

**CONCURRING STATEMENT OF  
COMMISSIONER PAMELA JONES HARBOUR**

*REGARDING STAFF REPORT,  
“SELF-REGULATORY PRINCIPLES FOR ONLINE BEHAVIORAL  
ADVERTISING”*

I have voted to authorize staff to issue today’s report on behavioral advertising. The report reflects tremendous efforts by staff to explore the complex issues surrounding behavioral advertising, and I thank staff for their diligence in tackling this important topic. The release of this report is yet another positive step in an ongoing dialogue between the Commission and relevant stakeholders, including industry representatives, consumer groups, and legislators.

I write separately to explain where I depart from the Commission’s present approach to the study of behavioral advertising. Simply stated, today’s staff report, while commendable, focuses too narrowly. Threats to consumer privacy abound, both online and offline,<sup>1</sup> and behavioral advertising represents just one aspect of a multifaceted privacy conundrum surrounding data collection and use. I would prefer that the Commission take a more comprehensive approach to privacy, and evaluate behavioral advertising within that broader context.

In recent years we have witnessed an explosion of “free” online content and services that collect, integrate, and disseminate data. Examples include web mail, blogs, mapping and location-based services, photo sharing, desktop organization, social networking, instant messaging, and mobile applications. These technologies offer valuable benefits, but not all consumers understand how the business model works. Consumers repeatedly pay for “free” content and services by disclosing their personal information, which is used to generate targeted advertising or for other commercial purposes. Once data is shared, it cannot simply be recalled or deleted – which magnifies the cumulative consequences for consumers, whether they realize it or not. This potential disconnect between consumer perception and business reality is troubling, and it merits increased Commission attention.

The current economic climate adds another layer of concern. Consumer data is a valuable asset under any circumstances, and most companies act in good faith to safeguard it. But in difficult economic times, when pressure mounts to extract the greatest possible value from every asset, some firms may be tempted to stray further into the zone of uncertainty between acceptable and unacceptable uses of consumer data.

Individuals ultimately must select the online tools they prefer, as well as the extent and scope of information they disclose. Consumers cannot make informed choices, however, unless they have

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<sup>1</sup> Offline sources of data, including public records (e.g., property records) as well as private databases (e.g., credit reporting agency files), also may pose potential risks to maintaining privacy.

complete and accurate information about how their data may be collected and used. Informed consent should not be assumed based on consumers' willingness to click through cryptic disclosures and licenses. Furthermore, once consumers exercise their choices, companies must be held accountable for the promises they make to consumers regarding collection and use of personal data.

A legislative approach to behavioral advertising is not prudent at this time, for two reasons. First, there are still more questions than answers. Second, and more importantly, any legislation should be part of a comprehensive privacy agenda, rather than fostering the current piecemeal approach to privacy. But nor can I fully support a self-regulatory approach to behavioral advertising, which the staff report appears to advocate. Industry consistently argues that self-regulatory programs are the best way to address privacy concerns, but the evidence is mixed at best. Self-regulation has not yet been proven sufficient to fully protect the interests of consumers with respect to behavioral advertising specifically, or privacy generally. For this reason, the Commission has played, and must continue to play, an integral role in facilitating the ongoing privacy discussion.

**I. IS THE CURRENT SELF-REGULATORY APPROACH ADEQUATE TO PROTECT CONSUMERS?**

My reluctance to fully embrace a self-regulatory approach has two bases. The first basis is philosophical: what are the appropriate parameters for the use of self-regulation? The second basis reflects more practical concerns: given the current state of technology, are consumers able to exercise meaningful privacy choices?

**A. The Circumstances Supporting Appropriate and Effective Self-Regulation Are Not Present Here**

Many consumer advocates question why the Commission continues to steadfastly support self-regulation in the privacy realm. The staff report offers one possible justification, at least in the context of behavioral advertising: self-regulation provides flexibility to adapt to rapidly-changing technology. In theory, flexibility is a valid and worthy goal. But taken alone, it is insufficient to justify a self-regulatory approach. Other conditions must be met if consumers' interests are to be adequately protected. The Commission should not endorse self-regulation under circumstances where industry still has not articulated meaningful standards or agreed to be held accountable.

