

Opt-In Consent for Online Behavioral Advertising: A Fair Bargain for Consumer Privacy

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I. INTRODUCTION

As the Internet grows, so does the threat to the privacy of millions of consumers that use it. The Internet provides consumers with a wealth of seemingly free entertainment and information. In many cases, online services provided by companies remain free to consumers because advertisers support the services in exchange for ad space. Google is a prominent product of this relationship. When a consumer searches for a new car using Google, the search results include some ads relevant to the search. This contextual method of advertising does not require Google to collect any information on the identity or online activities of the consumer.¹ In contrast, newer behavioral advertising methods invade a consumer's privacy as advertisers and their associates track the consumer across the Internet via tracking cookie technology.² This information is collected and used to create consumer profiles for sale to eager advertisers.³ Many consumers are unaware of this activity.⁴ Furthermore, advertising service providers are hard at work creating new, more invasive technologies that circumvent the efforts of consumers to acquire effective technological countermeasures.⁵ Consumers need relief from their elected

¹ *Privacy Implications of Online Advertising: Hearing Before the Senate Committee on Commerce, Science, and Transportation*, 110th Cong. 4(2008) (statement of Leslie Harris, President/CEO, Center for Democracy and Technology), available at http://commerce.senate.gov/public/_files/LeslieHarrisCDTOnlinePrivacyTestimony.pdf; Google recently explained some of its advertising services and information collection policies in a letter to several House Representatives. The letter is available at http://markey.house.gov/docs/telecomm/google_080808.pdf.

² *Id.*

³ *Id.*

⁴ A recent poll shows that 61% of consumers believe information on their online activities cannot be shared without their consent. ConsumersUnion, *Consumer Reports Poll: Americans Extremely Concerned About Internet Privacy Most Consumers Want More Control Over How Their Online Information is Collected and Used*, (Sept 25, 2008), http://www.consumersunion.org/pub/core_telecom_and_utilities/006189.html (last visited December 14, 2008).

⁵ See *What Your Broadband Provider Knows About Your Web Use: Deep Packet Inspection and Communications Laws and Policies: Hearing Before the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce*, 110th Cong. 10-19 (2008) (statement of Dr. David P. Reed), available at http://energycommerce.house.gov/cmte_mtgs/110-ti-hrg.071708.Reed%20-testimony.pdf.

representatives.

Congress should adopt baseline legislation that safeguards privacy and increases the bargaining power of the consumer. This legislation should include measures similar to the following provisions: 1. Any person who seeks to collect information relating to the online identity or activities of a consumer for commercial use must obtain the informed, opt-in consent of the consumer. 2. Any person who seeks to collect information relating to the online identity or activities of a consumer for non-commercial use must provide notice to the consumer and allow the consumer to opt-out of such use. Legislation should encourage the advertising industry to develop and adhere stringently to self-regulatory principles on other important issues such as information security and retention.

II. OPT-IN CONSENT FOR COMMERCIAL USE

Congress should require the online advertising industry to obtain the opt-in consent of a consumer before it uses information about the consumer for commercial gain. Advertisers recognize information about consumers as a valuable commodity that they are willing to purchase. Currently, a person may collect and retain personal information about a consumer and sell this information to an advertiser without providing notification to the consumer. However, in many cases, consumers receive free content supported by ad revenue in exchange for the information. While such an exchange may be beneficial to the consumer, the consumer never gets to decide what information the consumer is willing to give up in exchange for certain benefits. Under the current system, consumers do not have the right to actively participate in the market for their personal information. Consumers also lack the right to protect their privacy by abstaining from the market. The current system is fundamentally unfair to consumers. Consumers must give their consent before their privacy is compromised for the financial gain of

strangers.

Opt-in consent must be informed consent in order for it to be meaningful. Therefore, a person seeking to collect and market information about a consumer must first provide a detailed or layered notice to the consumer. The notice should include plain-language describing the privacy policy of the information collector including information on commercial and non-commercial data use, retention, and security. The opt-in choice must be linked to the notice in a way that reasonably ensures that the consumer has had the opportunity to read the notice and agree to the terms of the data collection. If the information collector decides to use the consumer's information in a way that is inconsistent with the notice, then the collector must update the notice accordingly and obtain the opt-in consent of the consumer again before using the information. These provisions will effectively bring consumers directly into the market and minimize the risk that their privacy will be compromised.

III. OPT-OUT FOR NON-COMMERCIAL USE

While opt-in consent is generally necessary to protect consumer privacy and encourage fair bargains for privacy in the digital marketplace, some non-commercial uses of consumer information that do not intrude deeply into a consumer's privacy may only warrant opt-out consent. The non-commercial use exception to opt-in consent ensures that important services are not seriously disrupted when the law takes effect. For example, Internet access providers and online service providers like Google may need to retain some limited, relatively anonymous information about a consumer including his IP address to maintain the quality of service to the consumer.⁶ Collection of this information may be necessary to protect the consumer from malicious hackers.⁷ In these cases, the consumer benefits directly from the data collection. A

⁶ Google provides notice of these uses at <http://www.google.com/intl/en/privacy.html>.

⁷ Google provides a description of its use of server logs for security purposes at <http://googleblog.blogspot.com/2008/03/using-log-data-to-help-keep-you-safe.html>.

person who collects information for non-commercial purposes that benefit the consumer should only collect information necessary for such purposes. Furthermore, a person should only retain the information as long as necessary to benefit the consumer. The consumer should still have a right to decide to opt-out of this collection, but the interests in these circumstances are not so great as require an opt-in system.

The opt-out system for non-commercial uses should also require notice to the consumer. The notice should include plain-language describing the privacy policy of the information collector including information on data use, retention, and security. This notice should be updated immediately whenever the consumer's information is used in a manner inconsistent with the notice. While this system provides a reduced level of protection for the consumer in non-commercial settings, it is an appropriate exception for the reasons listed above. Furthermore, even if opt-out was the standard for all uses of a consumer's information, legislation mandating notice and opt-out would grant the consumer a much higher level of legal protection than current laws provide.

IV. CONCLUSION

Consumers deserve to play an active role in a market that trades their privacy for cash. If Congress does not act to pressure the advertising industry into more stringent self-regulation, many consumers will probably remain in the dark about behavioral advertising. Therefore, Congress should enact legislation requiring opt-in consent for all commercial uses of a consumer's information. Such legislation should encourage the players in the industry to join self-regulatory groups like the Network Advertising Initiative (NAI) in order to avoid the need for further legislative action.⁸

⁸ Information on NAI is available at <http://www.networkadvertising.org/>.