

October 19, 2007

**Comments of the
Software & Information Industry Association (SIIA)
To the Federal Trade Commission (FTC) on
Online Behavioral Advertising**

On behalf of the members of the Software & Information Industry Association (“SIIA”), we submit our comments on the above-referenced request for comments, as requested in the Federal Trade Commission’s (“FTC”) public notice (“Notice”).¹

As the principal trade association of the software and information content industry, the more than 800 members of SIIA develop and market software and electronic content for business, education, consumers and the Internet. SIIA’s members are software companies, ebusinesses, and information service companies, as well as many electronic commerce companies. Our membership consists of some of the largest and oldest technology enterprises in the world, as well as many smaller and newer companies.

SIIA appreciates this opportunity to provide its insights on some of the issues raised by the FTC in anticipation of its workshop. As the FTC is aware, SIIA has been closely monitoring and working with the Commission in the implementation of a number of its policy and enforcement initiatives that touch on this subject area, including, for example, implementation of Section 5 deceptive trade practices generally, and the specific areas of combating pernicious spyware, data security, Gramm-Leach-Bliley, identity theft, Children’s Online Privacy Protection Act, CAN-SPAM and the Telemarketing Sales Rules (TSR).

On the whole, SIIA’s comments are made from the perspective of companies and entities that use online advertising tools and services, for the most part developed and maintained by others, to promote their own products and services in an increasingly competitive environment in which customers are seeking specialized information to inform their purchasing decisions. As such, SIIA members depend

¹ “FTC to Host Town Hall to Examine Privacy Issues and Online Behavioral Advertising”, August 6, 2007, found at: <http://www.ftc.gov/opa/2007/08/ehavioral.shtm>

on effective and innovative advertising strategies to gain new customers, maintain existing customers and, in many cases, provide a financial basis for new entrants into the market.

In reviewing the FTC's early reports on the subject,² many of the benefits identified by the Commission – albeit in language that merged divergent concepts such as “cookies,” “network advertising,” “profiling,” “targeted advertising,” etc. – remain true to today, and have become essential to consumers and businesses:

“Network advertisers’ use of cookies and other technologies to create targeted marketing programs also benefits both consumers and businesses. ... targeted advertising allows customers to receive offers and information about goods and services in which they are actually interested. Targeted advertising can also improve a consumer’s Web experience simply by ensuring that she is not repeatedly bombarded by the same ads.

“Businesses clearly benefit as well from the ability to target advertising because they avoid wasting advertising dollars marketing themselves to consumers who have no interest in their products. ... targeted advertising helps to subsidize free content on the Internet. ... advertising revenue helps to subsidize their operations, making it possible to offer free content rather than charging fees for access.

“... profiles can also be used to create new products and services. First, entrepreneurs could use consumer profiles to identify and assess the demand for particular products or services. Second, targeted advertising could help small companies to more effectively break into the market by advertising only to consumers who have an interest in their products or services.³²

“In sum, targeted advertising can provide numerous benefits to both business and consumers.”³

Since the FTC's original report, the growth of Internet commerce and the need to reach consumers and end users through the ubiquitous channel of the Internet has magnified these important benefits. Internet advertising is today an inherent element of any company's plan for success.

Moreover, Internet advertising has been an essential financial basis for many start-up companies that are working toward longer-term subscription-based revenue models or seeking to get new products and services into the market. Two examples:

² See, e.g., “Online Profiling: A Report to Congress”, June 2000, found at <http://www.ftc.gov/os/2000/06/onlineprofilingreportjune2000.pdf>. (Here in after referred to as “June 2000 Report”)

³ June 2000 Report, pp. 9-10 (footnotes omitted).

- **Hotchalk.com.** “The HotChalk Learning Environment is community software for teachers, students, and parents. It includes curriculum management, lesson plan development, automated assignment distribution, collection, and grading in a web-based environment. Teachers can find, create and share standards aligned resources and best practices.”⁴ The HotChalk Learning Environment is free for all schools everywhere and is based on an advertising-supported business model.⁵ HotChalk is working to license and distribute content from larger providers. But without the ability to advertise, HotChalk would not be able to provide its unique services for free to teachers, students and schools.
- **Answers.com.** A “free ‘one-stop shop’ with instant information on over 4 million topics,” Answers.com utilizes an advertising-based revenue model that permits an individual to access reference publications from established publishers to find tailored information.⁶ More than a redisseminator, Answers.com provides “original articles researched by Answers.com's in-house editorial team, community-contributed articles from Wikipedia, and user-generated questions & answers from Answers.com's industry-leading WikiAnswers™ (WikiAnswers.com).”

