



# Federal Trade Commission

---

**“Privacy: Where do we go from here? ”**

**Remarks of David C. Vladeck, Director, FTC Bureau of Consumer Protection<sup>1</sup>**

**International Conference of Data Protection and Privacy Commissioners  
Madrid  
November 6, 2009**

## **I. Background**

Good morning. I am delighted to be here in this beautiful city and I am grateful for the opportunity to be at this conference with all of you. A special thank you to the Spanish data protection authority for inviting me here today, and in particular for scheduling me on a panel that immediately followed a coffee break. I know that robust discussions are the most important thing at a conference, but good coffee is a close second. This conference has delivered on both.

As you know, I am the Director of the Bureau of Consumer Protection at the Federal Trade Commission. The FTC is an independent U.S. government agency, and privacy interests are critical to our consumer protection mission. The title of this panel is “Moving Towards A Global Regulation of Privacy: Proposal and Strategies.” Because of the FTC’s legal authority,

---

<sup>1</sup>The views stated here are my own and do not necessarily reflect the views of the Commission or any Commissioners.

my focus today will be on commercial uses of information. I see this discussion as a series of questions:

1. What do we want?
2. How do we get there? and
3. What can we agree on?

## **II. Fundamental Values**

So what do we want? I believe we are all in a similar place. When we peel the layers of the onion (and hopefully we don't end up in tears) we all share the same core values. We want transparency and we want consumers to have control over who obtains their data and what is done with it. We want private data kept secure. And we expect and demand accountability. At the FTC, these are our priorities, and I'd like to highlight some recent enforcement actions we've taken that further these goals.

The first is our recent enforcement efforts relating to the U.S.-E.U. Safe Harbor Framework, which enables companies to transfer data from Europe to the U.S. by committing publicly to comply with specified privacy requirements. A number of companies were claiming that they were part of this program, when in fact they were not. Companies must be accountable for representations they make to consumers about their information practices. We've reached settlements with six of the companies and an additional case is still ongoing.<sup>2</sup>

The second is my recent letter to Google relating to its plan to digitize millions of books. This project promises substantial benefits to consumers but also raises privacy

---

<sup>2</sup> See <http://www.ftc.gov/opa/2009/10/safeharbor.shtm> and *FTC v. Javian Karnani, and Balls of Kryptonite, LLC, a California Limited Liability Company*, all doing business as Bite Size Deals, LLC and Best Priced Brands, LLC, No. 09-CV-5276 (C.D. Cal. filed July 20, 2009); <http://www.ftc.gov/opa/2009/08/bestpriced.shtm>.

challenges that must be considered. Consumers may not want anyone - - including Google - - to know their reading habits. To address this issue, I requested that Google disclose how it will use the personal information it collects when it offers books online and delivers targeted advertising to consumers. Transparency is critical. I further called upon Google to commit to complying with the FTC's self-regulatory principles for online behavioral advertising - - a commitment Google made.<sup>3</sup>

Although it may be a simple matter to conclude that transparency, consumer control, and accountability are fundamental to all of us, answering "how do we get there?" is more challenging. Countries and regions have characters all their own. Cultural values - - as well as policy and legal traditions - - will affect how these fundamental goals are achieved. For example, in the United States, free speech considerations influence our approach to many policy and regulatory areas, including privacy.

I'd like to take a few moments to tell you about how the FTC is going about figuring out "how we get there" - - how we can improve on achieving the fundamental goals of transparency, consumer control, and accountability. We have launched a project to host a series of roundtables to get public input on various models for promoting consumer privacy. The roundtable participants will include stakeholders representing a wide range of views and experiences, such as academics, privacy experts, consumer advocates, industry participants and associations, technology experts, legislators, international representatives, and others. We welcome comments and papers as contributions to this process and we have a website dedicated to this project where submissions can be made.

---

<sup>3</sup> See Letter from David Vladeck to Jane Horvath Concerning the Google Books Project <http://www.ftc.gov/os/closings/090903horvathletter.pdf>.

This project involves looking at *all* aspects of privacy, including:

- the risks and benefits from the collection, sharing and use of consumer information ; and
- consumer expectations about how their information is collected and used.

Most importantly, we will be examining whether the existing legal requirements and self-regulatory regimes in the United States adequately protect consumer privacy interests today and will protect consumer privacy going forward.

The frameworks currently in place were developed in a different era. At the time they were constructed, I don't think anyone would have predicted that personal information would be used in the way it is today or that technology would evolve so quickly. Although, the famous Spanish philosopher, Jose Ortega y Gasset, who died in 1955, said something remarkably prescient; "tell me to what you pay attention and I will tell you who you are." He may have been trying to tell us to keep our eyes on behavioral advertising.

At the FTC, we have been relying on a number of approaches that may fall short in this highly dynamic technological era. The first, and the most prevalent, is the model of notice and consent. This construct may have made sense in the past where it was clear to consumers what they were consenting to, that consent was timely, and where there would be a single use or a clear use of the data. That's not the case today. Disclosures are now as long as treatises, they are written by lawyers - - trained in detail and precision, not clarity - - so they even sound like treatises, and like some treatises, they are difficult to comprehend, if they are read at all. It is not clear that consent today actually reflects a conscious choice by consumers. I'm not saying that consumers are falling asleep reading disclosures, although I admit to doing that every now and then; what I am saying is that the volume and complexity of notices has reduced the ability of

consumers to exercise meaningful consent for the collection and use of their information in ways that might be unexpected.