In practice, industry-driven self-regulation in the privacy arena has been characterized by inactivity. For many years, industry and its primary self-regulatory body took their collective eyes

off the ball.<sup>2</sup> A 2006 consumer complaint<sup>3</sup> resuscitated interest by the Commission and, consequently, by the industry. I supported staff's issuance of proposed self-regulatory principles for behavioral advertising in December 2007 because I hoped that staff's carefully-crafted guidance would spark greater industry action. The proposed principles were intended as a floor, not a ceiling.

But now, even after years of discussion, no metric exists to evaluate the effectiveness of self-regulatory efforts. Nor has a workable enforcement mechanism been developed. The recent 2008 Network Advertising Initiative ("NAI") principles, while offering notable improvements over the original 2000 NAI principles, do not approach the level of protections outlined in staff's proposed principles. While the Interactive Advertising Board ("IAB") and affiliated organizations are developing alternative guidelines, they come more than a year after the Commission's Behavioral Advertising Town Hall and the subsequent issuance of staff's proposed principles.<sup>4</sup>

I would prefer to see all of industry, in consultation with consumer groups and the Commission, working toward a single set of guidelines. Multiple sets of conflicting principles do nothing to move past the *status quo*, and provide an inadequate basis for the Commission to condone a self-regulatory approach.

## **B. Consumers Lack The Information and Ability To Exercise Privacy Choices**

Turning to more practical matters, most consumers do not fully understand the types and amount of information collected by businesses, or why the information may be commercially

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<sup>2</sup> See, e.g., Pam Dixon, World Privacy Forum, *THE NETWORK ADVERTISING INITIATIVE: Failing at Consumer Protection and at Self-Regulation* (Nov. 2, 2007), available at [http://www.worldprivacyforum.org/pdf/WPF\\_NAI\\_report\\_Nov2\\_2007fs.pdf](http://www.worldprivacyforum.org/pdf/WPF_NAI_report_Nov2_2007fs.pdf); Chris Jay Hoofnagle, *Privacy Self Regulation: A Decade of Disappointment*, EPIC.ORG (Jan. 19, 2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=650804](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=650804).

<sup>3</sup> See Complaint and Request for Inquiry and Injunctive Relief Concerning Unfair and Deceptive Online Marketing Practices from Jeffrey Chester, Executive Director, Center for Digital Democracy, and Ed Mierzwinski, Consumer Program Director, U.S. Public Interest Research Group (Nov. 1, 2006), available at [http://www.democraticmedia.org/news\\_room/press\\_release/FTC\\_online\\_adv2006](http://www.democraticmedia.org/news_room/press_release/FTC_online_adv2006).

<sup>4</sup> In February 2008 the Interactive Advertising Board released some high-level privacy principles, available at [http://www.iab.net/iab\\_products\\_and\\_industry\\_services/1421/1443/1464](http://www.iab.net/iab_products_and_industry_services/1421/1443/1464). In January of this year, the American Association of Advertising Agencies, the Association of National Advertisers, the Direct Marketing Association, and the IAB announced efforts to develop self-regulatory guidelines. See Press Release, Interactive Advertising Bureau, *Key Advertising Groups to Develop Privacy Guidelines for Online Behavioral Advertising Data Use and Collection* (Jan. 13, 2009), available at [http://www.iab.net/insights\\_research/530468/iab\\_news/iab\\_news\\_article/634777](http://www.iab.net/insights_research/530468/iab_news/iab_news_article/634777).

valuable. Small, discrete disclosures of information may not trouble an individual consumer. But large aggregations of data, based on a lifetime of Internet use, might evoke a different response.

