

DISSENTING STATEMENT OF COMMISSIONER SWINDLE  
in *Online Profiling Project*, File No. P994809  
July 27, 2000

I applaud the member companies of the National Advertising Initiative (NAI) for their agreement on self-regulatory principles concerning online profiling, *Self-Regulatory Principles For Online Preference Marketing By Network Advertisers*. The agreement provides transparency to consumers by furnishing notice of network advertisers' profiling on host Web sites and enabling consumers to choose not to participate in profiling.

I wholeheartedly endorse the language in the Commission's report commending NAI

for the innovative aspects of its proposal and for its willingness to adopt and follow these self-regulatory principles. I recognize that there may well have been instances of unacceptable practices related to profiling, which has unique attributes. The NAI has recognized this concern and has put forward a commendable scheme of self-regulation. As the Commission has generally recognized,<sup>(36)</sup> self-regulation is an important and powerful mechanism for protecting consumers, and the NAI principles present a solid self-regulatory scheme.

My dissent here is not directed to the NAI principles. Rather, it is directed to the majority's recommendation that, despite NAI's laudable self-regulatory efforts, legislation is needed as a "backstop."<sup>(37)</sup> Such legislation would have the same characteristics as the legislation recommended by a majority of the Commission in its 2000 Privacy Report, which I strenuously opposed.<sup>(38)</sup> Again, the devil is in the details. I consider legislation that mandates the four fair information practice principles to be overly burdensome and unwarranted, for the reasons discussed at length in my dissent from the 2000 Privacy Report.<sup>(39)</sup> Simply stated, we do not have a market failure here that requires legislative solution.

I oppose imposing burdensome regulation on an entire industry to address the 10% of advertisers who are not members of NAI - that is, those engaged in profiling to which the NAI self-regulatory principles would not apply. The majority can neither define nor identify who these advertisers are. We should not recommend legislation and regulation if we cannot demonstrate that the problems they are intended to resolve are real and significant. My colleagues, unwilling to accept a self-regulatory approach, find it necessary to support a highly regulatory scheme for an entire industry. I fear that the legislative recommendation will create an incentive for industry to discontinue seeking self-regulatory solutions.

The majority has been hasty in calling for legislation and regulation governing online profiling. NAI just announced its self-regulatory principles to address concerns that have been raised about online profiling, including a notice requirement that we all agree is paramount. Technology also has just been introduced into the marketplace that will empower consumers to address online profiling without the need for government action.<sup>(40)</sup> With each passing week, we learn more about industry initiatives and technological changes that can alleviate concerns about online profiling. Why not give these promising developments a chance before resorting to the heavy hand of government intervention?

I dissent.

---

### Appendix: NAI Principles

36. Federal Trade Commission, *Online Profiling: A Report to Congress (Part 2), Recommendations* at 9 (July 2000).

37. *Id.* at 10.

38. Federal Trade Commission, *Report to Congress on Privacy Online: Fair Information Practices in the Electronic Marketplace* (May 2000) (Dissenting Statement of Commissioner Orson Swindle).

39. *See generally id.*

40. *Microsoft Announces New Cookie Management Features for Internet Explorer 5.5* (July 20, 2000) (company press release).