



March 17, 2010

Online Publishers Association  
249 West 17th Street  
New York, NY 10011

Donald S. Clark  
Secretary  
Federal Trade Commission  
Room H-135 (Annex P)  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

**Re: “Privacy Roundtables” – Comment, Project No. P095416**

Dear Mr. Secretary:

The Online Publishers Association (“OPA”) appreciates the opportunity to comment on the issues raised by the Commission to inform its ongoing Privacy Roundtables. OPA is a trade association dedicated to representing trusted online content providers before the advertising community, the press, the government and the public. It is the only trade association focused exclusively on the digital content business and its unique role in the future of media. OPA members include many of the Internet’s most respected brands and they collectively reach 172.5 million unique visitors, or 83% of the U.S. online population.<sup>1</sup>

OPA members provide invaluable information services to the public at a time when consumers increasingly look to the Internet as their primary source of news and information. In 2008, the Internet surpassed newspapers as consumers’ primary source of both national and international news.<sup>2</sup> In 2009, OPA members invested more than half a billion dollars in the creation of high quality digital content, the vast majority of which they distributed for free.

Demand for quality digital content is increasing and content sites are fueling the growth of the Internet. A recent study conducted by OPA in conjunction with Nielsen Online shows that content sites accounted for 42% of all time spent online by Web users in 2009, compared to 34%

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<sup>1</sup> comScore Media Metrix, January 2010. Although the majority of OPA members operate consumer-oriented websites, they also reach millions of business users.

<sup>2</sup> *Post-Broadcast Democracy*, February 2009

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in 2003.<sup>3</sup> The average time that Web users spend on content sites on a monthly basis almost doubled during this period – increasing from 3 hours and 42 minutes to 6 hours and 58 minutes.<sup>4</sup> Web users spend much more time visiting content sites than they do interacting with sites or applications in any other major online category, including Communications (i.e., email services and instant messaging), Commerce (online shopping), Community (e.g., Facebook, MySpace and other social networking sites) and Search (e.g., Google search, Yahoo! search).<sup>5</sup>

Although advertising funds the majority of the digital news, information and entertainment created by OPA members, the growth of online display advertising revenue has lagged far behind Web users' surging demand for quality online content. Revenue from online display advertising still is only a fraction of the revenue generated by newspaper advertising,<sup>6</sup> and the value of online display inventory, measured on a cost per thousand impressions ("CPM") basis, is far lower than the CPMs commanded by advertising in traditional media such as television and radio.<sup>7</sup>

Moreover, what one leading analyst aptly described as a "perfect storm" of "[c]oncurrent economic, societal and technological trends" has ravaged all advertising-supported media in recent years.<sup>8</sup> As a result, online publishers face enormous economic challenges as they struggle to monetize their investment in the creation of digital content that website visitors have become conditioned to expect to receive for free.

Although OPA members are experimenting with various business models (including subscription content models), it is clear that online advertising is now, and will be for the foreseeable future, the lifeblood of digital publishing. The future of online publishing will depend on the vitality of the online advertising marketplace and our members' ability to compete successfully in that marketplace. To continue to provide quality journalism and other valuable content to Web users, online publishers must continue to offer innovative, effective and cost-efficient advertising services to advertisers and they must continue to attract large consumer audiences to their digital properties. The need to collect and use certain information about website visitors and the need to respect related privacy interests are both integral to these objectives.

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<sup>3</sup> Online Publishers Association, *Internet Activity Index* (IAI), September 17, 2009, available at <http://www.online-publishers.org/newsletter.php?newsId=556&newsType=pr>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> According to the Interactive Advertising Bureau, online display advertising revenue totaled \$7.8 billion for 2008. This represents just 20% of newspaper ad revenue (\$37.9 billion) for the same year. Hallerman, *supra* note 2 at 17-18 (newspaper ad revenue estimates are produced by eMarketer).

<sup>7</sup> Across media, advertising is commonly priced on the basis of CPM rates. Advertising in traditional media has been estimated to produce average CPMs of \$4.54 (radio) to \$10.25 (broadcast television), while non-premium Internet display advertising produces average CPMs of \$0.60 to \$1.10. Howard Beales, *Public Goods, Private Information, and Anonymous Transactions: Providing a Safe and Interesting Internet*, PowerPoint presentation given at the Law & Economics of Innovation Symposium at George Mason University School of Law, May 7, 2009 at 17 (citing Media Dynamics data from 2008).