Already, it is possible to assemble a “digital dossier” that captures an individual’s interests and habits, runs them through a predictive model, and determines what that person likely will do in the future. Car registrations are data-mined to target potential voters.<sup>5</sup> In the credit industry, behavioral scoring is used to justify lowering the credit limits of “at risk” card users.<sup>6</sup> At the mall, cameras embedded in advertising kiosks identify viewers’ faces to deliver target ads.<sup>7</sup> It requires little stretching of the imagination to envision how firms may use data to make decisions that will have tangible effects on consumers’ lives. There may be a “tipping point” – a point where consumers become sufficiently concerned about the collection and use of their personal information that they want to exercise greater control over it, but where any such attempt to exercise control becomes futile because so much of their digital life already has been exposed.

Many companies have represented to the Commission that consumers are aware of the “bargain” they have struck: they overwhelmingly choose to disclose information online, in exchange for free content, goods, and services. I am not yet convinced that the average consumer understands and embraces this arrangement. To the extent that industry currently attempts to provide notice and choice to consumers, such efforts are insufficient. Disclosures about information collection, use, and control are not meaningful if they are buried deep within an opaque privacy policy that only a lawyer can understand.

Nor is it meaningful to offer the illusion of consumer choice via inadequate technology. The primary mechanism by which consumers currently can exercise choice online – the opt-out cookie

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<sup>5</sup> See Todd Wasserman & Wendy Melillo, *Why the Candidates Watch What You Buy*, ADWEEK, Oct. 30, 2006, available at <http://www.adweek.com/aw/images/pdfs/polifeature.pdf>.

<sup>6</sup> The Commission might wish to devote some of its resources to explore these uses of data. See, e.g., Ron Lieber, *A Very Watchful Eye on Credit Card Spending*, NEW YORK TIMES, Jan. 31, 2009, available at <http://www.nytimes.com/2009/01/31/your-money/credit-and-debit-cards/31money.html>; Chris Cuomo et al., *“GMA” Gets Answers: Some Credit Card Companies Financially Profiling Customers*, ABC NEWS, Jan. 28, 2009, available at <http://abcnews.go.com/GMA/GetsAnswers/story?id=6747461&page=1>.

<sup>7</sup> Software manufacturers claim to accurately determine the gender of a viewer 85 to 90 percent of the time. See Dinesh Ramde, *When You Watch These Ads, the Ads Check You Out*, FORBES, Jan. 31, 2009, available at <http://www.forbes.com/feeds/ap/2009/01/31/ap5991271.html>.

– is fundamentally flawed.<sup>8</sup> Cookies are imperfect tools that serve multiple functions, including some never originally intended.<sup>9</sup> It is a counterintuitive concept to put a cookie on a user’s computer to inform websites and servers not to place subsequent cookies on the same computer. It is unrealistic to rely on an assumption that the opt-out cookie will remain on a user’s computer indefinitely. Cookies can be and are deleted (intentionally or unintentionally) by individual users, automated software (e.g., anti-virus and anti-spyware tools), or chance. Even assuming that opt-out cookies could be placed permanently on a computer, it is difficult for consumers to find opt-out cookies at all. They are typically buried in the depths of a privacy notice or, worse, on an unrelated third-party website. And when a user successfully locates an opt-out cookie, the cookie frequently does not download properly.<sup>10</sup>

Rather than continuing to embrace this confusing and unreliable tool, industry should accept the reality that opt-out cookies are inadequate to protect consumer privacy. I encourage the technology community, including companies that develop browsers and software utilities, to focus their efforts on developing viable and transparent alternatives.<sup>11</sup>

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<sup>8</sup> See Peter Swire & Annie I. Antón, *Online Behavioral Advertising: Technical Steps Needed to Ensure Consumer Control*, (Apr. 10, 2008), available at [http://www.americanprogress.org/issues/2008/04/swire\\_anton\\_testimony.html](http://www.americanprogress.org/issues/2008/04/swire_anton_testimony.html); Dixon, *supra* note 2, at 14.

