation
Case Study

[Image of Aveda app]

READY FOR A NEW LOOK?

My Aveda Makeover lets you color your own hair with Aveda Hair Color that’s up to 99% naturally-derived*. 

Need inspiration? Explore Aveda Look Book »

* from plant and non-petroleum minerals.

Top Looks for the Season  view all »
Case Study
Case Study
Case Study
Case Study
<table>
<thead>
<tr>
<th><strong>Who?</strong></th>
<th>Consumers on a global basis</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>What?</strong></td>
<td>• Photo</td>
</tr>
<tr>
<td></td>
<td>• Hair style/color preferences</td>
</tr>
<tr>
<td></td>
<td>• Email address</td>
</tr>
<tr>
<td></td>
<td>• Friend’s email address</td>
</tr>
<tr>
<td></td>
<td>• Social media account/profile data</td>
</tr>
<tr>
<td></td>
<td>• Geo-location</td>
</tr>
<tr>
<td><strong>Where?</strong></td>
<td>App is centrally hosted with localized, international instances</td>
</tr>
<tr>
<td><strong>Why?</strong></td>
<td>Incentivize consumer to make hair appointment and/or to purchase in an Aveda salon</td>
</tr>
<tr>
<td><strong>How?</strong></td>
<td>Through the App only and through API feeds</td>
</tr>
</tbody>
</table>
Case Study
“By ticking this box, I agree to the transfer of my personal data to the United States for the purposes indicated in the Privacy Notice [insert link to Privacy Notice]. Pursuant to European data protection law, the United States does not provide an adequate level of protection. I can withdraw my consent at any time by following the instructions provided here [insert link to the Your Rights and Choices section of the Privacy Notice]. For more information on how your personal data are transferred, please click her [insert link to the Data Transfers section of the privacy notice].
<table>
<thead>
<tr>
<th>Case Study</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Unless you register and open an account, the email addresses you enter in this application will not be saved or stored; nor will your email address, unless you elect otherwise, nor your friend’s email address be used for any purpose other than to send yourself or your friend your Looks.”</td>
</tr>
</tbody>
</table>
Case Study
Case Study

YOUR SPECIAL OFFER

Experience a free Botanical Therapy Moisture or Repair Treatment with an Aveda color and or cut service, value $35 - $25*.

FIND A PARTICIPATING SALON

Enter your zip code

OR

USE YOUR CURRENT LOCATION

For international locations, tap here.

* Valid for first time Botanical Therapy Moisture or Repair Treatment clients only.

NEED HELP?

Our Aveda experts are here to answer your product questions and offer recommendations just for you.

1.800.446.4831

EMAIL »

COLOR CONSERVE

Designed to protect, strengthen and add shine to keep your haircolor vibrant longer.
Case Study

AVEDA
READY FOR A NEW LOOK?

My Aveda Makeover lets you color your own hair with Aveda Hair Color that’s up to 99% naturally-derived*.

* From plant and non-petroleum minerals.

Top Looks for the Season  view all »

YOUR CONNECTIONS

LOG IN TO AVEDA
FACEBOOK
TWITTER

TOOLS
TERM & CONDITIONS
GET SPECIAL OFFER

TIPS  ON  OFF

HUNTON & WILLIAMS

ESTÉE LAUDER
COMPANIES
Welcome to the Aveda.com (the "Site").

Aveda Online ("Aveda Online") provides the content and services available on the Site to you subject to the following terms and conditions, our Privacy Policy and other terms and conditions and policies which you may find throughout the Site in connection with certain functionality, features or promotions as well as customer service. All of which are deemed a part of and included within these terms and conditions (collectively, "Terms and Conditions"). By accessing or using the Site, you are acknowledging that you have read, understand, and agree, without limitation or qualification, to be bound by these Terms and Conditions.

1. Privacy
   Please review our Privacy Policy so that you may understand our privacy practices.

2. Products and Services for Personal Use
   The products and services available on the Site, and any samples thereof we may provide to you, are for personal use only. You may not sell or resell any of the products or services, or samples thereof, you purchase or otherwise receive from us. We reserve the right, with or without notice, to cancel or reduce the quantity of any order to be filled or products or services to be provided to you that we believe, in our sole discretion, may result in the violation of our Terms and Conditions.

3. Purchase Related Policies and Procedures
   To view policies and procedures related to orders placed through this Site (such as order processing, shipping and handling, returns and exchanges), click here.

4. Accuracy of Information
   We attempt to be as accurate as possible when describing our products on the Site; however, to the extent permitted by applicable law, we do not warrant that the product descriptions, colors, information or other content available on the Site are accurate, complete, reliable, current, or error-free.