<sup>8</sup> David Hallerman, *US Advertising Spending: The New Reality*, [www.emarketer.com/Reports/All/Emarketer\\_2000576.aspx](http://www.emarketer.com/Reports/All/Emarketer_2000576.aspx).

OPA members believe that their website visitors should know what type of information is collected online, how that information is used and with whom it is shared. Our members have taken pains to describe their data collection practices clearly and in a way that Web users can understand. OPA members also share the Commission's desire to improve privacy protections for consumers. To that end, OPA is actively participating in industry efforts to create a robust self-regulatory framework for online behavioral advertising that is designed to increase the transparency of information practices across the entire online ecosystem and create new choices for website visitors.

Our members recognize that these efforts are necessary to maintain confidence in their brands and to attract the audiences they need to be competitive. At the same time, online publishers worry that overly broad privacy regulations could threaten the advertising-supported models that lie at the heart of their businesses and editorial missions. Online publishers are concerned that restrictive regulatory defaults could stifle innovation and distort competition with other media by interfering with market definition of privacy preferences in an online space that is rapidly evolving.

Whatever shape future privacy protection regimes ultimately take (whether as legislation, regulation or further self-regulatory principles), they should be tailored to particular uses of information that have a demonstrable impact on consumer welfare. This approach has served the public well over the last decade as the Commission, Congress and state legislatures have focused their efforts in the privacy arena on practices that inflict specific, demonstrable harms (e.g., spyware, phishing, identity theft, data breaches, abusive telemarketing and spam).

In addition, future privacy regimes should be sensitive to the different types of relationships that Web users form with entities in the online ecosystem and the different expectations of privacy that are created by those relationships. As the Commission and other policymakers grapple with the questions raised by the Privacy Roundtables, OPA hopes that they will give careful thought to the following observations from the perspective of the online publishing industry.

- 1. A robust self-regulatory framework is emerging in response to the FTC's behavioral advertising guidelines and requires time to be implemented and evaluated.**

In February of 2009, the Commission Staff issued its landmark Self-Regulatory Principles for Online Behavioral Advertising, which were expressly intended to "guide industry in developing more meaningful and effective self-regulatory models . . ."<sup>9</sup> In his first speech following his appointment as Chairman, Jon Leibowitz referred to the recently issued Staff

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<sup>9</sup> FTC Staff, *Self-Regulatory Principles for Online Behavioral Advertising* (February, 2009), ("Behavioral Advertising Staff Report") at 11, available at <http://www2.ftc.gov/opa/2009/02/behavad.shtm>

principles and expressed hope that industry would respond with “concrete improvements.”<sup>10</sup> At the same time, Chairman Leibowitz acknowledged that “[s]elf-regulation, if it works, can be the fastest and best way to change the status quo” while cautioning that if industry did not mount an “appropriately vigorous response,” Congress and the Commission might “move toward a more regulatory model.”<sup>11</sup>

Since the issuance of the Behavioral Advertising Staff Report, OPA has worked with a coalition of key stakeholder organizations in the online advertising industry to respond to the Commission’s call for more vigorous self-regulation. The first major product of this effort was the release of comprehensive privacy principles in June of 2009. More recently, the coalition unveiled a standard icon – akin to the universal recycling symbol – designed to clearly identify behaviorally targeted ads and link to a web page that educates Web users about behavioral advertising and the choices they have to limit the collection of information from their browsers and devices online. The online advertising industry launched a public education campaign that will include more than 500 million advertising impressions. The campaign is designed to raise awareness about the significance of the new icon, the nature and benefits of behavioral advertising, and the means to exercise choice. The coalition also expects to unveil this year a robust enforcement program, administered by the National Advertising Division of the Council of Better Business Bureaus, to implement the accountability principle of the new guidelines.

Although important aspects of these efforts are still emerging and will take time for OPA members to evaluate and for OPA to endorse fully,<sup>12</sup> there can be little doubt that industry has mounted a meaningful and vigorous response to the Commission’s appeal for improvements in the self-regulation of online advertising practices. These efforts should be given time to be fully implemented and analyzed before policymakers consider intervening with new regulation.

## **2. Marketplace effects in highly competitive areas of the online ecosystem, such as online publishing, will discipline online privacy practices.**

Much of the policy debate surrounding online privacy has properly focused on the issue of consumer choice. But the most powerful choice that Web users can exercise is one that they already have – the choice to stop patronizing a website whose data collection practices they find objectionable. In today’s intensely competitive online publishing industry, Web users can choose among a wide variety of sources of news, information and entertainment. In this environment, no publisher can maintain a business model that neglects consumer privacy interests.