<sup>9</sup> For a nice discussion of the history of cookies, see David M. Kristol, *HTTP Cookies: Standards, Privacy and Politics*, ACM TRANSACTIONS ON INTERNET TECH., Vol. 1, Issue 2, Nov. 2001, available at <http://arxiv.org/abs/cs/0105018>.

<sup>10</sup> Many consumers have complained of their inability to locate privacy policies and exercise opt-out on their favorite websites. The NAI website maintains an opt-out mechanism for its members, but consumers have had mixed results. See [http://www.networkadvertising.org/managing/opt\\_out.asp](http://www.networkadvertising.org/managing/opt_out.asp).

<sup>11</sup> Several consumer groups offered the idea of a “Do Not Track” list that would allow consumers to decide whether they want to be tracked on the Internet. I do not endorse the details of the specific proposal submitted to the Commission. I do, however, support a solution that addresses universality, accessibility, persistence and technological neutrality – unifying concepts that one consumer organization used to describe the Do Not Track proposal. See Comment to Federal Trade Commission from Ari Schwartz, Deputy Director, Center for Democracy and Technology; Linda Sherry, Director, National Priorities Consumer Action; Mark Cooper, Director of Research, Consumer Federation of America; Lee Tien, Senior Staff Attorney, Electronic Frontier Foundation; Deborah Pierce, Executive Director, Privacy Activism; Daniel Brandt, President, Public Information Research; Robert Ellis Smith, Publisher, Privacy Journal; Beth Givens, Director, Privacy Rights Clearinghouse; Pam Dixon, Executive Director, World Privacy Forum, to FTC, submitted in advance of the FTC Town Hall, *Behavioral Advertising: Tracking, Targeting, and Technology* (Oct. 31, 2007), available at <http://www.cdt.org/privacy/20071031consumerprotectionsbehavioral.pdf>.

## II. NEXT STEPS

Today's staff report is the culmination of extensive conversations with relevant parties, the Behavioral Advertising Town Hall, and comments received in response to issuance of the staff's proposed behavioral advertising principles. While I may disagree with some of the conclusions and the overall focus of the report, its release is an extremely positive step.

In an effort to continue this important dialogue, I ask my fellow Commissioners to consider directing staff to complete, by Summer 2010, a report that evaluates the efficacy of self-regulation in the realm of behavioral advertising. This timeline would enable industry to review today's report, seriously re-evaluate existing self-regulatory efforts, and revise them as needed. Meanwhile, Commission staff could continue its discussions with stakeholders, expand inquiry into new areas, conduct further study, and report back in a comprehensive manner. Where necessary, the use of compulsory process (for example, 6(b) orders)<sup>12</sup> is warranted to obtain the information necessary to complete this evaluation.

In the interim, I encourage the Bureau of Consumer Protection to enlist the resources of the Bureau of Economics and the Office of Policy Planning to develop a series of roundtable discussions or workshops on effective privacy notices,<sup>13</sup> and also to conduct a study of consumer attitudes and expectations regarding data collection and use (offline as well as online). Particularly with respect to online activities, a productive discussion of privacy policy is hampered by a lack of reliable empirical data about what consumers want from their online experience, as well as what they

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<sup>12</sup> The Commission has issued 6(b) orders in other contexts. *See, e.g.*, News Release, Federal Trade Commission, *FTC Orders Nine Insurers to Submit Information for Study of the Effect of Credit-Based Insurance Scores on Consumers of Homeowners Insurance* (May 19, 2008), available at <http://www.ftc.gov/opa/2008/12/facta.shtm>; FTC For Your Information: *Federal Register Notice Issued on Authorized Generic Drug Study* (April 30, 2007), available at <http://www.ftc.gov/opa/2007/04/fyi07238.shtm> (includes link to Federal Register notice). "Based on a preliminary analysis, approximately 80 brand-name drug manufacturers, several authorized generic drug companies, and 100 generic companies will receive Special Orders." 72 Fed. Reg. 25306 (May 4, 2007).

