

Analysis of Proposed Consent Order to Aid Public Comment
In the Matter of ScanScout, Inc., File No. 1023185

The Federal Trade Commission has accepted, subject to final approval, a consent agreement from ScanScout, Inc. (“ScanScout”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement’s proposed order.

ScanScout is a video advertising network that engages in online behavioral advertising, the practice of collecting and storing information about consumers’ online activities across websites in order to deliver advertising targeted to their interests as inferred from their online activities. ScanScout acts as an intermediary between website publishers and advertisers that wish to have their video advertisements placed on websites. As a general matter, when a consumer visits a website within an online behavioral advertiser’s network of website publishers, the online advertising network sets an HTTP cookie, which is a small text file, into the consumer’s browser or automatically receives a cookie it has previously set in the consumer’s browser. The cookie contains a unique identifier that allows the network to recognize the consumer’s computer and correlate the computer to online activity across websites. The advertising network uses the cookie to collect and store information about the consumer’s online activities, including content or advertisements viewed and the pages visited within a particular website.

By contrast, from at least April 2007 to September 2009, ScanScout used Flash cookies, also known as Flash local shared objects, instead of HTTP cookies to conduct online behavioral advertising. ScanScout’s privacy policy stated that by changing their browser settings, consumers could opt out of receiving cookies; however, at that time, users could not use their browser settings to block the placement of Flash cookies. Accordingly, the complaint alleges that ScanScout deceived consumers and violated Section 5 of the FTC Act by stating that consumers could prevent the company from collecting data about their online activities by changing their browser settings to prevent the receipt of cookies. The Commission alleges that representations ScanScout made in its privacy policy regarding consumers’ ability to opt out of receiving cookies were false or misleading.

Part I of the proposed order prohibits ScanScout¹ from misrepresenting (1) the extent to which data about users or their online activities is collected, used, disclosed, or shared and (2) the extent to which users may exercise control over the collection, use, disclosure, or sharing of data collected from or about them, their computers or devices or their online activities. Part II of

¹ In November 2010, ScanScout merged with Tremor Media, Inc., now known as Tremor Video, Inc. Tremor Video, Inc. is included in the definition of respondent in the order. In addition, the order includes a representation by ScanScout that any parents, subsidiaries, and successors necessary to effectuate the relief contemplated by the order are bound to the order as if they had signed the agreement and were made parties to the proceeding.

the proposed order requires the company to take a number of steps to improve the transparency of, and users' ability to control, its collection of user data for online behavioral advertising. First, within thirty (30) days after service of the proposed order, ScanScout must place a clear and prominent notice with a hyperlink on the homepage of its website that states: "We collect information about your activities on certain websites to send you targeted ads. To opt out of our targeted advertisements, click [here](#)." The notice must direct users to a mechanism that allows them to prevent the company from (1) collecting information that can be associated with them or contains a unique identifier, (2) redirecting their browsers to third parties that collect data, absent an affirmative action, and (3) associating any previously collected data with them. Such choice must remain in effect for a minimum of five (5) years. ScanScout may, however, collect data that can be associated with a particular user or that contains a unique identifier for certain permissible uses specified in the order – for example, to effectuate the consumer's opt out choice or to limit the number of times an advertisement is displayed.

Second, within close proximity to the mechanism, the company must disclose: (1) that it collects information about users' activities on certain websites to deliver targeted ads; (2) that by opting out, the company will not collect this information to deliver such ads; (3) users' current choice status (*i.e.*, whether opted out or not opted out); and (4) any circumstances that, if initiated by the user, would disable the mechanism or require the user to implement the mechanism again to maintain his or her choice (*i.e.*, if they switch browsers or devices, or if they delete cookies, they will have to opt out again).

Third, within or immediately adjacent to any behaviorally targeted display advertisement that the company serves, it must include a hyperlink that takes users directly to the required choice mechanism. The hyperlink text must disclose to consumers that selecting the hyperlink will give them choices about receiving targeted ads.

Fourth, due to technical limitations ScanScout cannot currently incorporate a hyperlink to the choice mechanism into all its video advertisements; therefore the order requires the company to undertake reasonable efforts to develop and implement a hyperlink for video advertisements that directs users to the choice mechanism, and the company must report regularly to the Commission regarding those efforts.

Parts III through VII of the proposed order are reporting and compliance provisions. Part III requires ScanScout to retain documents relating to its compliance with the order. Part IV requires dissemination of the order to all current and future principals, officers, directors, managers, employees, agents, and representatives having supervisory responsibilities relating to the subject matter of the order. Part V ensures notification to the FTC of changes in corporate status. Part VI mandates that ScanScout submit reports to the Commission detailing its compliance with the order. Part VII provides that the order expires after twenty (20) years, with certain exceptions.

The purpose of the analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.