

Online Behavioral Advertising Moving the Discussion Forward to Possible Self-Regulatory Principles

Background

Since the 1990's, the Federal Trade Commission and its staff have engaged in investigations, law enforcement, studies, and other policy developments to protect consumer privacy in the online environment. The FTC's work in this area is part of its broader, longstanding program to address privacy concerns in both the online and offline markets. In the online environment, innovation in consumer services and products – photo-sharing, blogging, the creation of virtual communities, and robust search, to name but a few – has significantly enhanced consumers' use of the Web. The FTC's privacy program seeks to balance support for such innovation with the need to protect against harms to consumers' privacy.

In November 2006, the FTC held three days of public hearings, "Protecting Consumers in the Next Tech-ade," to examine anticipated technological developments that could raise consumer protection policy issues over the next decade.¹ Online behavioral advertising – the practice of tracking consumers' activities online to target advertising – received considerable attention at the hearings. In the year since Tech-ade, the FTC staff has continued to examine online behavioral advertising. Among other things, to explore issues raised by consumer advocates and others,² the staff has held many dozens of meetings with consumer representatives, industry members, academics, technologists, and others to gain a better understanding of current and anticipated online advertising models.³

Most recently, on November 1 and 2, 2007, building on the Tech-ade hearings, the FTC hosted a Town Hall entitled "Ehavioral Advertising: Tracking, Targeting, and Technology." The event brought together interested parties to discuss the privacy issues raised by online behavioral advertising. The FTC selected the Town Hall format to convey the importance of launching a continuing dialogue and debate about the key issues. To prepare for the event and supplement the record, the FTC sought public comment on the issues.⁴

¹See <http://www.ftc.gov/bcp/workshops/techade/index.html>.

²See, e.g., Center for Digital Democracy and U.S. Public Interest Research Group Complaint and Request for Inquiry and Injunctive Relief Concerning Unfair and Deceptive Online Marketing Practices (Nov. 1, 2006), <http://www.democraticmedia.org/files/pdf/FTCadprivacy.pdf>.

³The FTC examined similar issues in 2000, when it held a workshop (jointly with the Department of Commerce) to examine online profiling, an early form of behavioral advertising that has evolved considerably since that time. See <http://www.ftc.gov/opa/1999/09/profiling.shtm>.

⁴See <http://www.ftc.gov/os/comments/behavioraladvertising/index.shtm>.

In examining the practices, the FTC has applied a broad definition of online “behavioral advertising,” one meant to encompass the various tracking activities engaged in by diverse companies across the Web. Thus, for purposes of this discussion, online “behavioral advertising” means the tracking of a consumer’s activities online – including the searches the consumer has conducted, the web pages visited, and the content viewed – in order to deliver advertising targeted to the individual consumer’s interests.

In advance of the Town Hall, the FTC identified certain key questions related to behavioral advertising for discussion by participants. These questions included what consumers know about the practice, whether consumer disclosures in this area are necessary and effective, how data collected for behavioral advertising is used and protected, and what standards do or should govern the practice as we move into the future. In addition, a number of industry groups, consumer advocates, and individual companies developed proposals and recommendations regarding the privacy issues raised by behavioral advertising. These include a Do Not Track proposal, submitted by a coalition of consumer groups; several reports discussing and critiquing the current practices and self-regulatory initiatives in this area; and a variety of industry initiatives to address the privacy issues raised.⁵ From all of these discussions and activities, certain core issues and concerns have emerged.

First, while behavioral advertising provides benefits to consumers in the form of free web content and personalized ads that many consumers value, the practice itself is largely invisible and unknown to consumers. The benefits include, for example, access to newspapers and information from around the world, provided free because it is subsidized by online advertising; tailored ads that facilitate comparison shopping for the specific products that consumers want; and, potentially, a reduction in ads that are irrelevant to consumers’ interests and that may therefore be unwelcome. Although many consumers value these benefits, few appear to understand the role that data collection plays in providing them. Second, business and consumer groups alike cherish the values of transparency and consumer autonomy, and view them as critical to the development and maintenance of consumer trust in the online marketplace. Third, regardless of whether one views behavioral advertising as beneficial, benign, or harmful, there are reasonable concerns about the possibility of consumer data collected for this purpose falling into the wrong hands or being used for unanticipated purposes.