5. Intellectual Property
   All information and content available on the Site and its look and feel, including but not limited to trademarks, logos, service marks, text, graphics, logos, button icons, images, audio clips, data compilations and software, and the compilation and organization thereof (collectively, the "Content") is the property of Aveda Online, our affiliates, partners or licensors, and is protected by United States and international laws, including laws governing copyrights and trademarks.

   Except as set forth in the limited licenses in Section 6 below, or as required under applicable law, neither the Content nor any portion of the Site may be used, reproduced, duplicated, copied, sold, resold, accessed, modified, or otherwise exploited, in whole or in part, for any purpose without our express, prior written consent.

6. Limited Licenses
   We grant you a limited, revocable, and non-exclusive license to access and make personal use of the Site. This limited license does not include the right to: (a) frame or utilize framing techniques to enclose the Site or any portion thereof; (b) republish, redistribute, transmit, sell, license or download the Site or any and/or all Content (except caching or as necessary to view the Site); (c) make any use of the Site or any and/or all Content other than personal use; (d) modify, reverse engineer or create any derivative works based upon either the Site or any and/or all Content; (e) collect account information for the benefit
Case Study

Aveda Corporation United States Privacy Policy

Effective Date: 10/16/2013

Aveda Corporation ("we", "us", or "our") respect your concerns about privacy and value the relationship we have with you. This Privacy Policy describes the types of personal information we collect about our customers, how we use the information, with whom we share it, and the choices available to our customers regarding our use of the information. We also describe the measures we take to protect the security of the information and how our customers can contact us about our privacy practices.

Click on one of the links below to jump to the listed section:
- Information We Collect
- Information You Provide
- Information We Derive by Automated Means
- Technologies We Use
- Cookies, Web Server Logs, and Web Beacons
- Third Party Web Analytics Services
- Targeted Advertising
- How We Use the Information Collected by Automated Means
- Information We Share
- Your Rights and Choices
- Data Transfers
- Children’s Privacy
- How We Protect Personal Information
- Links to Others’ (Non-Associated) Websites
- Updates to Our Privacy Policy
- How to Contact Us

Information We Collect

We may obtain personal information about you from various sources. We may collect this information when you provide it to us or when you use our websites or in connection with our social networking or mobile applications.

Our products are available for sale in many department stores. Personal information collected in these department stores is not provided to us. This Privacy Policy does not address any data collection at our retail partners. When you visit this site or our social networking or mobile applications, we may also collect certain information about your activities using technologies such as cookies, web server logs and web beacons.

Information You Provide

The types of personal information you may provide to us includes:
- Contact Information (such as name, postal address, email address, and mobile or other phone number)
- Age and date of birth
- Gender
- Username and password
- Payment Information (such as your payment card number, expiration date, delivery address, and billing address)
- Your skincare concerns
- Contact Information for friends or other people you would like us to contact
- Content you provide (such as photographs, articles and comments)
- Information provided to us by social networking or mobile applications when you use one of our social networking or mobile applications (such as your name, profile picture, likes, location, friends list and other information described in the social networking application sign-up page, or in your profile when using one of our mobile applications).

Customer Service / General Information / Privacy Policy

Customer Service | Email Sign-up | Sign In | x 8 Items in Cart

Effective Date: 10/16/2013

Aveda Corporation United States Privacy Policy

Aveda Corporation ("we", "us", or "our") respect your concerns about privacy and value the relationship we have with you. This Privacy Policy describes the types of personal information we collect about our customers, how we use the information, with whom we share it, and the choices available to our customers regarding our use of the information. We also describe the measures we take to protect the security of the information and how our customers can contact us about our privacy practices.

Click on one of the links below to jump to the listed section:
- Information We Collect
- Information You Provide
- Information We Derive by Automated Means
- Technologies We Use
- Cookies, Web Server Logs, and Web Beacons
- Third Party Web Analytics Services
- Targeted Advertising
- How We Use the Information Collected by Automated Means
- Information We Share
- Your Rights and Choices
- Data Transfers
- Children’s Privacy
- How We Protect Personal Information
- Links to Others’ (Non-Associated) Websites
- Updates to Our Privacy Policy
- How to Contact Us

Information We Collect

We may obtain personal information about you from various sources. We may collect this information when you provide it to us or when you use our websites or in connection with our social networking or mobile applications.

Our products are available for sale in many department stores. Personal information collected in these department stores is not provided to us. This Privacy Policy does not address any data collection at our retail partners. When you visit this site or our social networking or mobile applications, we may also collect certain information about your activities using technologies such as cookies, web server logs and web beacons.