A recent FTC enforcement action highlights the weaknesses of reliance on lengthy privacy policies to achieve meaningful transparency and consumer control. This case against a major American department store chain involved a failure to disclose adequately the scope of personal information the store collected from consumers via a downloadable software application.<sup>4</sup> According to the FTC's complaint, the company paid \$10 to consumers who visited the company's websites and agreed to download "research" software that the company said would confidentially track their "online browsing." In fact, the software collected vast amounts of information, including the contents of consumers' shopping carts, online bank statements, drug prescription records, video rental records, passwords, and library borrowing histories. Only in a lengthy user license agreement, available to consumers at the end of a multi-step registration process, did the company disclose the extent of the information the software tracked. The settlement calls for the company to stop collecting data from the consumers who downloaded the software, to destroy all data it had previously collected, and not to engage in similar conduct in the future. This demonstrates that meaningful consent is challenging in this new day and age and requires us to rethink how transparency is achieved.

Another approach that we have relied on in the past is to focus our efforts where there is tangible harm to consumers resulting from the misuse of their data. Uses of consumer information that resulted in such tangible, mainly economic, harm were seen as the priority from

---

<sup>4</sup> *In the Matter of Sears Holding Corp.*, FTC Docket No. C-4264 (September 9, 2009), <http://www.ftc.gov/os/caselist/0823099/index.shtm>.

our regulatory perspective. But in today's world, consumers experience a broader range of privacy-related harms, including reputational harm and unexpected or surprising uses of their information. The case I just discussed involved just such a harm - - consumers were simply not aware of, and surprised by, the expansive information collection that was occurring.

Behavioral advertising offers a useful example of the limitations of the Commission's historical reliance on notice and choice and harm-based approaches. Existing models of notice and consent in the behavioral advertising area are problematic. A long disclosure in a privacy policy, even if it is written clearly, may not be an effective way for consumers to appreciate why they are seeing a particular advertisement. During our upcoming roundtables on privacy, we hope to hear more about new approaches to providing effective notice and choice, both in the online and offline environment.

Behavioral advertising has also prompted a close examination of what constitutes "harm." In certain situations it may be more nuanced, but there are circumstances when, at its core, it reflects a concern about unwanted monitoring. Just two months ago, researchers at the University of Pennsylvania and UC Berkeley released a survey in which over 80 percent of consumers stated that they would not want to receive online ads based on data gathered about their online activities across multiple websites.<sup>5</sup> The message is clear. There is a fundamental value that consumers place on privacy that goes beyond tangible harm. Many consumers simply

---

<sup>5</sup> See Turow, King, Hoofnagle, Bleakley, and Hennessy, "Contrary to What Marketers Say, Americans Reject Tailored Advertising and Three Activities that Enable It," (September 2009), available at [http://graphics8.nytimes.com/packages/pdf/business/20090929-Tailored\\_Advertising.pdf](http://graphics8.nytimes.com/packages/pdf/business/20090929-Tailored_Advertising.pdf).

do not want their information tracked and many want the power to exercise control over when tracking occurs and the uses to which the data collected can be put.

We know that others are also taking stock, looking at their privacy approaches and considering how effective they are. For example, the European Commission is currently in the midst of its consultation examining privacy in Europe. We know that Canada is also considering ways to improve its approach to privacy. We can all agree that these types of examinations are necessary in order to figure out how we can achieve our shared fundamental goals.

Now, I've talked about the process of determining "how we get there" but the unanswered questions are how will we get there? And what will conclude? That remains to be seen. We are looking forward to the dialogue and debate that we will undoubtedly see in our privacy roundtable project and are encouraged they will lead the path to conceptualizing new and improved approaches to privacy. We are also looking forward to hearing about lessons learned during the consultation in Europe. But one thing is certain. We believe that we have much to learn from one another. There will be differences among jurisdictions, even though at the core, the fundamentals are the same.

Which brings us to the final question in the list that I posed earlier "what can we agree on?" Let's start with an easy one. We can all agree that like other areas of enforcement in this global era, privacy enforcement cooperation is essential. Many of the international organizations that focus on privacy have emphasized the need for greater privacy enforcement cooperation. We are excited at the prospect of enhanced cooperation and we are energized and encouraged by the widespread interest in, and prospect of, increased international cooperation. We know that many of you share this interest, and we look forward to discussing how we can work together to strengthen privacy enforcement cooperation on an international level.

We can also all agree that greater transparency, consumer control and accountability are fundamental goals. And I think that the only way we can figure out how to get there is to think creatively. Thinking outside the box. Thinking without being limited by standards that might restrict innovative and creative thinking. While we are all considering how we achieve our goals, we would be doing ourselves a disservice by prematurely trying to forge a consensus on specified standards. Globally, we are still surveying – we are getting our bearings – by exploring the privacy implications of modern communications technology and modern global commerce. Once we gain a greater understanding, we will all be in a better position to appreciate the scope of those areas on which we can agree. Now is not the time for carving rules in stone, but rather the time to take a fresh look, to open our minds and not be constricted by specified inflexible requirements.

Technology is developing rapidly and our policies need to keep up. Brain power is hard at work around the globe, and in this very room, to conceive of new and improved ways to achieve the goals of transparency, accountability, and consumer control. I'm sure you've heard it before, but in the words of Barack Obama, "yes, we can."

I appreciate the opportunity to participate in this discussion, and while I began my discussion with a quote from a philosopher, I'll end with a quote from a scientist. "Imagination is everything. It is the preview of life's coming attractions." That was Albert Einstein. Let's get to work, let's think creatively and let's see where our imaginations can take us and let's figure out how we can reach our goals. Thank you.