<sup>13</sup> The staff report praised and encouraged the development of innovative mechanisms for providing notice to consumers. This correctly reflects a common theme at the Town Hall: frustration over the inability of privacy policies to offer consumers meaningful notice of data collection and use. The Commission, industry, and all other stakeholders should continue to investigate the creation of simplified notices to consumers (for example, a short-form chart or standardized layered approach). The Commission has led efforts to develop more effective notices in the financial sector, and these lessons are applicable in the privacy realm as well. *See, e.g.*, *Financial Privacy Rule: Interagency Notice Research Project*, available at [http://www.ftc.gov/privacy/privacyinitiatives/financial\\_rule\\_inrp.html](http://www.ftc.gov/privacy/privacyinitiatives/financial_rule_inrp.html); *Interagency Public Workshop: Get Noticed: Effective Financial Privacy Notices* (Dec. 4, 2001), available at <http://www.ftc.gov/bcp/workshops/glb/index.shtml>.

understand about the data controls they may exercise while online. Recent surveys of consumer attitudes have begun to scratch the surface of these essential questions. Preliminary findings suggest that consumers are concerned about their online privacy, and are willing to take steps to protect it.<sup>14</sup>

Additionally, it would be helpful if Town Hall participants developed additional scholarship to supplement the Commission's efforts. As the Town Hall demonstrated, expert research from diverse disciplines provides valuable insights and enhances everyone's ability to think through these issues. Expanded scholarship not only will guide completion of the Commission's workshops and follow-up report, but also will help the Commission better react to evolving technology, and will inform Congress as legislative action is considered.

The new Administration should actively engage in the debate surrounding behavioral advertising, as well as privacy more generally. I restate<sup>15</sup> my recommendation for the development of comprehensive federal privacy legislation, which would unify and supplement the current piecemeal approach to privacy in the United States, while also acknowledging the global nature of information flows and the international diversity of approaches to these critical issues.

### **III. COMPETITION ASPECTS OF PRIVACY**

When the Commission approved the Google/DoubleClick merger in December 2007, I wrote a dissenting statement that, among other things, highlighted the nexus between privacy and competition.<sup>16</sup> That nexus only became stronger in 2008, and I continue to believe that the Commission is uniquely positioned to explore it further in 2009 and beyond.

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<sup>14</sup> See, e.g., Press Release, Consumers Union, *Consumer Reports Poll: Americans Extremely Concerned About Internet Privacy* (Sept. 25, 2008), available at [http://www.consumersunion.org/pub/core\\_telecom\\_and\\_utilities/006189.html](http://www.consumersunion.org/pub/core_telecom_and_utilities/006189.html); Press Release, Harris Interactive Inc., *Majority Uncomfortable with Websites Customizing Content Based Visitors Personal Profiles* (Apr. 10, 2008), available at [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=894](http://www.harrisinteractive.com/harris_poll/index.asp?PID=894); Press Release, TRUSTe, *TRUSTe Report Reveals Consumer Awareness and Attitudes About Behavioral Targeting* (Mar. 26, 2008), available at [http://www.truste.org/about/press\\_release/03\\_26\\_08.php](http://www.truste.org/about/press_release/03_26_08.php).

<sup>15</sup> See, e.g., Dissenting Statement of Commissioner Pamela Jones Harbour, *In the Matter of Google/DoubleClick*, F.T.C. File No. 071-0170 at 11-12 (Dec. 20, 2007), available at <http://www.ftc.gov/os/caselist/0710170/071220harbour.pdf>; Pamela Jones Harbour, Commissioner, Federal Trade Commission, Remarks Before the International Association of Privacy Professionals National Summit entitled, "Respecting the Individual: Privacy Frameworks for the 21st Century," at 15 (Mar. 10, 2006), available at <http://www.ftc.gov/speeches/harbour/06309iapp.pdf>.

