

**CONCURRING STATEMENT OF
COMMISSIONER PAMELA JONES HARBOUR**

*REGARDING STAFF REPORT,
“SELF-REGULATORY PRINCIPLES FOR ONLINE BEHAVIORAL
ADVERTISING”*

I have voted to authorize staff to issue today’s report on behavioral advertising. The report reflects tremendous efforts by staff to explore the complex issues surrounding behavioral advertising, and I thank staff for their diligence in tackling this important topic. The release of this report is yet another positive step in an ongoing dialogue between the Commission and relevant stakeholders, including industry representatives, consumer groups, and legislators.

I write separately to explain where I depart from the Commission’s present approach to the study of behavioral advertising. Simply stated, today’s staff report, while commendable, focuses too narrowly. Threats to consumer privacy abound, both online and offline,¹ and behavioral advertising represents just one aspect of a multifaceted privacy conundrum surrounding data collection and use. I would prefer that the Commission take a more comprehensive approach to privacy, and evaluate behavioral advertising within that broader context.

In recent years we have witnessed an explosion of “free” on

¹ Offline sources of data, including public records (e.g., property records) as well as private databases (e.g., credit reporting agency files), also may pose potential risks to maintaining privacy.

complete and accurate information about how their data may be collected and used. Informed consent should not be assumed based on consumers' willingness to click through cryptic disclosures and licenses. Furthermore, once consumers exercise their choices, companies must be held accountable for the promises they make to consumers regarding collection and use of personal data.

A legislative approach to behavioral advertising is not prudent at this time, for two reasons. First, there are still more questions than answers. Second, and more importantly, any legislation should be part of a comprehensive privacy agenda, rather than fostering the current piecemeal approach to privacy. But nor can I fully support a self-regulatory approach to behavioral advertising, which the staff report appears to advocate. Industry consistently argues that self-regulatory programs are the best way to address privacy concerns, but the evidence is mixed at best. Self-regulation has not yet been prove

² See, e.g., Pam Dixon, World Privacy Forum, *THE NETWORK ADVERTISING INITIATIVE: Failing at Consumer Protection and at Self-Regulation* (Nov. 2, 2007), available at http://www.worldprivacyforum.org/pdf/WPF_NAI_report_Nov2_2007fs.pdf; Chris Jay Hoofnagle, *Privacy Self Regulation: A Decade of Disappointment*, EPIC.ORG (Jan. 19, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=650804.

³ See Complaint and Request for Inquiry and Injunctive Relief Concerning Unfair and Dec

⁵ See Todd Wasserman & Wendy Melillo, *Why the Candidates Watch What You Buy*, ADWEEK, Oct. 30, 2006, available at <http://www.adweek.com/aw/images/pdfs/polifeature.pdf>.

⁶ The Commission might wish to devote some of its resources to explore these uses of data. See, e.g., Ron Lieber, *A Very Watchful Eye on Credit Card Spending*, NEW YORK TIMES, Jan. 31, 2009, available at <http://www.nytimes.com/2009/01/31/your-money/credit-and-debit-cards/31money.html>; Chris Cuomo *et al.*,

⁸ See Peter Swire & Annie I. Antón, *Online Behavioral Advertising: Technical Steps Needed to Ensure Consumer Control*, (Apr. 10, 2008), available at

The Commission has issued 6(b) orders in other contexts. *See, e.g.*, News Release,

¹⁴ See, e.g., Press Release, Consumers Union, *Consumer Reports Poll: Americans Extremely Concerned About Internet Privacy* (Sept. 25, 2008), available at http://www.consumersunion.org/pub/core_telecom_and_utilities/006189.html; Press Release, Harris Interactive Inc., *Majority Uncomfortable with Websites Customizing Content Based Visitors Personal Profiles* (Apr. 10, 2008), available at http://www.harrisinteractive.com/harris_poll/index.asp?PID=894; Press Release, TRUSTe, *TRUSTe Report Reveals Consumer Awareness and Attitudes About Behavioral Targeting* (Mar. 26, 2008), available at http://www.truste.org/about/press_release/03_26_08.php.

¹⁵ See, e.g., Dissenting Statement of Commissioner Pamela Jones Harbour, *In the Matter of Google/DoubleClick*, F.T.C. File No. 071-0170 at 11-12 (Dec. 20, 2007), available at <http://www.ftc.gov/os/caselist/0710170/071220harbour.pdf>

¹⁷ For example, search companies have continually changed their data retention policies, primarily by modifying the amount of time data is retained and applying improved techniques to de-identify such data. While debate exists over the relative merits of each individual company's technique, such actions are driven by demands from regulators, consumer advocates, and users themselves. *See, e.g.*, Press Release, Yahoo!, *Yahoo! Sets New Industry Privacy Standard with Data Retention Policy* (Dec. 17, 2008), available at <http://yhoo.client.shareholder.com/press/releasedetail.cfm?ReleaseID=354703>; Posting of Peter Fleischer, Global Privacy Counsel; Jane Horvath, Senior Privacy Counsel; and Alma Whitten, Software Engineer

My dissent in Google/DoubleClick also suggested the concept of a market for data itself, separate from markets for the services fueled by the data.²⁰ The dissent discussed John Battelle's "database of intentions" concept, which he describes as the "aggregate results of every search ever entered, every result list ever tendered, and every path taken as a result."²¹ Battelle asserts that no single company controls this collection of information, but posits that a few select companies share control. One of my key concerns in Google/DoubleClick was that the merged entity might move closer to dominating the database of intentions, and that the network effects generated by combining the two firms might have long-term negative consequences for consumers. Over the past two years, a series of mergers has further concentrated the competitive landscape in a putative market for consumer data,²² and merger analysis should take this trend into account. Today's economic climate likely will accelerate such concentration, potentially on a scale similar to the previous dot-com collapse.

