



**Comments on the Federal Trade Commission's Preliminary
FTC Staff Report, *Protecting Consumer Privacy in an Era of
Rapid Change: A Proposed Framework for Businesses and
Policymakers***

February 18, 2011

Introduction

The “normative framework” proposed in the FTC’s Preliminary FTC Staff Report, *Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers*, was developed with reference to one particular online business model. We are writing with concern that, because of that perspective, it fails to account adequately for solutions in other industries that effectively protect privacy. We believe that privacy interests can be better served when they are more closely tailored to specific businesses and industries.

TRA is a media measurement and research company which helps advertisers measure the effectiveness of TV advertising. Just as advertising is crucial in underwriting Internet content and services, advertising is essential in funding television programming. Media advertisers have long faced the problem famously attributed to John Wanamaker: “Half the money I spend on advertising is wasted; the trouble is I don't know which half.” Advertisers increasingly demand accountability when investing in media advertising. That is, they want to know not just that an ad ran, but that ads ran in media and on channels most likely to reach their intended audience and increase sales. This way, the advertiser knows whether there was a return on their media investment. TRA invented a privacy-protective method for measuring advertising effectiveness in this way.

**I. THE FTC’S PROPOSED NORMATIVE FRAMEWORK NEEDS ADJUSTMENT
FOR APPLICATION TO THE MEDIA MEASUREMENT AND RESEARCH
BUSINESS.**

The recommendations offered by the Preliminary Staff Report as a proposed normative framework were developed with reference to a particular business model: behaviorally targeted Internet advertising based on collected Internet browsing patterns, and the discomfort of some consumers in having their browsing tracked. The Commission then extrapolated its specific recommendations about that model onto all other forms of commerce that involve personal

information and, to some extent, even those that involve anonymized data. To its credit, the Preliminary Staff Report asks whether this extrapolation works, and whether different business contexts may call for different practices or forms of consent.¹ The specific recommendations in the Preliminary Staff Report do not fit other industries and business models, like media measurement and research.

Anonymized databases. For example, the Preliminary Staff Report recounts some unfortunate Internet experiences, like the disclosure of non-redacted search records and the cross correlation of Netflix rentals with social networks, and then seems to treat all anonymized data as suspect in the face of future technologies that might permit re-identification. However, it does ask if there are practices available for handling de-identified information.² Fortunately, the answer is yes. Many industries and business models, especially marketing and media measurement and research, have learned how to protect de-identified data sets from the risks of re-identification, and to use such data for services that have enormous public benefit.

TRA's flagship product is Media TRAnalytics®. The platform measures the effectiveness of TV advertising by matching exposure to particular ad campaigns with sales in retail establishments (e.g., supermarkets) to consumers who use loyalty cards. The platform is designed to overcome the limitations of traditional audience ratings data. Traditional audience ratings data will model (extrapolate) from a small sample to report. For example, the industry's traditional audience ratings metric (Nielsen) reported that the last Larry King Live show in December, 2010 averaged 2.25 million viewers compared to Fox News Channel's Hannity's 2.16 million, but that Hannity counted 543,000 adult 25-to-54 viewers, compared with 530,000 for King. However, in real terms, this means that, of the 20,000 panelists from Nielsen, only about 400 Nielsen panelists in the whole country tuned into King. These are important metrics for advertiser-supported programs, but they require an advertiser to make certain assumptions which may bear little relation to reality. By using TRA's platform, if an advertiser like Coke wanted to reach a soft drink audience, TRA can turn anonymized and aggregate viewing and purchase data into a report on the specific TV programs with the proportionately largest soft drink audience. This allows Coke to buy advertising time more efficiently than John Wanamaker, and to measure whether a particular ad campaign (perhaps a special commercial run in a test market) actually increased sales of that product in the market.

TRA's Media TRAnalytics is a product of privacy by design. While this certainly created some significant obstacles for a young company, we knew that such an approach would be important to attract the right partners, employees, investors and customer in order to build a long term sustainable business.

First, we arrange for "blind matching" of samples of ad media exposure (e.g., from DVRs or set-top boxes) and loyalty card records (e.g., from supermarkets), to compare pre- and post-

¹ For example, the Preliminary Staff Report asks, "Is the list of proposed 'commonly accepted practices' set forth in Section V(C)(1) of the report too broad or too narrow?" (at A-2); "Are there practices that should be considered 'commonly accepted' in some business contexts but not in others?" (*id.*); "Should the method of consent be different for different contexts?" (*id.* at A-3).