<sup>16</sup> See Dissenting Statement Of Commissioner Pamela Jones Harbour, *In the Matter of Google/DoubleClick*, supra note 15.

Increasingly, the market is exhibiting competition on non-price dimensions such as privacy,<sup>17</sup> and this trend is likely to continue as consumer awareness grows. In particular, the issues raised by data collection and use will provide ripe opportunities for companies to develop pro-consumer privacy tools, and to market these features to distinguish themselves from competitors. Firms that offer such controls may be vulnerable to criticisms from advertisers, who depend on a constant influx of consumer data for their own products and services to work as intended. In the long run, however, I believe that innovative responses will be embraced by consumers and developers<sup>18</sup> and should be encouraged. Of course, some firms still may choose to condition the use of their products and services on disclosure of information, and each firm is free to strike whatever balance it deems appropriate.<sup>19</sup>

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<sup>17</sup> For example, search companies have continually changed their data retention policies, primarily by modifying the amount of time data is retained and applying improved techniques to de-identify such data. While debate exists over the relative merits of each individual company's technique, such actions are driven by demands from regulators, consumer advocates, and users themselves. *See, e.g.*, Press Release, Yahoo!, *Yahoo! Sets New Industry Privacy Standard with Data Retention Policy* (Dec. 17, 2008), available at <http://yhoo.client.shareholder.com/press/releasedetail.cfm?ReleaseID=354703>; Posting of Peter Fleischer, Global Privacy Counsel; Jane Horvath, Senior Privacy Counsel; and Alma Whitten, Software Engineer to google.blogspot.com (Sept, 8, 2008), available at <http://googleblog.blogspot.com/2008/09/another-step-to-protect-user-privacy.html>; Press Release, Microsoft Corporation, *Microsoft Supports Strong Industry Search Data Anonymisation Standards* (Dec. 8, 2008), available at [http://www.microsoft.com/emea/presscentre/pressreleases/TrustworthyComputingPR\\_081208.mspx#text](http://www.microsoft.com/emea/presscentre/pressreleases/TrustworthyComputingPR_081208.mspx#text).

<sup>18</sup> Open-source solutions most efficiently leverage the creativity and expertise of developers and users. If industry does not create such tools, alternatives will develop that bypass traditional channels.

<sup>19</sup> Some commentators have argued that the online advertising business model cannot function adequately if it is subject to dramatic limitations, including the ability to opt-out. *See, e.g.*, Randall Rothenberg, *War Against the Web*, THE HUFFINGTON POST, April 21, 2008, available at [http://www.huffingtonpost.com/randy-rothenberg/war-against-the-web\\_b\\_97811.html?show\\_comment\\_id=12691561](http://www.huffingtonpost.com/randy-rothenberg/war-against-the-web_b_97811.html?show_comment_id=12691561).

My dissent in Google/DoubleClick also suggested the concept of a market for data itself, separate from markets for the services fueled by the data.<sup>20</sup> The dissent discussed John Battelle’s “database of intentions” concept, which he describes as the “aggregate results of every search ever entered, every result list ever tendered, and every path taken as a result.”<sup>21</sup> Battelle asserts that no single company controls this collection of information, but posits that a few select companies share control. One of my key concerns in Google/DoubleClick was that the merged entity might move closer to dominating the database of intentions, and that the network effects generated by combining the two firms might have long-term negative consequences for consumers. Over the past two years, a series of mergers has further concentrated the competitive landscape in a putative market for consumer data,<sup>22</sup> and merger analysis should take this trend into account. Today’s economic climate likely will accelerate such concentration, potentially on a scale similar to the previous dot-com collapse.

#### **IV. COMMENTS ON STAFF REPORT**

As a necessary predicate for condoning a self-regulatory approach, the Commission should more completely identify and explore the increasing range of “free” online services that operate by collecting consumer information. I would like to highlight a few specific areas mentioned in the report.

