And, *quelle surprise*, the ICO has already brought this to our attention, way back when it published its May 2012 Cookie Guidance, which reminded us:

In some areas, it is possible for functions usually performed by a cookie to be achieved through other means. This could include, for example, using certain characteristics to identify devices so that you can analyse visits to a website (this is sometimes known as ‘device fingerprinting’) ... Focusing solely on cookies is missing the point. Even where the clear cookies rules do not apply, you must consider the DPA whenever you are collecting information that builds up a picture that could allow you to identify an individual. You should tell people what you are collecting and how you are using this information.

(http://www.ico.org.uk/for_organisations/privacy_and_electronic_communications/the_guide/cookies)

Another timely reminder that it is not about cookies, it is about privacy.

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German federal court rules against ‘tell-a-friend’

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Who: German Federal Court of Justice

When: 12 September 2013

Where: Germany

Law stated as at: November 2013

What happened

According to a ruling of the German Federal Court of Justice (‘Bundesgerichtshof’), dated 12 September 2013, German companies are no longer allowed to use ‘tell-a-friend’ functionalities on their websites. The court considers emails sent via such functionalities as unsolicited marketing messages (ie, spam emails) for which the company providing such tell-a-friend functionality on its website is responsible. In the absence of an expressing and prior consent of the recipient of such a message (which will usually not exist in practice), the use of such functionalities might therefore lead to cease-and-desist requests and fines.

Unfair competition laws apply

Under German laws against unfair competition, and subject only to few exceptions, any form of email marketing without expressing prior consent of the addressee is unlawful and can be legally challenged by, for example,

the recipients and consumer protection bodies. The ruling has now (somewhat unsurprisingly) made clear that this prohibition also applies to tell-a-friend functionalities used by companies on their websites to promote their products and services (as emails generated by such functionalities are sent via the companies' websites and typically contain a link to the company website).

The court did not accept the argument that the email is initiated by a third person and not the company as such and that the company had used certain mechanisms in order to prevent the function from being misused. In the court's view, the key point is that the tell-a-friend email is sent via the tell-a-friend feature provided on a company's website, as recipients typically perceive the company as the sender of such emails.

Why this matters

By way of background, tell-a-friend website functionalities have been a sort of legal 'grey area' for a couple of years in Germany. However, before this case it could be argued that, by designing the emails in a certain way (ie, not including any advertisement in the emails beyond the recommendation itself), the legal risk could at least be reduced. After this German Federal Court of Justice ruling, this is no longer possible and companies using such functionalities should remove them from their websites as soon as possible.

That said, the ruling does not state whether simple 'mail-to functionalities' are also prohibited, that is, functionality on a company website that uses the email client of the recommending person to send an automated email with a link to the company website to a third person. In this case, it is actually the user himself or herself sending out the email. However, looking at the Federal Court of Justice's reasoning, it cannot be excluded that also such a functionality bears a certain legal risk going forward.

(The German Federal Court of Justice ruling in this case is available in full at <http://bit.ly/1dostnZ>).

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