⁵See, e.g., Center for Democracy and Technology *et al.*, *Consumer Rights and Protections in the Behavioral Advertising Sector* (Do Not Track proposal) (Oct. 31, 2007), <http://www.cdt.org/press/20071031press.php>; World Privacy Forum, *The Network Advertising Initiative: Failing at Consumer Protection and at Self-Regulation* (Nov. 2, 2007), <http://www.worldprivacyforum.org>; Press Release, AOL, *AOL Launches Innovative Privacy Education Program for Behaviorally Targeted Advertising* (Oct. 31, 2007), http://press.aol.com/article_display.cfm?article_id=1327.

Given the importance of these issues, FTC staff has proposed some governing principles for behavioral advertising and now seeks comment on the principles from interested parties. The principles are intended to address the unique concerns expressed about behavioral advertising and thus are limited to these practices. The purpose of this proposal is to encourage more meaningful and enforceable self-regulation to address the privacy concerns raised with respect to behavioral advertising. In developing the principles, FTC staff was mindful of the need to maintain vigorous competition in online advertising as well as the importance of accommodating the wide variety of business models that exist in this area. The staff intentionally drafted the principles in general terms to encourage comment and discussion by all interested parties and further development of the principles based on the comments.

Proposed Principles

1. Transparency and consumer control

Issue:

- Interested parties cite the need for greater transparency and consumer control to address the privacy issues raised by behavioral advertising. Many criticize existing disclosures as difficult to understand, inaccessible, and overly technical and long. They also stated that, with clearer disclosures, consumers can make more informed decisions about whether or not they want personalized advertising or, alternatively, whether they would prefer not to do business at particular websites. At the same time, panelists recognized that many consumers do not read privacy policies and raised a genuine question about consumers' willingness and ability to read and understand long disclosures about privacy.

Proposed Principle:

- Every website where data is collected for behavioral advertising should provide a clear, concise, consumer-friendly, and prominent statement that (1) data about consumers' activities online is being collected at the site for use in providing advertising about products and services tailored to individual consumers' interests, and (2) consumers can choose whether or not to have their information collected for such purpose.⁶ The website should also provide consumers with a clear, easy-to-use, and accessible method for exercising this option.

⁶Many FTC laws, rules, and policies require clear and conspicuous disclosures to prevent deception and possible consumer harm. For more information and guidance on the use of such disclosures in online advertising, see *Dot Com Disclosures, Information About Online Advertising*, <http://www.ftc.gov/bcp/online/pubs/buspubs/dotcom/index.shtml> (May 2000).

2. Reasonable security, and limited data retention, for consumer data

Issue:

- Stakeholders express concern that data collected for behavioral advertising may not be adequately secured and could find its way into the hands of criminals or other wrongdoers. They stated that appropriate security measures therefore are needed to minimize the risk of unauthorized access. On the other hand, some of the data that is collected may not be traceable to any individual consumer or computer, and therefore may do little harm if obtained by a wrongdoer.

Proposed Principle:

- Any company that collects and/or stores consumer data for behavioral advertising should provide reasonable security for that data. Consistent with the data security laws and the FTC's data security enforcement actions, such protections should be based on the sensitivity of the data, the nature of a company's business operations, the types of risks a company faces, and the reasonable protections available to a company.⁷

Issue:

- Stakeholders express concern about the length of time that companies are retaining consumer data collected for behavioral advertising. The longer that data is stored in company databases, the greater the risks to the data. On the other hand, there may be good reasons for retaining data, such as maintaining and improving customer service or tracking criminal activities on the website.

Proposed Principle:

- Companies should retain data only as long as is necessary to fulfill a legitimate business or law enforcement need.⁸ FTC staff commends recent efforts by some industry members to reduce the time period for which they are retaining data. However, FTC staff seeks comment on whether companies can and should reduce their retention periods further.

⁷For more information on the FTC's data security program and data security enforcement actions, see http://www.ftc.gov/privacy/privacyinitiatives/promises_enf.html.

⁸FTC enforcement actions and educational materials have highlighted the risk of storing consumer data longer than it is reasonably needed. See, e.g., DSW Inc., Docket No. C-4157 (Dec. 1, 2005), <http://www.ftc.gov/opa/2005/12/dsw.shtm>; *Protecting Personal Information: A Guide for Business*, <http://www.ftc.gov/infosecurity>.