The personalization of advertising has undergone enormous change in recent years; some even go so far as to suggest a “radical transformation”:

“Gone are the days when marketers randomly placed banner advertisements on related Web sites in the hopes of finding and attracting consumers. With the emergence of today’s sophisticated tools and technologies, marketers can now optimally locate consumers at the point of interest in less than a second. As a result, contextual advertising has become an indispensable online marketing tool used to successfully locate and attract consumers on line.”⁷

As a general matter, “Behavioral targeting technologies work by anonymously monitoring and tracking the content read and sites visited by a designated unique user or IP as that user surfs the Internet. This is done by serving tracking codes,

⁴ “HotChalk Supports Communities of Learners” found at: <http://www.hotchalk.com/about.html>.

⁵ According to HotChalk, with its patent-pending HotChalk Community Standards Engine, each school can control which ads students see, and determine which ads are shown. HotChalk has taken steps to ensure that it never displays advertising during the school day to students. Also children under the age of 13 are never exposed to advertising.

⁶ “Answers.com: what we do,” found at: http://www.answers.com/main/about_answers.jsp.

⁷ Jay Sears, then Vice President of Business Development (now SVP SVP, Strategic Products and Business Development) of ContextWeb, in *Upgrade Magazine* (SIIA), April/May 2005, found at: <http://www.contextweb.com/pdf/UpgradeMagazine.pdf>

which are implemented as cookies, on a user's computer as s/he is served ads from various online advertising networks."⁸

However, implementation of this general scheme varies, and new models are appearing regularly. For example, the approach can be applied to "on-site targeting" where the users are segmented based on content views or actions on one site and then are targeted on the site itself. This is distinct from "network targeting" where the users are segmented based on content views or actions on one site and then are targeted where ever they go on sites participating in the behavioral ad network.⁹

Moreover, the tools associated with behavioral advertising are also utilized in other contexts, such as news searches (where a reader of one article or series of articles will be able to benefit from additional links to additional articles in the similar subject area) and more generally, other non-advertising content searches

Recommendations to the FTC

As the FTC explores "what standards do, or should, govern practices related to online behavioral advertising,"¹⁰ SIIA urges a careful approach based on existing policy frameworks, taking into account the rapidly evolving models of Internet advertising and the need to assess the potential benefits relative to the harm.

First, to the degree that behavioral advertising involves the collection and use of **personally identifiable information**, it is the view of SIIA that the FTC's well-established approach of enforcing privacy promises,¹¹ as well as specific statutory provisions,¹² provide the FTC with an already existing and workable framework. Moreover, where use (or misuse) of personally identifiable information has presented a harm to individuals, the FTC has developed a track record for taking action. For example, the FTC has brought more than a dozen cases¹³ alleging

⁸ Loren Baker (Editor of *Search Engine Journal*), "Behavioral Targeting and Contextual Advertising", Sept. 1, 2004, found at: <http://www.searchenginejournal.com/behavioral-targeting-and-contextual-advertising/836/>.

⁹ "Behavioral Targeting 101," in *Web Analysis, Behavioral Targeting and Advertising*, Sept. 9, 2006, found at: <http://webanalysis.blogspot.com/2006/09/behavioral-targeting-101.html>.

¹⁰ Public Notice, August 6, 2007.

¹¹ "Enforcing Privacy Promises: Enforcing Section 5 of the FTC Act," found at: <http://www.ftc.gov/privacy/privacyinitiatives/promises.html>. See, especially, *In the Matter of Vision I Properties, LLC, doing business as CartManager International*, FTC Docket No. C-4135 (April 26, 2005); and *Gateway Learning Corp.*, FTC Docket No. C-4120 (Sept. 17, 2004).

¹² See Children's Online Privacy Protection Act (COPPA), Gramm-Leach-Bliley Act (GLBA), Fair Credit Reporting Act (FCRA), as amended by the Fair and Accurate Credit Transactions Act (FACTA).

¹³ See generally <http://www.ftc.gov/privacy/index.html>.

that companies misrepresented the nature or extent of its security procedures in violation of the FTC Act's prohibition on deceptive practices.¹⁴ In several of the cases, the Commission alleged that the security inadequacies led to breaches that caused substantial consumer injury and were thus unfair practices under the FTC Act.¹⁵ Some of the cases involved enforcement of the Commission's GLB Act Safeguards Rule or the FCRA.¹⁶ Similarly, the FTC has undertaken enforcement actions to fight spyware, and initiated at least eight law enforcement actions that successfully challenged the distribution of spyware alleged to cause injury to consumers in the online marketplace¹⁷

Taking this existing authority and experience into account, SIIA does not believe that legislation in this specific subject area is necessary, and we strongly urge the FTC not to advocate such a step. As the FTC further explores this area, we urge the Commission to recognize that in many cases – and this is an important consideration – the operation of behavioral advertising does not involve the collection, use or maintenance of *personally identifiable information* in order to fulfill its basic function (as distinct from the function of say, fulfilling a purchasing request),¹⁸ and not to confuse the two issues.