##### **A. First-Party and Contextual Advertising**

Staff concluded, after analysis of comments, that under certain circumstances first-party and contextual advertising should be exempted from the principles. I would prefer that staff solicit additional feedback before recommending that the Commission adopt such a policy. As a general

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<sup>20</sup> See Dissenting Statement Of Commissioner Pamela Jones Harbour, *In the Matter of Google/DoubleClick* at 9, supra note 15. “In the future, the Commission likely will issue Second Requests in other merger investigations that implicate combinations of data as well as potentially overlapping products and services. When those deals arise, the Commission should ensure that the combinations of data are included squarely within the scope of Second Requests. In this case, for example, it might have been possible to define a putative relevant product market comprising data that may be useful to advertisers and publishers who wish to engage in behavioral targeting.”

<sup>21</sup> JOHN BATTELLE, *THE SEARCH: HOW GOOGLE AND ITS RIVALS REWROTE THE RULES OF BUSINESS AND TRANSFORMED OUR CULTURE*, 1-17 (Portfolio, Penguin Group [USA] 2005); Posting of John Battelle to [battellemedia.com](http://battellemedia.com) (Nov. 13, 2003), available at <http://battellemedia.com/archives/000063.php>.

<sup>22</sup> During 2007, Microsoft bought aQuantive, Google acquired DoubleClick, Yahoo obtained complete control over Right Media, and WPP purchased 24/7 Real Media.

matter, sweeping exemptions are never advisable until empirical due diligence has been performed.<sup>23</sup> My concerns are heightened in this particular instance because the original proposed behavioral advertising principles did not directly address this issue. Meanwhile, the technologies underlying online advertising have been, and still are, changing rapidly. The Web 2.0 and emerging Web 3.0 environments – characterized by embedded applications, new delivery mechanisms (e.g., video), and migration to new platforms (e.g., mobile devices) – complicate existing definitions and demand increased understanding.

## **B. PII Versus Non-PII**

Staff distinguished between personally identifiable information and non-personally identifiable information, and appropriately indicated that the line separating the two has blurred. Information can no longer be classified as anonymous or not; at best, it may be placed somewhere along a continuum. Depending on context, information that at first glance appears non-identifiable may, in fact, reveal significant information about an individual.<sup>24</sup> As analytical tools improve, the line between PII and non-PII will continue to waver.<sup>25</sup> I applaud staff for thinking about this distinction and its potential effects.

## **C. Secondary Use**

Secondary use encompasses the combination of online and offline data from multiple public and private sources and from families of online services (e.g., email, search history, mapping software, social networking, mobile, etc.). The Commission knows very little about secondary uses of data. Staff sought comment on this topic and, unfortunately, received minimal response. More

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<sup>23</sup> See, e.g., Concurring Statement Of Commissioner Pamela Jones Harbour, *Regarding Federal Register Notice Rescinding the FTC's 1966 Guidance Concerning the Cambridge Filter Method* (Nov. 24, 2008) available at <http://www.ftc.gov/speeches/harbour/081124tobaccopjh.pdf>; Pamela Jones Harbour, Commissioner, Federal Trade Commission, *An Open Letter to the Supreme Court of the United States from Commissioner Pamela Jones Harbour* at 18-19 (Feb. 27, 2007), available at <http://www.ftc.gov/speeches/harbour/070226verticalminimumpricefixing.pdf>.

<sup>24</sup> See, e.g., Michael Barbaro & Tom Zeller, Jr., *A Face Is Exposed for AOL Searcher* No. 4417749, N.Y. TIMES, Aug. 9, 2006, available at [http://www.nytimes.com/2006/08/09/technology/09aol.html?\\_r=1&scp=1&sq=aol%20queries&st=cse&oref=slogin](http://www.nytimes.com/2006/08/09/technology/09aol.html?_r=1&scp=1&sq=aol%20queries&st=cse&oref=slogin).