The most important asset that our members possess is their reputation with website visitors, and the use of information in ways that violate their audience’s trust would be highly

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<sup>10</sup> Jon Leibowitz, Chairman, FTC, Remarks at the Center for Democracy and Technology Gala (March 10, 2009), <http://www.ftc.gov/speeches/leibowitz/090310remarksfordtdinner.pdf>.

<sup>11</sup> *Id.*

<sup>12</sup> The industry coalition expects to release the remaining details of the program, including mechanisms for consumer choice and enforcement, during the summer of 2010.

damaging to their businesses. Digital publishers accordingly have strong incentives to avoid practices that are inconsistent with their customers' privacy preferences. This consideration suggests that educating the public and increasing user awareness should be the principal goal of further efforts to strengthen the privacy protections afforded by online publishers.

The Commission already has raised public awareness about behavioral advertising through its Self-Regulatory Principles and its work on this proceeding. This spotlight will only grow brighter as the industry-sponsored public education campaign, awareness icon and related messaging spread throughout the marketplace. With appropriate transparency, the privacy practices in highly competitive sectors such as online publishing should be largely self-correcting. Market forces should deliver the privacy that consumers want, because competition for audiences will necessarily foster competition to satisfy Web users' privacy preferences, which should become easier to discern as awareness increases. Trusted brands that invest in both the content and privacy safeguards that Web users desire will be rewarded in an environment where well-informed consumers "can vote with their feet."

**3. First-party and third-party relationships with consumers create different expectations of privacy.**

During its recent examination of behavioral advertising, the Commission Staff recognized that the collection and use of consumer data in the context of a direct, first-party relationship with a consumer have very different privacy implications than the collection and use of information by parties that do not have a relationship with the consumer. Indeed, because of this critical distinction, the Staff expressly excluded first-party advertising by website publishers from its definition of "online behavioral advertising."<sup>13</sup>

Online publishers forge a direct and trusted relationship with their website visitors. In the context of this relationship, OPA members sometimes collect information that they use to serve advertising tailored to the preferences and interests of their audience, all as indicated by the interactions with the member's own website. This process is analogous to a sales clerk at a men's clothing store who recognizes a repeat customer and makes wardrobe suggestions based on the customer's past preferences for size, color and designers when the same customer is shopping at the same store. The same dynamic is involved when Amazon.com suggests books that a consumer might be interested in reading based on titles that the consumer previously purchased or browsed. Given the direct relationship between the consumer and the merchant in these circumstances, the consumer necessarily would understand that the merchant is in a position to learn and recall the customer's preferences and should not be surprised if the merchant uses that information to suggest future purchases.

In other words, as the Commission Staff concluded, "[g]iven the direct relationship between the consumer and [a individual] website, the consumer is likely to understand why he

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<sup>13</sup> Specifically, the Staff emphasized that the term "online behavioral advertising" is "not intended to include 'first party' advertising [by the web publishers on their own sites], where no data is shared with third parties...." Behavioral Advertising Staff Report at 45.

has received [a] targeted recommendation or advertisement and indeed may expect it. The direct relationship also puts the consumer in a better position to raise any concerns he has about the collection and use of the data, exercise any choices offered by the website, or avoid the practice altogether by taking his business elsewhere.”<sup>14</sup>

As discussed further below, online publishers also engage in the “first-party” collection and use of consumer data to provide a variety of consumer benefits and services unrelated to advertising, such as personalized content. Given these considerations, online privacy protection frameworks should continue to be sensitive to the different privacy implications of first-party and third-party data collection practices.<sup>15</sup>

**4. Virtually all online advertising, including contextual advertising, relies to some extent on the collection of information about website visitors.**

Online advertising delivers enormous benefits to consumers in the form of free or subsidized content and services. Therefore, privacy protection schemes should be designed so as not to inadvertently restrict data collection that is necessary to support these consumer benefits. For example, the online publishing industry relies heavily on revenue from online contextual advertising, which involves the delivery of ads based upon a current visit to a single web page or single search query. Contextual advertisements are targeted based on the content of the webpage or search results page on which they are displayed, rather than the interests of consumers that are inferred from their browsing history over time. (For example, an advertisement for a discounted vacation cruise package may be served to visitors to a webpage devoted to budget travel in the Caribbean because the advertiser assumes that computer users who are interested in articles about budget travel are more likely than the average consumer to be interested in a discounted cruise offer.)