¹⁴ E.g., *United States v. ChoicePoint, Inc.*, No. 106-CV-0198 (N.D. Ga.) (settlement entered on Feb. 15, 2006); *In the Matter of Guidance Software, Inc.*, Docket No. C-4187 (April 23, 2007); *In the Matter of Nations Title Agency, Inc.*, FTC Docket No. C-4161 (June 19, 2006); *In the Matter of Superior Mortgage Corp.*, FTC Docket No. C-4153 (Dec. 14, 2005); *In the Matter of Petco Animal Supplies, Inc.*, FTC Docket No. C-4133 (March 4, 2005); *In the Matter of MTS Inc., d/b/a/ Tower Records/Books/Video*, FTC Docket No. C-4110 (May 28, 2004); *In the Matter of Guess?, Inc.*, FTC Docket No. C-4091 (July 30, 2003); *In the Matter of Microsoft Corp.*, FTC Docket No. C-4069 (Dec. 20, 2002); *In the Matter of Eli Lilly & Co.*, FTC Docket No. C-4047 (May 8, 2002).

¹⁵ E.g., *United States v. ChoicePoint, Inc.*, No. 106-CV-0198 (N.D. Ga.); *In the Matter of CardSystems Solutions, Inc.*, FTC Docket No. C-4168 (Sept. 5, 2006); *In the Matter of DSW, Inc.*, FTC Docket No. C-4157 (March 7, 2006); *In the Matter of BJ's Wholesale Club, Inc.*, FTC Docket No. C-4148 (Sept. 20, 2005).

¹⁶ E.g., *United States v. ChoicePoint, Inc.*, No. 106-CV-0198 (N.D. Ga.), *supra*, note 14; *In the Matter of Nations Title Agency, Inc.*, FTC Docket No. C-4161 (June 19, 2006); *In the Matter of Superior Mortgage Corp.*, FTC Docket No. C-4153 (Dec. 14, 2005); *In the Matter of Nationwide Mortgage Group Inc.*, FTC Docket No. 9319 (April 15, 2005); *In the Matter of Sunbelt Lending Services*, FTC Docket No. C-4129 (Jan. 3, 2005).

¹⁷ See *Federal Trade Commission, Plaintiff, v. ERG Ventures, LLC and d/b/a ERG Ventures, LLC2, Media Motor, Joysticksavers.com, and PrivateinPublic.com*, FTC File Nos.: 062-3192 (Oct. 1, 2007); *Federal Trade Commission, Plaintiff, v. Digital Enterprises, Inc., d/b/a movieland.com*, FTC File No.: 062-3008 (Settlement agreed to, Sept. 11, 2007); *FTC v. Enternet Media, Inc.*, CV05-7777CAS, (C.D. Cal., filed Nov. 1, 2005); *FTC v. Odysseus Marketing, Inc.*, No. 05-CV-330 (D.N.H. filed Sept. 21, 2005); *In the Matter of Advertising.com, Inc.*, FTC File No. 042 3196 (filed Sept. 12, 2005), available at <http://ftc.gov/os/caselist/0423196/0423196.htm>; *FTC v. Trustsoft, Inc.*, Civ. No. H 05 1905 (S.D. Tex May 31, 2005); *FTC v. MaxTheater, Inc.*, File No.: 05-CV-0069 (E.D. Wash. Mar. 8, 2005); *FTC v. Seismic Entertainment, Inc.*, No. 04-377-JD, 2004 U.S. Dist. LEXIS 22788 (D.N.H. Oct. 21, 2004).

¹⁸ As a general matter, the tools will utilize randomly generated tracking numbers and segmentation categories that are developed by advertising service providers in conjunction with marketing partners. This *behavior* information is distinct from *personally identifiable* information that has been the predicate of FTC enforcement actions to date as part of its "Privacy Agenda."

Second, to the degree that action is taken, based on the existing policy frameworks, it is important to base any action on alleged *conduct* that may be unfair, deceptive or in violation of statute and not attempt to regulate the technology. In this way, the FTC would steer clear of precluding the benefits that consumers and businesses gain, as outlined earlier in this submission.

As SIIA has commented to the FTC in the past, it is essential that the FTC take into account that any potential enforcement action may unintentionally create confusion for legitimate vendors of software and information products, and, if carried to their logical conclusion, may ultimately deprive consumers of tangible benefits.¹⁹ In particular, SIIA remains committed to working with the Commission to ensure that the key issues of knowledge and consent, monitoring of usage, and harm to the consumer are not blurred. Our goal is to continue to assist the FTC so as to avoid making it difficult to distinguish any alleged deceptive and unfair practices from the common place, appropriate actions of legitimate software and information companies.

Conclusion

SIIA looks forward to working with the FTC as these issues are explored at the upcoming Town Hall. Please do not hesitate to contact us if we can provide additional information or answer any questions.

¹⁹ Comments of the Software & Information Industry Association, *In the Matter of Zango, Inc., formerly known as 180solutions, Inc., Keith Smith, and Daniel Todd*, File No. 052 3130 (December 5, 2006).