IV. COMMENTS ON STAFF REPORT

As a necessary pr

²⁰ See Dissenting Statement Of Commissioner Pamela Jones Harbour, *In the Matter of Google/DoubleClick* at 9, supra note 15. "In the future, the Commission likely will issue Second Requests in other merger investigations that implicate combinations of data as well as potentially overlapping products and services. When those deals arise, the Commission should ensure that the combinations of data are included squarely within the scope of Second Requests. In this case, for example, it might have been possible to define a putative relevant product market comprising data that may be useful to advertisers and publishers who wish to engage in behavioral targeting."

²¹ JOHN BATTELLE, *THE SEARCH: HOW GOOGLE AND ITS RIVALS REWROTE THE RULES OF BUSINESS AND TRANSFORMED OUR CULTURE*, 1-17 (Portfolio, Penguin Group [USA] 2005); Posting of John Battelle to battellemedia.com (Nov. 13, 2003), available at <http://battellemedia.com/archives/000063.php>.

²² During 2007, Microsoft bought aQuantive, Google acquired DoubleClick, Yahoo obtained complete control over Right Media, and WPP purchased 24/7 Real Media.

matter, sweeping exemptions are never advisable until empirical due diligence has been performed.²³ My concerns are heightened in this particular instance because the original proposed behavioral advertising principles did not directly address this issue. Meanwhile, the technologies underlying online advertising have been, and still are, changing rapidly. The Web 2.0 and emerging Web 3.0 environments – characterized by embedded applications, new delivery mechanisms (e.g., video), and migration to new platforms (e.g., mobile devices) – complicate existing definitions and demand increased understanding.

B. PII Versus Non-PII

Staff distinguished between personally identifiable information and non-personally identifiable information, and appropriately indicated that the line separating the two has blurred. Information can no longer be classified as anonymous or not; at best, it may be placed somewhere along a continuum. Depending on context, information that at first glance appears non-identifiable may, in fact, reveal significant information about an individual.²⁴ As analytical tools improve, the line between PII and non-PII will continue to waver.²⁵ I applaud staff for thinking about this distinction and its potential effects.

C. Secondary Use

Secondary use encompasses the combination of online and offline data from multiple public and private sources and from families of online services (e.g., email, search history, mapping software, social networking, mobile, etc.). The Commission knows very little about secondary uses of data. Staff sought comment on this topic and, unfortunately, received minimal response. More

²³ See, e.g., Concurring Statement Of Commissioner Pamela Jones Harbour, *Regarding Federal Register Notice Rescinding the FTC's 1966 Guidance Concerning the Cambridge Filter Method* (Nov. 24, 2008) available at <http://www.ftc.gov/speeches/harbour/081124tobaccopjh.pdf>; Pamela Jones Harbour, Commissioner, Federal Trade Commission, *An Open Letter to the Supreme Court of the United States from Commissioner Pamela Jones Harbour* at 18-19 (Feb. 27, 2007), available at <http://www.ftc.gov/speeches/harbour/070226verticalminimumpricefixing.pdf>.

²⁴ See, e.g., Michael Barbaro & Tom Zeller, Jr., *A Face Is Exposed for AOL Searcher* No. 4417749, N.Y. TIMES, Aug. 9, 2006, available at http://www.nytimes.com/2006/08/09/technology/09aol.html?_r=1&scp=1&sq=aol%20queries&st=cse&oref=slogin.

²⁵ The line between sensitive and non-sensitive data may also vacillate, affecting the collection and use of financial and health information and targeting of segments including children.

This inquiry may demand

As technology develops, industry needs to reconsider old strategies and listen to new perspectives, including international ones.²⁹ The Commission will play a pivotal role in focusing these efforts.

Last fall, the Commission expressed “cautious optimism” for a self-regulatory approach to online advertising.³⁰ Today’s staff report reflects more optimism, but less caution – even though nothing has happened to justify a change in tone. Much like the “Man Restraining Trade” in the beautiful sculpture outside my office window, I owe it to consumers to encourage the Commission to rein in unbridled optimism and ensure continued caution. For this reason, I share my thoughts today.

²⁹ See, e.g., Peter Cullen, Microsoft Corporation, Remarks before the 30th International Conference of Data Protection and Privacy Commissioners, “Moving Information Across Borders: The Need for a Global Accountability Framework” (Oct. 16, 2008), available at <http://blogs.technet.com/privacyimperative/archive/2008/10/16/moving-information-across-borders-the-need-for-a-global-accountability-framework.aspx>.

³⁰ See *Privacy Implications of Online Advertising: Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 110th Cong. (2008), available at http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=e46b0d9f-562e-41a6-b460-a714bf370171.