Although the delivery of contextual advertisements online sometimes involves very limited and ephemeral collection of data (e.g., information about the content of the page visited or a search term entered by a particular user immediately before the ad is displayed), the Commission Staff wisely excluded contextual advertising from its final self-regulatory principles for online behavioral advertising.<sup>16</sup> The Staff recognized that contextual advertising does not involve the “collection and retention of data about consumers’ online activities over time” and concluded that contextual advertising “provides greater transparency than other forms of behavioral advertising, is more likely to be consistent with consumer expectations, and presents minimal privacy intrusion when weighed against the potential benefits to consumers.”<sup>17</sup> Such

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<sup>14</sup> *Id.* at 27. By contrast, the Commission Staff noted that when behavioral advertising involves the sharing of data with ad networks or other third parties, the Web user “may not understand why he has received ads from unknown marketers based on his activities at an assortment of previously visited websites. Moreover, he may not know whom to contact to register his concerns or how to avoid the practice.” *Id.*

<sup>15</sup> The same considerations suggest that the collection and use of information that occurs entirely within a family of affiliated (i.e., commonly owned or controlled) websites that have adopted consistent privacy policies should also be treated as “first party” for purposes of applying online privacy principles.

<sup>16</sup> Behavioral Advertising Staff Report at 30.

<sup>17</sup> *Id.*



benefits “include free content – made possible by the revenue from the sale of the advertisements – and receipt of contextually relevant ads that consumers may value.”<sup>18</sup>

The same distinction should inform future systems that regulate the collection of information about consumers for advertising purposes. The scheduling, delivery and monetization of virtually *all* online advertising – not just behaviorally targeted advertising<sup>19</sup> – relies to some extent on data collected from website visitors. *A law or rule that gave consumers a blanket choice to block all online data collection for advertising purposes would destroy the online publishing industry as we know it today.*

**5. Many essential website features rely on the same data collection technologies that support behavioral advertising.**

Many of the same web technologies that enable online behavioral advertising also are used to collect information for important purposes that are unrelated to advertising and necessary to provide consumers with a quality Web experience. For example, publishers use the same cookie technology employed for behavioral advertising to deliver personalized web pages and experiences over multiple browsing sessions.<sup>20</sup> A website that is unable to recognize a user through a cookie could not populate the user’s (customized) pages with his or her preferred content and the user would have to re-enter a user name and password and/or his or her personal preferences during each visit to the site.

Moreover, because cookies allow ad serving technologies to track the number of ads served on a particular day to a particular computer, they help limit a user’s repeated exposure to a single ad or advertiser. Cookies also facilitate statistical reporting in connection with activity on a website and enable a website publisher to monitor its audience’s level of interest in the content, products and services that it offers. This monitoring helps website operators understand their users’ needs and interests and drives more informed and effective business and editorial decisions. None of these practices raises substantial privacy concerns. Accordingly, efforts to create new online privacy protections for consumers should focus on carefully defined uses and transfers of consumer data, not on the technologies used for data collection.

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<sup>18</sup> *Id.*

<sup>19</sup> The Commission Staff defined “online behavioral advertising” as “the tracking of a consumer’s online activities *over time* – including the searches the consumer has conducted, the web pages visited, and the content viewed – in order to deliver advertising targeted to the individual consumer’s interests.” *Id.* at 46 (emphasis in original).

<sup>20</sup> A cookie is a small text file that a website server places on a visitor’s hard drive. The cookie transmits information back to the web server about the browsing activities of the computer user on the site. This information may include the pages and content viewed, the time and duration of visits, search queries entered into search engines, and whether a computer user clicked on an advertisement. Cookies can be set both by the operator of a website that a consumer is visiting (i.e., “first-party cookies”), and by third-party companies or networks that serve advertising on the site (i.e., “third-party cookies”).

**6. The parties that collect information from Web users should be held responsible for compliance with privacy protection standards.**

Ads that appear on websites frequently are delivered to visitors by servers controlled by the advertiser or its agency, as opposed to the website publisher. In these circumstances, advertisements are delivered through direct communications between a Web browser and the advertiser's server; the advertiser can use this process to deploy cookies or other tracking technologies without the publisher's knowledge.<sup>21</sup> Accordingly, given the pervasiveness of advertising and the dynamic "real-time" environment in which online advertising is sold, privacy standards that effectively treat publishers as the "guarantors" of their advertisers' compliance would create untenable burdens for the online publishing industry.