3. Affirmative express consent for material changes to existing privacy promises

Issue:

- Industry and consumer representatives alike state that the privacy policy – a set of commitments about how information is handled – not only is an important tool for providing information to consumers, but also serves to promote accountability among businesses. It is widely recognized, however, that businesses may have a legitimate need to change their privacy policies from time to time.

Proposed Principle:

- As the FTC has made clear in its enforcement and outreach efforts, a company must keep any promises that it makes with respect to how it will handle or protect consumer data, even if it decides to change its policies at a later date.⁹ Therefore, before a company can use data in a manner materially different from promises the company made when it collected the data, it should obtain affirmative express consent from affected consumers. This principle would apply in a corporate merger situation to the extent that the merger creates material changes in the way the companies collect, use, and share data.

4. Affirmative express consent to (or prohibition against) using sensitive data for behavioral advertising

Issue:

- Stakeholders express concern about the use of sensitive data (for example, information about health conditions, sexual orientation, or children’s activities online) to target advertising, particularly when the data can be traced back to a particular individual. They state that consumers may not welcome such advertising even if the information is not personally identifiable; they may view it as invasive or, in a household where multiple users access one computer, it may reveal confidential information about an individual to other members.¹⁰ At the same time, panelists recognized that some consumers may view personalized advertising and content as a desirable source of education about their medical conditions or personal concerns.

⁹See, e.g., *Gateway Learning Corp.*, Docket No. C-4120 (Sept. 10, 2004), <http://www.ftc.gov/opa/2004/07/gateway.shtm> (company made material changes to its privacy policy and allegedly applied such changes to data collected under the old policy; opt-in required for future such changes).

¹⁰At least one self-regulatory program currently prohibits the use of sensitive personally identifiable data and has stated its intention to expand its guidance on the issue. See NAI Principles, <http://www.networkadvertising.org/networks/principles.asp>.

Proposed Principle:

- Companies should only collect sensitive data for behavioral advertising if they obtain affirmative express consent from the consumer to receive such advertising. FTC staff seeks specific input on (1) what classes of information should be considered sensitive, and (2) whether using sensitive data for behavioral targeting should not be permitted, rather than subject to consumer choice.

5. Call for additional information: Using tracking data for purposes other than behavioral advertising

Issue:

- Interested parties express concern that consumer tracking data collected and stored for behavioral advertising could be used for other potentially harmful purposes. To the extent that the collection of data for behavioral advertising is invisible to consumers, such secondary uses of the data may be especially so. Further, such uses may be contrary to consumers' reasonable expectations as they navigate the web. On the other hand, there may be secondary uses of data that provide benefits to consumers. For example, companies may use data to develop new products that appeal to their customer base or to enhance existing products and services that they offer.

Additional Information Needed:

- FTC staff seeks additional information about the potential uses of tracking data beyond behavioral advertising and, in particular: (1) which secondary uses raise concerns, (2) whether companies are in fact using data for these secondary purposes, (3) whether the concerns about secondary uses are limited to the use of personally identifiable data or also extend to non-personally identifiable data, and (4) whether secondary uses, if they occur, merit some form of heightened protection.

Next Steps: Request for Comment

- FTC staff seeks comment and discussion on the appropriateness and feasibility of these principles for both consumers and businesses, including the costs and benefits of offering choice for behavioral advertising. FTC staff recognizes that, to the extent that behavioral advertising supports free web content and other benefits, the choice by consumers not to participate could reduce the availability of such benefits. FTC staff welcomes comment on these and other issues raised by the proposed principles.
- Comments should be sent by Friday, February 22, 2008, to: Secretary, Federal Trade Commission, Room H-135 (Annex N), 600 Pennsylvania Avenue, N.W., Washington,

D.C. 20580, or BehavioralMarketingPrinciples@ftc.gov. The comments will be posted on the FTC's behavioral advertising web page for possible use in the development of self-regulatory programs.¹¹

These principles represent FTC staff's efforts to identify common themes and possible norms to govern behavioral advertising. They draw upon the issues and concerns raised at the Town Hall, the complaints and proposals submitted beforehand and afterwards, and the research and many dozens of interviews that FTC staff conducted in preparation for the event. In proposing these principles, FTC staff notes that it in no way intends to foreclose (1) other ideas suggested and being considered to address behavioral advertising, or (2) use of the FTC's enforcement or regulatory authority, including its authority to challenge unfair or deceptive practices under Section 5 of the FTC Act.

¹¹See <http://www.ftc.gov/bcp/workshops/ehavioral/index.shtml>.