Information You Provide

The types of personal information you may provide to us includes:
- Contact Information (such as name, postal address, email address, and mobile or other phone number)
- Age and date of birth
- Gender
- Username and password
- Payment Information (such as your payment card number, expiration date, delivery address, and billing address)
- Your skincare concerns
- Contact Information for friends or other people you would like us to contact
- Content you provide (such as photographs, articles and comments)
- Information provided to us by social networking or mobile applications when you use one of our social networking or mobile applications (such as your name, profile picture, likes, location, friends list and other information described in the social networking application sign-up page, or in your profile when using one of our mobile applications).
Case Study

• Social Networking Application Opt-Out

To remove or delete our apps from your social networking account, follow the instructions from the social network:

Facebook: https://www.facebook.com/help/?faq=1706982232003660 provided by the Facebook Help Center.

• Geo Location Information

We may ask you for your geo-location via our mobile application. You may choose not to share your geo-location details by adjusting your mobile device's location services settings. To decline from sharing your geo-location details, follow the instructions on your mobile device or changing the relevant settings; otherwise, please contact your service provider or device manufacturer.
Practical Tools

ICO has updated its guidance on marketing and published a checklist:

Direct marketing checklist

Businesses can use this checklist to help make sure their marketing messages comply with the law and don’t annoy customers. It also includes an at-a-glance guide to the different rules on marketing calls, texts, emails, faxes and mail. It is primarily aimed at small businesses. For detailed advice, see our full guidance on direct marketing.

Obtaining consent for marketing
- We use opt-in boxes
- We specify methods of communication (eg by email, by text, by phone, by recorded call, by post)
- We ask for consent to pass details to third parties for marketing, and name or describe those third parties
- We record when and how we got consent, and exactly what it covers

Using bought-in lists
- We check the origin and accuracy of the list
- We check when and how consent was obtained, and what it covers
- We don’t use bought-in lists for texts, emails or recorded calls (unless we have proof of opt-in consent within last 6 months which specifically named or described us)
- We screen against the TPS
- We tell people where we got their details

Making calls
- We screen live calls against the Telephone Preference Service (TPS)
- We only make recorded calls with opt-in consent
- We keep our own do-not-call list of anyone who says they don’t want our calls
- We screen against our do-not-call list

Sending texts or emails
- We only text or email with opt-in consent (unless contacting previous customers about our own similar products, and we offered them an opt-out when they gave their details)
- We offer an opt-out (by reply or unsubscribe link)
- We keep a list of anyone who opts out
- We screen against our opt-out list
Practical Tools

...and an at-a-glance guide to UK marketing rules

### At-a-glance guide to the marketing rules

<table>
<thead>
<tr>
<th>Method of communication</th>
<th>Individual consumers (plus sole traders and partnerships)</th>
<th>Business-to-business (companies and corporate bodies)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Live calls</td>
<td>- Screen against the TPS</td>
<td>- Screen against the Corporate TPS</td>
</tr>
<tr>
<td></td>
<td>- Can opt out</td>
<td>- Can opt out</td>
</tr>
<tr>
<td>Recorded calls</td>
<td>- Need specific consent</td>
<td>- Need specific consent</td>
</tr>
<tr>
<td>Emails or texts</td>
<td>- Need specific consent</td>
<td>- Can email or text corporate bodies</td>
</tr>
<tr>
<td></td>
<td>- Or soft opt-in (previous customer, our own similar product, had a chance to opt out)</td>
<td>- Good practice to offer opt out</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Individual employees can opt out</td>
</tr>
<tr>
<td>Faxes</td>
<td>- Need specific consent</td>
<td>- Screen against the Fax Preference Service (FPS)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Can opt out</td>
</tr>
<tr>
<td>Mail</td>
<td>- Name and address obtained fairly</td>
<td>- Can mail corporate bodies</td>
</tr>
<tr>
<td></td>
<td>- Can opt out</td>
<td>- Individual employees can opt out</td>
</tr>
</tbody>
</table>

This only gives a very broad overview of the marketing rules. For detailed advice, see our full guidance on direct marketing.

ICO

Information Commissioner's Office

Version 1
September 2013
Practical Tips

• In a transition period
• Transparency is the name of the game
• In the U.S.:
  – Ensure your privacy notice accurately describes what’s happening when visitors come to your site
    • Who is collecting it?
    • What is collected?
    • Where is their information going?
    • Why are they collecting it?
    • How can visitors opt out?
• In Europe:
  – Transparency also critical
  – But consent issues are more onerous, and likely to remain so
Resources

- Article 29 Working Party
  - Working Document 02/213 providing guidance on obtaining consent for cookies (WP208)
  - Opinion 03/213 on purpose limitation (WP 203)
  - Opinion 02/213 on apps on smart devices (WP 202)
  - Opinion 4/2012 on cookie consent exemption (WP 194)
  - Opinion 16/211 on EASA/IAB Best Practice Recommendation on OBA (WP188)
  - Opinion 13/2011 on geolocation services on smart mobile devices (WP185)
  - Opinion 2/2010 on online behavioural advertising (WP171)
QUESTIONS?

Thank You