<sup>25</sup> The line between sensitive and non-sensitive data may also vacillate, affecting the collection and use of financial and health information and targeting of segments including children.

information is needed before we can fully understand and analyze the complex linkages among data collectors and users.<sup>26</sup>

#### **D. Emerging Technologies**

New technologies signal a need to be more circumspect in developing broadly applicable principles. As processing capacity improves and storage prices decline, companies can and will more easily process and store vast quantities of data. As constraints on timing and space are alleviated, privacy concerns likely will become more germane on new platforms and devices. The emerging areas of deep packet inspection,<sup>27</sup> mobile advertising,<sup>28</sup> electronic personal health records, and cloud computing are a few examples where further inquiry will be needed.

#### **V. CONCLUSION**

The issues surrounding online advertising and behavioral targeting are layered and complex, and must be considered in the context of difficult economic, technology, and social issues. They also must be encompassed within a broader privacy framework that prioritizes the interests of consumers. Almost ten years ago, representatives from companies involved in all aspects of the online experience sought to create a self-regulatory scheme. A decade later, we are, in many respects, back at the beginning of this process.

I hope that today's staff report will re-invigorate a serious dialogue between industry and all other stakeholders regarding the future of self-regulation in the realm of behavioral advertising and privacy. Large portions of the industry are joining the discussion for the first time, which is refreshing. Many new participants bring differing opinions on how, if at all, to self-regulate. Consumers, and organizations that advocate on their behalf, are still struggling to be full partners in the conversation; their voices must be heard as well. Self-regulation cannot exist in a vacuum.

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<sup>26</sup> This inquiry may demand compulsory process.

<sup>27</sup> A series of Congressional hearings last year inquired into the practice and identified a series of potentially significant concerns to personal privacy. *See Broadband Providers and Consumer Privacy: Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 110th Cong. (2008), available at [http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing\\_ID=778594fe-a171-4906-a585-15f19e2d602a](http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=778594fe-a171-4906-a585-15f19e2d602a).

<sup>28</sup> The Commission in January 2009 received a complaint to investigate deceptive and unfair practices in the mobile marketplace. *See Complaint and Request for Inquiry and Injunctive Relief Concerning Unfair and Deceptive Mobile Marketing Practices from Jeffrey Chester, Executive Director, Center for Digital Democracy, and Ed Mierzwinski, Consumer Program Director, U.S. Public Interest Research Group (Jan. 13, 2009)*, available at [http://www.democraticmedia.org/files/FTCmobile\\_complaint0109.pdf](http://www.democraticmedia.org/files/FTCmobile_complaint0109.pdf).

As technology develops, industry needs to reconsider old strategies and listen to new perspectives, including international ones.<sup>29</sup> The Commission will play a pivotal role in focusing these efforts.

Last fall, the Commission expressed “cautious optimism” for a self-regulatory approach to online advertising.<sup>30</sup> Today’s staff report reflects more optimism, but less caution – even though nothing has happened to justify a change in tone. Much like the “Man Restraining Trade” in the beautiful sculpture outside my office window, I owe it to consumers to encourage the Commission to rein in unbridled optimism and ensure continued caution. For this reason, I share my thoughts today.

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<sup>29</sup> See, e.g., Peter Cullen, Microsoft Corporation, Remarks before the 30th International Conference of Data Protection and Privacy Commissioners, “Moving Information Across Borders: The Need for a Global Accountability Framework” (Oct. 16, 2008), available at <http://blogs.technet.com/privacyimperative/archive/2008/10/16/moving-information-across-borders-the-need-for-a-global-accountability-framework.aspx>.

<sup>30</sup> See *Privacy Implications of Online Advertising: Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 110th Cong. (2008), available at [http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing\\_ID=e46b0d9f-562e-41a6-b460-a714bf370171](http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=e46b0d9f-562e-41a6-b460-a714bf370171).