² Preliminary Staff Report at A-1 ("Are there reliable methods for determining whether a particular data set is 'linkable' or may become 'linkable'?"); *id.* at A-3 ("How should the proposed framework handle the practice of data 'enhancement,' whereby a company obtains data about its customers from other sources, both online and offline, to enrich its databases? Should companies provide choice about this practice?").

campaign sales. The data match process is double blind, executed by a trusted independent third party. For example, a supermarket will provide loyalty card purchase data for shoppers, and a Pay TV or DVR company will provide viewing data for viewers. Viewing data and loyalty card purchase data is provided to TRA—but TRA does not receive any names. Names (but not viewing or purchase data) are provided to a trusted independent third party, who uses the names only to tell TRA that shopper “123” is associated with viewer “xyz,” etc. TRA now can produce aggregate reports, such as the TV shows most likely being watched by an audience of potential Coke shoppers, and whether a particular ad campaign actually increased sales of Coke.³

Second, double-blind matching and using anonymized and aggregate data is only part of the solution. TRA does not have a consumer-facing relationship, but our data providers offer opt-out to subscribers before turning data over to us. To reduce the risk of derivative association or re-identification, we do not produce reports based on fewer than 30 households. From the outset, we decided to follow industry best practices for information security.

Third, we are the only media measurement company in North American to achieve ISO-27001 Certification. ISO 27001 certification requires a formal Information Security Management System (ISMS) that implements best practices. It requires employee training and awareness programs; fully documented Dev/Ops/Sys processes; physical security controls; and electronic security controls (IDS, Firewalls, PGP, etc). It requires a formal risk assessment process, a continuous improvement process, and annual audits from the British Standards Institute to check any departures from such protections. Inbound communications use fixed IP addresses, SSL or PGP. Our databases are secured with enterprise grade firewalls and an active intrusion detection system (IDS). In other words, although TRA does not receive or store personally identifiable information, it secures and manages its systems as if it does, and protects the data thoroughly against unauthorized access and use.

Our solution illustrates how the risks of re-identification of de-identified data can be managed in many creative ways, allowing data to be used for fact-based, research-driven and economically efficient advertising.

“Contextual” and “behavioral” advertising. The Preliminary Staff Report also tries to draw a distinction between contextual and behavioral advertising, but this distinction provides another illustration of the poor fit between the Preliminary Staff Report’s recommendations and the organization of other industries and businesses. In our case, TRA supports “contextual” advertisers (placing ads in shows) with anonymous “behavioral” purchase data. The Commission should not generalize from the operation of one business or one market (like online behavioral advertising), because those operations may not fit other businesses.

“Opt-in” and “opt-out.” The Preliminary Staff Report also does not make a recommendation between “opt-in” and “opt-out” for purposes of informed consent. But the choice makes an enormous difference in audience research. Part of the limitations of today’s standard audience metrics (e.g., how many adults aged 25-to-54 watched CNN or Fox) comes from the small size of the panels assembled for a television world that once had only a few broadcasters. With hundreds of channels, thousands of brand advertisers, and fragmented audiences today, far larger data sets are required to create valid measurements without distortion.

³ See TRA’s patent “Analyzing Return on Investment of Advertising Campaigns by Matching Multiple Data Sources,” U.S. Patent No. 7,729,940 (filed Apr. 14, 2008; issued June 1, 2010).

The opt-out data sets with which TRA works are sufficiently scaled to today's audiences, and still privacy-protected.

Consumer access to de-identified databases. The Preliminary Staff Report also recommends that databases—including those for “non-consumer-facing entities”—provide access to consumers in order to review and correct data, possibly in standardized ways.⁴ TRA does not provide access to stored data to anyone, let alone consumers. If we did, it would reduce our privacy protections, introduce the potential for pretexting, and harm rather than serve privacy interests.

Retention Periods. The Preliminary Staff Report also solicits comment on whether a very short standardized retention period, based on its understanding of what might work for online advertising, should be applied to all data.⁵ A short-lived retention period does not square with audience research. Research might go back more than a year to understand return on media investment. This requires analyzing when an advertising campaign ran and the sales effect, thereby requiring time-based longitudinal analysis over the course of time (e.g., how did the ad campaign perform from one time period to another). Artificial limits to retention periods are unnecessary supplements to the privacy protections already in place and would undermine the beneficial purposes that analytics, media measurement and research provides. Retention periods are legitimately different when used for different purposes, and will vary by business and company.⁶

Our point is simple: there can be many effective privacy protections put in place to secure privacy and allow beneficial commercial enterprises to function. Protections that are more tailored by industry sector are more likely to achieve balanced privacy protections appropriate for a wide variety of legitimate and beneficial businesses.⁷

II. MEDIA MEASUREMENT AND PLANNING PRODUCES SUBSTANTIAL SOCIAL BENEFITS.

This Commission is among the many institutions that have acknowledged the importance of advertising in general for underwriting content, services, and applications that many

⁴ Preliminary Staff Report at A-4 (“Is it feasible for data brokers to provide a standardized consumer choice mechanism and what would be the benefits of such a mechanism?”); *id.* at A-5 (“Should access to data differ for consumer-facing and non-consumer-facing entities?” “For non-consumer-facing companies, how can consumers best discover which entities possess information about them and how to seek access to their data?” “Is it feasible for industry to develop a standardized means for providing consumer access to data maintained by non-consumer-facing entities?”).

⁵ *Id.* at 48 (“Is there a way to prescribe a reasonable retention period?” “Should the retention period depend upon the type or the sensitivity of the data at issue?”).

