



October 4th, 2022

# Surveillance Advertising: How Did the Advertising Industry Allow This Label?

by Gary Kibel

When brands need to better position their products and services, they turn to the advertising industry. When a business feels the public is either misconstruing or being misled about its practices, it turns to the advertising industry.

Professionals in the advertising industry are the experts in developing memorable taglines, jingles, phrases and encouraging consumer actions.

So how did the advertising industry allow the term “[surveillance advertising](#)” to gain a foothold, not just with aggressive privacy advocates but with lawmakers and regulators? The results could be significant if seemingly innocuous, data-driven marketing practices are legislated out of existence.

To be clear, there absolutely are certain data practices that are creepy, go beyond mere ad targeting and should be subject to regulation. However, the entire data-driven marketing industry is now being saddled with this new phrase. Who wouldn't be scared by something called surveillance advertising?

A privacy advocacy group recently petitioned the Federal Trade Commission to engage in rulemaking to control what it referred to as surveillance advertising. But rather than acknowledging this phrase is overly broad and somewhat misleading, the FTC has readily repeated and even embraced it.

In Congress, a bill was recently floated called the “[Banning Surveillance Advertising Act of 2022](#).” The proposed law would ban certain advertising merely because it's targeted based on personal information and would provide consumers (i.e., class action lawyers) with a private right of action to bring lawsuits.

This type of method – tagging a seemingly ordinary practice with a phrase that evokes a strong negative connotation – is often used in politics and is very often successful.

Politicians, for example, seek to associate derisive nicknames with the opposition: Tricky Dicky, Crooked Hillary, Lying Ted, etc. Perhaps one of the most effective political misnomers has been labeling estate taxes as death taxes. Who wouldn't be outraged by a death tax! While, in reality, less than 1% of estates in the US are subject to estate taxes, the concept of a death tax evokes a strong response from many and has driven legislation despite the limited impact it has on the lives of most Americans.

In other words, the growing association between “data-driven” and “surveillance” is a problem.

The marketing industry is all about influencing people. It’s time for the industry to step up and take a number of steps. First, the industry should clearly differentiate between reasonable advertising practices and objectionable tactics and clearly explain the economic benefits of data-driven marketing. Stakeholders should also work closely with regulators and lawmakers to talk them off the ledge so they support reasonable privacy laws.

It’s possible for consumers to have more control over their personal information without outlawing effective and reasonable marketing practices. What’s unacceptable is for the advertising industry to be outwitted by a better marketing campaign.



**Gary Kibel** is a partner in the Privacy + Data Security Practice Group of Davis+Gilbert LLP. He may be reached at [gkibel@dglaw.com](mailto:gkibel@dglaw.com) or 212 468 4918.