Moreover, such an approach would be inconsistent with the allocation of legal duties and liabilities in analogous consumer protection law contexts, such as product liability and false advertising. For example, numerous courts have held that newspapers and other media publishers have no duty to investigate the ads they print.<sup>22</sup> These holdings are based on the recognition that imposing obligations on publishers to police their advertisers would both unduly restrict the flow of commercial speech and indirectly threaten the core, noncommercial speech that is supported by the sale of advertising. *See, e.g., Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F. 2d 830, 837 (5<sup>th</sup> Cir. 1989) ("[T]he publication's editorial content would surely feel the economic crunch from the loss of revenue that would result if publishers were required to reject all ambiguous advertisements.").

For the same reasons, many state Unfair Practices Acts expressly exempt media publishers, including website publishers, from liability for publishing false advertising claims without actual knowledge of their falsity.<sup>23</sup> These considerations do not suggest that online

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<sup>21</sup> Even in circumstances where an ad resides on a publisher's ad server, the advertiser can imbed the ad with technology that the advertiser can use to collect information directly from the user's computer through processes that the publisher does not control.

<sup>22</sup> *Pittman v. Dow Jones & Co.*, 662 F. Supp. 921, 922 (E.D. La. 1987) ("[A] newspaper has no duty, whether by way of tort or contract, to investigate the accuracy of advertisements placed with it which are directed to the general public, unless the newspaper undertakes to guarantee the soundness of the products advertised."), *aff'd*, 834 F.2d 1171 (5<sup>th</sup> Cir. 1987) (per curiam); *Walters v. Seventeen Magazine*, 241 Cal. Rptr. 101, 103 (Cal. Ct. App. 1987) ("[W]e are loathe to create a new tort of negligently failing to investigate the safety of an advertised product. Such a tort would require publications to maintain huge staffs scrutinizing and testing each product offered. The enormous cost of such groups, along with skyrocketing insurance rates, would deter many magazines from accepting advertising, hastening their demise from lack of revenue."); *Yuhas v. Mudge*, 322 A.2d 824, 825 (N.J. Super. Ct. App. Div. 1974) ("[N]o such legal duty to investigate advertisements] rests upon respondent [,the publisher of *Popular Mechanics Magazine*, unless it undertakes to guarantee, warrant or endorse the product. To impose the suggested broad legal duty upon publishers of nationally circulated magazines, newspapers and other publications, would not only be impractical and unrealistic, but would have a staggering adverse effect on the commercial world and our economic system."); *Goldstein v. Garlick*, 318 N.Y.S.2d 370, 374 (N.Y. Sup. Ct. 1971) ("Nor should the onerous burden be placed upon newspapers under ordinary circumstances to conduct investigations in order to determine the effect of a questioned advertisement.").

<sup>23</sup> *See e.g., CAL. BUS. & PROF. CODE § 17502* ("This article does not apply to any visual or sound radio broadcasting station, to any internet service provider or commercial online service, or to any publisher of a newspaper, magazine, or other publication, who broadcasts or publishes, including over the Internet, an advertisement in good faith,



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publishers can avoid responsibility for their own information practices. However, they do suggest that privacy protection frameworks should assign responsibility for compliance to the party that actually collects information from Web users, regardless of whether that party operates the website that a user is visiting at the moment of collection.

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OPA applauds the Commission for taking the time to study the privacy issues surrounding the collection of information from consumers and looks forward to working collaboratively with the Commission to answer any questions it may have regarding the online publishing industry.

Sincerely,

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without knowledge of its false, deceptive, or misleading character.”); FLA. STAT. § 817.43 (“The provisions of section 817.40 or section 817.41 shall not apply to any publisher of a newspaper, magazine or other publication, or the owner or operator of a radio or television station, or any other owner or operator of a media primarily devoted to advertising, who publishes, broadcasts, or otherwise disseminates an advertisement in good faith without knowledge of its false, deceptive or misleading character.”); GA. CODE ANN. § 10-1-421(b) (“Nothing in this Code section shall apply to any visual or sound broadcasting station or to any publisher or printer of a newspaper, magazine, or other form of printed advertising who broadcasts, telecasts, publishes, or prints such advertisement in good faith without knowledge of its false or fraudulent character.”); N.Y. GEN. BUS. LAW § 349(e) (“Nothing in this section shall apply to any television or radio broadcasting station or to any publisher or printer of a newspaper, magazine or other form of printed advertising, who broadcasts, publishes, or prints the advertisement.”).

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