⁶ As has been well reported by the National Institute of Standards and Technology, the precise techniques and level of protection varies according to the sensitivity of the data being protected and its intended use. Erika McCallister et al., *Guide to Protecting the Confidentiality of Personally Identifiable Information (PII) (Draft) – Recommendations of the National Institute of Standards and Technology*, NIST Special Publication 800-122 (Draft) (Jan. 2009) <http://csrc.nist.gov/publications/nistpubs/800-122/sp800-122.pdf>.

⁷ Department of Commerce Internet Policy Task Force, *Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework*, at 32 (“The range of services, business models, and organizational structures to which a FIPPs-based framework would apply counsel against attempting to develop comprehensive, prescriptive rules.”).

consumers enjoy without a second thought.⁸ Understanding the specific value of analytics, media measurement and research is an essential part of answering one of the Preliminary Staff Report's most fundamental questions: "How can individual businesses, industry associations, consumer groups, and government do a better job of informing consumers about privacy?"

- **A better economy.** Although we understand that some consumers harbor a suspicion of advertising and marketing, these are the tools that help businesses grow. Marketing is 20% of U.S. corporate spending. Marketing and advertising is central to economic expansion, investment, recovery, and jobs. Helping all businesses optimize their advertising spending helps to reduce waste, improve efficiency, and promote a better economy.
- **An opportunity for small business.** Today's Nielsen-style panels and modeling may only work for the largest advertisers and networks. Our approach creates valid metrics not only for large brands and networks but also for newer and smaller product brands. This provides a special benefit for small businesses, allowing them to advertise, market and grow in ways they could not otherwise afford.
- **Accountability.** Providing data from which return on investment decisions can be made for advertising and marketing expenditures makes TV advertising more transparent, accountable and accessible.
- **Less paper.** Helping to move direct marketing dollars out of bulk mail into electronic media is a greener solution.
- **Programming Diversity.** As a matter of pure research, larger data sets remove distortion and produce valid metrics with minimal bias. This is especially important for long tail cable channels and local broadcasters. By proving the value of niche programming, we help keep it funded with ad dollars.

III. RECOMMENDED PRINCIPLES FOR MEDIA MEASUREMENT AND RESEARCH.

We understand that U.S. laws may be leaving "gaps" in the Internet economy, but this does not mean that all businesses ignore privacy or that all businesses should be subject to a sweeping new privacy directive based on the specific organization of the Internet. TRA's solution illustrates how these important social benefits can be achieved while protecting privacy.

In the case of our business of media measurement and planning, we submit that any privacy policy should be informed by at least these principles:

⁸ FTC, Preliminary FTC Staff Report, *Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers*, at 33-35 (Dec. 2010); FTC, FTC Staff Report, *Self-Regulatory Principles For Online Behavioral Advertising: Tracking, Targeting, & Technology*, at 1, 6, 10 (Feb. 2009); Federal Communications Commission, *Connecting America: The National Broadband Plan*, at 53 (Mar. 2010); Department of Commerce Internet Policy Task Force, *Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework*, at 32 (Dec. 2010).

- **De-identified data is not personal information.** Information that has been aggregated or de-identified should not be considered covered personal information. Personal information should be defined as information that identifies a particular person. We understand and accept the principle that data must be reasonably protected against the risk of re-identification in order to be treated as de-identified.
- **Aggregate Measurement without Opt-In.** “Opt-in” should not be a requirement in order to assemble data for anonymized audience measurement or analytics. That level of protection is not required to protect privacy, and would undermine the very benefits that media measurement and research provides in today’s market of hundreds of choices with fragmented audiences.
- **Accommodate rapid change.** Any regulatory approach needs to be highly adept at accommodating the speed of change in technology and business models. We understand the appeal of very specific rules. Indeed, we have incorporated them into our products. But it is a different matter entirely for the government to adopt very specific legal requirements modeled on one particular business at one point in time. If there are to be general principles of privacy protection for all businesses, they should be expressed at a much higher level of abstraction, rather than to freeze particular models or tools in place. We believe, for example, in privacy by design. But this does not mean that a Privacy Impact Assessment should be publicly released for comment as every product is designed. In our case, premature disclosure may have adversely affected the development of our intellectual property (only recently protected by patent). We are supporters of annual audits as specified in ISO 27001, which can have a disciplining effect on operations. But it is possible that other businesses or industry segments can utilize other measures of accountability. Such a flexible approach can accommodate the operations of specific industries, and can adjust rapidly over time.
- **Neutral “safe harbor.”** There should be a neutral “safe harbor” status available to all companies adhering to reasonable self-regulatory principles. By neutral, we mean that rules should not create artificial distinctions among different businesses or varying technologies. If an industry or business can provide the same level of privacy protection under which another may operate, it should be allowed.

We believe that privacy and commercial interests are best served by such balanced, tailored, and flexible solutions that can rapidly adjust as technology and business models change.

TRA appreciates the opportunity to comment, and wishes to assist the Commission as work proceeds on these important matters.

Respectfully submitted,

Mark Lieberman
Chairman/CEO