From: Chris Hoofnagle [mailto:choofnagle@REDACTED]
Sent: Friday, December 07, 2012 3:10 AM
To: datacollection
Cc: Parsons, Kandi; Olsen, Christopher
Subject: Comment for Record in The Big Picture: Comprehensive Data Collection

Dear FTC,

Thank you for hosting a workshop on the issue of comprehensive data collection. In order to supplement oral comments today, I submit these comments for the record.

The Fair Credit Reporting Act: I did not hear any discussion of the Fair Credit Reporting Act today. It is important and relevant to this debate, because the FCRA is principally a use regulation law.

The FCRA offers insight into what our future could look like with regard to comprehensive data collection. The FTC is well aware of the depredations and lack of accountability of consumer reporting agencies. No speaker addressed these problems or the incentives that the FCRA regulatory model has created. Consumer reporting agencies are powerful entities, in part because we have no way to fundamentally object to their practices. Their freedom to collect information is an allocation of power away from individuals to institutions.

Imagine a world regulated by the FCRA's data use rules with no private right of action, unless the plaintiff could prove harm directly attributable to the company that possessed the data. Appeals to context and the like would have little force in such a world. Consumers would have no right, in law or in the market, to object to changing practices, because as with consumer reporting agencies, Facebook and related companies could still collect any data that they wanted.

Tech-neutral approaches. Technology is not neutral, and so it may sometimes be the case that we should pursue approaches that are not tech neutral. For more on this, see, Langdon Winner, Do Artifacts Have Politics?, in The Whale and The Reactor: A Search for Limits in an Age of High Technology (1986).

In defense of DPI. As a mechanism for supporting content, ISP-based DPI may be favorable on privacy grounds than the current mix of first and third party tracking. Currently, users are tracked by hundreds of different entities, which for all we know, could be governments.

If more tracking equals better ad targeting, collection of all data on the pipe must produce the best ads. ISPs are able to perform this level of tracking. From purely a privacy perspective (not considering competition issues), DPI may be favorable because it would be provided by a first party that the user pays. Payment would provide some incentive for the ISP to adhere to user wishes. And DPI would occur within the bounds of the ECPA and Cable Act. In fact, users of cable internet would have serious privacy advantages in a DPI regime over third party tracking, because the cable act has strict privacy requirements that could be interpreted to give consumers the benefit of deep profiling without long term retention of the data, extend to users a right to access of whatever data is collected, and give them the right to sue.

Web privacy census. Our regular crawl of internet sites for tracking vectors finds very many of them, and that a few companies can track individuals over the most popular sites on the internet. Because

internet use is concentrated on the most popular sites, this is problematic. These trackers have ISP-like insight, and can collect the same information that is protected by the ECPA when collected by ISPs. I attach the current census, and our literature review, which illustrates how researchers have found an increasing amount of tracking on sites.

What people want versus how they act. Academic studies of user attitudes are criticized because they generally do not present tradeoffs, and so do not replicate how people act in marketplace conditions. This critique ignores Joseph Turow's work on privacy and tradeoffs.

But there is a deeper problem. The conclusion that people want various "innovations" from Google and Facebook because people use them rests on an unstated assumption: that the market produces the most wanted option. This assumption holds that if the market does not produce privacy options, it is because consumers do not care. This logic is circular and not falsifiable. "...That which appears is good, that which is good appears." It is this logic that can lead one to believe that there is no market failure in privacy, or that the miracle of instant credit perfectly allocated risk.

Consider the market response to telemarketing--the DMA's edentulous "Telephone Preference Service." At its largest, it held 4.5 million telephone numbers. What explains such a small number of enrollments? Did consumers simply not care? Did the creation of the FTC's registry cause them to care all of a sudden? Or was the subsequent enrollment of over 200 million numbers in the FTC registry a response to American consumers desperately wanting an accountable tool to curb telemarketing?

To preserve choice, the Commission will have to act. In collaboration with Ashkan Soltani, my team at Berkeley has shown that advertisers use new, relatively unknown technologies to track people, specifically because consumers have not heard of these techniques. Furthermore, these technologies obviate choice mechanisms that consumers exercise. There is a range of commercial actors that have no respect whatsoever for consumer preferences. If their preferences are different than ours, they will find a way to get around them. They are imposing the law of the jungle upon our society. Privacy law is one of the few tools we have to civilize them.

Narratives of government paternalism are thus inverted here; the government provides choice-enforcing mechanisms, such as the do not call registry. The market "innovates" with Flash cookies and Google Buzz.

Respectfully submitted, Chris Hoofnagle

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